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The European precariat: the protection of precarious workers in the European Union

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Citation
Carter, D. W. (2023, April 19). *The European precariat: the protection of precarious workers in the European Union*. Retrieved from https://hdl.handle.net/1887/3594459

Version:	Publisher's Version
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The European Precariat:
The Protection of Precarious Workers in the European Union

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PROEFSCHRIFT
ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op woensdag 19 april 2023
klokke 11.15 uur

door

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Geboren in Southampton, England
In 1985

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Acknowledgments

I would like to thank my supervisors, Prof. Christa Tobler and Dr. Moritz Jesse, for their encouragement, motivation, and support during my time at Leiden. In particular, to Christa for giving me the opportunity to both write a PhD and act as Academic Coordinator for the Advanced LLM in European and International Business Law, which has undoubtedly been one of the most enriching and rewarding experiences of my life. Thank you also to Moritz for his support and mentorship as a teacher, moot court coach, co-coach, and co-author.

I would next like to express my appreciation to the members of the PhD Committee: Prof. Michael Dougan, Prof. Niamh Nic Shuibhe, Prof. Stefaan Van den Bogaert and Dr. Vasiliki Kosta for agreeing to assess my manuscript. I am honoured that they have invested the time and effort, and I am very grateful for the keen and helpful insights that they have provided.

A special mention to my paranymphs, Kristel van Kruisbergen and Valentine Vandendaele, for the laborious work of preparing for a PhD defence as well as their enduring support and friendship over the years and into the future.

Next, thank you to the many, many people at Leiden Law School and the Europa Institute that made my time in Leiden such a special and memorable experience. To my dear friend and marathon partner Merinda Stewart, thank you for keeping me sane during the highs and lows of the 'other marathon'. Thank you to my moot court coach, colleague, and dear friend Ilektra Antonaki for all her support and encouragement. Thank you to Maria Cabrera for persuading me to participate in the European Law Moot Court Competition and to my wonderful teammates, Aurelie Villanueva and Ruth Foulis, for our challenging, exhilarating, and generally life-altering experiences in Leiden, Prague, and Luxembourg. Thank you to Darinka Piqani for supervising my LLM thesis and her guidance throughout my studies. And to everyone else at Leiden that made it such a wonderful place to work: Maarten, Nathan, Barbora, Daniel, Kristof, Veronika, Richard, Anran, Tuvana, David, Carina, Jorrit, Armin, Vestert, Melanie, Alison, Ben, Jorrit, Armin, Rick, Petra, Jet, Jasmina, Narin, Agis, Sheena, and all the others who made my time at Leiden such a rich and fulfilling experience.

Finally, I would like to thank my parents for their emotional and financial support throughout my studies. To my mother, Loraine Harding, for her resolute support throughout my academic studies (and for proofreading large sections of this manuscript!), and to my father, Keith Carter, for giving me an opportunity to see that the most rewarding experiences can come from unexpected places.

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Chapter 1: Introduction

"We are living in a world in which nobody is free, in which hardly anybody is secure, in which it is almost impossible to be honest and to remain alive."[1]

- George Orwell (1937)

1 The Development of Labour Markets & The Rise of Precarious Employment

Around the same time as Orwell was writing about the dismal working and living conditions of the working classes in England and France during the early 20th Century, his compatriot, economist John Maynard Keynes, had a surprisingly optimistic vision of work for future generations. Keynes envisaged a time where fifteen-hour working weeks were the norm, which would allow people to dispense with the "disgusting morbidity" of obsessing over capital accumulation in favour of more "virtuous" activities.[2] Despite their differences in approach, both authors agreed that the average worker had little in terms of employment security or social protections. The then dominant system of unrestrained *laissez-faire* capitalism had resulted in increasing poor working conditions and rising inequality that in turn led to the Great Depression and ultimately the horrors of fascism in Europe.[3]

Following the Second World War, however, changes in employment norms and labour market regulation resulted in a significant improvement of the employment conditions of workers.[4] As free markets were re-established following the collapse of the global order, employment norms were increasingly based on the 'standard employment relationship' (SER) of full-time, permanent employment, that gradually became the basis of work relations in the second half of the twentieth century.[5] It also saw the establishment of the modern welfare state, with universal public services and stronger state support through social benefits.[6] For a brief period at least, Keynes' utopian dream of a world with less work and more leisure seemed attainable.

Whilst beneficial for workers, this era of 'embedded liberalism' where global markets were embedded into national social systems based on fixed labour markets and the SER is suggested to have contributed to a stagnation in the global economy, with a lack of flexibility in employment, fairly or unfairly, being seen as contributory factor.[7] As such, since the 1970s

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[1] G. Orwell, *The Road to Wigan Pier* (1937) Victor Gollancz: London, p. 153.

[2] J.M. Keynes, 'Economic Possibilities for our Grandchildren' (1930), in J.M. Keynes, *Essays in Persuasion* (2010) Plagrave Macmillian: London, p. 330.

[3] K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Times* (1944) Beacon Press: Boston.

[4] M. Goldmann, 'The Great Recurrence: Karl Polanyi and the Crises of the European Union' (2017) 23(3-4) *European Law Journal* 272-289; G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990) Polity Press: Cambridge; S. Kramer, *International Regimes* (1983) Cornell Publishing, Ithaca; D. Harvey, *A Brief History of Neoliberalism* (2005) OUP: Oxford; P. Armstrong, A Glynn, and J. Harrington, *Capitalism since World War II: The making and breaking of the long boom* (1991) Harper Collins: London; M. Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (2002) CUP: Cambridge.

[5] G. Standing, *Corruption of Capitalism* (2016) Biteback Publishing: London.; G. Esping-Andersen (n 4);

[6] P. Arestis, and M. Sawyer, 'Keynesian Economics for the New Millennium' (1998) 108(446) *The Economic Journal* 181; S. Giubboni, 'Social Rights and Market Freedom in the European Constitution: A Re-Appraisal' (2010) CUP: Cambridge; P. Addison, *The Road to 1945: British Politics and the Second World War* (1994) Pimlico: London.

[7] G. Therborn, 'The Tide and Turn of the Marxian Dialectic of European Capitalism' (2011) 9(1) *Journal of Modern History* 9-12; M. Kalecki, 'Political Aspects of Full Employment' (1943) 14(3) *Political Quarterly* 322; M. Blyth (n 4).

there has been an shift in economic and political discourse, away from the SER and towards more deregulated labour markets that focus on improving competitiveness through the creation of increasingly flexible forms of employment. This is commonly referred to the shift towards neoliberalism, which has seen the introduction and expansion of flexible forms of employment (e.g., part-time, fixed-term, employment agency work, self-employment, etc.) as the answer to Europe's economic problems.[8]

The Global Financial Crisis, instead of instigating a change in the approach towards labour marker regulation, resulted in a doubling-down on neoliberal solutions to economic problems, resulting in ever-more flexible employment norms and an insatiable drive towards competitiveness in labour markets, alongside the imposition of austere welfare policies based on reducing costs by getting people in work (and thus off benefits).[9] Furthermore, recent technological developments, such as rise of the platform economy, that have resulted in new forms of employment, most notably platform workers such as Uber Drivers, Deliveroo Riders, etc., that undermine classic distinctions between paid- and self-employment, as well as potentially removing certain rights and protections.[10] Just as the factories and mills of the industrial age made the pre-existing system of feudalism redundant, the information age and the rise of the platform economy has created new forms of employment that render old forms of regulation obsolete. This, combined with the shift towards flexible employment and competitive labour markets, has created a perfect storm of employment insecurity and exploitation, which leaves increasing numbers of workers in precarious working situations. *The European Precariat* will focus on these forms of non-standard employment that are highly insecure and create a stark power imbalance between employer and employee,[11] which can leave workers in an insecure, exploited and potentially unprotected situation due to its limited

[8] S. Ovotrup, and A. Prieur, 'The commodification of the personal: labour market demands in the era of neoliberal post-industrialization' (2016) 17(1) *Distinktion: Journal of Social Theory* 94; M. Blyth (n 4); D. Harvey (n 4); J. Ostry, P. Loungani and D. Furceri, 'Neoliberalism Oversold?' (2016) 53(2) *Finance & Development* 38.

[9] C. O'Brien, 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50(6) *CMLRev* 1643; D. Carter, 'Inclusion and Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The Others Amongst Us* (2020), CUP: Cambridge; M. Ferrera, 'The European Union and National Welfare States, Friends, not Foes: But What Kind of Friendship? *URGE Working Paper* 4/2005; S. Wright, 'Welfare-to-work, Agency and Personal Responsibility' (2012) 41(2) *Journal Social Policy* 309; K. Armingeon and L. Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) OUP: Oxford; M Blyth, 'The Austerity Battle: Why a Bad Idea won over the West' (2013) 92(3) *Foreign Affairs* 41-56; W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014), Verso: London; T. Tressel et al, *Adjustment in Euro Area Deficit Countries: Progress, Challenges, and Policies* (2014) International Monetary Fund: New York.

[10] A. Pesole et al, 'Platform Workers in Europe: Evidence from the COLLEEM Survey' (2018), Joint Research Centre: Brussels; Z. Kilhoffer *et al*, 'Study to gather evidence on the working conditions of platform workers' (2020) *Directorate-General for Employment Social Affairs and Inclusion - Report VT/2018/03*, Luxembourg: Publications Office of the European Union; N. Bodiroga-Vukubrat, A. Poscic, and A. Martinovic, 'Making a Living in the Gig Economy: Last Resort or a Reliable Alternative?', in G. G. Sander, V. Tomljenovic, and N. Bodiroga-Vukubrat (eds.), *Transnational, European, and National Labour Relations: Flexibility and the New Economy* (2018) Springer: Gham.

[11] Internal Labour Organisation, *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) ILO: Geneva; G. Rodgers, 'Precarious Work in Western Europe: The States of the Debate', in G. Rodgers and J. Rodgers, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (1989) International Institute for Labour Studies: Brussels; A. Koukiadaki & I. Katsaroumpas, 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017), DG for Internal Policies (European Parliament) PE 596.823; S. McKay, 'Disturbing equilibrium and transferring risk: confronting precarious work', in N. Countoris & M. Freedland (eds.) *Resocialising Europe in a Time of Crisis* (2013) CUP: Cambridge.

or short-term/intermittent nature, or if it treats workers as self-employed despite the employer controlling many aspects of their employment, or indeed a combination of two or three of these traits.

2 THE EUROPEAN REGULATION OF PRECARIOUS EMPLOYMENT

The subject matter of this thesis are EU migrant workers engaged in these precarious forms of non-standard employment. It starts from an assumption that increased insecurity in employment demands a strong system of labour market regulation that protects individuals from the negative effects arising from an economic system based on employment flexibility and labour market competitiveness. This is particularly true for EU migrant workers, who are subject to both free movement and social law, both of which can be affected by their precarious working situation. In the case of the European Union, the need for protection of such workers is heightened by the risk of differences in treatment across the internal market, which risks undermining the realisation of a European labour market, as well as excluding EU migrants from certain legal protection, thereby undermining wages and social standards.

This assumption is based on the many references, albeit often vague and imprecise, contained within the Treaty of Lisbon to the protection of workers. Article 9 TFEU obliges the Union to guarantee adequate social protection when defining and implementing its policies and activities; under Article 3 TEU the Union commits to work towards a "highly competitive social market economy that aims to achieve full employment, social progress, and a high level of protection, whilst combatting social exclusion and promoting social justice and protection"; and Article 151 TFEU outlines social objectives like the promotion of employment, improving living and working conditions, as well as proper social protection. Despite these many references, on the phenomenon of precarious employment the Treaties is virtually silent. Despite being a long-standing issue,[12] until relatively recently the term has been absent from mainstream discourse in European Union law and policy, although it has been suggested that prior to the Treaty of Lisbon the commitment to adequate social protection was effectively a proxy for the fight against the negative social problems associated with precarious employment.[13]

More recently, European Union institutions have begun to recognise the problems associated with precarious forms of non-standard work. For example, the Court of Justice has recognised that the definition of worker is becoming harder to maintain in light increasing levels of flexible and precarious employment.[14] The European Commission has also noted that the current system has the danger of "excluding growing numbers of workers in non-standard forms of employment, such as domestic workers, on-demand workers, intermittent workers, voucher-based workers and platform workers" from social protection due to the application

[12] Since, at least, V. Letourneux, *Precarious Employment and Woking Conditions in Europe* (1998): European Foundation for the Improvement of Living and Working Conditions: Dublin.

[13] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart.

[14] See, for example, Case C-413/13 *FNV* ECLI:EU:C:2014:2411, para. 32-34; Opinion of Advocate General Wahl in Case C-413/13 *FNV* ECLI:EU:C:2014:2215, para. 51.

of the worker definition.[15] The Commission also notes that platform work "brings challenges, as it can blur the boundaries between employment relationship and self-employed activity", as it is "likely to restrict access to existing labour and social rights".[16] The Council of the European Union has also recognised that non-standard workers who do not have "full-time, open-ended contracts" can encounter difficulties in terms of their social protection, and self-employed persons are completely excluded from formal access to key social protection schemes in some Member States.[17] Furthermore, since the adoption of the European Pillar of Social Rights (albeit a non-binding policy document) the Union has specifically recognised that evolving labour markets pose challenges in terms of providing social protection.[18] The Pillar contains a codified commitment to ensure that "employment relationships that lead to precarious working conditions shall be prevented". In this respect, workers should be entitled to the right to fair and equal treatment regarding working conditions "regardless of the type and duration" of their employment.

The protection of EU migrant workers engaged in precarious forms of non-standard employment is complicated by the division of competences in the areas of market and social integration. Whilst the European Union has the competence to establish economic rules realising the functioning of the internal market, competences in social law, including rules on employment law and social security entitlement, are largely retained by the Member States.[19] This has traditionally meant that the Union's powers have been limited to setting rules that establish and facilitate a pan-European (labour) market, with any social protections available being incidental effect of this primarily economic aim. That said, gradually the Union has obtained limited competences in the area of social law, that has allowed it to adopt market-fixing legislation that seeks to re-dress the power imbalance between employers and employees directly, by either setting a floor of rights that are applicable to all workers in Europe or ensuring the equal treatment between more vulnerable groups of workers and 'normal' workers.[20] This means that both the EU and nation-states seek the competence to determine who is a worker, non-worker, or self-employed person for certain areas of their own legal systems, which can conflict with one another and result in a lack of protection for precarious workers.

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[15] Article 2, Proposal for a Directive on transparent and predictable working conditions in the European Union COM (2017) 797 final 2017/0355(COD); See also European Commission, Proposal for a Directive on Improving Working Conditions in Platform Work COM(2021) 762 final.

[16] Recital (6), Proposal for a Directive on Improved Working Conditions in Platform Work COM(2021) 762 final, p. 21.

[17] Council Recommendation of 8th November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), para (18).

[18] Recital 9, Interinstitutional Proclamation on the European Pillar of Social Rights (2017/C 428/09).

[19] F. Scharpf, 'The asymmetry of European integration, or why the EU cannot be a social market economy' (2010) 8(2) *Socio-Economic Review* 211-250; D. Schiek, 'A Constitution of Social Governance for the European Union', in D. Kostakopoulou & N. Ferreira (eds.), *The Human Face of the European Union: Are the EU Law and Policy Humane Enough?* (2016) CUP: Cambridge; F. Scharpf, 'The European Social Model: Coping with Challenges of Diversity' (2002) MPIfG Working Paper 02/8; see S. Giubboni, 'Social Rights and Market Freedom in the European Constitution: A Re-Appraisal' (2010) 1(2) *European Labour Law Journal* 161-184; M. Ferrera, 'Modest Beginnings, Timid Progresses: What's next for Social Europe?', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge.

[20] See Directives 97/81/EC on part-time work; 1999/70/EC on fixed-term work; 2003/88/EC concerning certain aspects of the organisation of working time; 2008/104/EC on temporary agency work; and 2019/1152 on transparent and predictable working conditions in the European Union.

The division in competences results in a tension between the European Union and its Member States in terms of defining who is a worker for the purposes of European free movement, national immigration, and European/national social and labour law.[21] For those who do not meet one or more of these classifications, their legal status and level of protection can be limited. Developments in non-economic law, such as Union Citizenship, have improved the legal situation for those not classified as workers, however, it is unclear just how much protection this affords to precarious workers,[22] and as this thesis shall show, the development of Union Citizenship can undermine the previously established norms and principles regarding the rights and protections of workers.

Given the Union's limited competences in the field of social law, much of the social protection of precarious workers at the European level is sought through policy coordination, such as the Open Method of Coordination (OMC), the European Employment Strategy and Flexicurity policy, and more recently the system of coordination established through the European Semester.[23] Policy coordination represents the limits of the legal integration and is therefore mostly outside the scope of this thesis. However, European policy developments do indicate the influence of neoliberal economic thinking, which has resulted in a focus on flexibility of employment and competitive labour markets as the solutions to all of Europe's problems, which has potentially undermined the level of protection available under the law.

Overall, the EU legal system, with its asymmetrical integration and focus on flexible employment relations, can have the effect of reducing the rights or excluding from legal status entirely certain types of workers, who legally speaking disappear from the eyes of the law.[24] Those that fail to obtain this status, or retain it during periods of economic inactivity, can lose legal protection and even legal status entirely as a result.[25] These legal gaps are particularly problematic for EU migrant workers engaged in precarious work, as they sit on the intersection between free movement and social law, and can lose protection due to their status as (i) EU migrants, or as (ii) non-standard workers. In fact, their exclusion from such legal classifications means that employers can save on labour costs by circumventing the social protections that are supposed to protect such workers.[26] However, such exclusion can be damaging for society as it creates dualisms within the labour market and commodifies the

[21] C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016) FreSsco: Brussels; N. Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) 47(2) *Industrial Law Journal* 192-225; T. van Peijpe, 'EU Limits for the Personal Scope of Employment Law' (2012) 3(1) *European Labour Law Journal* 35-59; S. Giubboni, 'Being a Worker in EU Law' (2018) 9(3) *European Labour Law Journal* 223-235.

[22] H. Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' (2013) 16(2) *European Journal of Migration* 147-179; D. Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40(2) *European Law Review* 249-262; U. Šadl and S. Sankari, 'Why did the Citizenship Jurisprudence Change?', in D. Thym, *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing; C. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53(4) *CMLRev* 937.

[23] M. Daly, 'Whither EU Social Policy? An Account and Assessment of Developments in the Lisbon Social Inclusion Process' (2007) 37(1) *Journal of Social Policy* 1-19;

[24] D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, p. 224.

[25] See N. Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(4) *CMLRev* 1597; C. O'Brien (n 22).

[26] G. Standing (n 5); G. Standing, *The Precariat: The New Dangerous Class* (2011) Bloomsbury: London, p. 49.

labour of precarious workers, and as well as pushing the worker towards social exclusion can also create downward pressures on social standards that are damaging for both migrant and native workers, as well as for both precarious and non-precarious workers.[27]

3 PROTECTING THE EUROPEAN PRECARIAT

Keynes' optimistic vision of future employment has not come to pass. Instead, contracts with fewer hours tend to be performed on an involuntary basis where the worker would prefer more hours or a more secure contract.[28] The very idea of 'standard' employment, based on full-time, permanent work, arguably no longer adequately describes modern labour markets. Instead, increasing numbers of workers are engaged on part-time contracts with few hours, fixed-term and temporary positions that leave them with an intermittent working history, and in positions that blur the distinctions between self and paid-employment, pushing employment-based risks onto the worker rather than the employer. New forms of employment relations, such as bogus or false self-employment, have been fuelled by the rise of the platform economy, and shift many of the risks and costs associated with employment onto the worker while the employer retains control over the worker's job tasks, schedule, and pay.[29] Overall, there is a rising degree of insecurity related to employment within labour markets that are constantly seeking to gain more competitiveness, which has permeated into every section of the labour market.[30] Modern labour markets, with their shift towards de-standardised and precarious form of employment, seem less like Keynes' optimistic vision of the future, and more akin to the dystopia predicted by Karl Marx of a highly alienated and exploited workforce with little dignity or agency over their lives.[31]

The European Precariat will undertake a comprehensive analysis of the situation of EU migrants engaged in what shall be referred to as 'precarious forms of non-standard employment'. It will assess the extent to which the Union is able to effectively realise the aim of ensuring adequate legal protection to workers engaged in precarious forms of non-standard work, particularly in light of the market/social divide that exists in the EU legal order and the political influences that have shifted the nature of labour markets and norms surrounding employment over recent decades. It will explain what precarious employment is and how it has arisen, analyse the situations in which precarious workers may lose legal protection due to their working

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[27] D. Schiek, 'EU Social Rights and Labour Rights and EU Internal Market Law' (2015) *European Parliament DG for Internal Policies* IP/A/EMPL/ST/2014-02 PE 563.457.

[28] L. Fanti, and P. Manfredi, 'Is Labour Market Flexibility Desirable or Harmful? A Further Dynamic Perspective' (2010) 61(2) *Metroeconomia* 257-266; K. Stone & H. Authurs, 'The Transformation of Employment Regimes: A Worldwide Challenge', in K. Stone & H. Authurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (2013) New York, Russel Sage; H. Berger and S. Danninger, 'Labor and Product Market Deregulation: Partial, Sequential, or Simultaneous Reform?'.

[29] A. Thornquist, 'False Self-employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market' (2015) 31(4) *International Journal of Comparative Labour Law and Industrial Relations* 411-429; J. Johanessen, *The Workplace of the Future: The Fourth Industrial Revolution, The Precariat and the Death of Hierarchies* (2019) Routledge: Abingdon.

[30] U. Oberg, 'Precarious Work and European Union Law' (2016) EFBWW - EFFAT - EPSU - ETF - ETUC - industriAll - UNI Europa: Brussels; G. Rodgers (n 11).

[31] For example, see K. Marx, *Economic & Philisophic Manuscripts of 1844* (2017) Dover Publications: Mineola; for the modern context, see J. Bloodworth, *Hired: Six months working undercover in low-wage Britain* (2019) London: Atlantic Books.

situation, examine the wider consequences of this lack of protection, and finally make suggestions as to how a higher level of protection can be provided whilst staying within the political and constitutional confines of the law. *The European Precariat* will look at three case studies of precarious worker, which are the most common forms of precarious employment, and furthermore the types of workers who are most likely to lose legal protection due to their working situation. Concretely, these are (i) part-time, on-demand (including platform workers), zero-hour contract, and any other workers whose employment is rendered precarious by its limited nature, (ii) fixed-term, short-term, temporary, and any other worker whose employment is made precarious by its intermittent nature, and (iii) persons who are engaged on a precarious self-employed basis, which can include the 'false' or 'bogus' self-employed, as well as those on the borderline between paid and self-employment.

4 RESEARCH QUESTION & SUB-QUESTIONS

The thesis will answer the following main research question:

"What space is there in EU law for the legal protection of the 'European Precariat' (i.e., EU Migrant Workers engaged in precarious forms of non-standard employment)?"

In order to answer this complex legal question, it will first be necessary to comprehensively explain what is meant by the term 'precarious work' and the 'European Precariat', as well as outlining how much 'space' there is for legal protection within the EU legal order, in light of its constitutional and political limitations. Having done this, it will be possible to explain the system of legal protection that is available to EU migrant workers engaged in precarious forms of employment. This will set the stage for the three case studies undertaken in this thesis, which will identify situations in which the law does not provide adequate legal protection to EU migrant workers engaged in specific forms of precarious employment and make suggestions as to how the European Precariat can be best protected within the constitutional and political confines of the EU legal order.

Part I: The Space for Protection

The first part of the thesis provides a general introduction to the development of labour markets and the European regulation thereof. It will explain both trends relating to employment norms, and the political priorities in the regulation of labour markets. In doing so, it will answer the following sub-questions.

- How have European labour markets developed over time? What are the main political priorities and drivers that have led to these changes?
- What are the main characteristics of precarious employment?
- How has the protection of workers in Europe developed over time, bearing in mind the division of competences between Union and Member States in the fields of economic and social law?
- How does the development of EU law correspond to the development of labour markets in general (i.e., does the EU have the same political and economic priorities)?

Part II: The Legal Protection of EU Migrant Workers

The second part of the thesis will look at the system of legal protection available to EU migrant workers under EU law. In explaining the legal system and the level of protection it provides, it will answer the following sub-questions:

- How does EU law protect EU migrant workers engaged in non-standard forms of employment?
- How does this differ in relation to free movement/EU social law?
- What influence has non-economic integration, in particular Union Citizenship, had on the system of protection available for workers?
- What are the wider legal consequences of this system for protection of precarious workers?

Part III: How does EU law Protect the European Precariat?

The third part of the thesis assesses the situation of the 'European Precariat' (i.e., the three main types of precarious forms on non-standard work that form the subject matter of this thesis). Namely, these are: (i) part-time and on-demand work, (ii) intermittent and temporary work, and (iii) precarious forms of self-employment. In each of these case studies, the following sub-questions will be asked:

- What are the key legal issues determining the status and rights of the different kinds of precarious workers?
- To what extent are these precarious workers excluded from social protection due to their employment status?
- What are the wider social consequences of the exclusion of each precarious worker from social protection?
- How can each precarious worker be best protected within the confines of the law?

5 METHODOLOGY & LIMITATIONS OF THE THESIS

The European Precariat takes a contextual approach to assess the level of legal protection available to EU migrant workers engaged in precarious forms of non-standard work. The law will be contextualised in terms of how it is formed: i.e., placing it within its historical social, political, and economic context. This will use economic and political theory to explain the development of labour markets over time, and how this development has affected the idea of protection within the current legal order. Furthermore, the law will be contextualised in terms of its outcomes: i.e., the social consequences of a lack of legal protection for precarious workers, which will be used to justify the proposed solutions to the problems caused by precarious work. When assessing the Court's interpretation of European Union legal provisions, this thesis will use the traditional approach of legal interpretation that forms the basis of the Court's judicial reasoning, i.e., that the Court will take a literal reading of the legal provisions wherever possible, and where this is not possible will undertake a contextual or teleological

reading of the text.[32] This creates a holistic assessment of the law and its interpretation, looking not just at the wording of the Treaties and secondary legislation, but also the objectives behind them and the norms that led to their adoption.

Defining The 'European Precariat'

This thesis examines the protection available to EU Migrants engaged in precarious forms of non-standard employment. A distinction must initially be made between 'precarious' and 'non-standard' employment, as these terms of not necessarily synonymous. Not all non-standard work is necessarily precarious: for example, while a Deliveroo Rider or a Freelance Business Development Consultant may both technically be engaged on "non-standard" contracts, the latter is unlikely to describe him or herself in a "precarious" working situation. Likewise, some workers engaged on an SER basis may find their working and living situation is precarious. However, the *European Precariat* focuses on non-standard work, as this is most likely to create gaps in the law. It adopts a definition of precarious employment as non-standard work characterised by increased insecurity and a power imbalance between employer and employee. This working definition is used to determine which forms of non-standard work are characterised as precarious for the purposes of this legal thesis.

The thesis will examine the situation of EU migrant engaged in such employment. Migrants are disproportionality represented in precarious forms of work and given that they are usually less integrated into society, they are more likely to feel its effects. They are also on the intersection between immigration rules and social law, meaning that they can lose status or rights under either area (or both) due to their employment status. It should be noted that this investigation of EU migrant workers' rights under EU social law will have spill-over effects, given that EU social law is universally applicable to all those within a geographical territory (i.e., they are not dependent on the individual's nationality). However, it is EU citizens living and residing in another Member State that make up the primary subject matter of this thesis.

Law vs. Policy

The division between market and social competences in the European Union legal order means that there are limited social competences to adopt hard laws in this area, for example relating to social security entitlement or setting minimum social standards. As such, must of the social protection provided to precarious workers is pursued through policy coordination.[33] Given that this is a legal thesis, European social policy will not be analysed in depth. However, while legal rules will be used to explain the level of protection available to precarious workers (i.e., primary law, secondary legislation, and the case-law of the Court of Justice), policy documents and 'soft law' instruments will be used to explain the objectives behind the law and to place it in its political and societal context. In other words, European social policy will be used to

[32] See, for example, K. Lenaerts, and J.A. Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2013) *AEL 2013/9*; G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (2013) Oxford: Hart Publishing.

[33] M. Dawson (n 34), 'The Origins of an Open Method of Coordination' (2011), in *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (2011) CUP; P. Copeland, 'A Toothless bite? The effectiveness of the European Employment Strategy as a governance tool' (2013) 23(1) *Journal of European Social Policy* 21; M. Daly (n 23).

explain the political priorities and direction of the Union (which can spread from policy coordination into hard law), as well as the limits of legal integration (i.e., where the law cannot be applied due to the constitutional limitations of the Union).

Free Movement vs. Social Law

The subject matter of this thesis, the 'European Precariat', is defined as EU migrant workers engaged in precarious forms of non-standard employment. Given their status as migrant *and* non-standard workers, the European Precariat sits on the intersection between two areas of law, namely the provisions on the freedom of movement for workers (or establishment/citizenship depending on their employment status), as well as EU social law. This means that they risk being excluded from legal protection due to their status as both migrants and as non-standard workers. This issue is especially important as the Union and Member States both claim the prerogative to determine who is a worker for their respective legal systems. However, despite the theoretical sharp division between market and social legal competences at the Union level, it is difficult to fully separate the market from the social when looking at the protection of workers, as the two are often connected and can influence one another. As such, *The European Precariat* will assess the situation of precarious workers under both areas of law, looking at the different objectives and rationales behind the law, as well as the commonalities between them.

European Union vs. National law

Both the European Union and Member States claim the power to determine who is a worker for their own legal systems: the EU asserts that a Union-wide definition is necessary for the facilitating the free movement of workers, as well as ensuring the effectiveness of EU social legislation, whilst the Member States claims the competence to determine who is a worker (or who is a non-worker, self-employed person, etc.) for the purposes of their own immigration and labour law systems. However, the actual determination of an individual's employment status is undertaken by national authorities. As such, in order comprehensively assess the level of protection available to the European Precariat, it is also necessary to assess their situation "on the ground", to see how well EU law is implemented in the Member States, and if there are conflicts between national approaches and that of the Court of Justice. The thesis will not engage in a systematic comparative analysis of the practices between specific Member States but will rather look at selected relevant issues in certain Member States to demonstrate where there are problems with the implementation of EU law at the national level. Finally, it should also be noted that the research for this thesis has taken place before, during, and after the UK's exit from the European Union. However, as the UK was a full Member State during the most of this thesis (initially it was unclear whether the UK would even leave), and was subject to EU rules until the start of 2021, the UK is treated as a full Member State for the purposes of this thesis.

6 ACADEMIC RELEVANCE

In laying down the 'legal space' available for the protection of EU migrant workers engaged in precarious forms of employment, *The European Precariat* will expand on literature

concerning the development of markets over time, and in particular the shift from embedded liberalism to neoliberalism in Europe.[34] It will also use the extensive literature on the development of European social policy since the start of European integration and the division between market and social competences.[35] The thesis will build on these ideas by applying them to the situation of workers specifically, looking at how the development of labour markets and the European protection of workers has developed over time, and explaining how the level of protection is dictated by the constitutional limitations and the political priorities of the of the Union and its Member States.

The thesis will also build on the research undertaken into the most common forms of precarious employment.[36] As opposed to much research concerning precarious employment, *The European Precariat* does not assume that precarious employment is an external phenomenon. Instead, it assesses it as a consequence of economic and political developments. On the basis of this historical assessment, a working definition for precarious employment will be developed, which will be used to identify the forms of precarious employment that are most liable to exclude the worker from legal protection.

In explaining the legal framework that regulates the protection of EU migrant workers, the thesis will expand and update the literature that exists on the concept of worker in EU law.[37] It will also combine these ideas with those on 'market citizenship',[38] to comprehensively explain the system of protection provided under the worker definition in EU law, as well as

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[34] J. Caporaso & S. Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63(4) *International Organization (CUP)* 593-620; M. Goldmann (n 4); D. Ashiagbor, 'Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration' (2013) 19(3) *European Law Journal* 303-324; F. Scharpf (n 19); S. Giubboni (n 19); C. Joerges, 'What is left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *European Law Review* 461-489; W. Streeck, 'From Market Building to State Building? Reflections on the Political Economy of European Social Policy' in S. Liebfried and P. Pierson (Eds) *European Social Policy: Between Fragmentation and Integration* (1995) Brookings Institution: Washington; D. Schiek (n 19); D. Schiek (n 27); M. Ferrera (n 19); J. Ostry, P. Loungani and D. Furceri (n 6).

[35] J. Goetschy, 'The European Employment Strategy: Genesis and Development' (1999) 5(2) *European Journal of Industrial Relations* 117; P. Copeland (n 34); M. Dawson (n 34); J. S. O'Connor, 'Policy Coordination, social indicators and the social policy agenda in the European Union' 15(4) *Journal of European Social Policy* 345-361; M. Daly (n 23); D. Ashiagbor (n 13); M. Dawson & B. de Witte, 'The EU Legal Framework of Social Inclusion and Social Protection', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge; M. Bell, 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37(1) *European Law Review* 31; S. Freedman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 *Industrial Law Journal* 299.

[36] U. Oberg (n 30); G. Rodgers (n 11); S. McKay (n 31); A. Broughton (n 31); A. Koukiadaki & I. Katsaroumpas (n 11); G. Standing (n 26); S. McKay (n 11).

[37] C. O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46(4) *CMLRev* 1107; C. O'Brien, E. Spaventa, & J. De Coninck (n 21) N. Kountouris (n 21); T. van Peijpe (n 21); S. Giubboni (n 21).

[38] M. van den Brink, 'The Problem with Market Citizenship and the Beauty of Free Movement', in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge; S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (1996) Kluwer Law: The Hague; S. O'Leary, *European Union Citizenship: Options for Reform* (1996) IPPR: London; N. Nic Shuibhne (n 25); M. Everson, 'The Legacy of the Market Citizen', in J. Shaw & G. More, *New Legal Dynamics of European Union* (1995) Clarendon: Oxford; D. Kochenov, 'On Tiles and Pillars: EU citizenship as a Federal Denominator', in D. Kochenov (ed.) *Citizenship and Federalism: The Role of Rights* (2015) CUP: Cambridge; F. Pennings, 'Coordination of Social Security on the Basis of the State-of –Employment Principle: Time for an Alternative?' (2005) 42(1) *CMLRev* 67.

the positive and negative consequences of such a system. *The European Precariat* will also examine the situation of precarious workers when they do not meet the worker definition under EU law. In doing so, it will build on the extensive literature on the situations of 'economically inactive' persons under EU Citizenship rules and Directive 2004/38, notably their ability to claim social benefits.[39] Whilst most literature assumes a sharp division between the situation of workers and non-workers, this thesis will add to the literature by examining the situations of precarious workers, who are often on the borderline between economic activity and inactivity, under Directive 2004/38, as they seek to navigate the complex array of legal statuses and protections under EU free movement law.[40] The thesis further develops ideas put forward by the author in previous publications relating to EU Citizenship and the inclusion/exclusion of EU migrants.[41] That said, those interested in this element of the thesis are invited to read these publications, which combined with *The European Precariat* hopefully

[39] C. O'Brien (n 9); D. Kochenov (n 24); D. Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 *CYELS* 270-301; F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015) OUP: Oxford, D. Schiek, 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611; S. Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Intersentia: Cambridge; D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) *CMLRev* 17; N. Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) *CMLRev* 889; G. Davies, 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) 25(10) *Journal of European Public Policy* 1442 – 1460; D. Schiek, 'Perspectives on Social Citizenship in the EU: From *Status Positivus* to *Status Socialis Activus* via Two Forms of Transnational Solidarity' in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2017); H. Verschueren (n 22); E. M. Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (2014) *European Parliamentary Research Service* 140808REV1; S. Mantu, 'Concepts of Time and European Citizenship' (2013) 15 *European Journal of Migration and Law* 447–464; F. Wollenschläger, 'The Judiciary, the legislature and the evolution of Union Citizenship', in P. Syrpis (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012) CUP: Cambridge; P. Minderhoud, 'Sufficient Resources and Residence Rights under Directive 2004/38', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Intersentia: Cambridge; A. Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) *32 European Law Review* 787; C. Barnard, 'EU Citizenship and the Principle of Solidarity' (2005) Oxford: Hart Publishing; U. Šadl and S. Sankari (n 22); N. Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice', in P. Sypris (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012), CUP: Cambridge; D. Thym (n 22); G. Davies, 'Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency' (2016) College of Europe Research Paper 02 / 2016; M. Dougan, 'The Bubble that Bursts: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens', in M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (2013) Oxford: Hart Publishing; M. Jesse & D. Carter, 'Life after the *Dano*-Trilogy: Legal Certainty, Choices and Limitations in EU Citizenship Case Law', in N. Cambien, D. Kochenov, & E. Muir, *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (2020) Leiden: Brill Nijhoff; M. Van den Brink, 'The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?', in: Bauböck, R. (eds) *Debating European Citizenship* (2019), IMISCOE Research Series. Springer: Cham.

[40] With some exceptions, including C. O'Brien (n 22); D. Kramer, 'From worker to self-entrepreneur: The transformation of *homo economicus* and the freedom of movement in the European Union' (2017) 23 *EurLawJ* 172.

[41] D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208; M. Jesse & D. Carter, 'Life after the *Dano*-Trilogy: Legal Certainty, Choices and Limitations in EU Citizenship Case Law', in N. Cambien, D. Kochenov, & E. Muir, *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (2020) Leiden: Brill Nijhoff; D. Carter, 'Inclusion and Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The Others Amongst Us* (2020), CUP: Cambridge.

provides a comprehensive understanding of the legal situation for EU migrants under EU citizenship law.

In terms of the case studies undertaken in this thesis, it will build on the literature that exists, which tends to focus on the situation of specific legislative instruments at the European level,[42] as well as the regulation of non-standard and precarious forms of employment from a national perspective.[43] *The European Precariat* will take a holistic approach, looking at the situation of different types of precarious worker, and considering their situation under both free movement and social law. This will allow for an assessment of the relationship between free movement and social law, to see the extent to which they complement and/or conflict with one another.

Overall, *The European Precariat* will add to the literature by undertaking a comprehensive analysis of the situation of EU migrant workers engaged in precarious work from a legal perspective. It will seek to place the law in its economic and political context and contribute to the literature by undertaking an assessment of the development of the European labour market and how this has influenced the level of protection available to EU migrant workers. By taking a holistic approach, looking at both free movement and social law, as well as the situation when workers fall on either side of certain legal tests (i.e., worker/non-worker, paid/self-employed, etc.), it is hoped that the thesis will be able to define the level of protection available to precarious workers, show where this protection is lacking, and suggest ways in which the Union could improve the level of protection available to precarious workers, whilst adhering to the constitutional and political confines of the EU legal system.

7 SOCIETAL RELEVANCE

The European Precariat was published during a time of stagnating and even declining living standards in Europe. Since 2008, the EU has been in a state of near constant-crisis, the most recent being the COVID-19 pandemic and the current crisis of inflation. The issue of precarious employment is highly relevant in this context as the shift towards competitive labour markets and flexible employment is often seen as the solution to economic problems. In fact, all forms

[42] S. Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU law?' (2013) 32(1) *Yearbook of European Law* 30-56; N. Kountouris, 'EU Law and the regulation of 'atypical' work', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing; M. Aimo, 'In Search of a European Model for fixed-term work in the name of the principle of effectiveness' 7(2) *European Labour Law Journal* 232; A. Davies, 'CFV' (2013), in N. Countouris & M. Freedland (Eds.), *Resocialising Europe in a Time of Crisis* (2013), CUP: Cambridge; S. Kamanabrou, 'Successful Rules on Successive Fixed-term Contracts?' 33(2) *International Journal of Comparative Labour Law and Industrial Relations* 221-240; A. Bogg, 'The regulation of working time in Europe', in in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing); S. Lee, D. McCann, & J.C. Messenger, *Working Time around the World: Trends in Working Hours, Laws and Policies in a Global Comparative Perspective* (2007) Routledge: London; P. Schoukens and A. Barrio, 'The changing concept of work: when does typical work become atypical' (2017) 8(4) *ELLJ* 306; T. Nowak, 'The turbulent Life of the working Time Directive' (2018) 25(1) *Maastricht Journal of European and Comparative Law* 118-129; A. Koukiadaki & I. Katsaroumpas (n 11).

[43] F. Behling, F, and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970; A. Thornquist (n 29); A. Adams, M.R. Freedland, & J. Prassl, 'The Zero-Hours Contract: Regulating Casual Work, or Legitimising Precarity' (2015) *Oxford Legal Studies Research Paper No. 11/2015*

of precarious employment, including on-demand work, temporary and short-term contracts, platform work, and potentially false self-employment have all increased in number over recent years.[44] As precarious employment becomes more prevalent, so do the challenges it causes. In fact, increasing workplace insecurity and precariousness is suggested to be the most pressing concern when looking at the problems facing modern labour markets.[45]

Precarious employment is also highly relevant given the damaging outcomes it can result in. Those engaged in precarious forms of non-standard work risk losing legal protection as a result.[46] As well as leaving certain workers at risk from losing legal protection, such a system, whereby even those engaging in limited economic activity are not entitled to the protection available to workers feeds into arguments that EU law commodifies labour and sees fairness and social justice as synonymous with the market.[47] Furthermore, the use of precarious forms of work is liable to create dualisations in the labour market, that may place pressures on the wages and social standards of both native and migrant workers engaged in precarious forms of employment.[48]

The case studies undertaken in *The European Precariat* are also highly relevant as they focus on the three fastest growing and most dangerous forms of precarious work: namely, part-time and on-demand work (including zero-hour contract workers),[49] falsely self-employed persons, in particular that working through platforms,[50] and those on temporary and short-term contracts.

It remains to be seen whether the Union and its Member States will shift even more towards precarious employment due to current crises. It is hoped that *The European Precariat* will be able to provide concrete suggestions that can provide practical solution that will help to mitigate or resolve some of the problems caused by precarious employment. Furthermore, it is hoped that this thesis will contribute towards discussions on the tricky balance between market and social competences, at least from the perspective of the protection of workers.

8 Structure of the Thesis

The European Precariat will be structured into three parts that will allow for a comprehensive analysis of the protection available to EU migrant worker engaged in precarious forms of non-standard work. **Part I** of the thesis looks at the nature of the precarious employment and the political and economic developments that dictate the level of protection that can be provided under EU law (i.e., the 'space' for legal protection). Following this, **Part II** of the thesis examines the legal framework applicable to precarious workers, and where gaps in the gaps

[44] OECD, *OECD Employment Outlook 2020: Worker Security and the COVID-19 Crisis* (2020) OECD publishing: Paris; S. McKay (n 11); A. Broughton (n 31); P. Schoukens and A. Barrio (n 42); C. Lang, S. Clauwaert, & I. Schomann, 'Working Time Reforms in Time of Crisis' ETUI Working Paper 2013.04; Z. Kilhoffer et al (n 10).
[45] U. Oberg (n 30); S. McKay (n 11).
[46] A. Broughton (n 31); A. Koukiadaki & I. Katsaroumpas (n 11); C. O'Brien, E. Spaventa, & J. De Coninck (n 21).
[47] C. O'Brien (n 22); D. Schiek (n 19).
[48] G. Esping-Andersen (n 4); D. Schiek (n 40); D. Schiek (n 19);
[49] A. Adams, M.R. Freedland, & J. Prassl (n 44).
[50] A. Thornquist (n 29); Z Z. Kilhoffer et al (n 10); N. Bodiroga-Vukubrat, A. Poscic, and A. Martinovic (n 10); P. Schoukens and A. Barrio (n 43).

are liable to arise due to the classifications in the law (i.e., the 'legal protection' of EU migrant workers). Finally, **Part III** of the thesis assesses the situation of three specific types of precarious workers, i.e., the European Precariat: (i) part-time, on-demand (including platform workers), and zero-hour contract workers; (ii) temporary, short-term, and other intermittent workers; and (iii) those falsely or precariously working on a self-employed basis (including platform workers). It will examine what rights and protections they lose due to their employment situation, explaining the wider social consequences of this lack of protection, and finally making suggestions as to how their protection can be increased, within the confines of the Union legal order.

Chapter 2 tracks the development of labour markets over time. It explains how the level of protection available for workers is dictated by the dominant political priorities of the time. This can be seen from the shift from the *laissez-faire* economic policies of the pre-war era to the post-war consensus of 'embedded liberalism', which was defined by the 'standard employment relationship' (SER) of full-time, permanent employment, and the benefits of the modern welfare state. It can also be seen from the shift away from embedded liberalism towards more flexible forms of employment and conditional welfare systems based on activating workers into employment (commonly known as neoliberalism). The chapter explains how this shift, when combined with other factors such as the rise of the platform economy, have resulted in increasingly flexible and insecure forms of employment, that can be characterised as 'precarious. Whilst this is difficult to define (one person's precarity is another's flexibility), the chapter creates a workable definition that can be used in this legal thesis and outlines the three most prominent forms of precarious employment that shall form the subject matter of this thesis: namely, (i) extremely limited or on on-demand work; (ii) short-term and intermittent work, and (iii) bogus and precarious forms of self-employment.

Chapter 3 looks at the European regulation of labour markets over time, examining how this has been influenced by the shifting nature of labour markets explained in Chapter 1, as well as the constitutional limitations of European integration. It explains how the division between market and social competences, i.e., the Union traditionally having very limited powers in the area of social law, affects the level of protection that can be provided to EU migrant engaged in precarious forms of employment. Despite limited developments in the area of social law, much of the social protection of precarious workers is pursued through policy coordination, rather than hard law. Furthermore, the chapter will track the development of European Unio social policy in light of the shift towards neoliberalism explained in the previous chapter, looking at how European Union law and policy has been influenced by neoliberal principles, and the extent to which this is liable to affect the level of protection that can be afforded to precarious workers.

Chapter 4 explains the system of legal protection that applies to EU migrant workers under EU law. Concretely, it looks at how the definition of worker under EU law, based on the *Lawrie-Blum* criteria of (i) remuneration, (ii) subordination, and (iii) genuine economic activity, was first developed in the area of the freedom of movement for workers, but has gradually been applied to other legislative instruments in the area of EU social law. The chapter examines the direct and indirect reach of the *Lawrie-Blum* criteria in both EU free movement and social law, before providing an explanation of the 'gateway' function of *Lawrie-Blum* using the concept of market citizenship. In this respect, the *Lawrie-Blum* criteria acts as a gateway to a federalised

form of market citizenship, whereby the worker is entitled to a range of 'horizontal' free movement rights and 'vertical' employment-based rights. However, like all forms of citizenship, this system can be problematic insofar as it has an exclusionary nature that is liable to push precarious workers out of legal protection.

Chapter 5 looks at the situation of EU migrant workers engaged in precarious employment under non-economic free movement law, i.e., the provisions on Union Citizenship and the subsequent adoption of Directive 2004/38. It tracks the development of the law, from the Court's initial generous, teleological approach based on the Treaty provisions, to its more strict and literal approach following the adoption o Directive 2004/38, which creates a unifying document for the rights and protections of all EU migrants (i.e., those classified as economically active and inactive). After explaining this shift in approach, the chapter will evaluate the approaches of the Court, and assess whether its recent approach is justified in view of the objectives and nature of the Directive, as well as its theoretical methods of interpretation. Following this, the chapter will explain how Directive 2004/38 fails to establish a genuine form of social citizenship that is comparable to the nation state, and instead creates a highly conditional system based on an idea of earned citizenship that retain employment status at the heart of the system. The chapter will finally explain the legal consequences of this strict and conditional approach towards interpreting the Directive, and how it is liable to mean that precarious workers can fall between the gaps created in the law and reduce their level of legal protection in general.

Chapter 6 examines the situation of part-time, on-demand/platform, zero-hour contract, and any other workers whose employment is rendered precarious by its limited or on-demand nature. It will first provide an explanation of which forms of part-time work should be considered as precarious and which should not. Next, it will explain how EU law distinguishes between genuine and marginal employment through the genuine economic activity requirement within the *Lawrie-Blum* criteria, including the approach the Court uses and the factors it considers relevant when making this assessment. It will further examine how this approach has changed over time, and how it can be compared to Member State rules and practices when making this assessment for the purposes of national law. Following this, it examines the rights and protections that may be lost as a result of failing to meet this requirement, both from the perspective of free movement law under Article 45 TFEU and Directive 2004/38, as well as their situation under EU social law. It will next look at the wider social implications this dichotomy in the law can have, in terms of both undermining the idea of market solidarity upon which the internal market is based, as well as a creating a form of a class of '*European Lumpenprecariat'* (updating the traditional *proletariat*) that in turn is liable to result in dualisations in the labour market that undercut the standards of all workers. In view of this, a suggestion is made for a rebuttable presumption of genuine employment, based on formal elements relating to the worker's employment, that would ensure a higher level of protection for such workers whilst staying within the constitutional and political limitations of European integration.

Chapter 7 looks the situation of fixed-term, temporary, short-term, and all other workers whose employment situation is precarious due to its intermittent nature. This includes any worker (such as platform or falsely self-employed), whose employment means that they are likely to face an intermittent working pattern. The chapter examines the protection available

to such periods during periods of inactivity. It examines their situation under Directive 2004/38, specifically the rules of worker status retention under Article 7(3), and their ability to obtain permanent residence status under Article 16(1), which have been limited by the Court's strict approach to interpreting the Directive. Furthermore, it examines their situation under EU social law, assessing how this can complement free movement law by providing additional protection to intermittent workers. The Chapter then looks at the wider consequences of this system of protection, including how it leads to similar problems of dualisations in the labour market and downward pressures on wages and social standards, as well as putting intermittent workers at risk of social exclusion by denying them legal status and diminishing their rights. Finally, it will provide a suggestion as to how intermittent workers can be afforded a higher level of protection, whilst being sensitive to the extremely limited competences the Union has when concerning EU migrant workers during periods of economic inactivity. Concretely, it is suggested that the Court should allow for more residual protection for ex-workers following a period of employment, either under Article 7(3) as a worker or as having sufficient resources under Article 7(2), assuming such persons do not become an unreasonable burden on the host-state's public finances.

Chapter 8 looks at the situation of individuals who are in precarious forms of self-employment. This is defined as including the situation where worker is classified as being self-employed and has many of the risks and obligations associated with employment, despite their relationship with eh undertaking/platform being more representative of employer-employee (commonly known as 'false' or 'bogus' self-employment). The Chapter explains how the Court distinguishes between genuine and false self-employment at the EU level and compares this to the assessment that takes place at the national level, looking for commonalities and differences between them. It puts forward a presumption of paid-employment that the Court could apply, based on the existence of a 'hierarchical relationship', which could be rebutted on a case-by-case basis, following an assessment of the freedom the worker has in terms of setting their rates of pay, working schedule, etc.

Furthermore, the Chapter makes an argument that the binary approach used by the Court to distinguish between genuine and false self-employment is insufficient to provide them with adequate legal protection, given the increasingly grey area between the two forms of employment. Whilst the exclusion of genuinely self-employed persons from most social law is, for the most part, justified on the basis of their different employment situations, it is claimed that there are certain social rights, for example the right to collectively agreed rates of pay, that are increasingly difficult to deny to such workers. The Chapter explains how collectively agreed rates of pay for self-employed persons are in principle restricted under EU rules on competition and service provision, before making suggestions as to how this protection could be provided under the current legal system.

Chapter 9 makes the overall final conclusions to the thesis. It brings the analysis together by summarising the findings and answering the main research question and sub-questions. It also compiles the suggestions made in the case studies as to how to better protect the European Precariat within the confines of the European Union legal system, and finally asks what overall lessons the Union can learn in terms of how best to protect the European Precariat.

Part I: The Development of Labour Markets and the Rise of Precariousness

Chapter 2: The De-standardisation & Precariatisation of Employment

1 INTRODUCTION

The following chapter will explain the development of labour markets throughout the period of European integration and how precious employment can be understood in the context of this legal thesis. The regulation of labour markets and employment in Europe has always been dominated by the question of whether labour should be treated as a commodity to be bought and sold, and the extent to which individual workers should be protected from the of the market. This tension was prominent in the context of European integration, as following the Second World War, European law and policy makers shifted towards what is described as the *standardisation* of employment, which stemmed from embedded liberalism ways of thinking about the economy and resulted in the hegemony of the standard employment relationship and the establishment of the modern welfare state. However, since the 1970s and 1980s, there has been a shift away from standardised employment and universalist welfare systems. This has been part of the general shift towards neoliberal ways of thinking about the economy, which in the context of labour market regulation has shifted the focus away from the SER and towards more flexible employment and competitive labour markets. This can be referred to as the *de-standardisation* of employment. The *de-standardisation* of employment has resulted in increasing levels of non-standard employment, as well as welfare systems based on responsibility and activating labour market policies. Since the Global Financial Crisis, this shift became more pronounced, with employment at risk of veering from de-standardisation to precariatisation. Whilst difficult to define, the main traits of precarious employment are increased (involuntary) insecurity at work, as well as a greater power imbalance between employer and employee (at least when compared to standard employment). Precarious employment, at least within the context of this thesis, can be classified on the basis of: (i) extremely limited or on on-demand work; (ii) short-term and intermittent work, and (iii) bogus and precarious forms of self-employment.

2 THE DEVELOPMENT OF LABOUR MARKETS PRE-EUROPEAN UNION

During negotiations between the EU and the UK following the UK's decision to leave the European Union, the Union was keen to stress that the four 'fundamental freedoms' of goods, services, persons, and capital, that make up the internal market under Article 26 TFEU were indivisible, and that the UK could not engage in "cherry picking" by seeking to gain preferential treatment in respect to one of these over the others.[1] The indivisibility of these freedoms is the traditional perspective on the internal market, even if this is not quite as accurate as is often claimed.[2] Claims of indivisibility between the freedoms mask the fact that labour, or more accurately the worker that performs such labour, is clearly not in the same position as other factors of production such as goods and services as they are individual

[1] European Council (Art. 50) guidelines for Brexit negotiations (220/17) 29th April 2017, para. 1; see also Editorial Comments, 'Is the "indivisibility" of the four freedoms a principle of EU law?' (2019) 56(1) *Common Market Law Review* 1.

[2] C. Barnard, 'Free Movement vs. Fair Movement: Brexit and Managed Migration' (2018) 55(special) *Common Market Law Review* 203.

human beings rather than tangible or intangible objects, a point which needs to be recognised when regulating labour markets.

The modern idea of the labour 'market' did not exist prior to industrialisation. In feudal times, an individual's economic status and life opportunities were not governed by their ability to sell their labour on the market, but rather through "trust, solidarity and security".[3] This meant that a person's life prospects were primarily determined by their social class, which itself was defined through the "family, church, or lord".[4] There were limited labour market mechanisms based on supply and demand, which could cause wages to fluctuate following major events such as the Black Death,[5] however, this cannot be understood equating to a functioning market society as it is understood today.[6] During the 18th century, the rigid hierarchical structures of feudalism began to break down. Large-scale agriculture gradually replaced small farms, leading to the mass dislocation of many peasants and farmworkers, who were suddenly without work and having to compete with their peers for manual employment at the newly established mills and factories in urban areas. As labour became free from the confines of feudalism and this new class of industrialised proletarian workers began to compete with one another, it led to claims that labour was "a commodity, just like every other, and rises and falls according to demand",[7] and that "like all things that can be purchased and sold, and which may be increased or diminished in quality, has its natural and its market price".[8] Adam Smith considered this commodification of labour to be a good thing that would improve the prosperity of workers: "if things were left to follow their natural course, where there was perfect liberty, and where every man was perfectly free to choose whatever occupation he thought proper and to change it when he thought proper".[9]

The problem with this perspective is that labour is clearly not a commodity "like any other". Already in the 19th century this perspective as claimed to be a "very narrow" and "false" concept that equates labour to an independent entity and ignores the "needs, nature and feelings" of the individual concerned.[10] Unlike other goods and services, labour is not an inanimate object. It is inherently and inextricably linked to the person that performs it. Dealing with labour requires dealing with the demands of workers as individuals,[11] creating a bond with a person rather than an abstract concept.[12] In other words, labour cannot be treated just like any other commodity, as unlike other commodities the workers that perform labour must eat, sleep, survive, prosper, and reproduce both themselves and the society in which they

[3] M. Goldmann, 'The Great Recurrence: Karl Polanyi and the Crises of the European Union' (2017) 23(3-4) *European Law Journal* 272-289, p. 275.
[4] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990) Polity Press: Cambridge, p. 35.
[5] Ibid, p. 38.
[6] On this point, see the diverging views of S. Hejeebu, and D. McCloskey, 'The Reproving of Karl Polanyi' (1999) 13(3-4) *Critical Review* 285-314, p. 285, and M. Blyth, 'The Great Transformation in understanding Polanyi: Reply to Hejeebu and McCloskey' (2004) 16(1) *Critical Review* 117-133, p. 122.
[7] D. Ricardo, *On The Principles of Political Economy and Taxation* (1817), see 'Chapter 5: On Wages'.
[8] A. Smith, *The Wealth of Nations* (2012) Wordsworth, London, pp. 167 – 169; see also E. Burke, *Thoughts and Details on Scarcity* (1795).
[9] A. Smith (n 8), p. 104.
[10] J.K. Ingram, *Work and the Workman. Being an Address to the Trades Union Congress in Dublin September 1880* (1880), Hanse Books: Norderstedt.
[11] K. Marx, *Das Kapital: Volume One* (1867) Pacific Publishing: New York, pp. 557 – 564.
[12] S. Evju, 'Labour is not a Commodity: Reappraising the Origins of the Maxim' (2013) 4 *European Labour Law Journal* 222, p. 224.

live.[13] They must consider their economic livelihood, physical and mental health, the prosperity their family and of society in general. As Benjamin Franklin once said (albeit in the context of slavery): "other cargoes do not rebel".[14] The Covid-19 pandemic has clearly shown how economies can survive without certain goods and services being available during lockdowns, however, removing labour from the economy requires strong state support becoming available to them to avoid the significant social problems that would have inevitably arisen without it.

There is also an ideological tension surrounding the question over the extent to which labour should be treated as a commodity. The liberal perspective originating from Smith who, whilst never advocating for the removal of all social protections, believed that the formation of free markets would ensure that all who want to be employed and prosper will be able to do so.[15] This liberal perspective on labour markets considers them to be essentially meritocratic in nature, and that those who become unemployed or fall into poverty are blameworthy as they failed to make use of the emancipatory qualities of the market.[16] The more extreme adherents of this perspective see social protections as damaging to society *per se*, as it is claimed that they encourage "moral corruption, idleness, and drunkenness" and therefore increase poverty.[17] Previous attempts to implement a social wage as a buffer against *laissez-faire* capitalism, thereby ensuring the "traditional guarantees of feudal society",[18] are suggested to have unwittingly stifled competition and prevented the formation of organised labour that would have allowed workers to improve their material situation directly.[19] This meant that workers were, at least initially, grateful to see the establishment of virtually an unfettered and unregulated labour market.[20]

However, it soon became clear that an unfettered labour market was even more damaging to workers. Whilst it led to an unprecedented era of productivity and wealth, at the same time it made the physical health and mental condition of the average worker "utterly miserable".[21] The removal of social protections led to widespread exploitation, and extreme levels of inequality and social deprivation. The only form of welfare were workhouses where destitute individuals could find food and shelter, however, once they entered it became impossible to leave, earning them the name the "prisons for the poor".[22] This was the true consequence of treating labour as a commodity like any other: an over-supplied labour market where workers had to accept ever-lower wages and ever-worsening working conditions, thereby resulting in a negative spiral.[23] Workers lost their humanity as they were forced into fierce competition

[13] See, for example, Chapter 23 in K. Marx (n 11).
[14] Y. Varoufakis & D. Groutsis, 'The Trouble with Labour' (2010).
[15] G. Esping-Andersen (n 4), p. 42.
[16] Ibid.
[17] F. von Hayek, *Road to Serfdom* (1944); M. Friedman, *Freedom and Capitalism* (1962).
[18] G. Esping-Andersen (n 4) p. 36; see also K. Polanyi, *The Great Transformation* (1944). The Speenhamland Laws were a response to increasing poverty and destitutiobn in rural England as a result of the partitioning of land. It established a social wage linked to the price of bread.
[19] K. Polanyi, *The Great Transformation* (1944), pp. 82-83.
[20] M. Goldmann (n 3), p. 275
[21] See F. Block, 'Karl Polanyi and the Writing of the Great Transformation' (2003), p. 279.
[22] R. Oastler, *Damnation! Eternal Damnation to the fiend-begotten 'coaser-food', new Poor Laws* (1837).
[23] G. Esping-Andersen (n 4), p. 3.

with one another,[24] and poverty became a necessary consequence of the system.[25] This can be understood as an extreme form of labour commodification, whereby social protections are removed from workers and they are increasingly reliant on the market for their survival.

The period of *laissez-faire* capitalism demonstrated the problems of labour commodification and a lack of social protection. Karl Polanyi claimed that the application of market mechanisms to 'false commodities' like labour that are deeply rooted in the historical context of society is a self-defeating task.[26] Markets cannot be "freed" from society, because they are formed and maintained through politics and society: "all economies, and economic behaviour, are enmeshed in non-economic institutions".[27] They are 'socially embedded' into the socio-cultural obligations, norms and values that exist within a society. The more social protections are removed in the pursuit of the "stark utopia" of self-regulating markets,[28] the more society will react against it through counter-movements that seek to protect individuals from the negative consequences of the market.[29] In other words, society checks the growth of markets in order to protect itself.[30] This means that subjecting commodities like labour entirely to market mechanisms is simply impossible to achieve.[31]

Therefore, the industrial revolution and the formation of labour markets saw a reduction in the protection available to individuals. As society shifted from feudalism to the industrial age, the role of the state was reduced to establishing and safeguarding a self-regulating market,[32] with institutions such as the workhouses becoming part of this system. Social protection includes not just concrete laws and rules, but also "ideas, rules, and institutional structures", that shifted in favour of unfettered markets.[33] However, the removal of social protections meant removing part of the fabric of society, which resulted in counter-movements against markets. These movements are not inherently progressive. Whilst they can take the form of movements supporting the five-day working week or other employment protections, they can also take the form of authoritarian dictatorships.[34] Indeed, Polanyi blamed the rise of fascism in Europe in part on the role of *laissez faire* capitalism of the pre-war era.

3 Bretton Woods and the Post-war Consensus of Embedded Liberalism

The problems of labour commodification and *laissez-faire* capitalism meant that, following the Second World War, there was a widespread consensus that the economic conditions that led

[24] Ibid, p. 36.
[25] Fabien Bottini, 'The Roots of the French Welfare State' (2013), 643, p. 653.
[26] K. Polanyi (n 19).
[27] D. Ashiagbor, 'Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration' (2013), p. 305; J. Caporaso & S. Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63(4) *International Organization (CUP)* 593-620, p. 598.
[28] K. Polanyi, *The Great Transformation* (1944), Chapter 6; F. Block, 'Karl Polanyi and the Writing of the Great Transformation' (2003), p. 282.
[29] J. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982), p. 385. See also, C. Kindleberger, *The World in Depression 1929-1939* (1973), p. 32.
[30] D. Ashiagbor (n 27), p. 304.
[31] F. Block (n 21); See also, J. Caporaso & S. Tarrow (n 27), p. 596.
[32] J. Ruggie (n 29), p. 386.
[33] F. Block (n 21), p. 299.
[34] J. Caporaso & S. Tarrow (n 27), p. 596; M. Goldmann (n 3), pp. 274 – 275.

to the Great Depression and the rise of fascism in Europe should not be repeated. At the Bretton Woods Conference of 1944, it was concluded that the economic policies of the pre- and inter- war eras were too focused on the subordination of internal social policy by external financial policy.[35] Opposition to the idea of the self-regulating market was prominent within the conference, with Keynes particularly vocal in his criticism: "to suppose that there exists some smoothly functioning automatic mechanism of adjustment which preserves equilibrium if only we trust to methods of *laissez-faire* is a doctrinaire delusion which disregards the lessons of historical experience without having behind it the support of sound theory".[36] It was therefore concluded that nations should have more democratic control over social security and economic stability. The main objective was to reign in the power of banks and global finance, and to allow for more state intervention in the economy. This resulted in the re-nationalisation of many central banks (thereby allowing them to play a greater role in domestic policy), and Governments became increasingly active in terms of intervention in the domestic economy to regulate price levels, employment rates, etc.[37] Whilst there was not total agreement over the "form and depth" of state intervention, there was little disagreement over the final objective.[38] Such demands were "very nearly universal, coming from all sides of the political spectrum and from all ranks of the social hierarchy".[39]

The outcome of Bretton Woods should not be seen as a countermovement against free markets.[40] Whilst it gave more weight to the role of national social protection, its main aim was actually to re-establish multilateralism and global markets. However, what distinguished this from the preceding *laissez-faire* system was the "crucial component" of embedding international trade liberalisation into the democratic choices regarding domestic social policy that were made at the national level.[41] Unlike the previous system, it would "safeguard and even aid domestic stability" as this multilateralism "would be predicated upon domestic interventionism".[42] In essence, greater openness in the international economy was coupled with measures cushioning the domestic economy from external disruptions.[43] It was considered that this multilateralism was compatible with the requirements of domestic stability and encouraged the division of labour, including the notion of comparative advantage, but would also minimise "socially disruptive adjustment costs" and "national economic and political vulnerabilities".[44] Simply put, the idea was to make international monetary policy conform to domestic social and economic policy, and not the other way around.[45] The social protection of workers was a crucial aspect of this embedded system, as it was considered that this more socially-minded system of global trade would become "welfare-

[35] J. Ruggie (n 29); A. Eckes, *A Search for Solvency: Bretton Woods and the International Monetary System, 1941 – 1971* (1975); G.J. Ikenberry, 'The Political Origins of Bretton Woods', in Michael D. Bordo and B. Eichengreen, A *Retrospective on the Bretton Woods System: Lessons for International Monetary Reform* (1991).
[36] J. Ruggie (n 29), p. 388.
[37] Ibid, p. 390.
[38] Ibid, p. 394. See also D. Ashiagbor (n 27), p. 306.
[39] J. Ruggie (n 29); See also A. Eckes (n 35).
[40] J. Caporaso & S. Tarrow (n 27).
[41] D. Ashiagbor (n 27).
[42] Ibid, p. 393.
[43] Ibid, p. 405.
[44] A. Eckes (n 35).
[45] J. Ruggie (n 29), p. 390.

improving, rather than welfare diverting".[46] Embedded Liberalism therefore essentially meant that global markets were embedded into domestic social policy, in particular national systems of solidarity relating to redistribution and the provision of public services, thereby ensuring that democratic institutions were able to influence and control such market mechanisms.[47]

3.1 Standardised Employment

As well as re-establishing the multilateral global order, the reaction to *laissez-faire* capitalism also resulted in a convergence in the objectives and aims sought by nation states. There was a shared legitimacy of a set of social objectives to which the industrial world had moved towards, albeit unevenly, but certainly as a 'single entity'.[48] Political discourse shifted, resulting in rival political parties unwilling to shift too far away from the common consensus.[49] This convergence predominantly centred around demand-side, Keynesian economics, although it should be noted that Keynesianism acts as a as a linguistic 'catch-all' term that encompasses all demand-based economic and social policies that were hegemonic in Europe and the US during this period.[50]

Keynesian labour markets focussed on full employment and powerful trade unions, which tended to combine strong wage increases with high rates of inflation. Keynesian labour market policies tended to ensure that individuals were engaged on the 'standard employment relationship' (SER), sometimes referred to as 'Fordism', which became the norm for the regulation of labour markets in developed nations.[51] The SER is defined as a "stable, socially protected, dependant, full-time job … the basic conditions of which (working time, pay, social transfers) are regulated to a minimum level by collective agreement and/or social security law".[52] SER jobs during this periods were often "long-term, stable, fixed-hour jobs with established routes of advancement, subject to unionisation and collective agreements … facing local employers whose names and features they were familiar with".[53] The 'founding premise' of the SER is that full-time, permanent positions are necessary in order to guarantee a family wage, an adequate level of social protection, as well as redressing the power imbalance between employees and employers.[54] Moreover, there tended to be a deeper relationship

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[46] M. Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (2002) CUP: Cambridge.

[47] See, amongst others, S. Kramer, *International Regimes* (1983) Cornell Publishing, Ithaca; D. Harvey, *A Brief History of Neoliberalism* (2005); P. Armstrong, A Glynn, and J. Harrington, *Capitalism since World War II: The making and breaking of the long boom* (1991); G. Standing, *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (2016); M. Goldmann (n 3); G. Esping-Andersen (n 4); J. Ruggie (n 29); J. Cremers, 'Non-standard employment relations or the erosion of workers' rights' (2010).

[48] J. Ruggie (n 29), p. 398.

[49] M. Blythe, *Austerity: The History of a dangerous idea* (2013).

[50] M. Blyth (n 46), p. 126.

[51] P. Schoukens and A. Barrio, 'The changing concept of work: when does typical work become atypical' (2017) 8(4) *ELLJ* 306, p. 307; F. Hendrickx, 'Regulating New Ways of Working: From the new 'wow' to the new 'how'' (2018); see also G. Standing, *The European Precariat: The New Dangerous Class* (2011); J. Cremers (n 47).

[52] A. Koukiadaki & I. Katsaroumpas, 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017), DG for Internal Policies (European Parliament) PE 596.823, p. 19.

[53] G. Standing (n 51), p. 7.

[54] G. Bosch, 'Towards a New Standard Employment Relationship in Western Europe' (2004) *42 British Journal of Industrial Relations 617*; see also A. Koukiadaki & I. Katsaroumpas (n 52), p. 19.

between employer and employee; with the guarantee of a private pension as well as other non-wage benefits associated with employment.[55] Whilst employment during this time should not be romanticised, given the lack of social protection in certain areas such as health and safety, the SER served to minimise the commodification of labour and the exploitation of workers through a heightened sense of security and stability. This significantly improved the social protection of workers, at least when compared to the pre-war era of laissez-faire capitalism.

3.2 The Welfare State

As well as changing employment norms, this period of Keynesian domestic policies also resulted in the establishment of the modern welfare state and policies of redistribution.[56] It was considered that workers should be provided a residual layer of protection – or a safety net – against the risks of engaging in the labour markets. Again, Keynes was instrumental in establishing the modern welfare state in Europe, which centred around social security entitlement, which should be "(the UK's) policy abroad for the peoples of all the European countries, no less than at home".[57] This social security entitlement was envisaged as constituting family allowances and redistributive transfers deriving from income tax, as well as wider social policies such as educational reform, universal healthcare, and the nationalisation of key public services and industries. The demands of many political actors were similar in this regard,[58] with all the founding Member States of the EEC incorporating normative foundations of the welfare state into their constitutions.[59]

Whilst the direction of travel was clear, the construction of the welfare state varied between nations. Britain followed its universalist 'Beveridge' system, which unified various pre-existing schemes into a single weekly flat rate contribution calculated to ensure a minimum standard of living when earnings were interrupted.[60] The Beveridge model differed from other European systems as it was not based on contribution, but universalist in nature and financed by general taxation.[61] The German system, on the other hand, was based on its own Sozialstaat established by Bismark in the 19th century.[62] This concentrated on ensuring social insurance covering sickness, workplace fatality, disability, and old age. Whilst the Sozialstaat continued throughout the Nazi era, increasing groups of persons were excluded from its protection, such as Jews, Gypsies, and political dissidents.[63] Following the end of the Nazi regime, the German Constitution established the Sozialstaat as an unalterable principle of the new democracy. However, Germany still retained its 'Ordoliberal' model and did not shift entirely towards Keynesianism, given the negative connotations associated with significant state intervention

[55] P. Schoukens & A. Barrio (n 51).
[56] P. Arestis, and M. Sawyer, 'Keynesian Economics for the New Millennium' (1998) 108(446) *The Economic Journal* 181.
[57] Keynes' Memo on War Aims. As contained in P. Addison, *The Road to 1945: British Politics and the Second World War* (1994), p. 168.
[58] Ibid, pp. 164 – 189.
[59] S. Giubboni, 'Social Rights and Market Freedom in the European Constitution: A Re-Appraisal' (2010).
[60] P. Addison (n 57), p. 213.
[61] F. Bottini (n 25), p. 656.
[62] Ibid, p. 654.
[63] L. Leisering, 'The Welfare State in Postwar Germany – Institutions, Politics and Social Change' (2001), p. 2.

in the economy as implemented by the Nazi regime.[64] That said, in the 1960s an SDP Government shifted the German welfare state more towards the Beveridge model.[65] France applied a "nearly identical approach" to Germany during the 19th century. However, following the war France pursued a policy of ensuring social security to all citizens. This system finally synthesised the old French insurance protection (more akin to a Bismarkian contributory system) with Beveridgean universal protection.[66] Italy also moved towards a more comprehensive system of social protection after the second world war. Italy could not adopt its own comprehensive Beveridge-style plan, given the large-scale expense involved. However, social protection was extended into ever increasing areas, and by the 1960s the Italian welfare state looked similar to those already implemented in Northern Europe.[67] In conclusion, the welfare states of Europe during the 1950s and 1960s were structurally similar and tended to be based around the Bismarck model of employment-based and corporatist welfare or the Beveridge universalist approach.[68]

Embedded liberalism therefore represented a paradigm shift in the relationship between labour and markets, insofar as it asserted that global markets were to be embedded into domestic social policies, which would govern the protection of workers. There was a stark shift away from supply-side *laissez-faire* capitalism, and towards demand-side Keynesian economic policies that prioritised stronger regulation and more limited capital and labour movements.[69] This led to the hegemony of the SER and the formation of modern welfare systems. This is an example of how not just labour market regulation changed, but also the "ideas, rules, and institutional structures" surrounding the economy. It is little coincidence that around the same time the International Labour Organisation (ILO) was declaring that labour was "not a commodity".[70] Overall, the post-war period demonstrates globally a stronger commitment to protecting workers from over-commodification and exploitation.[71]

4 THE DE-STANDARDISATION OF EMPLOYMENT

Since the period of embedded liberalism, there have been significant changes to labour markets. These changes to the economic and political situation in Europe have meant that the original bargain of embedded liberalism has broken down.[72] The 1970s saw a period of economic instability which brought around a period of high-inflation and rising

[64] See, for example, **T. Beck and H. Kotz,** *Ordoliberalism: A German oddity?* (2017) Centre for Economic Policy Research: London.
[65] L. Leisering (n 63), p. 2. It should be noted that this refers exclusively to the West German Federal Republic, rather than the German Democratic Republic.
[66] F. Bottini (n 25), p. 656.
[67] M Troilio, 'The Welfare State After the Second World War: A comparison between Italy and Canada (1945 – 2013), pp. 408 - 409.
[68] S. Giubboni (n 59), p. 162.
[69] See, for example, J.M. Keynes, *The General Theory of Employment, Interest and Money* (1936).
[70] Article 1(a), ILO Declaration of Philadelphia, Declaration concerning the aims and purposes of the International Labour Organisation.
[71] J. M. Keynes (n 69); M. Blythe (n 46); see also P. Arestis and M. Sawyer (n 56).
[72] M. Ferrera, 'Modest Beginnings, Timid Progresses: What's next for Social Europe?', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge, p. 21.

unemployment.[73] It is claimed that the Keynesian goals of full employment, fixed labour markets, and significant incremental wage increases pushed by strong trade unions resulted in labour having an increasingly strong position *vis-a-vis* capital, resulting in high inflation and diminished corporate profits.[74] This stagnation led to new ways of organising production, work, and economic activities, that were based on the neoliberal principles of flexible specialisation and vertical disintegration.[75] These gradually began to replace the orthodoxy based around the SER that existed during the post-war era of embedded liberalism, and heralded in the period of de-industrialisation and emergence of the post-industrial society.[76]

4.1 Shifting Consensus: From 'Embedded' to 'Neo' Liberalism

The break-down of embedded liberalism resulted in a shift towards more *laissez-faire* principles, commonly referred to today as 'neoliberalism'.[77] In essence, neoliberalism represents a shift away from fixed, tightly regulated labour markets based on full-employment and generous welfare entitlement, towards flexible, competitive labour markets that prioritise controlling inflation over full-employment and the introduction of "work-inducing" welfare policies.[78] In many respects neoliberalism can be understood as the polar opposite to Keynesianism: whilst the latter focuses on demand-side economics, full-employment, strong trade unions, and fixed labour markets, the former focuses on supply-side economics, with the aim of full employment replaced by inflation stability, as well as reduced wage rates and labour costs, flexible labour markets that facilitate the hiring and firing of workers, diminished trade union power, and stricter welfare systems with reduced public spending.[79]

Neoliberalism is suggested to be the product of the 'Mont Pelerin Society', a group of eminent liberal scholars, such as Hayek, Popper, and von Mises.[80] Unlike Bretton Woods and the post-war consensus, there was no 'master plan' to implement neoliberalism. The Mont Pelerin Society were long-term critics of Keynesian ideas and embedded liberalism,[81] however, their ideas only found traction once Keynesianism started to falter. As Milton Friedman famously stated, when a crisis occurs, "the actions that are taken depend on the ideas that are lying

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[73] G. Therborn, 'The Tide and Turn of the Marxian Dialectic of European Capitalism', in A. Wirsching (Eds), 'The 1970s and 1980s as a Turning Point in European History?' (2011), p.8-26; see also F. Hayek, 'Inflation Resulting from the Downward Inflexibility of Wages' (1958), pp. 295-299; F. Hayek, *The Constitution of Liberty* (1960).
[74] M. Kalecki, 'Political Aspects of Full Employment' (1943) 14(3) *Political Quarterly* 322; M. Blyth (n 46); G. Standing (n 47).
[75] A. Thornquist, 'False Self-employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market' (2015), p. 415.
[76] J. Cremers, (n 47).
[77] See, amongst others, J. Ostry, P. Loungani and D. Furceri, 'Neoliberalism Oversold?' (2016); G. Standing (n 47); D. Harvey (n 47); D. Harvey *Marx, Capital and the Madness of Economic Reason* (2017).
[78] See, amongst others, F. Handler, 'Activation Policies and the European Social Model' in A. Serrano Pascual and M. Jepsen (Eds) *Unwrapping the European Social Model* (2006); G. Alberti, 'The Government of Migration through Workfare in the UK: Towards a shrinking Space of Mobility and Social Rights?'; C. O'Brien, 'The ECJ sacrifices EU citizenship in vain: Commission v. United Kingdom' (2017).
[79] See, for example, F. Hayek 'Unions, Inflation and Profits' (1959); see also A. Thornquist (n 75).
[80] N. Shaxson, *The Global Finance Curse: How Global Finance is making us all poorer* (2018); G. Standing (n 47).
[81] See, for example, F. Hayek, *The Road to Serfdom* (1944) ; F. Hayek, *The Constitution of Liberty* (1960) ; M. Friedman, *Capitalism and Freedom* (1962); M. Friedman, 'Inflation and Unemployment: Nobel Lecture' (1977); G. Stigler, 'Information in the Labor Market' (1962).

around taken during a crisis depend on the ideas lying around at the time".[82] Neoliberalism came to the fore following the elections of US President Ronald Reagan and UK Prime Minister Margaret Thatcher, as the latter in particular sought to combine Hayek's free-market philosophy with a "revival of Victorian values", famously telling her ministers that Hayek's 'A Constitution of Liberty' was "what they now believed".[83] This ultimately resulting in a paradigm shift towards a new economic consensus, with 'third way' Social Democratic politicians such as UK Prime Minister Tony Blair and German Chancellor Gerhard Schröder adopting similar economic policies, albeit with more focus on redistributive policies and funding public services. Neoliberal doctrine is now claimed to be hegemonic in global institutions, with the IMF, World Bank, and OECD, all being accused of focussing entirely on neoliberal doctrine, i.e., export-led industrialisation, reduced welfare spending, encouraging privatisation of public services, reduced government spending, reducing public sector salaries and public service costs, and the strict enforcing of private property rights.[84] Even the EU's internal market, once an "ambitious project of macroeconomic integration" is now suggested to be "a wave of privatisation and deregulation".[85] Nowadays, neoliberalism acts as a catch-all linguistic tool to describe modern liberal supply-based economics, similar to that of 'Keynesianism' in the post-war era. It is often used to describe any liberal-minded economic policy, that has the danger of rendering the term meaningless. However, for the purposes of this thesis, it can be said that the shift towards neoliberalism has had two major effects on employment and the regulation of labour markets: namely, (i) a shift away from the SER towards more flexible forms of employment, and (ii) the introduction of activating welfare policies and the discourse of responsibility. These will now be explained in turn.

4.2 Flexible (i.e., de-standardised) Employment

One of the main priorities of neoliberalism was to create more flexibility in the labour market, which essentially means creating new possibilities for employment outside of the SER, and reducing employment protections and labour costs relating to wages, employment protections, hiring and firing costs, etc. Neoliberalism considers that excessive regulation results in higher wages and labour costs, and adversely affects hiring and firing decisions.[86] Consequently, greater labour market flexibility allows for wages to 'adjust rapidly' to economic conditions.[87] In particular, the SER was argued to encourage labour market dualizations, the process whereby those not in a position to obtain an SER contract are more likely to be unemployed and in poverty.[88] Replacing it with flexible employment was argued

[82] https://www.goodreads.com/quotes/110844-only-a-crisis---actual-or-perceived---produces-real
[83] See S. Metcalf, 'Neoliberalism: The Idea that Swallowed the World' (18th August 2017) The Guardian Online.
[84] *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (2016), p. 42; J. Cremers, 'Non-standard employment relations or the erosion of workers' rights' (2010).
[85] J. Cremers, (n 47).
[86] L. Fanti, and P. Manfredi, 'Is Labour Market Flexibility Desirable or Harmful? A Further Dynamic Perspective' (2010).
[87] Ibid.
[88] K. Stone & H. Authurs, 'The Transformation of Employment Regimes: A Worldwide Challenge', in K. Stone & H. Authurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (2013) New York, Russel Sage; see also A. Koukiadaki & I. Katsaroumpas (n 52), p. 20.

to foster employment growth, boost long-term economic prosperity generally,[89] and ensure a return to steady growth following downturns in the business cycle.[90] Flexible labour markets are associated with improved productivity as there are more fluid labour market transitions and greater economic efficiencies.[91] They are suggested to be beneficial for workers as flexibility facilitates more frequent transitions in and out of employment for less qualified and low-income workers, particularly more vulnerable and marginalised groups such as women and the young.[92] This is suggested to ensure stable levels of employment in the long-term, whilst ensuring that the benefits of labour market flexibility are "broadly shared across society".[93]

The problem is that the benefits of labour market flexibility are at best elusive and are not shared broadly across society. Labour market flexibility has resulted in shifting the balance of power in the labour market away from workers and towards employers.[94] Unsurprisingly, diminishing the power of labour and removing the social protections of workers does not benefit them, and in fact is disproportionately damaging to those in the most low-wage and flexible types of employment. OECD research suggested that labour market flexibility immediately results in more firing, with the positive effects on hiring rates materialising more slowly, which can result in an overall reduction in employment.[95] Labour market flexibility tends to result in a gradual replacement of SER positions with flexible ones: for example, full-time replaced by part-time workers or temporary staff replacing permanent staff. This adversely affects job quality and results in higher rates of unemployment.[96] Moreover, any benefits deriving from labour market flexibility are not spread equally throughout society, with lower-income workers disproportionately affected by labour market flexibilization.[97] In fact, already by 2006 the European Commission had recognised that the flexibilization of employment has aggravated labour market segmentation and reduced the job security of the most vulnerable and disadvantaged workers in society.[98] In particular, it risks the situations whereby workers are trapped in "a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position".[99] In general labour market flexibility has not been of much benefit to workers, and indeed has even potentially been damaging to those in lower-wage positions.

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[89] H. Berger, and S. Danninger, 'Labor and Product Market Deregulation: Partial, Sequential, or Simultaneous Reform?' (2005), p. 4.

[90] J. Stiglitz et al, *Stability with Growth: Macroeconomics, Liberalization and Development* (2006); I. Antonaki, *Privitisations and Golden Shares: Bridging the gap between the State and the market in the area of free movement of capital in the EU* (2019) Leiden: E.M. Meijers Institut.

[91] B. Cournede, 'Enhancing Economic Flexibility: What is in it for workers?' (2016), p. 5.

[92] Ibid.

[93] Ibid; See also H. Berger and S. Danninger, 'Labor and Product Market Deregulation: Partial, Sequential, or Simultaneous Reform?', p. 7; B. Cournede (n 91), p. 8.

[94] A. Thornquist (n 75), p. 415.

[95] B. Cournede (n 91), p. 5.

[96] Ibid.

[97] J. Cremers, (n 47).

[98] European Commission Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century (2006) COM 708 fina.

[99] Ibid.

4.3 Activating Labour Market Policies

Neoliberalism has also resulted in a change in approach towards the welfare state. It seeks to strip away many of the protections that were permitted, and occasionally nurtured, under the system of embedded liberalism, including institutions such as the welfare state.[100] Concretely, this means replacing the more universalist welfare policies of embedded liberalism with the mantra that work is the best form (and should be only form) of welfare.[101] What this means in practice is that individuals should not spend prolonged periods outside of employment whilst in receipt of welfare benefits, especially those relating to unemployment, and should be 'encouraged' back into employment through a series of 'activating' policies aimed at punishing those that do not adequately reintroduce themselves into the labour market.[102]

It should be noted that certain activating labour market policies are logical: it is certainly not an unreasonable request to expect a jobseeker to write a CV, submit job applications, or attend interviews if they expect to receive state support for jobseekers. That said, other requirements go too far, however, such as a requirement to accept *any* job, even below one's skill grade or an unpaid role, in order to gain skills and employability or to attend weekly consultations which cannot be cancelled and failure to attend can result in the individual losing benefit entitlement. Whilst such measures are formally aimed at eliminating poverty through increased employment, there is a cost-cutting rationale behind them, and an ideological crusade to 'end welfare dependency',[103] often seen as the 'bogeyman' by adherents of neoliberalism, despite the concrete negative effects of welfare dependency being (at best) extremely difficult to find. It should be noted that not all European states have adopted activating labour market policies. Whilst certain liberal market economies, such as the UK and the Netherlands, have enthusiastically embraced activating labour market policies, other countries, in particular those in Scandinavia, still retain much of the Keynesian labour market policies of the era of embedded liberalism.[104]

Activating labour market policies are often associated with the 'personal responsibility system' of welfare, that is highly reminiscent of the *laissez-faire* approach, insofar as it sees the labour market as inherently meritocratic and employment as the sole route out of poverty.[105] As such, if an individual does not find work, then it is their own fault for failing to utilise the meritocratic powers of the market. In other words, those who cannot work are deemed irresponsible, and any lack of social protection is the result of the individual's actions.[106] This approach risks commodifying the individual, as they become more reliant on the market for their survival. Activating labour market policies are suggested to be a core part of neoliberalism, and it is argued that that labour market flexibility should be combined with

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[100] D. Harvey (n 47), pp. 160, 169.

[101] S. Wright, 'Relinquishing Rights? The Impact of Activation on Citizenship for Lone Parents in the UK', in S. Betzelt, S. Bothfeld (eds), *Activation and Labour Market Reforms in Europe. Work and Welfare in Europe* (2011), Palgrave Macmillan: London, p. 57.

[102] C. O'Brien (n 9), p. 1647; D. Carter, 'Inclusion and Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The Others Amongst Us* (2020), CUP: Cambridge, p. 303; M. Ferrera, 'The European Union and National Welfare States, Friends, not Foes: But What Kind of Friendship? *URGE Working Paper* 4/2005.

[103] S. Wright (n 101), p. 57.

[104] G. Esping-Andersen, *Social Foundations of Post-industrial Economies* (1999) OUP: Oxford.

[105] D. Harvey (n 47), p. 168.

[106] C. O'Brien (n 102), p. 1672.

programmes such as active labour market (re-) introduction programmes in order to feel its full effects.[107] However, like labour market flexibility, activating labour market policies and the responsibility model of welfare have come under harsh criticism in recent years. They are suggested to fail in providing adequate social protection to individuals through policies of redistribution, instead providing the bare minimum in order to force people back into labour market.[108] Moreover, the strict conditionality associated with activating policies means that those not meeting such conditions are likely to be pushed into poverty and social exclusion.[109] It ignores the chaotic and random reality of daily life, and punishes people for reacting to external factors, such as redundancy, illness, bereavement, etc.[110] The actual lives of individuals becomes subsidiary to economic and employment policies, in particular cutting public spending.[111] This arguably affects the moral foundations of European welfare states, in terms of what is considered to be a fair social minimum.[112] This creates a situation similar to the workhouses of Victorian England, whereby poverty becomes an integral part of the system, pushing people to accept ever-worse working conditions in order to avoid falling into deprivation and poverty. State support is kept intentionally low, in order to ensure that people's lives are not overly good, thereby using poverty as a labour market tool. Worst of all, such labour market policies are justified on the basis of a non-existent problem: research indicates that the section of society which is able to actively work but chooses not to do so is insignificantly small and has no real bearing on public finances.[113]

5 Labour Markets following the Global Financial Crisis

Despite being described as the 1929 moment of our generation, the 2008 Global Financial Crisis has not yet resulted in a radical shift in economic discourse and policy around labour market regulation like Bretton Woods. In fact, at least initially, the primary response was a doubling down on neoliberal approaches towards labour markets and welfare entitlement, specifically reducing labour costs and wage-rates and increasing labour market flexibility, as a means of achieving a more competitive economy.[114] These changes to employment relations, particularly working schedules, and an increase of non-standard positions as an alternative to mass unemployment has occurred in many European countries.[115] This was a particular problem in Eurozone Member States, as they were unable to rely on the traditional tool of currency devaluations to regain competitiveness. Instead, they had to implement 'internal devaluations', which primarily involve reducing labour and social costs in order to secure

[107] B. Cournede, 'Enhancing Economic Flexibility: What is in it for workers?' (2016).
[108] C. O'Brien (n 102), p. 1674.
[109] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart.
[110] S. Wright, 'Welfare-to-work, Agency and Personal Responsibility' (2012) 41(2) *Journal Social Policy* 309, 322.
[111] C. O'Brien (n 102), p. 1672.
[112] Ibid, p. 1676; see also K. Nelson, 'Social assistance and EU poverty thresholds 1990–2008. Are European welfare systems providing just and fair protection' (2013), 29 *European Sociological Review* 387.
[113] S. Wright (n 110), p. 321.
[114] J. Cremers, (n 47).
[115] International Labour Office, *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016); OECD, *In It Together: why Less Inequality Benefits All* (2015); P. Schoukens & A. Barrio (n 51); A. Bogg, 'The regulation of working time in Europe', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 287.

public finances and regain competitiveness.[116] In particular, Member States that required financial assistance through the European Financial Stability Facility (EFSF) and subsequently the European Stability Mechanism (ESM) were subject to strict conditionality in the form of severe internal devaluations that seek to reduce labour costs, making these economies more competitive on the European and world stages.[117]

Member States have used the financial crisis to make changes to national labour law that resulted in shorter working time and increased flexibility that have encouraged the use of non-standard employment relations more generally.[118] Whilst this is a common trait in neoliberal labour markets, since the crisis this has been extended into sectors where it was not previously common, such as in professional roles.[119] This results in maximising both flexibility for employers as well as their power and control over workers.[120] This has resulted in ever-increasing levels of increasingly flexible forms of employment marginal part-time, zero-hour, and on-demand contract work,[121] the use of false self-employment,[122] and fixed-term work, many of which were actually in decline before the Crisis.[123]

Another important development during this period that has contributed to the increase in precarious employment has been the rise of the platform economy. Technological advancement has always been a significant driver in developing labour markets, as they tend to disrupt pre-existing forms of regulation.[124] In the 21st century, the 'big data' revolution has led to an unprecedented level of technological breakthroughs, which occur in every sector and at every level, thereby "blurring the lines between the physical, digital and biological spheres".[125] In particular, this has resulted in the establishment of the platform economy, which has created new forms of employment, often relating to delivery services. Notable examples include companies such as *Uber* and *Deliveroo*, as well as other delivery and passenger hire services that have been the subject of litigation in recent years given that their employment status is far from clear.[126] The challenges relating to big data and artificial

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[116] S. Deakin, 'Regulatory Competition in European after Laval' (2008) *Centre for Business Research Working Paper No 364*, University of Cambridge, p. 6.

[117] K. Armingeon and L. Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012); M. Ronzoni, 'How Social Democrats may become reluctant radicals: Thomas Piketty's Capital and Wolfgang Streeck's Buying Time' (2018); T. Tressel et al, *Adjustment in Euro Area Deficit Countries : Progress, Challenges, and Policies* (2014).

[118] M. Blyth, 'The Austerity Battle: Why a Bad Idea won over the West' (2013); W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014).

[119] A. Bogg (n 115), p. 288.

[120] Ibid, p. 276.

[121] A. Broughton et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels, p. 69; P. M. Cardoso et al, 'Precarious Employment in Europe' (2014). In the UK, where zero-hour contracts are legal, these have risen over the last 10 years from 20.000 to over 1.000.000.

[122] For example, see European Commission Staff Working Document, 'Country Report The Netherlands 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019) SWD (2019) 1018 final; see also European Commission Staff Working Document, 'Country Report The United Kingdom 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019) SWD(2019) 1027 final.

[123] S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, p. 18.

[124] See G. Standing (n 47).

[125] K. Schwab, 'The Fourth Industrial Revolution: What it means, how to respond to it' (14th January 2016).

[126] A. Pesole et al, 'Platform Workers in Europe: Evidence from the COLLEEM Survey' (2018).

intelligence are likely to accelerate these changes significantly, and even create new ones.[127] While not directly related to the Global Financial Crisis, the platform economy does not exist in a vacuum, and the new and potentially exploitative employment relations adopted by companies operating in this area are at least in part the consequence of the employment flexibility fostered under neoliberalism.

The period since the Global Financial Crisis has not seen a shift back in favour of workers over the market. In fact, if anything it has shifted further the other way, from a system designed to ensure fair competition amongst actors, towards one based on ensuring a state's competitiveness *vis-à-vis* other states. This required forcing down the cost of labour to make it more competitive, as well as reducing welfare spending even further. When combined with new forms of employment made possible by technological innovation, has resulted in something of a perfect storm that is pushing employment towards precariousness.

At the time of writing this thesis, it is unclear what effect the Covid-19 pandemic, or more recently the inflation crisis, will have on labour markets and employment norms in Europe. Despite certain measures being adopted during the pandemic that protected individuals' employment and earnings, it is uncertain whether it will act as a long-term catalyst for a more protective system of social protection and secure employment. That said, global institutions such as the IMF have begun to question whether the negative consequences associated with neoliberal responses for workers actually outweigh the benefits for employers.[128] Furthermore, during the pandemic many previously sacrosanct fiscal rules were jettisoned to support workers such as the Growth and Stability Pact. There was also much discussion over the importance of key sector workers, who are often engaged in the most precarious of situations and make up the subject matter of this thesis. That being said, it is also possible that the Union and its Member States will reach for the neoliberal playbook when forming their responses: more flexibility, more conditionality, and more austerity.

6 THE TRAITS OF PRECARIOUSNESS

The shift towards neoliberalism, combined with the financial crisis and the rise of the platform economy, meant that there were increasing levels of non-standard employment, such as part-time work, fixed-term work, agency work, etc. However, not all non-standard work should be considered as precarious, making the task of defining precarious employment very difficult.[129] This is particularly the case in the European Union, which has not explicitly discussed work precariousness until very recently.[130]

[127] J. Johanessen, *The Workplace of the Future: The Fourth Industrial Revolution, The Precariat and the Death of Hierarchies* (2019) Routledge: Abingdon.
[128] J. Ostry, P. Loungani and D. Furceri, 'Neoliberalism Oversold?' (2016); B. Cournede, 'Enhancing Economic Flexibility: What is in it for workers?' (2016); OECD, *In It Together: why Less Inequality Benefits All* (2015).
[129] U. Oberg, 'Precarious Work and European Union Law' (2016) Grant VP/2014/0554, p. 9.
[130] The obligation to prevent precarious working conditions is now contained in Article 5 of the European Pillar of Social Rights.

The ILO defines precarious employment as that in which "employment security, which is considered one of the principal elements of the labour contract, is lacking".[131] This insecurity can come in the form of job stability, working conditions, uncertainty in terms of continuing employment; control over labour processes; the nature and stability of income and access to social protection, etc.[132] However, solely using insecurity is inappropriate when determining whether employment is precarious. 'Insecurity' can be found in many SER positions, at least in certain sectors.[133] Furthermore, it cannot be equated with non-standard employment. Whilst non-standard work is more insecure than SER work in general, by using the SER as the benchmark it suggests that *any* deviation from the strict SER is problematic.[134] This is not the case, as certain types of non-standard work, in particular part-time work and self-employment, are often reported in highly positive terms.[135] For these persons, the 'insecurity' associated with non-standard employment is actually perceived as increased flexibility or independence, which workers often see as desirable as it provides greater individual autonomy, a more sustainable work-life balance, or more free time.[136] As such, it is difficult to know whether precarious employment should be defined as sectors within the labour market, sub-sections of non-standard work, or something beyond this entirely.[137]

Precarious employment can therefore be understood as forms of non-standard employment that are characterised by even greater insecurity.[138] Furthermore, the voluntary nature of this employment insecurity is very important. The EPSC highlights this point by defining precarious employment as the situation whereby "more job seekers are *forced* into short-term contracts, part-time work or other forms of labour *which they see as undesirable*" (emphasised added).[139] This suggests that undesirable or forced insecurity is key to determining whether employment is precarious. If the worker is pushed by economic forces into an insecure, non-standard position, when they would prefer more security in terms of employment protections, longer hours, or a more secure status, then their employment is more likely to be characterised as precarious employment. It also demonstrates the high power-imbalance between employee and employer in these situations, another characteristic of precarious employment, as employers can push individuals into a less-than-desirable working situation.[140]

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[131] Policies and Regulations to Combat Precarious Employment (2011), ILO Catalogue. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_164286.pdf; see also P.M. Cardoso (n 121),; A. Broughton (n 121), p. 7.

[132] J. Fudge & R. Owens, 'Precarious Work, Women, and the New Economy: The Challenge to Legal Norms', in J. Fudge & R. Owns (eds), *Precarious Work, Women, and the New Economy* (2006) Hart Publishing: London, p. 12; G. Standing (n 51), p. 17.

[133] A. Koukiadaki & I. Katsaroumpas (n 52), p. 21.

[134] U. Oberg (n 129), p. 12; see also G. Rodgers, 'Precarious Work in Western Europe: The States of the Debate', in G. Rodgers and J. Rodgers, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (1989) Brussels: International Institute for Labour Studies, p. 3.

[135] EPSC Strategic Notes, *The Future of Work: Skills and Resilience for a World of Change*. Issue 13, 10th June 2016.

[136] Eurofound, 'Flexible Forms of Work: very atypical contractual arrangements' (2010). Available at https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements

[137] N Kountouris, 'The Legal Determinants of precariousness in personal work relations: A European Perspective' (2012) *Comparative Labour Law & Policy Journal* 21, p. 24.

[138] See S. McKay et al (n 123); A. Broughton (n 121); A. Koukiadaki & I. Katsaroumpas (n 52); U. Oberg (n 129).

[139] EPSC Strategic Notes, *The Future of Work: Skills and Resilience for a World of Change*. Issue 13, 10th June 2016.

[140] V. Porthe et al, 'Extending a Model of Precarious Employment: The case of Spain' (2010) 53(4) *American Journal of Industrial Medicine*; C. Thornquist, 'Welfare States and the Need for Social Protection of Self-Employed Migrant

These two characteristics are inherently connected: the power imbalance often means that the employer can reduce the worker's security by easily altering an employee's rights and status, terminating their contact, changing their schedule and job tasks, or not providing them with a formal employment contract.[141] Other characteristics include the close monitoring and assessment of individual tasks, resulting in sanctions or dismissal for those not abiding by the demands of the employer, which are often excessively strict.[142] Job tasks also become commodified, with increasing amounts of 'pay-per-job' roles, which often involve increasing amounts of non-waged tasks and fewer non-cash benefits.[143] Their marginal status also means they have less trade union representation, or are even excluded from this, thereby limiting their ability to improve their employment situation independently.[144] They are often unable to enforce employment rights, meaning they run the risk of being subject to unsafe working conditions, as well as insufficient income to support oneself following a period of employment.[145] The difficulty in regulating employment and the promotion of non-standard work is actually suggested to be normalising and even actively encouraging the characteristics of precarious employment.[146] Another consequence of precarious employment is that it creates dualizations in the labour market, whereby workers are engaged on differing contracts, despite sometimes performing exactly the same role, and therefore obtain different rights and protections.[147] There is an irony given that non-standard work was claimed to mitigate the problems of dualizations between workers in SERs and non-SERs, but has instead just created its own. In fact, increasingly employers seek to actively exploit legal loopholes such as labour market dualizations, to undermine social protection in order to minimise labour costs.[148] The above suggests a regression towards a form of casual and exploitative employment that is reminiscent of the pre-SER, or even arguably pre-capitalist, forms of exploitation.[149]

The insecurity associated with precarious employment does not just affect workers in employment, but also has wider consequences for life in general, insofar as it can lead to social vulnerability in general.[150] Most pertinently, it is suggested to increase the risk of unemployment or in-work poverty, as well as poor mental and physical health.[151]

Workers in the European Union' (2015) 34(4) *International Journal of Comparative Labour Law and Industrial Relations* 391, p. 395.

[141] D. Tucker, 'Precarious Non-standard employment: A review of the literature' (2002); see also P.M. Cardoso (n 121); A. Broughton (n 121), p. 9.

[142] S. Ovotrup, and A. Prieur, 'The commodification of the personal: labour market demands in the era of neoliberal post-industrialization' (2016).

[143] G. Standing (n 51).

[144] U. Oberg (n 129), p. 11.

[145] S. McKay, 'Disturbing equilibrium and transferring risk: confronting precarious work', in N. Countoris & M. Freedland (eds.) *Resocialising Europe in a Time of Crisis* (2013) CUP: Cambridge, p. 199; see also S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, and U. Oberg (n 129), p. 10.

[146] A. Koukiadaki & I. Katsaroumpas (n 52), pp. 27-28.

[147] See S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London.

[148] G. Standing (n 51).

[149] A. Thornquist (n 75).

[150] G. Rodgers, 'Precarious Work in Western Europe: The States of the Debate', in G. Rodgers and J. Rodgers, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (1989) Brussels: International Institute for Labour Studies, p. 3.

[151] D. Ashiagbor (n 109), p. 80.

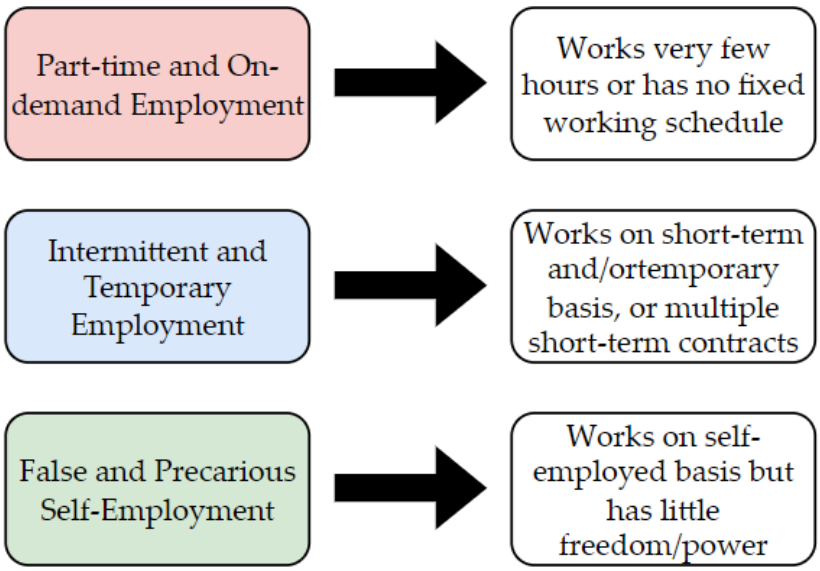
Furthermore, the strict conditionality and poverty-traps associated with 'activating' labour market policies reduce an employee's ability to refuse requests and also put them at risk of social exclusion.[152] This is particularly the case for migrant works, who must consider their legal status and rights as migrants (i.e. their residence status and potential equal treatment rights), as well as their position on the labour market.

Research conducted for European institutions tends to equate precarious and non-standard employment, and separates precarious employment into categories such as part-time work, fixed-term work, employment agency work, independent contractor status and the false self-employed, posted work, non-remunerated work, etc.[153] This approach is lacking, however, as precarious employment should be classified on the basis of the attributes of a particular non-standard position, rather than general categories of non-standard work.[154] Therefore, such forms of non-standard employment should only be classified as precarious if they contain a degree of involuntary insecurity and provide the employer with a high degree of power over the worker.

For example, this can occur when the worker has limited job or income security due to the limited nature of their employment. Whilst part-time work can allow a worker to spend more time with family and enjoy a better work/life balance, when this is precarious it does not guarantee them a sufficient number of hours and/or remuneration. This is a problem for part-time workers performing very few hours, as well as on-demand workers such as those on zero-hour contracts or engaged in platform work. Another example is where the individual is engaged on a short-term or temporary basis which undermines their employment security. This refers to the security a worker has during periods of economic inactivity. Short-term and temporary positions become the norm, rather than the exception. These positions can provide a worker with valuable work experience than might otherwise be unavailable, however, increasingly workers are trapped into never-ending cycle of temporary positions, with limited support from the state due to the strict conditionality of neoliberal welfare systems. Finally, a recent phenomenon is the problem of false or bogus self-employment. This is where an individual is engaged on a self-employed basis, thereby taking on much of the risks associated with employment but having few of the rewards traditionally associated with being one's own boss. Their (mis-)classification as self-employed persons means that they take greater risks and have employment and social protections.[155]

[152] I. Greer, 'Welfare reform, precarity and the re-commodification of labour' (2016).
[153] See S. McKay et al (n 123); A. Broughton (n 121); A. Koukiadaki & I. Katsaroumpas (n 52); U. Oberg (n 129).
[154] Internal Labour Organisation (n 115), p.18.
[155] See, for example, P. Schoukens & A. Barrio (n 51), p. 317.

Figure 1: The Main Types of Precarious Employment



7 CONCLUSION

From the beginning of industrialisation and the formation of modern labour markets, the protection available to workers has been dominated by the existential question of whether labour should be treated as a commodity 'like any other', and the extent to which it can be separated from the worker that performs it. This has resulted in the level of protection available shifting over time as political and economic priorities also change. During the era of industrialisation, *laissez-faire* economics resulted in a high degree of worker commodification, with few social protections provided by the state, which is argued to have laid out the conditions for the Great Depression and the rise of fascism in Europe in the 1930s. As a response to this, the *laissez-faire* approach was firmly rejected at the Bretton Woods conference in favour of 'embedded liberalism', which ensured that global markets were embedded into social policies decided at the national level. In terms of labour markets, this 'embedded liberalism' was based on the 'standard' employment relationship (the SER) and the modern welfare state, both of which resulted in greater worker protections than existed previously, as well as a period of significant economic growth and rising living standards.

In the 1970s, however, economic stagnation crept into the system of embedded liberalism. The result was a gradual shift away from the idea of embedding global markets into domestic systems in favour of greater liberalism and free trade, which is now commonly known as neoliberalism. In the context of labour markets, neoliberalism resulted in a departure from the SER towards flexible forms of employment such as part-time and fixed-term work, and a shift towards stricter, more conditional welfare systems based on reducing public expenditure and encouraging individuals into the labour market through activating policies. Instead of resulting in a change in the protection afforded to workers, the Global Financial Crisis led to a doubling-down of neoliberal solutions to the crisis. This, when combined with the rise of platform work, has arguably increased the level of precarity in the labour market, by creating

new insecure forms of employment and made kinds of non-standard work precarious through their insecurity and by shifting more power in favour of employers.

This has resulted in the ongoing increase in precious forms of employment, which can be understood as non-standard employment where the individual faces undesirable insecurity (as opposed to flexibility) and a high power-imbalance between employee and employer. The most notable forms of employment meeting this definition include (i) part-time with few hours and on-demand work such as zero-hour contracts and platform work; (ii) intermittent employment and in particular the repeated use of temporary contracts; and finally, (iii) the use of contracts of self-employment to push risks onto the worker, when they do not give them the benefits of such work and maintain a level of control over them.

Chapter 3: The European Response to the Development of Labour Markets

1 INTRODUCTION

While the previous chapter looked at the development of labour markets and the rise of precarious employment generally, the following chapter will look at the regulation of labour markets at the European level. It will first outline the main economic and political ideas of protection within the EU legal order, as well as the constitutional boundaries and the limited powers the Union has in the area of social protection. This will explain how the historic division between market and social competences in the EU legal system has meant that, whilst the EEC/EU has had the competence to establish market rules relating to the European labour market, Member States have retained most competences in the areas of social and employment law. The division of competences has resulted in gaps in protection where the Union does not sufficient powers, meaning that social protection is often pursued through non-binding policy coordination that seeks to elevate Member State social standards without hard laws. Furthermore, the European Union has been influenced by the shift towards neoliberal labour markets, and this chapter will assess if, and to what extent, the European Union has followed the same trajectory towards neoliberalism. This will further identify the limits to the law as it shows the constitutional and ideological limits to the level of protection available at the EU level.

2 THE TREATY OF ROME

The following section will outline this development up to and including the Treaty of the European Economic Community (EEC). Even before the establishment of the EEC, there were various international agreements that provided some, albeit often limited, social protection to workers engaged in employment in another European country. Workers were included with the 'pooling' of resources under the Treaty Establishing the European Coal and Steel Community (ECSC). The rights of these workers were limited, however, the parties to the Treaty did bind themselves to renounce "any restriction based on nationality" in relation to remuneration and employment conditions.[1] The inclusion of such rights for migrant workers was suggested to be mainly due to Italy, which was seeking solutions for its surplus labour supply.[2] Furthermore, the Paris Treaty Establishing the Organisation for European Economic Cooperation (OEEC, later OECD) emphasised the need to ensure transfers of labour from surplus to deficit countries, and to find a balance between the "progressive reduction of obstacles to the free movement of persons" whilst ensuring "conditions satisfactory from the economic and social point of view".[3] Ultimately, however, the OECD rules were ineffective at

[1] Article 68, Treaty Establishing the European Coal and Steel Community (1951). Not published in Official Journal.

[2] D. Kramer, 'From worker to self-entrepreneur: The transformation of the *homo economicus* and the freedom of movement in the European Union' (2017) 23 *European Law Journal* 172, p. 177.

[3] OECD, *General report of the Committee of European Economic Co-operation (Volume II)* (1947), Chapter III on recommendations, pp. 449-450. Available at https://babel.hathitrust.org.

reducing these obstacles, given the limited migration throughout Europe which did not "alleviate substantially the situation in the overpopulated countries of Southern Europe".[4]

2.1 Rome: Social Protection through Market Integration

In the context of the EEC specifically, the protection provided to workers and its limitations were heavily influenced by two preparatory reports compiled prior to the established of the EEC, namely the 'Ohlin' and 'Spaak' reports.[5] The 'Ohlin Report', compiled by ILO,[6] considered that adequate social protection for all Europeans could be achieved purely through European economic integration. It used the theory of comparative advantage to argue that countries should specialise in the production of goods and services where they are most efficient.[7] This process would mean that labour could grow where costs were lowest, which would gradually level-up social standards throughout Europe.[8] As such, there was not considered to be any contradiction between the free mobility of labour and the capacity of the Member States to ensure 'fairness' on the market through national legislation. This levelling-up would benefit workers in high and low wage countries, and would be particularly beneficial for the latter, as growth in productivity due to the effective international division of labour and subsequent growth in productivity resulted in a process of "upward convergence", whereby social standards in Europe would equalise in an upward direction.[9] This would ensure the "minimum conditions for satisfactory social progress", and the elimination of competition based on a country's failure to respect international agreed standards".[10] The Ohlin report did also recognise some of the problems associated with an unfettered European labour market. This included cultural differences like language, religion and history, as well as material factors, such as the danger that low-wage migration could undermine employment security, wage levels, and housing pressures.[11] In light of these, the formation of a an 'unfettered' system of free movement was not envisaged, but rather the "freer international movement of labour on a more limited scale", as well as entitlement to social security and welfare benefits available to nationals of that state. [12]

The Brussels Report on the General Common Market by the High Authority of the European Coal and Steel Community (the 'Spaak Report'),[13] sometimes referred to as the 'White Paper' of the EEC,[14] is similar to Ohlin insofar as it predicts that the upward equalisation of social standards would result from the establishment of a common market, rather than being a

[4] B. Ohlin et al, *Social Aspects of European Economic Integration* (1956), p. 98.
[5] See C. Barnard, 'Free Movement vs. Fair Movement: Brexit and Managed Migration' (2018), p. 211; see also F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015).
[6] B. Ohlin et al, *Social Aspects of European Economic Integration* (1956).
[7] Ibid, p.13; F. de Witte (n 5).
[8] Ibid.
[9] Ibid, p. 86-87.
[10] Ibid, p. 91.
[11] Ibid, p. 99.
[12] Ibid, pp. 102 – 103.
[13] P.H. Spaak et al, 'Brussels Report on the General Common Market' ('The Spaak Report') (1956) Information Service of the High Authority of the European Coal and Steel Community, Brussels.
[14] P. Davies, 'The Emergence of European Labour Law', in W. McCarthy (ed.) *Legal Intervention in Industrial Relations: Gains and Losses* (1996), p. 319; see also S. Giubboni, 'Social Rights and Market Freedom in the European Constitution: A Re-Appraisal' (2010), p. 162.

prerequisite to it.[15] However, Spaak focuses more on the negative consequences of unfettered migration in Europe.[16] It does not make any declaration of the inviolable right to free movement, but rather merely committed Member States to annually increase the number of workers from other Member States who are eligible for employment.[17] It also made specific reference to measures that would prevent migration flows from becoming dangerous for the standard of living or employment of workers.[18] However, it is also stated that these should not affect the right of migrant workers to work and the "progressive elimination of all discriminatory regulations" that reserve more favourable treatment for nationals with regard to employment.[19]

The demands for equal treatment between migrant and domestic workers and breaking down obstacles to employment turned out to be relatively uncontroversial, demonstrating that even before the single market ideas of equal treatment for migrant workers, in particular relating to social security, were already being discussed as a means of facilitating free movement.[20] European nations were already "infusing" norms of "market solidarity" by including migrant workers within schemes of social solidarity and in the economic interaction between capital and labour more generally.[21] The EEC reports also recognised the potential problems caused by an unfettered labour market, and sought to include various safeguards to ensure the managed flow of labour migration throughout Europe. However, negotiations for the final text of the EEC were fraught, as Member States such as France and Luxembourg considered that migration should be limited according to the capacity of the Member states to absorb migrant workers,[22] whilst others like Italy argued for complete and unfettered free movement, which was its own priority, given the high levels of unemployment at the time.[23]

Ultimately few of these safeguards made their way into the final text of Rome, with limited exceptions. The more controversial measures aimed at managing migration flows, such as the 'emergency brake', were not adopted.[24] Furthermore, Member States were reluctant to give up their systems of work permits in favour of a European system, and did not want to lost the ability of their own nationals to enter other Member States in order to work through such mechanisms.[25] This meant that the provisions on the freedom of movement for workers focused almost entirely on ensuring access to employment and equal treatment for migrant workers, with Article 48(2) EEC providing for the abolition of discrimination based on nationality as regards employment, remuneration and other conditions of work. That being said, it is suggested that Member States opted for a "demand-induced" system aimed at soaking up Italian labour surpluses, rather than some kind of overarching notion of free

[15] C. Barnard, 'The Traditional Story of the Development of EU Social Policy' in P. Craig & G. De Burca (Eds), *The Evolution of EU Law* (2011), pp. 642 - 643; D. Ashiagbor, 'Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration' (2013), p. 308.
[16] C. Barnard (n 5).
[17] Spaak Report (n 13), Chapter III (b) and (d), p. 19.
[18] Ibid.
[19] Ibid.
[20] C. Barnard (n 5), p. 209.
[21] F. de Witte (n 5), p. 97.
[22] D. Kramer (n 2), p. 179.
[23] C. Barnard (n 5), p. 211.
[24] Ibid, p. 210.
[25] See specifically Articles 49 and 117 EEC. See also Ibid.

movement.[26] This is supported by provisions such as Article 49 EEC, which confers upon the Commission the competence to set up "appropriate machinery … to facilitate the achievement of a balance between supply and demand in the employment market".

The EEC was even more limited in terms of concrete social rights for workers. Certain Member States, such as France, were initially sceptical of the EEC as they considered that harmonising national social policies should have been a precondition for market integration in Europe.[27] The Treaty did enshrine the idea of upward convergence contained in Ohlin and Spaak within Article 117 EEC, where it is stated that Members States agreed upon "the need to promote improved working conditions and an improved standard of living for workers", which would result from the development of a common market favouring the harmonisation of social systems. Under Article 118, the Union gained a cooperation competence in the areas of employment, social security, and collective bargaining. The only concrete social rights contained in the Treaty was the right to equal pay between men and women under Article 119 EEC. The Court famously held in *Defrenne (No 2)* that the "double aim" of European integration was "at once economic and social",[28] granting this provision direct effect and allowing the Court to develop this right through its case-law.[29] However, the reach of the EEC's social rights was still very limited. For example, the less discussed case of *Defrenne (No.3)* concerned not remuneration but an upper age-limit of 40 imposed on female air crew staff but not men.[30] The Court held that it was "impossible to widen the terms of Article 119 EEC" to include general terms and conditions of employment.[31] The Community had not "assumed any responsibility for … guaranteeing … equality between men and women in working conditions other than remuneration".[32]

Therefore, the EEC was based on a sharp division between market and social competences. However, this was not the result of ignoring the protection of workers entirely. On the contrary, the provision of adequate social protection to workers has been an essential aspect of the process of European integration ever since its inception.[33] This came through its commitment to the continued improvement of working conditions and standards of living across Europe. However, it was considered that this would happen organically as a result of the functioning of the common market, without the need for European social competences. As such it was considered that merely facilitating the free movement of labour through the principle of equal treatment would, when combined with the positive effects of other forms of economic integration, result in an adequate level of social protection. Ultimately, whether this

[26] D. Kramer (n 2), p. 179.
[27] S. Giubboni (n 14), p. 162.
[28] Case 43/75 *Defrenne v Sabenna (No 2)* ECLI:EU:C:1976:56, para. 12.
[29] A.C.L. Davies, A. Bogg, & C. Costello, 'The role of the Court of Justice in Labour Law' in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 116.
[30] Case 149/77 *Defrenne v Sabenna (No 3)* ECLI:EU:C:1978:130
[31] Ibid, paras. 23-24; see also Opinion of Advocate General Capotorti in Case 149/77 *Defrenne* ECLI:EU:C:1978:115, pp. 1383-1384.
[32] *Defrenne v Sabenna (No 3)*, paras. 26-30; Opinion of Advocate General Capotorti in *Defrenne v Sabenna (No 3)*,, pp. 1386-1387.
[33] B. Cantillon, H. Verschueren, & P. Ploscar, 'Social Protection and Social Inclusion in the EU: Any Interactions between Law and Policy?', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge, p. 1.

division was on attempt to preserve or undermine national system of social protection is still an open question.

2.2 The EEC: European Embedded Liberalism?

One perspective views the lack of social rights and protections in the EEC as a victory for adherents of German concept of Ordoliberalism, that prioritises supply-side economic policies and considers that economic integration will inherently result in an improvement in living and working conditions.[34] Whilst less extreme than *laissez-faire* or neoliberalism, Ordoliberalism sees the role of the EEC as ensuring market liberalisation, private autonomy, economic freedoms, strict adherence to competition rules, fiscal discipline, and a diminished public sector.[35] In other words, it protects a European economic constitution, whereby individuals' private property rights are prioritised over collective action and public intervention in the market. Whilst it is aimed at stopping abuses of public power, the result is that economic freedoms are at risk of not being subject to any political intervention whatsoever.[36] The Ordoliberal perspective sees the social deficit arising from the division between market and social integration not as a means of shielding domestic social policies from global markets (as was the case with embedded liberalism), but as a means of undermining it.[37] The EEC was thus argued to be a "liberal counterweight" to the Keynesian welfare and labour market policies that dominated national politics.[38] This lack of market correcting competences mean that the Union could not intervene in the labour market to pursue social justice,[39] with any positive effects merely incidental to the main aim of establishing the common market.[40] That being said, this did not stop the EEC from pursuing certain social priorities. The claim of the Court has European integration is both economic and social demonstrates that the Court has always been willing to give weight to social considerations. Whilst it is suggested that the provision on equal pay between men and women had an underlying market aim as it made states with more female workers more competitive,[41] the Court's reasoning in *Defrenne* suggests that this economic consideration is merely incidental to the main social priorities of the Treaty. The

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[34] D. Schiek, 'A Constitution of Social Governance for the European Union', in D. Kostakopoulou & N. Ferreira (eds.), *The Human Face of the European Union: Are the EU Law and Policy Humane Enough?* (2016) CUP: Cambridge, p. 22.

[35] I. Antonaki, *Privatisations and Golden Shares: Bridging the gap between the State and the market in the area of free movement of capital in the EU* (2019) Leiden: E.M. Meijers Institut, p. 121; see also W. Sauter, 'The Economic Constitution of the European Union' (1998); C. Joerges, 'What is left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *European Law Review* 461-489.

[36] F. Scharpf, 'The European Social Model: Coping with Challenges of Diversity' (2002); see S. Giubboni (n 14), p. 164; C. Joerges (n 35), p.463.

[37] M. Dawson, 'The Origins of an Open Method of Coordination' (2011), in *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (2011) CUP: Cambridge, p. 27-28.

[38] M. Goldmann, 'The Great Recurrence: Karl Polanyi and the Crises of the European Union' (2017), p. 276.

[39] C. Barnard, 'EU Social Policy: From Employment Law to Labour Market Reform' in P. Craig & G. De Burca (Eds), *The Evolution of EU Law* (2011), pp. 645-650; M. Bell, 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37 *European Law Review* 31, p. 32-34.

[40] See W. Streeck, 'From Market Building to State Building? Reflections on the Political Economy of European Social Policy' in S. Liebfried and P. Pierson (Eds) *European Social Policy: Between Fragmentation and Integration* (1995) Brookings Institution: Washington, p. 399.

[41] S. Fredman 'Discrimination Law in the EU' (2000) *Legal Regulation of the Employment Relation*, p. 188; M. Bell (n 39), p. 32.

Court has since said as much, stating that the economic aim pursued by Article 119 EEC is "secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right".[42] As a final note, even without explicit social competences, the EEC still managed to adopt a range of secondary legislation that had at least a partially social aim through the flexibility clause.[43]

As such, the lack of social competences in the EEC does not necessarily indicate a hostility towards national system of social protection, but can also be seen as an attempt to preserve the competence of Member States to construct their own social protection systems.[44] Rather than an attempt to undermine Keynesian social policies in certain Member States, the EEC is suggested to be a disappointment to Ordoliberals, who wished to depoliticise the economy further and overcome almost all forms of state intervention.[45] From this perspective, the "political decoupling" between the market and social meant that social policy became an entirely separate subject from European integration.[46] Therefore, rather than undermining national policies, this division actually ensured socially-healthy social policies whilst opening up European markets to trade.[47] This allowed for a virtuous circle between open economies and outward-looking economic policies on the one hand and closed welfare states and inward-looking social policy on the other.[48] It also preserved differences in national welfare systems as Member States were unconstrained in terms of their social regulation capabilities.[49] From this perspective, the lack of social competences did not represent a lack of concern for the social protection of workers, but rather is suggested to be one of the main aspects of Europe's much acclaimed 'social model',[50] as it allowed discretion to Member States in the construction of national welfare systems.[51] This is supported by the comments of the Advocates General of the Court of Justice, who have stated that since the start of European integration asserted that labour is not a commodity,[52] and that a worker is "not a mere source of labour, but a human being".[53]

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[42] Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* ECLI:EU:C:2000:72, para. 57.

[43] M. Shanks, 'The Social Policy of the European Communities' (1977). The Directives included Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer; Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.

[44] B. Cantillon, H. Verschueren, & P. Ploscar (n 33), pp. 1-2.

[45] M. Goldmann (n 38), p. 277; S. Giubboni (n 14), p. 165.

[46] S. Giubboni (n 14), p. 166.

[47] D. Schiek, 'EU Social Rights and Labour Rights and EU Internal Market Law' (2015) *European Parliament DG for Internal Policies* IP/A/EMPL/ST/2014-02 PE 563.457, p. 22-23.

[48] M. Ferrera, 'The European Union and National Welfare States, Friends, not Foes: But What Kind of Friendship?', p. 3; M. Dawson (n 37), p. 29.

[49] S. Giubboni (n 14), p. 163; M. Ferrera, 'Modest Beginnings, Timid Progresses: What's next for Social Europe?', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge, p. 21; see R. Gilpin, *The Political Economy of International Relations* (1987) Princeton: Princeton University Press, p. 335.

[50] D. Schiek (n 34), p. 26.

[51] S. Giubboni (n 14), p. 167.

[52] Opinion of Advocate General Jacbos in Case 344/87 *Bettray* ECLI:EU:C:1989:113, para. 29.

[53] Opinion of Advocate General Trabucchi in Case C-7/75 *Epoux F* ECLI:EU:C:1975:75, p. 696.

Therefore, a more nuanced view suggests that this 'decoupling' of economic rights and social protections has strong links with the idea of embedded liberalism,[54] albeit with links to Ordoliberalism.[55] It represents a widespread desire for multilateralism and free trade, although there was also a recognition that this should shield national democracy from market integration, by ensuring that the latter is embedded into democratically controlled national social policies.[56] It may be the case that both perspectives are not that far apart. They both agree that the EEC had the legitimacy to establish a law-based order committed to guaranteeing economic freedoms through supranational institutions,[57] however, both also consider that the EEC did not have the legitimacy to undertake the same kind of process in the field of social policy,[58] and could not impinge upon Member State sovereignty in this regard.[59] The final outcome seems to be an economic liberalism at the European level, underlined by an economic constitution based on market rights, with social policy being limited to (but also protected within) the national sphere.[60] In short: "Adam Smith abroad, John Maynard Keynes at home".[61]

As a final point, it should be noted that through the common market, the EEC did in fact achieve upward progress in living and working conditions everywhere at the same time, thereby validating the theory of upward convergence.[62] The division between market and social competences is suggested to have been instrumental in this respect, as it allowed for what were otherwise unattainable economies of scale, with the economic benefits of these used to improve national systems of redistribution and social protection.[63] Concerns over the negative effects of labour migration, such as pressures on social services and benefits turned out to be unwarranted, given that the main issue "was not excess migration but too little".[64] That being said, it is uncertain whether the EEC was totally responsible for this period of increasing living standards. The post-war era of embedded liberalism is suggested to have brought an era of unparalleled growth and prosperity and is often described as the "golden age" of capitalism.[65] In particular, individuals obtained strong employment protections through the SER, there was homogeneity between the original six Member States in terms of welfare entitlement, and a willingness to include migrant workers within domestic systems of social protection. This homogeneity lessened the need for harmonised social standards as these were becoming more approximated organically, and the potential negative effects caused by

[54] H. Verschueren, 'The European Internal Market and Competition between Workers' (2015) 6(2) *European Labour Law Journal* 137; M. Goldmann (n 38); D. Ashiagbor (n 15); M. Dawson (n 37), p. 29.
[55] D. Schiek, 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611, p. 615.
[56] S. Giubboni (n 14), p. 165.
[57] C. Joerges (n 35), p.471.
[58] S. Giubboni (n 14), p. 166.
[59] M. Ferrera (n 49), p. 21; see also S. Giubonni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (2006) CUP: Cambridge.
[60] D. Schiek (n 34), pp. 21-22; D. Schiek, 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611, p. 615.
[61] M. Ferrera (n 49), p. 21; see R. Gilpin, *The Political Economy of International Relations* (1987) Princeton: Princeton University Press, p. 335.
[62] D. Kramer (n 2), p. 178; see also High Authority, Report of the Situation of the community: laid before Extraordinary Session of the common Assembly, November 1954, p. 142.
[63] M. Ferrera (n 49), p. 21.
[64] C. Barnard (n 5), p. 210.
[65] See for examples J. Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (2016).

divergent social and employment standards between Member States and migration flows were limited.

3. MAASTRICHT: THE START OF SOCIAL INTEGRATION

The previous chapter explained how during the 1970s and 1980s the consensus of embedded liberalism began to break down and has been replaced by a neoliberal approach towards labour markets and employment. The following section will explain how Maastricht can be seen as part of the European response to the economic conditions of the 1970s and 1980s. It will assess the developments that came as a result of Maastricht, as well as the influence of neoliberalism on European Union policy.

3.1 Maastricht: Making the Market more Social

The economic difficulties of the 1970s led to much discussion over how the EU should react to changing economic conditions. The Union also had long-standing fears over potential pressures on social standards following the accession of lower-wage states, that could lead to societal problems such as social dumping and distortions of the labour market.[66] Concretely, the ongoing expansion of the Union to include lower-wage states was considered to undermine the level of convergence and coherence between Member State social systems that is required to preserve the model of embedded liberalism.[67] These concerns meant that the Union's response centred on finding ways of reducing unemployment whilst ensuring stronger social competences at the European level. This first began in the 1970s with the failed attempt to adopt a 'Social Action Programme', that attempted to create social recommendations binding on Member States.[68] The 1980s saw more successful developments in both economic and social integration. The Single European Act (SEA) sought to "improve the economic and social situation by extending common policies and pursuing new objectives".[69] Notably, this would be achieved by realising a fully unified internal market that would seek the abolition of obstacles to trade in the free movement of goods, persons, services and capital, as well as ensuring competition in the internal market is not distorted.[70] In particular, the SEA sought to remove the remaining obstacles to the freedom of movement for workers, which was considered to be "almost entirely complete",[71] and extend the freedom of movement beyond the workforce, primarily to students, in order to "help young people, in whose hands the future of the Community's economy lies".[72]

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[66] European Commission, 'Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic social Rights for Workers' (1989) COM (89) 568 final.
[67] D. Schiek (n 34), p. 25-26.
[68] M. Dawson & B. de Witte, 'The EU Legal Framework of Social Inclusion and Social Protection', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge, pp. 45; M. Daly, 'Whither EU Social Policy? An Account and Assessment of Developments in the Lisbon Social Inclusion Process' (2007) 37(1) *Journal of Social Policy* 1-19, p. 2; J. S. O'Connor, 'Policy Coordination, social indicators and the social policy agenda in the European Union' 15(4) *Journal of European Social Policy* 345-361, p. 347.
[69] Preamble, Single European Act (1987) OJ L 169/2.
[70] European Commission (White Paper), 'Completing the Internal Market' (1985) COM (85) 310 final, p. 4.
[71] Ibid, p. 25.
[72] Ibid, p. 26.

The SEA was market-oriented, and the influence of neoliberalism was evident. The SEA discusses the efficient allocation of 'human resources' and ensuring 'market flexibility', however it was virtually absent on social integration.[73] That being said, it did encourage improvements in working conditions, such as health and safety and working time, and included the competence to set minimum standards through Directives.[74] The SEA did not contain an employment policy, however, at a similar time the 'European Social Dialogue' was set up, that allowed the Union's social partner organisations to agree on non-binding opinions. It is suggested that the blueprint for future social integration did not come from the SEA, but rather the Community Charter (1989), which should be seen as the counterweight to the SEA, establishing the social rights required in a true European market.[75] As is stated in the Community Charter "the same importance must be attached to the social aspects as to the economic aspects and … therefore, they must be developed in a balanced manner".[76] The Community Charter repeated the EEC's objective to improve living and working conditions of workers through the completion of the internal market. It also established non-binding principles, such as the commitment under Article 10 to provide "adequate social protection", including social security benefits, to EU (migrant) workers. It also established the principles of fair remuneration and employment conditions, and for potentially the first time made a specific reference to providing social protection to workers engaged in employment outside of the SER.[77] In fact, it contained a number of provisions that are relevant for non-standard workers, such as residence and non-discrimination rights for migrant workers; rest periods and annual paid leave; the freedom of association and right to join trade unions; as well as equal treatment for women, and young, old, and disabled persons.

The Maastricht Treaty followed on from the SEA and, while not formally incorporating including the Community Charter within the Treaty, it was referred to in both the Social Protocol and Social Agreement which were contained within Maastricht, and which permitted the European Union (excluding the United Kingdom) to formally extend the social competences of the EU. This was because the United Kingdom did not want the EU to extend its social competences, and therefore blocked the inclusion of such competences within the main text of the Treaty. Therefore, the Union agreed on the Social Protocol, that permitted the 11 Member States excluding the UK to use the EU's "institutions, procedures and mechanisms" to give effect to the Social Agreement, and to ensure that any rules established would not apply to the UK.[78]

With this permission, the remaining 11 Member States could then agree on the 'Social Agreement', a kind of early form of enhanced cooperation that allowed the other States to further in terms of social integration. The Social Agreement laid down the main social

[73] Ibid, p. 5.
[74] Article 21, Single European Act (1987) OJ L 169/2.
[75] O. de Schutter, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights' (2016) *European Parliament (AFCO Committee) PE 536.488*, p. 12.
[76] https://www.eesc.europa.eu/resources/docs/community-charter--en.pdf
[77] See Articles 4 – 6 1989 Charter.
[78] Protocol on Social policy; Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, as contained in the Treaty on European Union (Consolidated Version) *OJ C 325/5 24.12.2002*.

objectives, which included the "promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion". It included a range of support and complementary competences of the Union, including improving health and safety, working conditions, the consultation of workers, equality between men and women in terms of labour market opportunities and treatment at work, and the integration of persons excluded from the labour market. In this respect, the Agreement allowed the Council to adopt Directive setting minimum requirements through the legislative procedure under Article 183c of the Treaty. However, in certain areas such as the social security and social protection of workers, as well as the protection of unemployed workers, the Council would act unanimously on a proposal from the Commission and only consulting the Parliament. The Social Agreement also ensured that there was more dialogue between the European Commission and the Union's social partners within the law-making process, and even permitted the social partners to conclude Agreements, which could then be implemented into laws at the Union level. The influence of neoliberalism can even be seen in the Social Agreement, insofar as despite it being focused on social matters, emphasised "the need to maintain the competitiveness of the Community economy" and to ensure that rules established under it "would not hold back the creation and development of small and medium-sized undertakings".

The Maastricht Treaty also established the right to free movement of economically inactive persons through Citizenship of the Union, which under Article 8a stated that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States". This has had a significant impact on the status and rights of non-standard migrant workers and has also pushed the boundaries of solidarity between Union citizens and Member States. The concrete rights and protections provided through these social rules, as well as the consequences for precarious workers, shall be discussed in later chapters.

3.2 Amsterdam: Formalised Social Competences

Following the election of a Labour government in 1997, the UK withdrew its objection to the inclusion of social competences within the Treaty itself, and as such joined the Social Agreement, thereby ensuring that the social competences within the Maastricht Treaty would apply to all Member States. The subsequent Amsterdam Treaty revision ensured that Article 118 EC became a real legal basis from which the Union could adopt Directives setting minimum social standards under a QMV basis in the areas of health and safety, working conditions, and non-discrimination.[79] This mean that Treaty of the European Union, despite not containing any real employment policy, at least gave "considerable attention" to employment issues.[80] This represented a radical change in the constitutional framework for European integration, moving it beyond the traditional market/social division and system of embedded liberalism that characterised the EEC. It paved the way for the Union to adopt a range of social legislation that directly improved the situation of workers. Furthermore, competences in the areas of health and safety allowed it to adopt important legislation such as

[79] M. Daly (n 68), p. 3.

[80] J. Goetschy, 'The European Employment Strategy: Genesis and Development' (1999) 5(2) *European Journal of Industrial Relations* 117, p. 119.

the Working Time Directive, and the granting of more powers to social partners enabled them to collectively create framework agreements that could ultimately be incorporated into EU law as fully-fledged Directives.[81]

3.3 Open Coordination & The European Employment Strategy

Despite some developments in the field of social law, the main result of the Treaty of Maastricht was to skew the balance between economic and social integration further, particularly through the rules on Economic and Monetary Union (EMU) which limited the policy options of Member States, thereby unsettling the balance of embedded liberalism.[82] This meant that national social policy was no longer shielded from the consequences of European integration. However, as certain areas of policy were still firmly off-limits for the Union, such as social security entitlement and sensitive areas of employment law, this meant that social protection in those areas was not pursued through the harmonisation of regulatory standards, but rather through policy coordination outside the formal Treaty structure, that would encourage a convergence of social goals, preferences, and ideas at a policy level.[83] This is known as the Open Method of Coordination (OMC).

The OMC on social policy was primarily established through the European Employment Strategy (EES), which was originally part of the Delors White Paper on Growth, Competitiveness, and Employment.[84] This was adopted through the Treaty of Amsterdam in 1997 when the Protocol on Social Policy was incorporated into the main body of the Treaty,[85] which acted as a major catalyst for social policy during the 1990s and 2000s.[86] After a slow start, the EES became one of the few unifying projects in the EU, and a necessary counterweight to the more advanced system of economic integration,[87] and is now considered to be a 'cornerstone' of EU social policy.[88] The EES sought to ensure high levels of employment and balanced and sustainable development.[89] It envisaged a "skilled, trained and adaptable"

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[81] *Ibid*, p. 118; N. Kountouris, 'EU Law and the regulation of 'atypical' work', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 246; For example, Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC; Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP; Directive 96/71/EC concerning the posting of workers in the framework of the provision of services; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2003/88/EC concerning certain aspects of the organisation of working time; Directive 2008/104/EC on temporary agency work. See also S. Peers, 'Equal Treatment for Atypical Workers: A New Frontier for EU Law?' (2013).

[82] M. Dawson (n 37), p. 42.

[83] *Ibid*, p. 43.

[84] European Commission, 'Growth, competitiveness, employment: The challenges and ways forward into the 21st century' (1993) Luxembourg: Office for Official Publications of the European Communities.

[85] J. S. O'Connor, 'Policy Coordination, social indicators and the social policy agenda in the European Union' 15(4) *Journal of European Social Policy* 345-361, p. 347.

[86] J. Goetschy (n 80), p. 120.

[87] Ibid, p. 124.

[88] P. Copeland, 'A Toothless bite? The effectiveness of the European Employment Strategy as a governance tool' (2013) 23(1) *Journal of European Social Policy* 21, p. 21.

[89] https://ec.europa.eu/social/main.jsp?catId=101&langId=en

workforce and flexible labour markets that respond to changing economic conditions.[90] Through the EES, guidelines, benchmarks, and indicators were set at the European level, with Member States seeking to realise these through 'Nation Action Plans for Employment' (NAPs),[91] with the Union seeking to assist in improvements to social policy through various horizontal procedures.[92] The EES, and OMC more broadly, therefore functions primarily through a system of horizontal process, such as peer review, dialogue, soft incentives, normative reflection, and experimentation.[93] This is suggested to not be a 'top-down' or 'bottom-up' approach, but rather an ongoing discussion whereby Union and Member States can help develop and shape each other's policies,[94] a process which is suggested to actually complement rather than undermine, hard-law legislation.[95]

Following on from Amsterdam and the EES, the Lisbon Strategy of 2000 sought to include more social aspects within the OMC, notably through the combating of social exclusion and promotion of social inclusion.[96] The Social OMC was intended to support social cohesion in the EU through social legislation, financial instruments, and coordination processes.[97] In essence, this was achieved through job promotion, greater competition in the economy, and improved social cohesion.[98] Social exclusion can be defined as the process whereby individuals are prevented from participating fully in society due to poverty, a lack of opportunities, or discrimination.[99] It is associated with a whole range of risk factors that are damaging for the person at-risk, as well as society more broadly.[100] It should be emphasised at this point that the idea of social exclusion is strongly linked to the consequences of non-standard and precarious employment, and can even be seen as a proxy-term for this, given the risks such workers face.[101] As such, the priority is to facilitate the employment of at-risks groups - most notably women, young persons, and minorities - who are often overrepresented in non-standard employment.[102]

From a practical perspective, the OMC is criticised for being largely toothless, and therefore insufficiently mitigating the problems resulting from the imbalance between market and social integration at the European level. Its soft-law approach means that it is a purely voluntary method of monitoring and enforcing common objectives, that has limited effect in influencing

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[90] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart, p. 77.
[91] *Ibid*, p. 83.
[92] M. Dawson & B. de Witte, (n 68), p. 43-44.
[93] M. Daly (n 68), p. 7.
[94] S. Stiller & M. van Gerven, 'The European Employment Strategy and National Corte Executives: Impacts on activation reforms in the Netherlands and Germany' (2012) 22(2) *Journal of European Social Policy* 118, p. 119.
[95] B. Cantillon, H. Verschueren, & P. Ploscar (n 33), p. 2.
[96] P. Copeland (n 88), p. 21.
[97] European Commission, 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social protection and Social Inclusion' COM (2008) 418 final, p. 2. See also, M. Daly (n 68), p. 2.
[98] M. Daly (n 68), p. 4.
[99] D. Ashiagbor (n 90), p. 90.
[100] Ibid.
[101] Ibid, p. 89.
[102] Ibid, p. 91; See also European Commission, Communication: Towards Common Principles of Flexicurity: More and better jobs through flexibility and security' (27th June 2007) COM (2007) 359 final, p.3.

and converging Member State policies.[103] Similarly, the Social OMC has been criticised for being too broad and unfocused, thereby impeding a clear narrative, as well as a lack of implementation of the national programmes.[104] It is suggested to lack any "oomph" character and struggled to criticise individual countries for failing to meet targets and recommendations.[105] In 2008 it was recognised that improvements were needed to improve the system of aims and indicators.[106] Concretely, rather than being used to create new national strategies to combat unemployment and social exclusion, it is suggested to be mainly used by Member States as an excuse to get through unpopular domestic legislation or a means of 'uploading' their own ideological preferences to the Union.[107] This results in the implementation of national employment plans that were already adopted or in the pipeline.[108] As opposed to hard law, soft-law coordination is political process, and as such tends to result in moderate outcomes, with very little novel or radical policy ideas, thereby diluting the influence of the EES further.

3.4 Maastricht: European Neoliberalism?

As well as the practical problems relating to the OMC, it is also criticised for its strong links to the principles of neoliberalism. Concretely, the EES altered the idea of social protection in the EU, from one based primarily on safety nets defending an individual's position, to one that acts as a 'springboard', encouraging people to obtain new skills and new jobs.[109] This 'springboard' focuses on promoting "entrepreneurship, employability and adaptability",[110] primarily by means of increased employment flexibility; reducing non-wage labour costs; adopting 'activating' labour market policies; and re-integrating the long-term unemployed into the labour market.[111] The EES in particular focused on labour market flexibility by actively encouraging Member States to facilitate "more flexible types of contract" such as part-time work.[112] This was in order to help reconcile work and family life, modernise employment and enhance labour market efficiency.[113] Even the Social OMC was amended in 2005 to focus more on creating jobs and economic growth, that suggests further influence of neoliberal discourse.[114] The aims and objectives of the Social OMC shifted from broad principles such as "helping the most vulnerable" and "facilitate participation in employment" to the "active social inclusion" of individuals, and the "financial sustainability" of pension schemes and

[103] P. Copeland (n 88), pp. 21 - 22; S. Stiller & M. van Gerven (n 94), p. 119.
[104] M. Daly (n 68), p. 5.
[105] Ibid, p. 8.
[106] European Commission, 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social protection and Social Inclusion' COM (2008) 418 final, p. 3.
[107] S. Stiller & M. van Gerven (n 94), p. 120, 128; J. Goetschy (n 80), p. 130. See also M. Dawson (n 37).
[108] P. Copeland (n 88), p. 33.
[109] S. Stiller & M. van Gerven (n 94), p. 119.
[110] Commission Communication, Proposal for Guidelines for Member States Employment Policies (1998) COM (97)497 final, pp.1-2.
[111] J. Goetschy (n 80), p. 121-122.
[112] Council Decision 2002/177 on guidelines for Member States' employment policies for the year 2002 [2002] OJ L 60/60.
[113] Council Recommendation 2002/549 on the broad guidelines of the economic policies of the Member States and the Community [2002] OJ L 182/1.
[114] M. Daly (n 68), p. 5.

labour market policies.[115] These changes create a situation whereby combatting social exclusion effectively equates to social inclusion through labour market participation only.[116] Overall, the EES and Social OMC have shifted towards activating labour market policies, and the cost effectiveness of such policies.[117] In short, these focus on more employment, regardless of its quality, and fewer welfare benefits in order to decrease pressures on public finances.[118]

Perhaps the biggest contributory factor in this shift to neoliberalism is the idea of 'flexicurity', which combines elements of the EES and Social OMC. It seeks to "reduce segmented labour markets and precarious jobs, and promote sustained integration", by integrating underrepresented persons into the labour market, such as "women, the young, and migrants".[119] However, this means that the only real method to integrate was through labour market flexibilisation. Job security would therefore be replaced by employment security, i.e. employment protections whilst in employment can be lessened, in order to provide more stability through improved social protection and lifelong learning skills, that facilitate transitions back into the labour market.[120] This combination of labour market flexibility with employment security was suggested to be beneficial for both workers and employers, as it allows them to fully enjoy the opportunities presented by globalisation.[121] Open-ended contracts were discouraged as they were argued to damage employment protections.[122] Furthermore, an explicit goal was to eliminate "strict employment protection legislation", that was claimed to hamper hiring decisions and create dualisations in the labour market, disproportionately affecting more marginalised groups and the long-term unemployed.[123] However, it is also argued to be ineffective in terms of achieving more security when transitioning in and out of employment (i.e. employment security). Its adherence to activating labour market policies, meant that the priority was ensuring that labour market policies did not have a "negative effect" on employment rates and did not "reduce financial incentives to accept work".[124] Flexicurity is therefore based on the right-and-duty principle and responsibility discourse that characterises neoliberalism.[125] This adherence to activating labour market policies suggests that under flexicurity job security was replaced by employment *insecurity*.

The links between neoliberal and the EES and Social OMC are suggested to undermine their effect. Whilst the general aims of the EES and OMC are uncontroversial, in reality they are pursued through labour market flexibility, which prioritises reducing labour costs in periods of economic instability.[126] In doing so, they promote the exact kinds of employment practices

[115] See Annex 1, European Commission, 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social protection and Social Inclusion' COM (2008) 418 final, p. 9.
[116] M. Daly (n 68), p. 7.
[117] Ibid, pp. 4 - 6.
[118] C. O'Brien, 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50(6) *CMLRev* 1643, p. 1673
[119] European Commission Communication: Towards Common Principles of Flexicurity: More and better jobs through flexibility and security' (27th June 2007) COM (2007) 359 final, p, 3.
[120] Bell (n 39), pp. 34-35.
[121]European Commission (n 119), p. 4; D. Ashiagbor (n 60), p. 86.
[122] Ibid, p.3.
[123] Ibid, p. 5 – 6.
[124] Ibid, p. 6.
[125] Ibid, p. 11.
[126] D. Schiek (n 47), p. 22.

that circumvent and/or undermine labour market regulations and social protections.[127] Contrary to the original ambitions of the EES, it did not lead to "more and better" jobs, but rather the gradual replacement of SER positions with flexible employment, often with less social protection and more precarious working conditions.[128] This focus on *quantity* over *quality*,[129] contributes to a "false perception" that flexible employment is by itself beneficial for workers.[130] However, this is a fallacy: whilst some non-standard employment, such as part-time work, can be beneficial for certain individuals, other forms such as fixed-term, agency work, bogus self-employment, etc., are only really beneficial for employers.[131] Whilst this relates more to policy, rather than law, the shift in discourse and approach demonstrates the influence that neoliberalism has had over Union institutions and the development of Union law and policy.

4 THE TREATY OF LISBON

The Treaty of Lisbon follows on from the failed Constitutional Treaty of 2005, including many of its provisions. The Treaty gives more importance to the protection of workers, at least nominally, however, it is questionable how much it really changed in terms of the functioning on the EU. At face value, Lisbon rewrites and expands on the basic values and objectives of the Union, including giving greater importance to the idea of social protection.[132] Article 9 TFEU contains a general obligation on the Union to ensure the promotion of "a high level of employment, the guarantee of social protection, and the fight against social exclusion when defining and implementing its policies and activities generally". This general mainstreaming clause obliges the Union institutions (including the Court of Justice) to give consideration to issues of social protection and inclusion when applying and interpreting Union law, even in the absence of explicit competences or legal instruments to achieve these goals.[133] In the context of free movement law, Article 3(2) TEU lays down the basic principles underlying the internal market which commits the Union to establish a "highly competitive social market economy, aiming at full employment and social progress and a high level of protection", and should "combat social exclusion and discrimination, promote social justice and protection". Article 151 TFEU lays down the social objectives of the Union and Member States as "the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion". These statements are argued to require EU actors to balance economic and social considerations in policymaking, thereby suggesting a greater role for social considerations than in previous treaties.[134]

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[127] D. Ashiagbor (n 90), p. 87.
[128] Ibid, p. 78.
[129] Ibid.
[130] A. Davies, 'Regulating Atypical work: beyond equality' (2013), in N. Countouris & M. Freedland (Eds.), *Resocialising Europe in a Time of Crisis* (2013), CUP: Cambridge, 230-249, p. 233.
[131] *Ibid*, p. 233-234; see also S. Freedman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 *Industrial Law Journal* 299.
[132] M. Dawson & B. de Witte, (n 68), p. 54.
[133] Ibid, p. 55.
[134] Ibid, p. 56.

4.1 The Balance Between Market and Social Rights

The shift towards a "social" market economy, rather than a free-market economy based almost entirely on unrestricted competition is encouraging.[135] However, there is a concern that, despite the many references to social protection and social inclusion throughout the Treaty, these are mostly rhetorical and vague, with the Treaty's text being unclear and inconsistent. Whether social protection should be "high level", "proper", or "adequate", depends entirely on the Treaty provision in question with no indication as to what these terms mean or the differences between them. The lack of comprehensively regulated, EU-level governance framework for employment and social policy means that there is no benchmark with which one can compare this.[136] Moreover, the lack of concrete law-making competences in certain areas of social policy demonstrates that the division of competences and the social powers of the EU are still largely the same as under Maastricht.[137] This means that for the most part, the combatting of social exclusion and ensuring social protection is still based on the OMC for social inclusion and protection, which has now developed into the over-arching European Semester.[138] This suggests that, rather than the Lisbon Treaty, the developments made to the system of coordination under the Lisbon Strategy of 2000 have done most to include social protection at the heart of the Union's policy agenda,[139] and this has had most impact on the Union taking up issues of social protection and social exclusion.[140] The focus on soft-law coordination approach means that the criticisms labelled against the OMC still remain: the Union will always prioritise 'harder' internal market (economic) rules, which contribute to a significant "implementation gap" between the recommendations and actual practice.[141] The broad scope of coordination also means that country recommendations are relatively toothless and unfocused, often being about "everything and thus nothing".[142] This adds to the asymmetrical integration between market and social rights, and makes legislative initiatives such as those relating to a guaranteed minimum income more difficult to realise, and that binding legal rules would serve as better guidelines for national governments and might perhaps resolve the asymmetry between social and economic legal standards in the Union.[143]

The fact that Lisbon maintained the previous balance between market and social competences meant that there were very few developments in EU social law after it came into force, and nothing that improved the position of non-standard or precarious workers. This has changed since the adoption of the European Social Pillar, which takes the issue of precarious employment seriously and will be discussed later in this chapter. That said, Union policy coordination has seen a significant development through the Council Recommendation on Social Protection that emphasises the importance of Member State social protection systems, which are suggested to be a "cornerstone" of the European social model, and crucial to the

[135] M. Ferrera (n 49), p. 29.
[136] N. Milotay, 'Social protection in the EU: State of play, challenges, and options" (2018) *European Parliament Research Service* PE 628.258, p. 3.
[137] M. Dawson & B. de Witte, (n 68), p. 54.
[138] B. Cantillon, H. Verschueren, & P. Ploscar (n 33), p. 2.
[139] M. Dawson & B. de Witte, (n 68), p. 43.
[140] B. Cantillon, H. Verschueren, & P. Ploscar (n 33), p. 2.
[141] M. Dawson & B. de Witte, (n 68),, p. 44 - 45.
[142] Ibid; see 'Facing the Challenge: The Lisbon Strategy for Growth and Employment', Report form the High Level Group chaired by Wim Kok (November 2004), p. 16.
[143] B. Cantillon, H. Verschueren, & P. Ploscar (n 33), p. 11.

realisation of a well-functioning social market economy.[144] The Recommendation focuses on the social protection of non-standard workers specifically, acknowledging that the social protection of workers is still "largely based on full-time open-ended contracts between a worker and single employer" (i.e. the SER).[145] Given that non-standard workers do not have "full-time, open-ended contracts", they can encounter difficulties in being effectively covered by social protection, or covered at all, whilst self-employed persons are completely excluded from formal access to key social protection schemes in some Member States.[146] The Council recognised that rules relating to income and time thresholds in particular can work to the disadvantage of non-standard workers by constituting an unduly high obstacle to accessing social protection for some groups of non-standard workers and for the self-employed.[147] As such, non-standard workers face a higher risk of income poverty than standard workers, thereby further underlining the need to ensure their social protection.[148] Interestingly, in its Recommendation the Council provides an indication as to the key functions of social protection systems. Namely, to protect people against the financial implications of social risks, such as illness, old age, accidents at work and job loss,[149] as well as allowing individuals to uphold a decent standard of living, replace lost income, live with dignity, prevent from falling into poverty while contributing to the activation and facilitating of a return to work and labour-market transition.[150]

4.2 Increased Fundamental Rights Protection

One significant legal development brought about by the Treaty of Lisbon is the elevated status of fundamental rights within the EU legal order, including for the purposes of this thesis fundamental social rights. Fundamental rights have long been a part of the EU legal order; however, these have historically been incorporated into non-binding policy instruments such as the 1961 Social Charter and the 1989 Community Charter. Whilst containing important rights and principles for workers, and in the case of the 1989 Charter acting as a catalyst for the adoption of social legislation providing significant social protection to workers, the concrete legal value of such instructions has been limited. More impactful has been the Court's gradual inclusion of fundamental rights as general principles of EU law,[151] including using the provisions of the ECHR.[152]

The Charter of Fundamental Rights of the European Union ('the Charter') has changed this situation. The Charter was adopted in 2000 however, initially it had a similar legal value to the 1961 and 1989 Charters as it was not binding on Member States. The legal nature of the Charter

[144] Council Recommendation of 8th November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), para (8).
[145] Ibid, para (13).
[146] Ibid, para (18).
[147] Ibid, para (19).
[148] European Commission, 'Employment and Social Developments in Europe: Annual Review 2018' (2018) Publications Office European Union: Luxembourg, p. 119.
[149] Council Recommendation of 8th November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), para (8).
[150] Ibid, para (17).
[151] See Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114.
[152] Opinion 2/13 ECLI:EU:C:2014:2454.

changed after Lisbon, which included Article 6(1) TEU which states that the Charter shall have "the same legal value as the Treaties".[153] This simple sentence has radically altered the status of fundamental social rights within the EU legal order. The Charter includes the rights and protections contained in the previous Charters, but goes further, containing a whole chapter on worker's rights, which includes the right to collective bargaining and action; protection in the event of unjustified dismissal; the right to fair and just working conditions; and the right to social security and social assistance.[154] Whilst the Charter provides many protections and rights, the ability of individuals to rely upon them are limited. This is because the Charter only applies when the situation falls within the scope of EU law,[155] many provisions of the Charter are not sufficiently clear and precise to be relied upon by individuals,[156] and those that are able to be relied upon may only be done so in situations where secondary legislation is not applicable.[157]

4.3 The European Pillar of Social Rights

A final important development for the protection of workers, particularly those in precarious forms of employment, is the European Pillar of Social Rights (the 'Social Pillar').[158] The Social Pillar was agreed in 2017 and represents a high-profile political affirmation of broad social rights and principles, and a stronger commitment to an improved EU social policy following the UK's departure from the Union.[159] In doing so, it seeks to "revisit the social *acquis* in the light of new challenges" and act as "a compass for renewed convergence towards better working and living conditions",[160] thereby becoming a "guide towards efficient employment and social outcomes".[161] The Pillar contains 20 principles within three Chapters: (i) equal opportunities to the labour market, (ii) fair working conditions, and (iii) social protection and inclusion.[162] Within these principles, attention is paid to the problems associated with modern

[153] See Article 6(1) TEU.
[154] See Articles 28, 30, 31, 34 of the Charter of Fundamental Rights of the European Union (2012 consolidated version) C 326/391
[155] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, para. 21. See K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European Constitutional Law Review* 375.
[156] Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, para. 45.
[157] Case C-414/16 *Vera Egenberger* ECLI:EU:C:2018:257; Case C-68/17 *IR v JQ* ECLI:EU:C:2018:696; Case C-193/17 *Markus Achatzi* ECLI:EU:C:2019:43; Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871; Case C-684/16 *Tetsuji Shimizu* ECLI:EU:C:2018:874; Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981. See S. A. de Vries, 'The *Bauer* et al and *Max Planck* judgments and EU citizens' fundamental rights: an outlook for harmony' (2019) 1 *European Equality Law Review* 16.
[158] Interinstitutional Proclamation on the European Pillar of Social Rights (2017/C 428/09).
[159] S. Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance' (2019) 21 *CYELS* 101-127, pp. 101-102.
[160] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *Annual Growth Survey 2018*, 22 December 2017.
[161] Recital 12, Interinstitutional Proclamation on the European Pillar of Social Rights (n 158)
[162] European Commission, Commission Recommendation on the European Pillar of Social Rights COM (2017) 20600; European Commission, Establishing a European Pillar of Social Rights COM (2017) 250; S. Sabato et al, 'Implementing the European Pillar of Social Rights: What is needed to guarantee a social impact' (2018); S. Sabato and F. Corti, 'the Times they are A-Changin? The European Pillar of Social Rights from Debates to Reality Check' (2018) in B. Vanhercke, D. Ghailani and S. Sabat, *Social Policy in the European Union: state of play 2018* (2018); M.

labour markets and flexible, non-standard employment. For example, Article 5 on secure and adaptable employment explicitly states that "regardless of the type and duration of employment relationship, workers have the right to … social protection", and that "employment relationships that lead to precarious working conditions shall be prevented".[163] Furthermore, Article 12 states that "regardless of the type and duration of employment relationship, workers and under comparable conditions self-employed persons should have the right to adequate social protection".[164]

The Social Pillar explicitly states that it is not legally binding, and as such does not confer rights upon workers directly. This suggests a legal value more comparable to the 1961 and 1989 Charters than the Charter of Fundamental Rights. The aim of the Charter is not to create new rights, but to "reaffirm the rights already present in the EU and international legal *acquis* and complements them to take account of new realities … (and) seeks to render them more visible, more understandable, and more explicit".[165] As such, the Pillar should be considered as far more than just a set of principles. In the first place, it should be considered as a significant milestone for social protection, given that it collates a very broad range of rights and principles, including new principles that are more relevant to modern labour markets, into one single document that has been endorsed by all EU institutions, including the European Council.[166] More than this though, the Pillar envisages new legislation, institutions, and country-specific coordination and recommendation through the European semester.[167] It can, and has, formed the basis for further social integration, providing further incentive to adopt new binding and non-binding legal acts.[168] The concrete protections provided under the legislation deriving from the Social Pillar shall be discussed in more detail in subsequent chapters.

The Social Pillar is closely connected to the Union's system of open coordination, now implemented through the European Semester. The Pillar's principles have been incorporated into the European Semester recommendations using the Social Scoreboard.[169] In doing so, it evaluates Member State policy in relation to equal opportunities and access to the labour market, dynamic labour markets and fair working conditions, and public support/social protection and inclusion.[170] As such, it can be considered as a significant social expansion of the Union's system of coordination , whereby Member States may receive Country Specific Recommendations to introduce or improve various social policies.[171] Finally, Regulation

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Manfredi, 'From the austerity measures to the European Pillar of Social Rights: what kind of protection for economic and social rights in the European Union?' (2019).

[163] European Parliament, European Council, European Commission, 'Interinstitutional Proclamation on the European Pillar of Social Rights' (2017) (C 428/09), Article 5.

[164] Ibid, Article 12.

[165] European Commission Communication, 'Establishing a European Pillar of Social Rights' COM (2017) 250 final.

[166] S. Garben (n 159), p. 104.

[167] *Ibid*, p. 102; S. Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review* 210, p. 216; see also P. Watson 'The Community Social Charter' (1991) 28 *CMLRev* 37.

[168] European Commission Staff Working Document, 'Monitoring the implementation of the European Pillar of Social Rights' (2018) SWD [2018] 67 final, in particular pp. 9-11.

[169] Commission Staff Working Document, Social Scoreboard accompanying the document establishing a European Pillar of Social Rights SWD [2017] 200 final.

[170] See S. Garben (n 159), p. 114 - 115.

[171] S. Garben, (n 167), p. 217.

2019/1149, adopted under the Pillar, establishes the European Labour Authority (ELA).[172] The ELA assists Member States and the Commission in their effective application and enforcement of Union law related to labour mobility and the coordination of social security systems within the Union, this includes the effective implement of legislation such as the Posted Workers Directive, the Social Security Coordination Regulation, and the Workers Regulation.[173]

The Social Pillar still retains some of the principles of neoliberalism that were included in earlier legislation. For example, Article 5 seeks to foster the "transition towards open-ended forms of employment", whilst Article 5(2) seeks to ensure that employers have the "necessary flexibility" to adapt to changing economic conditions, in what seems to be a strange inclusion in a policy document aimed at protecting workers. Article 13 provides the right to unemployment benefits and "activation support", in language reminiscent of flexicurity, and furthermore states that "such benefits shall not constitute a disincentive for a quick return to employment". Article 14 elaborates on this, providing for minimum income benefits, however, these "should be combined with incentives to (re-)integrate into the labour market".

Whilst the focus on activating labour market policies and flexibility suggests a continuation of the previous economic orthodoxy, the Social Pillar clearly has a stronger focus on secure employment and social protection. While no paradigm shift in terms of the protection of precarious workers, the Social Pillar is likely to provide significant additional social protection to individuals engaged in non-standard employment, particularly as it focuses on the issues relating to modern labour markets. Its benefit will be elevated by the fact that it seeks to facilitate the enforcement of both EU rules in the internal market and social law.[174] That said, its focus on coordination means that all the problems associated with implementing national recommendations still exist, and without stronger techniques for implementation it is unclear how much legal value the Social Pillar will ultimately have.[175] However, the Social Pillar did establish the ELA, an entirely new agency, to assist with the enforcement of the protections provided under it. Whilst it remains to be seen how effective the ELA will be in enforcing such protections, it does suggest that the Pillar may have more teeth than initially assumed.

5 Conclusion: The Limits and Influences on the Protection of Workers under EU law

The social protection of workers was initially based almost entirely on economic integration, with very few European social competences. This has changed over time, with the EU gaining significant legal competences in the field of social law, as well as the establishment of a system of social policy coordination aimed at influencing the domestic policies of the Member States to fill the gaps where this social protection is lacking. This represents a recognition that economic integration, by itself, will not improve the protection of workers, with the Union increasingly recognising that a socially minded Europe with strong protections for workers is

[172] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland).
[173] See Article 4, Regulation (EU) 2019/1149.
[174] S. Garben (n 159), p. 116.
[175] S. Garben, (n 167), p. 222.

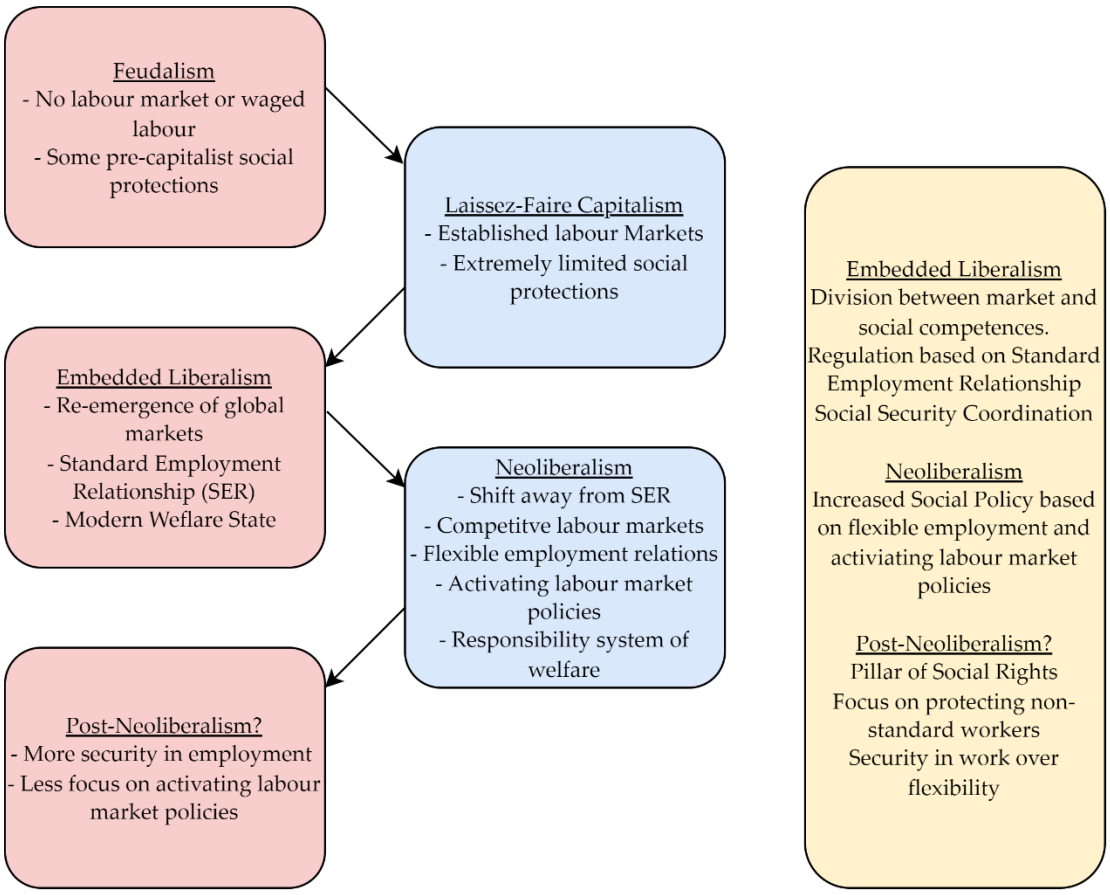
necessary for not just the living standards of Europeans but also the proper functioning of the internal market.[176] This is particularly the case in a heterogeneous Union with vast disparities in wage rates and social standards, in order to avoid a race to the bottom in terms of social standards.

Whilst the idea of social protection is difficult to measure precisely, it can be broadly understood as requiring that individuals are (i) protected from social risks associated with the labour market (which is clearly a priority for non-standard workers); and (ii) provided with a decent standard of living, regardless of their socio-economic status.[177] The subject matter of this thesis, i.e., EU migrants engaged in precarious forms of non-standard employment, are liable to lose out on this protection through their exclusion from rights and protection available under both migration and social law. Their position on the intersection between these two areas of law means that they can lose protection under one or both sets of rights, underlining their need for protection.[178]

the extent to which EU law can deliver this protection to precarious workers is questionable. It is limited by the division between market and social competences at the Union level. In the absence of harmonised European social standards, in particular relating to welfare entitlement and redistribution, social protection under EU law is mostly limited to ensuring that migrant workers do not face barriers to employment and are not discriminated against (both inside and outside of employment), whilst in a host-state. Whilst the EU sets a minimum floor of rights in certain fields, these are limited. Consequently, most of the protection provided to migrant workers relates to ensuring their protection against social risks and ensuring a decent standard of living *vis-à-vis* nationals of the host-state. The imbalance between market and social competences has meant that much of the protection of workers is primarily pursued through the coordination of national systems. This highlights the limits of legal integration, particularly as the coordination tools used by the Union are suggested to be relatively ineffective at shifting Member State rules, whilst being heavily influenced by neoliberal principles that are argued to further undermine social protection. Furthermore, there are clear elements of neoliberal discourse contained in the Union's social policy documents, with the EES and Flexicurity in particular using activation policies and labour market participation as arguably to sole means of improving the living standards of Europeans.
The limited effect of EU social law, the questionable effectiveness of policy coordination, and the influences of neoliberalism on EU social policy is suggested to mean that that, even following Lisbon, the Union still does not have adequate tools with which to pursue its social goals effectively, and therefore can only really provide lip-service to its social objectives of securing a fairer, more equitable distribution of life chances for EU citizens.[179]

[176] M. Ferrera (n 49), pp. 18 - 19.
[177] Council Recommendation of 8th November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).
[178] See C. O'Brien, 'I trade; therefore I am: Legal Personhood in the European Union' (2013) *50 CMLRev 1643*, in particular pp. 1660-1672, 1676.
[179] M. Dawson & B. de Witte, (n 68), pp. 41 – 42; M. Ferrera (n 49), pp. 18 - 19.

Figure 2: The Development of Labour Markets and European Regulation



Part II: The General Protection of EU Migrant Workers

Chapter 4: The Definition and Status of the Worker under EU Law

1 INTRODUCTION

After examining the development of labour markets and the European Union regulation thereof over the period of European integration, the following part of this thesis will explain how workers, particularly those engaged in non-standard and precarious forms of employment, obtain protection under EU law. It will outline how workers gain legal protection through the '*Lawrie-Blum* criteria', i.e., the conditions that the Court has developed through its *acquis* that an individual must fulfil if they are to be recognised as a worker under EU law.[1] It will explain the main facets of this test and explain how these have developed over time. The *Lawrie-Blum* criteria is predominantly understood in the context of the freedom of movement for workers. However, this chapter will examine how the Court has extended its application into EU social law, using either a direct or indirect application to ensure the effectiveness of certain EU social legislation.

However, given that flexible and precarious forms of employment undermine the traditional classifications in the law that distinguish workers from non-workers, self-employed persons, etc., the status of the individual and their legal classification as a worker becomes all-important for their protection, resulting in an all-or-nothing approach whereby meeting the relevant criteria acts as a 'gateway' that provides the individual with the full protection available under Union law. The Court of Justice has explicitly recognised that the definition of worker is becoming harder to maintain in light of modern employment trends, in particular increasing levels of flexible and precarious employment.[2] The Commission has also noted that the current system has the danger of "excluding growing numbers of workers in non-standard forms of employment, such as domestic workers, on-demand workers, intermittent workers, voucher-based workers and platform workers" from social protection due to the application of the worker definition.[3]

This system of protection can be understood as a form of 'worker citizenship' that has a federal character, as it confers both horizontal free movement rights and vertical employment-based rights. However, it also has the limitations of citizenship, insofar as it is conditional on the individual engaging sufficiently with the market, thereby excluding those that do not meet these conditions from legal protection.

2 THE DEFINITION OF WORKER UNDER EU LAW

There is a fundamental tension between the EU and Member States legal systems relating to the balance of competences between the two in the fields of market integration and social law. Member States largely wish to retain the power to determine who is a worker for sensitive national competences such as employment law, social security entitlement, immigration

[1] Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284.

[2] See, for example, Case C-413/13 *FNV* ECLI:EU:C:2014:2411, para. 32-34; Opinion of Advocate General Wahl in Case C-413/13 *FNV* ECLI:EU:C:2014:2215, para. 51.

[3] Article 2, Proposal for a Directive on transparent and predictable working conditions in the European Union COM (2017) 797 final 2017/0355(COD).

regulations, etc. The disparity between the labour systems of the Member States and the lack of harmonising competences at the European level in certain areas of social policy is argued to mean that the idea of a unitary, coherent, European definition of worker is misguided.[4] The Union, on the other hand, seeks to ensure the effectiveness and uniformity of EU law, particularly thorough its internal market provisions including the freedom of movement for workers. The Court has asserted that there is nothing in the Treaties to suggest that the task of defining the worker should be left entirely to Member States, as this competence would make it possible for Member States to "modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty", thereby meaning that the ability to unilaterally fix and modify this definition under national law would deprive the idea of worker under EU law of all effect and frustrate the realisation of the Treaty's objectives.[5] This creates a kind of legal paradox, whereby the principle of conferral dictates that Member States should retain this competence in certain areas, whilst the effectiveness of EU law requires a European definition in other areas, which inevitably overlap with one another.

In principle, there is not a uniform definition of worker under EU law. The Court of Justice has long claimed that "there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied".[6] However, this does not provide a clear answer as to what definition should be applied in a particular case. There is little indication in EU secondary law, as this uses the terms of worker or employee without providing any kind of autonomous definition for these.[7] Instead, the definition of employee under EU secondary law is usually linked to national law or defined using tautological terms such as "any persons employed by an employer".[8]

2.1 The Lawrie-Blum Criteria

Despite the Court's assertion that EU law required a uniform understanding of the worker, it was not until the mid-1980s that it was considered necessary to articulate the criteria fully.[9] In *Lawrie-Blum*, the Court laid down a three-prong test that would establish whether an individual would be considered as a worker for the purposes of EU free movement law. *Lawrie-Blum* concerned a British national that had finished a teaching degree in Freiburg in Germany, but was refused admission to a secondary school in order to undertake the required 'preparatory service' necessary to qualify as a public school teacher. Germany claimed that her

[4] C. O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 *CMLRev* 1107, p. 1115.
[5] Case C-75/63 *Unger* ECLI:EU:C:1964:19, p. 184-185.
[6] Case C-85/96 *Martinez Sala*, para. 31; Case C-256/01 *Allonby* ECLI:EU:C:2004:18, paras. 63; Case C-393/10 *O'Brien* ECLI:EU:C:2012:110, para. 30; see T. van Peijpe, 'EU Limits for the Personal Scope of Employment Law' (2012), p. 40.
[7] N. Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018), p. 198; C. O'Brien (n 3), p. 1115; see also Case 53/81 *Levin* ECLI:EU:C:1982:105, para. 9.
[8] See, for example, Article 3(a) Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work
[9] It is interesting that, despite the repeated claim that a uniform European definition was necessary, it was not until well into the period of de-standardisation of employment that the Court ever felt that it was necessary to explain this test fully.

status as a trainee teacher meant that she did not fall under the category of worker, and thus not entitled to the principle of equal treatment under [Article 45(2) TFEU].

In its decision, and after confirming once more that there must be a uniform, broadly interpreted, European definition of the worker,[10] the Court held that once three cumulative conditions were fulfilled, an individual would be classified as a worker under EU law. Concretely, it was stated that an individual that " … for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration" is considered as a worker under EU free movement law.[11] With this short sentence, the Court established a three-pronged test that has been applied in many cases in different areas of law to determine who is a worker under the provisions on the freedom of movement for worker, and later EU law in general.[12] The three-pronged test established by the Court means that the individual must (i) perform a 'genuine economic activity'; (ii) be subordinate to another individual whilst doing that; and (iii) receive remuneration for the activity they perform. Each of these conditions within the *Lawrie-Blum* test shall be discussed in turn.

2.2 Genuine Economic Activity

The Court has held that an individual must be engaged in a "genuine economic activity" in order to obtain worker status under EU law. This is "to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary".[13] This means that the activity performed by the individual must be sufficiently genuine in order to obtain the status of worker. In practice, this means that the activity in question must satisfy both a qualitative and quantitative element. First, the activity must constitute economic activity in a *qualitative* sense: i.e., is the activity being performed genuinely economic in nature? Second, it must be performed to sufficient extent *quantitatively* speaking, i.e., the activity is performed to the extent that it can be considered as 'genuine'. The following section will explain how the Court has developed these tenets of the *Lawrie-Blum* criteria.

2.2.1 Qualitative Genuine Economic Activity

The qualitative aspect of the genuine economic activity assessment considers whether the activity being performed is economic in nature. Any activity will pass this aspect of the test, as long as it is "capable of forming part of the normal labour market".[14] As might be predicted, this is a broad test that is easily fulfilled. Already in *Lawrie-Blum* the Court rejected the argument that all trainee teachers could be excluded from worker status due to the non-genuine nature of their activity. The fact that they were 'trainees' was irrelevant for the Court. The only important factor was that "the activity should be in the nature of work performed for remuneration, irrespective of the sphere in which it is carried out".[15] This suggests that the

[10] Ibid, para. 16. As the Court has previous stated in *Unger*; Case 53/81 *Levin* ECLI:EU:C:1982:105; and Case 316/85 *Lebon* EU:C:1987:302.
[11] *Lawrie-Blum*, para. 17.
[12] See, for example, T. van Peijpe (n 6); N. Kountouris (n 7).
[13] Case C-316/13 *Fenoll* ECLI:EU:C2015:200, para. 27; Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 93.
[14] Case C-456/02 *Trojani* ECLI:EU:C:2004:488, para. 15.
[15] *Lawrie-Blum*, para. 20.

Court applies a functional test, looking at the specific role of the person in question, rather than excluding entire sectors or institutions from the genuine economic activity aspect of the *Lawrie-Blum* criteria. This can be seen from *Steymann*, where the Court held that activities performed "by members of a community based on religion or another form of philosophy *as part of the commercial activities of that community*" (emphasis added) will be considered as effective employment, presuming the other conditions are fulfilled.[16] Therefore, even if the place of employment in non-economic, so long as the activities the individual performs are economic then this aspect will be fulfilled.

Despite this broad interpretation, the Court has found that certain types of activity do not satisfy the requirement. If the activity "constitutes merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the paid employment" then it will not be considered as economic in nature.[17] In other words, if the individual in question is "unable to take up employment under normal conditions" then any activity they perform is unlikely to be considered as genuinely economic by the Court.[18] The sheltered employment of disabled and vulnerable persons risks not being covered by the concept, which incidentally is one of the most precarious forms of employment. In *Bettray*, the Court held that a Dutch employment programme designed for the purpose of "…maintaining, restoring or improving the capacity for work of persons who, for an indefinite period, are unable, by reason of circumstances related to their situation … to work under normal conditions" did not meet the requirement of being economic in nature.[19] Again in *Trojani*, the Court held that the referring court would have to determine whether Mr Trojani's reintegration placement at the Salvation Army was "capable of forming part to the normal job market", or whether it was simply a form of rehabilitation that would not be recognised under the *Lawrie-Blum* criteria.[20] This case-law, and the *Bettray* case in particular, came under criticism for creating "considerable uncertainty" over the status of sheltered workers and potentially excluding them from EU-based protections, which arguably undermines the protection of disabled workers contained in the 1961 and 1989 Charters, the actual Charter, and the Social Pillar.[21]

Perhaps in response to these criticisms, the Court has shifted towards a more inclusionary notion of qualitative genuine activity for sheltered workers. In *Fenoll*,[22] it held that despite disabled people often having a *sui generis* status under national employment law, this "can in no way whatsoever affect whether or not the person is a worker" under EU law.[23] The Court then applied a broader test than *Bettray*, looking to see whether those working in the re-integration centre were performing duties of "some economic benefit" in return for remuneration.[24] The Court sought to distinguish the situation of *Fenoll* from *Bettray* by

[16] Case 196/87 *Steymann* ECLI:EU:C:1988:475.
[17] Case 344/87 *Bettray* ECLI:EU:C:1989:226, para. 17.
[18] Ibid, para. 18.
[19] *Bettray*, paras. 4 - 5
[20] *Trojani*, para. 24.
[21] See Article 15 European Social Charter (1061); Article 26 Community Charter of the fundamental Social Rights of Workers (1989); Articles 21 and 26 Charter of Fundamental Rights (2012); Article 17 European Pillar of Social Rights (2018). See C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017), p. 98.
[22] Case C-316/13 *Fenoll* ECLI:EU:C:2015:200.
[23] Ibid, paras. 30 – 31; see also Case C-116/06 *Kiiski* ECLI:EU:C:2007:536, para. 26.
[24] Ibid, paras. 32 – 33.

suggesting that the activities in *Bettray* were "simply a method of re-educating and rehabilitating the persons carrying them out", and thus could not be real and genuine.[25] By contrast, the activities performed in *Fenoll* had "a certain economic value", a point which was "all the more true", as the activities gave value to the productivity of severely disabled persons.[26] In doing so, the Court gave strong indications that Mr Fenoll's activities could be regarded as forming part of the normal labour market.[27]

The Court's logic in distinguishing between the two cases is unconvincing. If the broader, more inclusive approach in *Fenoll* were to be applied in *Bettray* then this would clearly result in Mr Bettray's classification as a worker.[28] Mr Bettray's activity was considered to be around "one-third of the level of productivity of a normal worker", which would surely meet the requirement of having "some economic benefit" as suggested in *Fenoll*.[29] Despite the questionable reasoning used to get there, the Court's case-law suggests that it is moving away from a predominantly market-based and/or charitable approach, to one that is more inclusive of people working outside the open labour market.[30] It is possible that Court is making a normative judgement over what types of sheltered workers should be protected and which should not, with the stricter approach applied in *Bettray* being reserved for 'less deserving' workers, such as those dealing with drug addiction.[31]

A final situation where the qualitative nature of the activity is relevant is the situation where students are in employment before or alongside their university studies. For example, in *Brown* the Court found that eight months of pre-university industrial training with a view to undertaking a related university course in the same area would render the activity genuine in nature, even if the individual was only employed because he had already been accepted for admission to university.[32] However, the Court has also found that employment that is "merely ancillary" to the individual's university studies will be excluded from the scope of the law.[33] As such, if the employment is incidental to the pursuit of the studies (for example, an internship required as part of a degree course), then this will not be classified as genuine employment.

In conclusion, the Court applies a broad qualitive test, which will consider any activity that has "some economic benefit" to meet this test. Assuming this is the case, then it should not matter that the activity in question is performed as part of a rehabilitative scheme, or is part of a vocational training scheme, so long as that role could potentially be performed by someone working in normal market conditions.

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[25] Ibid, para. 38; *Bettray*, para. 17.
[26] Ibid, para. 40; see also Opinion of Advocate General Mengozzi in Case C-316/13 *Fenoll* ECLI:EU:C:2014:1753, para. 42.
[27] Ibid, para. 42.
[28] M. Bell, 'Disability, rehabilitation and the status of worker in EU Law: *Fenoll*' (2016) 53(1) *CMLRev* 197, p. 204.
[29] *Ibid*; see Opinion of Advocate General Jacobs in Case C-344/87 *Bettray* ECLI:C:1989:113, para. 16.
[30] Ibid, p. 203 - 204.
[31] C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017), p. 98.
[32] Case 197/86 *Brown* ECLI:EU:C:1988:323, para. 23.
[33] Ibid, para. 27.

2.2.2 *Quantitative Genuine Economic Activity*

The second part of the genuine economic activity requirement is that the activity in question must be performed to the extent that it can be considered 'genuine'. This means that activities which are performed on a small or limited scale will be "regarded as purely marginal and ancillary".[34] Distinguishing between genuine and marginal activity is the most contentious and contested aspect of the *Lawrie-Blum* criteria. Again, the Court applies a broad understanding of the term. Even in *Lawrie-Blum*, the Court was quick to point out that it was irrelevant that Ms Lawrie-Blum worked "only a few hours a week" and was paid "remuneration below the starting salary of a qualified teacher".[35] These factors did not render her employment marginal and ancillary.[36]

In subsequent case-law, the Court has continued to apply a broad notion of genuine activity. For example, in *Levin*, the Dutch authorities rejected a residence permit application from a British national that not been in full-time employment for over a year, as was required to obtain the status of worker under Dutch law, as her part-time job did not provide "sufficient means" for her support, which needed to be at least the level of the Dutch minimum wage.[37] The Netherlands claimed that only persons engaging in an activity which was "full and complete in both the social and economic spheres and which enables the worker at least to provide himself with means of support" should be able to obtain the status of worker.[38] The Court firmly rejected this argument, stating that the rules on the freedom of movement for workers "also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration".[39] As such, part-time work could not be excluded *per se*, and a case-by-case assessment needed to consider whether activities were performed "on such a small scale as to be regarded as purely marginal and ancillary".[40] The Dutch approach would have excluded many low-paid and short-term workers from obtaining social protection, and as such the Court's inclusion of part-time work is beneficial for non-standard and more casual workers. As noted by the Advocate General, whilst if only few hours are worked it may be difficult to establish that the work in question is genuine, a low income cannot justify a limitation being imposed under the freedom of movement for workers.[41] This means that the worker's financial contribution to the state is irrelevant for this classification, with the only important factor being whether the individual is genuinely engaged (or as shall be seen, genuinely trying to engage) in normal labour market activities.

It also does not matter if the remuneration is so low as to result in the worker being entitled to social assistance in the host-state. *Kempf* concerned a German piano teacher providing 12 lessons a week for around a year, who was denied a residence permit by the Dutch authorities

[34] Ibid, para. 17.
[35] *Lawrie-Blum*, para. 14.
[36] Ibid, para. 21.
[37] *Levin*, p. 1039
[38] Ibid, p. 1040
[39] Ibid, para. 16
[40] Ibid, para. 17
[41] Opinion of Advocate General Gordon Slynn in Case 53/81 *Levin* ECLI:EU:C:1982:10, p. 1061

"because he had had recourse to public funds … and was therefore manifestly unable to meet his needs out of the income received from his employment".[42] The Dutch Government claimed that work "providing an income below the minimum means of subsistence" should not be considered to be genuine and effective if the individual also claims "social assistance drawn from public funds".[43] They also argued that the limited amount of work performed meant that it does not constitute the "immediate means" for improving his living conditions, but is rather "merely one of the means by which he obtains the guaranteed minimum means of subsistence". Again, the Court rejected all of the Dutch arguments. First, the national court had already determined that Mr Kempf's work "was not on such a small scale as to be purely a marginal and ancillary activity".[44] The Court then underlined the fact that it is irrelevant that a part-time worker may derive supplementary means of subsistence from other means: e.g. through property, from a family member (as was the situation in *Levin*), or indeed they are obtained from financial assistance drawn from the public funds, as was the case in *Kempf*.[45]

The short-term, on-demand, or casual nature of the employment will also not automatically render it marginal and ancillary. In *Raulin*, a French national worked for 8 months as a waitress in (again) the Netherlands on an 'on-call' contract. After five months' employment she began a course in visual arts at an Art College in Amsterdam, but was denied a study grant as the Dutch authorities considered that she was not eligible for a residence permit.[46] The Court conceded that the "irregular nature and limited duration of the services actually performed", as well as the fact that "the person concerned worked only a very limited number of hours" may indicate that the activities are purely marginal and ancillary, and that the national court should consider whether the worker is required to remain available to work by the employer.[47] That being said, if Ms Raulin left her employment voluntarily in order to take education in a field unrelated to that of their previous occupation, she would not retain the status of worker, regardless of the nature of their initial employment.[48]

To date, the Court has continued to apply a generous undertaking of genuine economic activity. It has held that employment not exceeding 18 hours a week will not necessarily be classified as marginal and ancillary.[49] In *Rinner-Kühn* the Court held that employment of "not more than 10 hours a week or 45 hours a month" would not necessarily be marginal and ancillary.[50] In *Megner and Scheffel* the Court held that, in the context of Directive 79/7/EEC, that the German authorities could not exclude the individual from being considered as part of the working population because the "small earnings" as their earnings were "not sufficient to satisfy their needs".[51] Advocate General Geelhoed, in his Opinion in *Ninni-Orasche*, claimed that even part-time activity "whereby normally no more than even 10 hours a week are worked" would not render it marginal and ancillary.[52] The Court has even suggested that

[42] Case C-139/85 *Kempf* ECLI:EU:C:1986:223, para. 4
[43] Ibid, para. 7.
[44] Ibid, para. 12.
[45] Ibid, para. 14.
[46] Case C-357/89 *Raulin* ECLI:EU:C:1992:87, para. 3 - 4
[47] Ibid, para. 14.
[48] Ibid, para. 21 – 22.
[49] Case C-102/88 *Ruzius-Wilbrink* ECLI:EU:C:1989:639, paras. 7, 17.
[50] Case 171/88 *Rinner-Kühn* ECLI:EU:C:1989:328 Para. 11.
[51] Case C-444/93 *Megner and Scheffel* ECLI:EU:C:1995:442, paras. 17-18.
[52] Opinion of Advocate General Geelhoed Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:117, para. 30.

employment of around five hours a week is not enough in itself to render the employment ancillary and marginal.[53] This suggests that, at least from the perspective of the Court of Justice, almost any economic activity will meet this test, even if the individual works very few hours. However, there is a hint as to the ultimate limit of genuine economic activity contained in recently adopted legislation. Directive 2019/1152 on transparent and predictable working conditions in the European Union sets a threshold on hours worked before it is applicable. The original Commission proposal suggested that employment "equal to or less than 8 hours in total in a reference period of one month" would be excluded from its scope.[54] However, the final version of the Directive shortens this reference period to 3 weeks, and extends the threshold to "equal to or less than 3 hours" per week (i.e. around 12 hours per month).[55] Even this extended threshold sets a very low bar to be met in order for the Directive to apply, which goes at least as far and quite possibly beyond the *acquis* of the Court.

Despite its traditional focus on quantitative factors, in recent years the Court has begun to place more emphasis on the contractual relationship between worker and employer and the existence of certain employment-based rights and obligations, rather than simply the number of hours performed, or the remuneration received. In a number of recent decisions, it has been stated that "independently of the limited amount of the remuneration for and the number of hours of the activity in question, 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".[56] Concretely, this includes factors such as the right to paid leave, sick pay, and collectively agreed rates of pay.[57] The shift towards more qualitative considerations is explained more in Chapter 6.

As stated by Advocate General Ruiz-Jarabo Colomer, the Court's *acquis* shows that "effective and genuine activities can vary widely" and that "only exceptionally has an activity been held to be 'purely marginal and ancillary'".[58] Excluding low-wage and casual workers would result in them having less protection than other workers, which would commodify their labour and distort the labour market.[59] Therefore, in terms of the protection of non-standard workers, the Court's broad approach must be welcomed. However, despite the extensive case-law in the area, it is still not clear what level of remuneration or hours worked will render employment marginal and ancillary. This is mainly due to the fact that the Court will very rarely actually indicate whether employment is marginal in specific terms, leaving this decision to the national courts. Only in extreme cases will the Court determine the status of the individual's employment. As example of where the Court has done this is *UX*, where it held that as a judge "handed down 478 judgments and made 1,326 orders and … conducted hearings twice per week", her services "did not appear" to be purely marginal and ancillary.[60] Moreover, it is not

[53] Case C-14/09 *Genc* ECLI:EU:C:2010:57, para. 27.
[54] Article 1(3) Proposal for a Directive on transparent and predictable working conditions in the European Union.
[55] Proposal for a Directive on transparent and predictable working conditions in the European Union (Analysis of the final compromise text with a view to agreement) (12th February 2019), p. 17.
[56] *Genc*, para. 26; see also Case C-432/14 *O v Bio Philippe Auguste* ECLI:EU:C:2015:643, para. 24; Case C-143/16 *Abercrombie & Fitch Italia v Antonio Bordonaro* ECLI:EU:C:2017:566, para. 20.
[57] Case C-14/09 *Genc* ECLI:EU:C:2010:57, para. 27.
[58] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:150 para. 24.
[59] J. Cremers, 'Non-standard employment relations or the erosion of workers' rights' (2010)
[60] Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 95.

clear what factors are the most important when making this assessment, especially the relevance of formal factors relating to the employment relationship.

2.3 Subordination

The second *Lawrie-Blum* criterion is that the individual performs an activity "under the direction of another person".[61] This essentially distinguishes between a contract *of* service: i.e. they work as a paid-employee under the direction and supervision of an employer, and a contract *for* services: i.e. they are a self-employed contractor working for other employers as their clients.[62] In short, is the individual a paid-employee working under the direction and supervision of a company, or are they self-employed and taking on this role themselves? The distinction between paid- and self- employment under EU law reflects the distinction in traditional labour relations, whereby self-employed persons are seen as being in an objectively different situation than paid-employees as they take on more risk and forfeit rights and protections in favour of a greater degree of control and the possibility of taking greater rewards by way of profits.

Generally speaking, the Court of Justice has adopted a broad notion of what it means to be subordinate to another legal or natural person. The concept covers not just traditional employer-employee relationships, but also more complicated relationships. For example, in *Danosa*,[63] the Court held that the applicant, the sole member of a board of directors of a company, could be in a relationship of subordination with the undertaking itself. The fact that Ms Danosa was the sole director was "not enough in itself to rule out the possibility that she was in a relationship of subordination to that company".[64] As such, being the CEO or director of a company does not necessary preclude the status of worker, as that principle is still likely to be subordinate to the shareholders of that company. This is obviously not the same as a situation where the individual owns their company (and thus the shares) and is therefore their own employer.

Furthermore, the Court has held that an individual can be in a relationship of subordination with the state. For example, it has held that a researcher preparing a doctoral thesis on the basis of a grant will also meet this condition (so long as they are paid), as will other forms of education and training that are funded by the state, even indirectly.[65] The Court has held that this will still be the case, even if the activity if "distinct from a normal employment relationship and intended to bring about only his future inclusion in the labour market in general".[66] For example, the Court has held that the President of a Port Authority could be in a relationship of subordination with a Government Minister that had powers of supervision and

[61] *Lawrie-Blum*, para. 17.
[62] F. Behling and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970, p. 977; J. Cremers, 'Non-standard employment relations or the erosion of workers' rights' (2010).
[63] Case C-232/09 *Dita Danosa* ECLI:EU:C:2010:674. This case concerned Directive 92/85/EEC, which uses the same definition of worker as Article 45 TFEU.
[64] Ibid, para. 47.
[65] Case C-94/07 *Ranccanelli* ECLI:EU:C:2008:425, para. 37; Case C-10/05 *Mattern and Cikotic* ECLI:EU:C:2006:220, para. 21.
[66] Case C-188/00 *Kurz* ECLI:EU:C:2002:694, para. 44.

management over the position, insofar as he had the power to remove him, approve certain decisions, etc.[67] In *Sindicatul Familia Constanta* the Court held that foster parents could be in a relationship of subordination with the state, thereby classifying them as workers for the purposes of the Working Time Directive.[68] According to the Court, the most important factor when considering the relationship between worker and employer is the "the existence of a hierarchical relationship", which has to be considered "in each particular case, on the basis of all the factors and characteristics characterising the relationship".[69] *In casu*, the Court found that the Member State authorities in question monitored the contract; could terminate or suspend it according to national employment rules; and ensured that a specialist was supervising their professional activity. As such, the foster parents were held to be in such a hierarchical relationship, which was "evidenced by permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract".[70] The Court has followed this approach more recently, suggesting that subordination "implies the existence of a hierarchical relationship between the worker and his or her employee" and that this should be assessed "on the basis of all the factors and circumstances characterising the relationship between the parties".[71] In *UX*, the Court held that judges must be protected from external intervention of pressures liable to undermine their independence, that this did not preclude them from being classified as workers under the *Lawrie-Blum* criteria.[72] Merely being subject to a disciplinary authority was insufficient in itself to create a legal relationship of subordination, however, an assessment of the judges' working time, including the fact that they are obliged to comply with rules that govern in a detailed manner the organisation of their work, as well as having to comply with instructions from the Head of Magistrates, meant that there was a relationship of subordination.[73]

In addition to defining who can be subordinate to whom, the Court has also been confronted with situations where it has to distinguish between paid and self-employment. In *Allonby*,[74] the Court first asserted that formal classifications of being self-employed under national law do not prevent the individual being classified as a worker under EU law, specifically if this independence "is merely notional, disguising employment relationship".[75] In making this assessment, the Court will assess the "extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that there is no obligation imposed on them to accept an assignment is of no consequence".[76] As such, the Court is willing to apply an autonomous notion of paid-employment and will not give a *carte blanche* to national legislators and administrators when determining who is a worker and who is self-employed, allowing them to undermine the EU-based definition of the worker.[77] The Court has continued to apply an independence-based test to determine whether individuals are engaged in paid- or self-employment. In *Iraklis Haralambidis*, the Court held that the position of President of a

[67] Case C-270/13 *Iraklis Haralambidis* ECLI:EU:C:2014:2185, para. 30 - 32.
[68] Case C-147/17 *Sindicatul Familia Constanţa* ECLI:EU:C:2018:926.
[69] Ibid, para 42; see also Case C-692/19 *Yodel Delivery* ECLI:EU:C:2020:288, para. 28.
[70] *Sindicatul Familia Constanţa*, para 45.
[71] *UX*, para. 103.
[72] Ibid, para. 104.
[73] Ibid, para. 107 – 110.
[74] Case C-256/01 *Allonby* ECLI:EU:C:2004:18.
[75] Ibid, para. 71; see N. Kountouris (n 7), p. 202.
[76] Ibid, para. 72.
[77] Ibid , para. 71.

Port Authority lacked the features that are "typically associated with the functions of an independent service provider", such as freedom in terms of the type of work performed, the manner in which they are completed, the choice of time and place of work, and the freedom to recruit staff or subcontract out work.[78] Similarly in *FNV*, the Court held that an individual will not be recognised as being self-employed if they he/she "does not determine independently his own conduct on the market, but is entirely dependent on the principal, because (s)he does not bear any financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking".[79]

The Court broad notion of subordination within the *Lawrie-Blum* criteria has a market-making rationale: it facilitates the freedom of movement of workers by defining more economically active individuals as paid-workers, whilst limiting distortions on the labour market by not allowing individuals to be falsely classified as self-employed, although it does result in a binary distinction between paid and self-employed workers, which itself can cause problems (as is discussed in more detail in Chapter 8).[80]

2.4 Remuneration

The final requirement under the *Lawrie-Blum* criteria is that he or she receives remuneration for the economic activities performed.[81] The Court has (again) interpreted this concept broadly. It has held that the level of remuneration received by the worker is not relevant for the purposes of determining whether remuneration has been received, as is the origin of the remuneration.[82] Furthermore, it can encompass many types of transfers from employer to employee that go beyond typical cash payments. Assuming the worker receives something for the labour they perform, then this will normally be considered as consideration for a service and thereby satisfy the requirement. For example, the Court has held that a separation allowance that is paid in addition to wages could fall under the concept of remuneration insofar as it "constitutes compensation for the inconveniences suffered by a worker who is separated from his home".[83] Importantly, allowances that are paid by the state can also fall under the definition of remuneration, both where they are paid directly by the State through an employment contract, and also when they are paid to workers more generally.[84] Furthermore, in *UX* the Court held that judges' 'honorary' status did not mean that the financial benefits they received through this system did not constitute remuneration under Article 45 TFEU.[85] As such, payments through certain allowances outside of a formal

[78] Case C-270/13 *Iraklis Haralambidis* ECLI:EU:C:2014:2185, para. 34.
[79] *FNV*, para. 33.
[80] E. Groshiede & B. ter Haar, 'Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13 KNV Kunsten Informatie', in M. Laga, S. Bellomo, N. Gundt, and J.M.M. Boto (eds) *Labour Law and Social Rights in Europe. The Jurisprudence of International Courts* (2018) Wydawnictwo Uniwersytetu Gdańskiego.
[81] *Lawrie-Blum*, para. 17.
[82] Case 53/81 *Levin* ECLI:EU:C:1982:105, para. 16; Case 344/87 *Bettray* ECLI:EU:C:1989:226, para. 16; and Case C-456/02 *Trojani* ECLI:EU:C:2004:488, para. 16; Case C-109/04 *Kranemann* ECLI:EU:C:2005:187, para. 17; Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 101.
[83] Case 152/73 *Sotgiu* ECLI:EU:C:1974:13, para. 8.
[84] Ibid, para. 8.
[85] *UX*, para. 100.

employment contract will constitute remuneration under the *Lawrie-Blum* test, even if the worker is not paid directly by their employer.[86] Furthermore, the Court has held that non-monetary forms of payment, such as lodgings and board,[87] or even payment-in-kind such as 'pocket money',[88] can also constitute remuneration under the *Lawrie-Blum* test.

The ultimate limit to the concept of remuneration is work "of economic value but is not performed in market conditions".[89] This means that unremunerated work such as volunteer work or irregular employment will be excluded.[90] Trainees will be considered as receiving remuneration if they are paid by their employer, or through state-backed schemes, however, unpaid trainees will not meet this condition.[91] An example of the exclusion of unremunerated persons from the scope of EU law can be seen from Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The Court has held that this Directive does not cover individuals performing unremunerated activities such as caring for a handicapped spouse, "regardless of the extent of that activity and the competence required to carry it out", however, the individual will retain the status of worker if they gave up a 'genuine' occupational activity to care for their spouse.[92] As such, EU law recognises 'genuine' remunerated work, but will not recognise 'non-genuine' unremunerated work.

The broad interpretation of the Court towards the concept of remuneration is a product of the market rationale behind the freedom of moment for workers, insofar as a narrower interpretation would break down fewer barriers to trade by excluding more migrant workers from legal protection. However, this requirement does mean that certain individuals are excluded from legal status, not because of the activity they perform, but due to the place and manner in which they do it. This is suggested to create distortions on the labour market and even the prospect of social exclusion of unremunerated workers.[93] It results in the situation where two people can perform exactly the same role, however, only the one receiving compensation will have legal protection. That said, extending protections to those engaged in any remunerated activity would risk placing significant pressures on delicately balanced welfare systems, which could result in undermining their legitimacy.

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[86] Case C-1/97 *Birden* ECLI:EU:C:1998:568, para. 28.
[87] Case 186/87 *Steymann* EU:C:1988:475.
[88] *Trojani*.
[89] C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016), p. 20.
[90] *Steymann*; see also C. O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 *CMLRev* 1107, p. 1115.
[91] Case C-1/97 *Birden* ECLI:EU:C:1998:568, para. 28; see also U. Oberg, 'Precarious Work and European Union Law' (2016) Grant VP/2014/0554, p. 33.
[92] Case C-77/95 *Züchner* ECLI:EU:C:1996:425, para. 16. See also C. O'Brien 'I trade, There I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643, p. 1662.
[93] See Section 6.7.

A summary of definition of the worker under the *Lawrie-Blum* criteria is produced below:

Summary of *Lawrie-Blum* Worker Definition Criteria			
Criterion		**Test**	**Includes/excludes**
Genuine Economic Activity	Quantitative	Is activity performed "on such a small scale as to be marginal and ancillary"?	- Includes part-time and short-term work (e.g. 4 – 8 hours a week, 2-week period of employment, etc.) - No examples of Court finding work to be marginal and ancillary? - Some legislation excludes those working less than 12 hours per month from scope of application.
	Qualitative	Is activity capable of forming part of "normal job market"?	- Functional not institutional (depends on individual's role, not status of institution - Excludes sheltered employment (without "certain economic value") - Excludes university placements.
Subordination		Does worker perform activity "under control of another person"?	- Broad interpretation: includes the Government, the state, shareholders, etc. - CJEU will distinguish between paid and self-employment (including bogus S/E) on basis of subordination criterion.
Remuneration		Does individual "receive payment for services performed"?	- Includes: Indirect payment (from state, etc) - Excludes: Domestic and care work (but, subsidised by state?) / Internships

3 The Reach of Lawrie Blum beyond the Freedom of Movement for Workers

The market/social divide means that the Union and Member States both claim the competence to determine who is a worker for the purposes of specific areas of law. Member States claim the competence to determine who is worker for the purposes of their own national systems of labour law, which is still a limited competence of the EU. However, there is a risk that EU-based social protections may be undermined if Member States had total discretion in making this classification, as they could undermine the effectiveness of EU law by arbitrarily classifying individuals as non-workers. The following section assesses the applicability of the *Lawrie-Blum* criteria outside of the freedom of movement for workers. It will explain the different approaches EU social law uses to determine who falls within its scope depending on the nature of the legislation in question, and what this means for the application of the *Lawrie-Blum* criteria in that particular area.

3.1 EU Definition: The Direct Application of Lawrie-Blum

The application of the *Lawrie-Blum* criteria to EU social law depends on the wording of the legislation in question. Where the legislation is silent on the definition of worker for the

purposes of its scope, the Court will use the *Lawrie-Blum* criteria directly. For example, the Court has held that as both the Working Time Directive and the General Health and Safety Framework Directive make no reference to national definitions of employees or workers, an EU-based definition using the *Lawrie-Blum* criteria should be applied.[94] In *Kiiski*, the Court held that in the context of Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, the "essential feature of an employment relationship" is that the person performs services under the direction of another person in return for remuneration.[95] By the time of the Court's decision in *Danosa*, it was suggested to be "settled case-law" that for the purposes of Working Time Directive that the *Lawrie-Blum* criteria should be used to determine who is a worker.[96] More recently, in the case of *Union Syndicale Solidaires Isère* which concerned the current Working Time Directive, the Court held that as the Directive makes no reference to the definition of worker, either as defined in national law or the Framework Health and Safety Directive 89/391, the concept must have an autonomous, EU-based definition, using the *Lawrie-Blum* criteria.[97] Therefore, it can be concluded that in all matters of health and safety, and importantly the rules on working time, are dependent on the individual meeting the *Lawrie-Blum* criteria.

EU Legislation relating to equal treatment is also absent on the definition of such terms. Directive 2000/78 makes reference to the concepts of 'worker' or 'employee' without including any definition within those Directives as to what these terms actually mean, whilst Directive 2000/43 makes no reference to these terms within the legislation itself. Instead, both Directives tend to concern potential discrimination between two persons already classified as workers under national law. However, where it has been necessary to make this determination, the Court has consistently applied the *Lawrie-Blum* criteria. In *Allonby*, the court held that whilst there was "no single definition" of worker under EU law, there needed to be a uniform definition (this time in the context of equal treatment between men and women), and that the *Lawrie-Blum* criteria should apply in this case.[98] This suggests that, at least in the area of equal treatment between men and women, the *Lawrie-Blum* worker definition applies directly.[99]

Finally, the Court will also apply the Lawrie-Blum criteria directly in the context of the Discrimination at Work Directive. In *Bio Philippe Auguste*,[100] which concerned age discrimination, the Court considered the limited nature of the applicant's activity, repeating its mantra that the limited nature of the employment activity does not automatically render it to be marginal.[101] The Court then held that, if the applicant could be considered as a worker by meeting the *Lawrie-Blum* criteria, then this would be differential treatment that needed to be justified.[102] This suggests that those *not* meeting the *Lawrie-Blum* criteria would not be

[94] Case C-428/09 *Union Syndicale Solidaires Isère* ECLI:EU:C:2010:612, para. 27 - 28.
[95] Case C-116/06 *Sari Kiiski* ECLI:EU:C:2007:536, para. 25. Directive 92/85 is the precursor to Directive 2003/88.
[96] Case C-232/09 *Dita Danosa* ECLI:EU:C:2010:674, para. 39.
[97] *Union Syndicale Solidaires Isère*, para. 27 - 28.
[98] *Allonby*, paras. 63, 66 - 67
[99] This can be assumed to be the case with Directive 2006/54, even without an explicit reference to the *Lawrie-Blum* criteria.
[100] Case C-432/14 *O v Bio Philippe Auguste* ECLI:EU:C:2015:643.
[101] Ibid, para. 23 - 24.
[102] Ibid, para. 28.

protected under the Directive. The Court used the same approach in *Antonino Bordonaro*,[103] which concerned a national rule allowing companies to dismiss on-call workers that reach the age of 25. The Court first sought to determine whether Mr Bordonaro could be classified as a worker using the *Lawrie-Blum* criteria. The Court applied a combination of the qualitative and quantitative aspects of the genuine economic activity test, saying that it is necessary to take into account not only the hours and remuneration of the work, but also the "right to paid leave, to the continued payment of wages in the event of sickness, to a contract of employment which is subject to the relevant collective agreement, to the payment of contributions and, as appropriate, the type of those contributions".[104] Using this formula, the Court stated in rather explicit terms that his work "cannot be regarded as being purely marginal and ancillary", meaning that he was a worker for the purposes of EU law.[105] These cases demonstrate the Court is willing to apply the *Lawrie-Blum* criteria to cases concerning equal treatment at work, and can be assumed to also apply in the context of the Race Equality Directive.

3.2 Member State Definition: The Indirect Application of Lawrie-Blum

The other situation in which the *Lawrie-Blum* criteria can apply is when EU legislation refers to national laws and practices in terms of its scope of application. This can be understood as the 'subsidiary' approach towards classifying who is a worker for a particular piece of legislation and suggests that the Court should (at least in theory) leave this power to Member States.[106] Indeed, in some cases the Court will defer almost entirely to national definitions. For example, the Court held the Transfer of Undertakings Directive may be relied upon "only by persons who are protected as employees under the law of the Member State concerned".[107] The unlimited discretion provided to Member States is justified in this situation given that, whilst workers do benefit from these instruments, the real object of such legislation is the undertaking going insolvent or whose ownership is changing.[108]

However, for other legislation that uses a subsidiary approach to defining the worker based on national laws and practices, if this is aimed at protecting workers then the Court is willing to apply the *Lawrie-Blum* criteria as a lower-limit below which Member States cannot go without undermining the effectiveness of the EU legislation. An example of how this works in practice can be seen from the Non-standard Work Directives. For example, Clause 2(1) of the Framework Agreement on part-time work states that it applies to workers "who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State". This suggests that the Court should defer to Member States in making this classification. However, the Court has been willing to enforce a

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[103] Case C-143/16 *Abercrombie & Fitch Italia v Antonino Bordonaro* ECLI:EU:C:2017:566.
[104] Ibid, para. 20.
[105] Ibid, para. 21 – 23.
[106] Using the terminology of S. Giubboni, 'Being a Worker in EU Law' (2018) 9(3) *European Labour Law Journal*. 2018 223-235.
[107] Case C-105/84 *Danmols Inventar* ECLI:EU:C:1985:331, para. 27; Case C-343/98 *Collino & Chiappero* ECLI:EU:C:2000:441, para. 36; See Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. Directive 77/187 has now been repalced by Directive 2001/23, however, the Court has maintained this principle: see Case C-108/10 *Scattolon* ECLI:EU:C:2011:542, para. 39.
[108] S. Giubboni (n 106), p. 231; N. Kountouris (n 7), p. 196

lower limit to this discretion, which seems to be based on the *Lawrie-Blum* criteria. In the case of *O'Brien*, which concerned a part-time judge in the UK that claimed entitlement to a retirement pension on a *pro rata* basis.[109] The Court started by confirming that the concept of part-time work under the Directive had to be interested in accordance with national law.[110] However, it went on to state that the discretion granted to Member States to define part-time work is not unlimited, and that it must not undermine the objectives sought by the Directive, thereby depriving it of its effectiveness or the general principles or EU law.[111] To grant Member States total discretion would allow them to "remove at will" certain categories of persons from the protection offered by the Directive.[112] The Court rejected the UK's argument that this approach would undermine national identity which is protected under Article 4(2) TEU.[113] The case demonstrates that even in cases where social legislation uses a subsidiary approach towards defining who is a worker, the Court is nevertheless willing to set a lower limit that Member States cannot go below when applying national definitions. However, the Court has not indicated in the context of the Part-time Work Directive what this lower limit should consist of, merely stating that it should be considered whether the relationship is "substantially different from an employment relationship between an employer and a worker", in particular the distinction between employees and self-employed persons,[114] and whether they are entitled to sick pay, maternity/paternity pay, and other benefits.[115] However, the Court did not apply the *Lawrie-Blum* criteria directly, as it has done in other situations.

The difference in the application of the *Lawrie-Blum* criteria can be seen from the case of *Wippel*.[116] The case concerned a female on-demand (part-time) worker, and therefore was considered on the basis of both the Part-time Work Directive (indirect application) and legislation on equal treatment between men and women (directly application). Advocate General Kokott considered that for the purposes of the Part-time Work Directive, the concept of worker was *not* a Community-law concept, meaning that Member States had 'wide discretionary powers' to define this term, and could only violate the duty of cooperation under what was then Article 10 EC if it defined this term so narrowly that it would deprive the Framework Agreement of "any validity in practice and achievement of its purpose", which she did not consider to be the case in this situation.[117] The case highlights an interesting difference: whilst the concept of part-time work was not intended to be harmonised at the European level,[118] in the area of equal treatment between men and women, as protected under Article 141 EC, as well as Directives 75/117 and 76/207 and the Community Charter of the Fundamental Social Rights of Workers, the Advocate General confirmed that this field of law *does* have "a Community concept and afforded a wide interpretation" that is based on the *Lawrie-Blum* criteria as developed in the context of the freedom of movement for workers.[119]

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[109] Case C-393/10 *O'Brien* EU:C:2012:110.
[110] Ibid, paras. 32 – 33.
[111] Ibid, paras. 34 – 35; see also Opinion of Advocate General Kokott in Case C-393/10 *O'Brien* ECLI:EU:C:2011:746, paras. 36 – 37.
[112] Ibid, paras. 36. The Court compared this situation directly to that of the Fixed-term Work Directive.
[113] Ibid, paras. 50.
[114] Ibid, paras. 43 - 44.
[115] Ibid, paras. 45.
[116] Case C-313/02 *Wippel* ECLI:EU:C:2004:607
[117] Opinion of Advocate General Kokott in Case C-313/02 *Wippel* ECLI:EU:C:2004:308, para. 44 - 45.
[118] *O'Brien*, para. 31-32.
[119] Opinion of Advocate General Kokott in *Wippel*, paras. 49 - 50.

Given the overlap between the two areas of law, this meant that the *Lawrie-Blum* criteria could apply to Ms. Wippel's work activity through the application of the equal treatment legislation, regardless of the application of the *Lawrie-Blum* criteria to the Part-time Work Directive.[120] The Court of Justice did not find it necessary to consider whether Ms Wippel was a worker or not, deferring this assessment to the referring court.[121]

The Court has been more willing to apply the *Lawrie-Blum* criteria indirectly in cases concerning other EU social legislation. Clause 2(1) of the Framework Agreement on Fixed-time Work states that it applies to workers "who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State". However, the Court has still been willing to apply the *Lawrie-Blum* criteria to ensure the effectiveness of this Directive. In *UX*, an Italian magistrate complained that she was not entitled to the 30 days' annual leave that ordinary judges were entitled to due to her holding an 'honorary' role, despite this position being indistinguishable from ordinary judges and the fact that since 2017 honorary magistrates had the right to paid annual leave.[122] The case concerned the application of the Working Time and Fixed-term Directives. In the context of the former, the Court applied the *Lawrie-Blum* criteria directly to find that the services performed by the magistrates did not "appear to be purely marginal and ancillary".[123] In the context of the latter, the Court held that whilst the Fixed-term Directive "leaves Member States free to define the terms 'employment contract' or 'employment relationship' used in that clause in accordance with national law and practice", this discretion "is nevertheless not unlimited".[124] Italy was therefore not permitted to arbitrarily exclude magistrates from this classification under national law as the effectiveness and uniform application of Directive 1999/70 would be undermined as a result.[125] In order to exclude this position from the scope of the Directive entirely, it would need to be the case that the nature of the employment relationship is substantially different from a normal employer-employee relationship.[126] The Court then held that the Directive should cover magistrates that "performs real and genuine services which are neither purely marginal nor ancillary, and for which he or she receives compensation representing remuneration",[127] a definition which would appear to be indistinguishable from *Lawrie-Blum*.

The Court has applied similar reasoning in the context of the Employment Agency Directive. Similar to the other Drectives, under Article 3(1)(a) it states that it covers "any person who, in the Member State concerned, is protected as a worker under national employment law".[128] Despite using the subsidiary approach to worker definition, however, the Court has again been willing to apply the *Lawrie-Blum* criteria in the context of agency work, this time even more readily than for the other Non-standard Work Directives. It has explicitly stated that "the essential feature of an employment relationship is that, for a certain period of time, a person

[120] Ibid, paras. 51 – 54.
[121] *Wippel*, paras. 51, 65 – 66.
[122] Case C-658/18 *UX* ECLI:EU:C:2020:572.
[123] Ibid, paras. 93- 95.
[124] Ibid, para. 117.
[125] Ibid, para. 118.
[126] Ibid, para. 123; see also *O'Brien*, para. 42.
[127] Ibid, para. 134.
[128] Case C-216/15 *Betriebsrat der Ruhrlandklinik* ECLI:EU:C:2016:883, para. 25.

performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard".[129] The definitions included under Article 3 which refer to national employment law, merely preserves the power of Member States to determine who is a worker under national legislation.[130] It does not grant a "waiver" of its power to determine the scope of the concept for the purposes of Directive 2008/104, and that "the EU legislature did not leave it to the Member States to define that concept unilaterally".[131] This means that "neither the legal characterisation under national law, of the relationship between the person in question and the temporary-work agency, nor the nature of their legal relationships, nor the form of that relationship, is decisive for the purposes of characterising that person as a worker within the meaning of Directive 2008/104".[132] The Court thus again uses an effectiveness argument to find that that there must be a lower limit when defining who is a worker which Member States cannot go below. In particular, the obligation under Article 2 to "ensure the protection of temporary agency workers and to improve the quality of temporary agency work" would be undermined if Member States were permitted "to exclude at their discretion certain categories of persons from the benefit of the protection intended by that Directive".[133] This meant a worker could not be denied that status under German law simply because she did not have a formal contract of employment with the temporary-work agency in question.[134]

A final mention will be made of the scope of application of the legislation deriving from the European Pillar of Social Rights, and in particular Directive 2019/1152 on transparent and predictable working conditions, which uses the subsidiary approach in determining its scope of application. The Commission's Proposal for this Directive included the *Lawrie-Blum* criteria explicitly in its definition section, which would have been the first time the *Lawrie-Blum* criteria was codified in secondary legislation. The Commission explained this inclusion as necessary, given that a non-uniform definitions of worker across Member State risks "excluding growing numbers of workers in non-standard forms of employment, such as domestic workers, on-demand workers, intermittent workers, voucher-based workers and platform workers".[135] As such, Article 3 of the Proposal stated that a worker would constitute any "natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration".[136] This was "based on the case law of the CJEU as developed since case *Lawrie-Blum*, as most recently recalled in C-216/15 *Ruhrlandklinik*", and meant that the Directive would apply to all workers "as long as they fulfil the criteria set out above".[137]

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[129] Ibid, para. 27.

[130] Ibid, para. 31; see also Opinion of Advocate General Saugmandsgaard Oe in Case C-216/15 *Betriebsrat der Ruhrlandklinik* ECLI:EU:C:2016:518, para. 29.

[131] Ibid, para. 32.

[132] Ibid, para. 35.

[133] Ibid, para. 36 - 37.

[134] Ibid, para. 29 - 30.

[135] Article 2, Proposal for a Directive on transparent and predictable working conditions in the European Union COM (2017) 797 final 2017/0355(COD).

[136] See Article 2(1)(a), Proposal for a Directive on transparent and predictable working conditions in the European Union COM(2017) 797 final COM(2017) 797 final, p. 25.

[137] Proposal for a Directive on transparent and predictable working conditions in the European Union COM(2017) 797 final COM(2017) 797 final, p. 11.

However, the *Lawrie-Blum* criteria was ultimately removed from the definitions section of the Directive by the Council.[138]

The definition of worker was "softened" by replacing the codified definition with a subsidiary clause.[139] The scope of application under Article 1(2) changed from "every worker in the Union" to "every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice".[140] The Directive does make reference to the case-law of the Court,[141] and the Recital explicitly mentions *Lawrie-Blum* as a benchmark to ensure that "provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive".[142] The Directive makes reference to the case-law of the Court of Justice, and the Recital explicitly mentions *Lawrie-Blum* as a benchmark, meaning that "provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive".[143] However, moving the *Lawrie-Blum* criteria to the non-binding preamble, rather than the definitions section, can be seen as at least a partial rejection by the Member States of a uniform, European definition of the worker based on the *Lawrie-Blum* criteria.

Finally, the recent Proposal for a Minimum Wage Directive uses the same language as included within Directive 2019/1152, insofar as it applies to "workers in the Union who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice of the European Union".[144] The above suggests that, despite the efforts of the Commission to include a codified version of the *Lawrie-Blum* criteria, legislation deriving from the Social Pillar will use the subsidiary approach to defining the worker, linking this with national law and practice. However, given that the main aim of this legislation is to protect workers, in particular non-standard workers, it is highly likely, if not inevitable, that the Court will use *Lawrie-Blum* as a de facto lower limit to stop Member States undermining the effectiveness of the Directives. This would likely be the case if a Member State sought to exclude certain kinds of non-standard workers from its scope, despite them meeting the *Lawrie-Blum* criteria.

Therefore, where EU legislation uses a subsidiary approach to classify who is worker based on national laws and practices, the Court will place a limit on the discretion afforded to Member states to ensure the effectiveness of the legislation in question. In the context of the

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[138] See B. Bednarowicz, 'Workers' rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?' (24th April 2019).

[139] Emanuele Menegatti, 'Taking EU labour law beyond the employment contract: The role played by the European Court of Justice' (2020) 11(1) *ELLJ* 26-47, p. 45.

[140] Article 1(2) Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, *OJ L 186/105 11.7.2019*.

[141] Ibid.

[142] See Recital 8,

[143] See Recital 8, Article 1(2) Directive (EU) 2019/1152 (n 140)

[144] Article 2, Proposal for a Directive on adequate minimum wages in the European Union COM(2020) 682 final, p. 23.

Fixed-term and Employment Agency Directives, the Court has applied the *Lawrie-Blum* criteria explicitly through this effectiveness argument. For the Part-time Work Directive, the Court has not been so explicit in its use of the *Lawrie-Blum* terminology. However, its reasoning is the same as cases concerning the Fixed-term Directive, and therefore it is logical to assume that the same principles apply given the similarities between the two Directives. The same reasoning will likely apply to legislation deriving from the Social Pillar, notably the Directive on Predictable and Transparent Working Conditions, despite the *Lawrie-Blum* criteria being removed from the main body of the Directive's text.

The application of the *Lawrie-Blum* criteria across EU law can be summarised as follows:

EU Social Law – Rights and Application		
Legislation	**Worker Definition**	**CJEU has applied *Lawrie-Blum*?**
Directive 1997/81/EC (The Part-time Work Directive)	**Subsidiary**	**No**
Directive 1999/70/EC (The Fixed-term Work Directive)	**Subsidiary**	**Yes (indirect application)**
Directive 2008/104/EC (The Employment Agency Directive)	**Subsidiary**	**Yes (indirect application)**
Directive 2003/88/EC (The Working Time Directive)	**Undefined**	**Yes (direct application)**
Directive 2000/78/EC (The Equality Treatment Directive)	**Undefined**	**Yes (direct application)**
Directive (EU) 2019/1152 Directive (EU) 2019/1158 (The 'Social Pillar' Legislation)	**Subsidiary**	**N/A (Legislation not in force)**
Regulation (EU) 492/2011 (The Workers Regulation)	**Undefined**	**Yes (direct application)**

3.3 A Uniform Definition of Worker Across EU Law?

The Court has consistently held that there is no single definition of the worker under EU law,[145] suggesting that the definition of worker under the freedom of movement for workers does not need to correspond to that under social security coordination or social law.[146] However, at the same time the Court has also repeatedly held that that there needs to be a uniform, EU-based definition, which seems to invariably be based on the *Lawrie-Blum* criteria.[147] Advocate General

[145] *Martinez Sala*, para. 31; *Allonby*, para. 63; Case C-543/03 *Dodl and Oberhollenzer* ECLI:EU:C:2005:364, para. 27.
[146] *Martinez Sala*, para. 31; M. Risak and T. Dullinger, 'The concept of 'worker' in EU law: Status quo and potential for change' *ETUI Report 140*, ETUI AISBL, Brussels, p. 17. To that effect, see also *Allonby*, paras. 62-64.
[147] *Allonby*, paras. 63, 66 - 67

Kokott has suggested that the definition of worker can vary between areas of law, with *Lawrie-Blum* being used as a benchmark for this definition.[148] This would suggest that at the very minimum, the same principles developed by the Court should be applied in the context of each legislative instrument. This was the approach used by the UK Supreme Court, which recently used the case-law on foster parents under the Working Time Directive to find that Uber drivers were in a hierarchical relationship (and thus an employment relationship) with the platform.[149]

It is claimed here that, regardless of the Court's assertion that there is no single uniform definition of worker under EU law, there is a *de facto* uniform definition based on the *Lawrie-Blum* criteria, that is applied in all areas of law, or at the very minimum free movement and social law. The Court has for the most part been consistent in this application, using the *Lawrie-Blum* criteria directly in cases where legislation is silent on the definition of worker, and indirectly where legislation makes reference to national laws and practices as a lower benchmark that protects the effectiveness of the legislation in question. The use of a uniform definition of worker on the basis of the *Lawrie-Blum* criteria should be welcomed, as it protects those at risk from being excluded under national regulations due to a non-uniform application at EU level. The use of the *Lawrie-Blum* criteria as the ultimate limit to national competences when determining who is worker ensures the effectiveness of EU legislation, as to do otherwise would it difficult, if not impossible, to realise the aims of the Directive, for example the setting of minimum standards or protecting vulnerable persons through equal treatment, if Member States could simply remove their obligations by excluding various workers under national law.[150] Furthermore, this approach protects native and EU workers alike from the risk of downward pressures on wages and social standards caused by divergent definition across Member States.[151]

4 LAWRIE-BLUM AS THE GATEWAY TO MARKET CITIZENSHIP

The final section of this chapter will use the concept of market citizenship to explain the system of legal protection available to EU migrant workers. It will explain how this system provides protection in general terms, before examining how this form of market citizenship functions and the difficulties in can create insofar as it results in an 'all-or-nothing' approach to citizenship which means that it is liable to exclude certain individuals that do not meet the requirements under the law.

4.1 Protection through Lawrie-Blum

The rights conferred under the freedom of movement for workers are the original rights derived through the *Lawrie-Blum* criteria and seek to facilitate the movement of workers by breaking down barriers to free movement, primarily by means of opening employment opportunities to nationals from other Member States and by ensuring that such workers are

[148] Opinion of Advocate General Kokott in *Wippel*, para. 50.
[149] *Uber BV and others v Aslam and others* [2021] UKSC 5, para. 72; see also *Sindicatul Familia Constanţa*, para 42.
[150] T. van Peijpe (n 6), p. 41.
[151] Ibid, p. 38 – 39.

treated equally *vis-à-vis* Member State nationals. This establishes a level playing field that provides migrant workers the same protections and opportunities as the native population. This level playing field does not just require the host-Member State to provide employment-based protections, but wider social protections that are necessary to ensure that migrant workers are not disadvantaged on the labour market, such as secure residence,[152] the coordination of social security systems to stop the migrant falling between gaps created by the cross-border application of social security rules,[153] and even any social benefit or advantage that is granted to workers or residents in that state.[154] This reasoning even stretches so far as to include "conditions of integration" of family members into the host state.[155] As the Court has explained, the free movement provisions could not be fully effective if a migrant worker were deterred from exercising their rights by obstacles to the entry and residence of their family.[156] Overall, this means that the migrant worker is entitled to "all advantages by means of which the migrant worker is able to improve his living and working conditions and promote his/her social advancement".[157]

The protections under EU free movement law function on a *lex loci laboris ab initio* principle. This means that once the individual meets the *Lawrie-Blum* criteria, they are subject to the legislation of the host-state (which includes both protections and obligations) from the first day of employment.[158] There are no requirements on the length or form of employment, assuming the *Lawrie-Blum* criteria are met. The Court has been commended for this protection, as through its "well-intentioned efforts" it has incorporated "social considerations into the definitional process" which has influenced the expansion of the worker category.[159] This expansive approach adheres to the Court's claims that workers are not merely a source of labour and should not be treated as a commodity.[160] It also the demonstrates the interconnectedness between market and social integration: migrant workers need strong social protections to survive and prosper when engaging in the labour market within a host-state. Therefore, whilst these social protections are incidental to the predominant aim of building and expanding a European labour market, they are nonetheless an inherent and inevitable part of the system.[161]

The *lex loci laboris* principle is suggested to be overly generous to migrant workers, which risks undermining the protections available to native workers. In this respect, certain benefits

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[152] Case C-363/89 *Roux* v *Belgian State* ECLI:EU:C:1991:41, para. 9; Case C-18/95 *Terhoeve* ECLI:EU:C:1999:22, para. 38; Case C-370/90 *Singh* ECLI:EU:C:1992:296, para. 17; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, para. 95.

[153] F. Pennings, 'Coordination of Social Security on the Basis of the State-of –Employment Principle: Time for an Alternative?' (2005) 42(1) *CMLRev* 67, p. 69; F. Pennings, 'Principles of EU coordination of social security', in F. Pennings & G. Vonk (eds.), *Research Handbook on European Social Security Law* (2015) Camberley: Elgar Publishing, p. 324; see also Case 24/75 *Teresa & Silvana Petroni* ECLI:EU:C:1975:129, para. 13.

[154] Case 207/78 *Criminal proceedings against Gilbert Even* ECLI:EU:C:1979:144, para. 22.

[155] Case 76/72 *Michel S* ECLI:EU:C:1973:46, para. 13.

[156] Case 59/85 *Reed* ECLI:EU:C:1986:157, para. 28; Case C-60/00 *Carpenter* ECLI:EU:C:2002:434, para. 39; see also E. Ellis, 'Social Advantages: A New Lease of Life' (2003) 40(3) *CMLRev* 639, p. 648.

[157] Ibid, p. 644

[158] F. Pennings (n 153), pp. 68-70.

[159] C. O'Brien, Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 *CMLRev* 1107, p. 1115.

[160] Opinion of Advocate General Trabucchi in Case 7/75 *F v Belgium* ECLI:EU:C:1975:75, p. 696 Opinion of Advocate General Jacobs in Case C-344/87 *Bettray* ECLI:EU:C:1989:113, p. 1677; C. O'Brien (n 92), p. 1677.

[161] E. Ellis (n 156), p. 652.

related to social solidarity, for example family benefits, should be limited to those who are part of the *community* (i.e., granted on the basis of residence rather than employment), which would better protect more generous social security systems like those in Scandinavia.[162] There has also been an attempt to implement a transitional period before individuals are entitled to full equal treatment. Under the 'New Settlement' agreed between the UK and European Council prior to the UK's 'Brexit' referendum, the UK would have been allowed to depart from the *lex loci laboris* principle by withholding social benefits for an initial period of time (including economically active migrants), until they were considered to have sufficiently integrated into the UK.[163] The UK's decision to leave the EU meant that the New Settlement ultimately never came into force, and as such, despite limited criticisms, the *lex loci laboris ab initio* has remained untouched to date.

The *Lawrie-Blum* criteria also provides the worker with the range of social rights and protections available under EU social law. This can be directly as the conditions laying down who is a worker of the purposes of certain legislation, or indirectly as a floor that will ensure the effectiveness of the legislation.[164] EU social law primarily protects workers by ensuring that there is equal treatment between the norm and a more vulnerable group of workers. For example, the Non-standard Work Directives ensure that part-time and fixed-term workers are not discriminated against on the basis of their employment situation through the application of *pro rata* and equal treatment principles.[165] They also provide indirect social protection to certain vulnerable workers such as women and young persons, who are overrepresented in non-standard forms of employment such as part-time and fixed-term work, and who may lose protection as a consequence. Other EU social law instruments provide protection to workers by setting a floor of social rights that are applicable to all Europeans engaged in employment and which Member States cannot undermine.[166] Examples include the Working Time Directive and the Directive on Transparent and Predictable Working Conditions. Such legislation is highly relevant for precarious workers, as being excluded from this floor of rights due to their employment situation is liable to add to their precarious situation. Finally, the Court has been willing to use certain provisions of the Charter to enforce the some of the minimum rights conferred in such legislation.[167]

EU social law functions as the mirror imagine of free movement law: whilst the latter has a market-*building* aim with incidental social protections, EU social law is predominantly based on a market-*correcting* logic, but with market building properties. Even the original social right

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[162] F. Pennings (n 153), p. 77 - 78; see also Christensen and Malstedt Lex Loci Laboris versus Lex loci domiclii – an inquiry into the normative foundations of European social security law (2000) ISSUE *European Journal of Social Security* 70, p. 78.

[163] European Council, Draft declaration of the European Commission on issues related to the abuse of the right of free movement of persons (2 February 2016) (OR.en) EUCO 8/16; for a comprehensive discussion of the New Settlement, see C. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *CMLRev* 937, pp. 966 – 973.

[164] T. van Peijpe (n 5), pp. 38 – 39.

[165] See Clause 4, and in particular Clause 4(2), on the Framework Agreements on Part-time and Fixed Term Work, as contained in the Annexes to Directives 97/81/EC and 1999/70/EC.

[166] M. Bell, 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37 *European Law Review* 31, p. 32-34.

[167] This applies only the case where secondary legislation does not provide protection. For further explanation, see Section 6.6.4 on the application of the Charter.

of equal pay between men and women is suggested to have been based on the strategic goal of furthering the inclusion of women in the workforce in order to improve competitiveness.[168] Furthermore, the Part-time Work Directive actively promotes the use of part-time employment as means of including more persons within the labour market, although it seeks to achieve this in a balanced and sustainable way.[169] This means that the protection that is available to EU migrant workers is dependent on a number of factors, rather than the traditional market-building/correcting dichotomy commonly used in the context of national labour law. Instead, the system of protection available at the European level is based on a complicated mix between market building and fixing aims, rather simply two groups of rules.[170] Certain legislation, such as the as the Working Time Directive, directly re-dresses the balance between capital and labour and mitigates against regulatory competition in terms of employment and social standards by focusing on the employment and social rights of workers over market integration.[171] However, for the most part, the economic basis behind EU social law means that it places economic growth and flexible employment practices at least at the same level as the social rights of workers, thereby limiting the level of protection that can be afforded under such laws.[172]

4.2 Market Citizenship with a Federalised Character

The fact that the *Lawrie-Blum* criteria covers both EU free movement and social law means that it acts as a gateway to obtaining the status of 'market citizen' under EU law. By meeting these criteria, the market citizen (or possibly more accurately, the 'worker citizen') gains access to almost the full range of rights and protections available under EU law. However, the term 'market citizen' remains ill-defined with incompatible meanings often attributed to it.[173] At the most basic level, citizenship can be understood as "a juridical condition which describes membership of, and participation in, a defined community or state, carrying with it a number of rights and duties which are, in themselves, an expression of the political and legal link between the state and individual".[174] It is therefore associated with entitlement to certain rights and protections, as well as being subject to certain duties. In the context of the nation-state, these rights and protections have been gradually developed over time, from civic, to political, to social rights.[175] In addition to providing certain rights, citizenship is suggested to have a

[168] S. Fredman 'Discrimination Law in the EU' (2000) *Legal Regulation of the Employment Relation*, p. 188; M. Bell (n 166), p. 32.
[169] Recital (5), Directive 97/81/EC concerning the Framework Agreement on part-time work
[170] M. Bell (n 166), p. 32; C. Barnard, *EU Employment Law* (4th Ed) (2012) OUP: Oxford, pp. 38-40.
[171] Ibid.
[172] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart, p. 94.
[173] M. van den Brink, 'The Problem with Market Citizenship and the Beauty of Free Movement', in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, pp. 246 – 247.
[174] S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (1996) Kluwer Law: The Hague, p. 13; see also N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(1) *CMLRev* 1597, p. 1601; S. O'Leary, *European Union Citizenship: Options for Reform* (1996) IPPR: London.
[175] T. H. Marshall, *Citizenship and Social Class* (1950), CUP: Cambridge.

normative role in determining how society should be constructed insofar as it dictates the principles that guide citizens in their rights and obligations.[176]

Using this definition, it is evident that even before the establishment of Union Citizenship, an "implicit state of a citizenship nature" could be widely traceable in Community legislation and case law.[177] The basic features of citizenship, as defined by the influential writings of T.H. Marshal, are met insofar as EU migrant workers are entitled to a range of core civic and social rights that are fundamental to the status of citizen.[178] The only real difference between this form of citizenship and that available at the national level is the connecting factor which grants the individual this status and rights, which is based on meeting the *Lawrie-Blum* criteria rather than possessing the nationality of a state.
This thesis does not use market citizenship as a normative tool to argue in favour of the EU moving beyond its foundations of economic activity and cross-border activity, and towards a genuine form of social citizenship that is comparable to those existing at the national level.[179] As is discussed in the following chapter, there is very limited possibility of removing the economic foundations of freedom movement law, at least in the short to medium-term.[180] The understanding of market citizenship used in this thesis is that only those participating in the market are the main beneficiaries of EU-based protections.[181] Whilst some limited protections do exist outside of this status, the enjoyment of socio-economic rights under EU law is overwhelmingly linked to the individual's status as a worker, performance of an economic activity, or dependency on a worker.[182]

Federal citizenship can be understood as a system whereby a citizen possesses membership of two political communities within the same state or polity.[183] Under federal citizenship, citizens are entitled to 'horizontal' state-level rights that are available when moving from one sub-polity to another, as well as 'vertical' federal rights that they derive from the overarching polity. Despite claims that there is only a 'tenuous' analogy between market and federal forms of citizenship,[184] the concept of market citizenship under the *Lawrie-Blum* criteria shares core features with this type of federal family.[185] The core right of market citizenship is to the ability to move to other states and undertake economic activities there under the same employment and social conditions as nationals of that host-state.[186] The ability to stay on the territory of host-province/state/country, and entitlement to receive social assistance whilst there, is

[176] M. Everson, 'The Legacy of the Market Citizen', in J. Shaw & G. More, *New Legal Dynamics of European Union* (1995) Clarendon: Oxford, p. 80.
[177] N. Nic Shuibhne (n 174), p. 1610.
[178] T. H. Marshall (n 175).
[179] N. Nic Shuibhne (n 174), p. 1597; see also M. van den Brink (n 173), pp. 247 - 248.
[180] M. van den Brink (n 173), p. 251.
[181] Ibid, p. 248.
[182] C. O'Brien (n 92), p. 1651; see also S. O'Leary, 'The Social Dimension of Union Citizenship', in A. Rosas & E. Antola (Eds), *A Citizens' Europe: In Search of a New Order* (1995) Sage: London, p. 162; D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208.
[183] M. van den Brink (n 173), p. 251.
[184] M. Everson (n 176), p. 77.
[185] M. van den Brink (n 173), p. 251.
[186] M. Everson (n 176), p. 96.

suggested to be a core aspect of any federal or confederal concept of citizenship.[187] A link can be made with Marshall, who considered that equality of treatment is the most fundamental of rights associated with citizenship status.[188] However, market citizenship under *Lawrie-Blum* confers both horizontal market access rights as well as vertical social rights, i.e., rights derived directly from the overarching federal polity of the European Union. These are obtained through meeting the *Lawrie-Blum* criteria, however unlike free movement rights, they are available to all citizens irrespective of their movement between states within the overarching federal polity. This combination of free movement and social rights protection through the *Lawrie-Blum* criteria means that European market citizenship is reminiscent of federal forms of citizenship, albeit one which is centred on employment rather than nationality.

The consequence of this all-encompassing system of market citizenship based on the *Lawrie-Blum* criteria is that it creates a binary inclusionary/exclusionary system. All forms of citizenship distinguish between insiders and outsiders, meaning that it inherently has an exclusionary character.[189] This the same with EU market citizenship, as the far-reach of the *Lawrie-Blum* criteria means that anyone not meeting it has fewer protections than 'insiders' that meet the criteria. This is obviously a problem for precarious workers, who are on the margins of economic activity and thus may be excluded from protection due to them not meeting the *Lawrie-Blum* criteria.

5 CONCLUSION

Whether an individual obtains the status of worker under EU law is based on the three-stage *Lawrie-Blum* criteria of (i) genuine economic activity, (ii) subordination, and (iii) remuneration. The Court has consistently applied a broad notion to each of these criteria whilst being careful not to encroach upon the national competence to determine who is a worker for the purposes of domestic legislation. Whilst the Court has claimed that the definition of worker varies across different areas of law, in practice it applies the *Lawrie-Blum* criteria in all areas concerning the rights of workers. Obtaining this status provides the workers with the full range of rights under EU law: both free movement rules that facilitate labour migration by ensuring a level playing field between migrant and native workers, as well as market fixing EU social law that seeks to ensure that (i) non-standard workers are not discriminated against in employment, or (ii) sets a minimum floor of social rights. In EU social law, the *Lawrie-Blum* criteria functions as either the explicit definition of the worker of the purposes of that legislation, or indirectly as a floor below which the Member state cannot go.

This means that the *Lawrie-Blum* criteria have become an all-encompassing gateway to gaining the rights and protections under EU law. As such, it can be understood as a form of 'market', or perhaps more accurately 'worker', citizenship which is reminiscent of federal forms of citizenship insofar as the *Lawrie-Blum* criteria provides the worker with horizontal free movement rights and vertical social rights. Whilst this is protective for workers who meet the

[187] A. Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) *32 European Law Review* 787, p. 813; *Ibid*, p. 251.
[188] T. H. Marshall (n 175).
[189] D. Kochenov, 'On Tiles and Pillars: EU citizenship as a Federal Denominator', in D. Kochenov (ed.) *Citizenship and Federalism: The Role of Rights* (2015) CUP: Cambridge.

application of the criteria, as it mitigates against their exploitation through not being classed as worker, it also has an exclusionary effect for precarious workers on the fringes of economic activity who may not meet the *Lawrie-Blum* criteria.

Chapter 5: Non-economic Free Movement & Union Citizenship

1 INTRODUCTION

The classification of an individual as a worker under the *Lawrie-Blum* criteria only partially explains the system of social protection available to precarious workers.[1] It does not explain the situation of those not meeting the *Lawrie-Blum* criteria, or the situation of migrants during periods of economic inactivity. Stronger social rights for non-workers would provide protection to precarious workers regardless of their status as workers, however, the division of competences between the EU and the Member States limits the Union's ability to provide social rights to non-workers. Member States are often highly sensitive to opening their national welfare systems for non-working migrants. This means that the extension of free movement law beyond economic activity has been difficult, haphazard, and still largely incomplete.

The following chapter will assess how Union Citizenship and non-economic free movement rights in general have affected the protection provided under the *Lawrie-Blum* criteria. It will first explain the development of non-economic free movement rights in the European Union, from the original 'Residency Directives',[2] through the establishment of Citizenship of the Union, and finally the amalgamation of the rights of workers and non-workers within Directive 2004/38 (the 'Citizenship Directive'), a unifying document for the rights and protections of all EU migrants.[3] It will then discuss how the Court interprets the rights of EU citizens under Directive 2004/38 in a strict manner that sticks to the wording of the Directive. It will further explain how the Citizenship Directive fails to establish a real form of social citizenship that is comparable to the nation state and would provide residual protection for migrant workers. Instead, there is a strictly conditional system based on an

[1] Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284. As is discussed in more detail in Chapter 4.
[2] Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence OJ L 180/26; Directive 90/365/EEC of the Council on the right of residence for employees and self-employed persons who have ceased their occupational activity OJ L 180/28; Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students OJ L (23 November 2016) 317/59.
[3] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

idea of earned citizenship. This sees time spent lawfully resident as the overriding factor when determining the status and rights of citizens. However, employment status is linked to this idea of time, meaning that economic activity still has a prioritised status within the legal system. The Chapter finally assess the impact that this development has had on the concept of market citizenship as explain in Chapter 4, specifically how the strict and conditional system created by the Directive is problematic for non-standard and precarious workers as it means that individuals will fall between the gaps created by this strict application of the law.

2 THE DEVELOPMENT OF NON-ECONOMIC RIGHTS: PRE-CITIZENSHIP

Under the EEC, there were very few protections for individuals that were not economically active through the internal market provisions.[4] However, during the 1980s the Union gradually sought to extend the protection provided under free movement law by encompassing more groups of persons. This extension of the protections afforded to market actors happened in two ways. The first is where free movement rights were extended through the internal market provisions to encompass more persons who were not engaged in employment *per se*, but who were protected under the market-building rationale of the internal market. The second are the Residency Directives, which began the process of granting residence and limited equal treatment rights to purely non-economic individuals, such as students and non-workers.

2.1 'Non-economic' Market Rights

Some individuals that do not meet the *Lawrie-Blum* criteria can nonetheless obtain certain protections under the freedom of movement for workers provisions. However, these are still based on economic activity, namely, the migrant's past or future economic activity in the host-state. Very early on the Court held that the worker provisions will continue to protect those previously possessing the status of worker, at least for a certain period of

[4] Prior to this, whilst certain economically inactive persons were entitled to certain rights (for example, family members of workers and self-employed migrants), these were derived rights conferred on the basis of the EU migrant's economic activity.

time.[5] Furthermore, the Court explicitly stated that the rights available to migrant workers "do not necessarily depend on the actual or continuing existence of an employment relationship",[6] and that workers will be considered as such under certain provisions of EU law.[7] This means that ex-workers are in a privileged position in contrast to first time jobseekers or economically inactive citizens.[8] This is because they are considered to have established a "sufficient link of integration" with the host-Member State, this link arising through the taxes they pay by virtue of their employment, thereby contributing to the financing of the social policies of that state.[9]

The Court has also held that the Treaty provisions allowed EU migrants "to look for … an occupation or activities as employed or self-employed persons".[10] Therefore, Member States cannot exclude the right to move freely and to stay in the territory of the other Member States to seek employment there.[11] To do otherwise "would jeopardise the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective".[12] However, the Court also held that Member States may implement a 'temporal limitation' on this residence, as this will provide the person with "a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment".[13] *In casu*, the Court considered that the British six-month residence limitation for jobseekers appeared to be reasonable.[14] This decision explicitly confirmed the right of jobseekers to remain in a host-Member State for the purpose of seeking work, and for as long as they are genuinely there for this purpose.[15] In terms of the equal treatment rights of jobseekers, the Court has held that those who move in search of employment qualify for equal treatment "only as regards access to employment".[16] This means that

[5] Case C-75/63 *Unger* ECLI:EU:C:1964:19, pp. 185 – 186.
[6] Case C-39/86 *Lair* ECLI:EU:C:1988:322, para. 31.
[7] Ibid, para. 33.
[8] S. Mantu, 'Analytical Note: Retention of EU worker status – Article 7(3)(b) of Directive 2004/38' (2013) *European Network on Free Movement of Workers*, p. 10.
[9] Case C-379/11 *Caves Krier Frères Sàrl* ECLI:EU:C:2012:798, para. 53.
[10] Case C-48/75 *Royer* ECLI:EU:C:1976:57, para. 31.
[11] Case C-292/89 *Antonissen* ECLI:EU:C:1991:80, para. 10.
[12] Ibid, para. 12.
[13] Ibid, para. 13 - 14.
[14] Ibid, para. 21.
[15] O. Golynker, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity' (2005) 30(1) *European Law Review* 111.
[16] Case 316/85 *Lebon* ECLI:EU:C:1987:302, para. 26.

wider social protections, such as the all-encompassing concept of 'social advantages' under Regulation 1612/68, did not extend as far as to include jobseekers.[17]

Finally, as well as ex-workers and jobseekers, the Court has held that the freedom of service provisions allow an individual to receive economic services whilst in another Member State without being subject to restrictions, which includes tourists, persons receiving medical treatment, and persons travelling for the purpose of education or business.[18] This is because protecting individuals from harm on the same basis as nationals and residents in the host-state "is a corollary of freedom of movement".[19] Whilst this protection retains a market-rationale, it "significantly loosened" the link between free movement rights and economic activity.[20] This protection is based on the market rationale of the internal market: i.e., that the facilitation of the freedom of movement for workers, or service provision, requires barriers to trade to be eliminated, primarily through ensuring equal treatment between Member State nationals and EU migrants.

2.2 The Residency Directives

The first real measures that extended residence and equal treatment rights to fully economically inactive persons were the three Residency Directives that established a base of residence for students, ex-workers, and self-sufficient persons.[21] Unlike the free movement provisions, these Directives had a clear social aim and contributed towards the formation of Union Citizenship. That said, they also had an economic aim, insofar as they were introduced to further harmonize residence rights in order to promote the free movement of persons, which was seen as necessary for the completion of the internal market.[22] Specifically, the Commission White Paper on the SEA emphasised the need to extend the measures ensuring the free movement of persons to

[17] Ibid, para. 26-27.
[18] Case C-286/82 *Luisi and Carbone* ECLI:EU:C:1984:35, para. 16.
[19] Case C-186/87 *Cowan* ECLI:EU:C:1989:47, para. 17.
[20] F. Wollenschläger, 'The Judiciary, the legislature and the evolution of Union Citizenship', in P. Syrpis (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012) CUP: Cambridge, p. 306.
[21] Directive 90/364/EEC; Directive 90/365/EEC; Directive 93/96/EEC (n 2).
[22] As can be seen in the recitals to the Directives.

those outside the workforce, especially students, in whose hands "the future of the Community's economy lies".[23]

During the negotiations of the Residency Directives, concerns were raised by higher-wage States over the consequences of extending the free movement provisions to all Union citizens, as their generous welfare systems could become a magnet for nationals from poorer Member States.[24] Concretely, it was considered that they needed to exclude risks for the social systems in the Member States as a result of immigration of persons who might become a burden on these,[25] in order to protect against 'social benefit tourism'.[26] Consequently, all three Directives contained a similar limitation to granting a right of residence under EU law, contained in Article 1 of each. Whilst formulated slightly differently,[27] the aim was to ensure that the individual had sufficient resources to avoid becoming a burden on the social security system of the host-Member State during their period of residence.[28]

Defining 'sufficient resources' was (and still is) a controversial point for the EU legislator and judiciary, and the term is yet to be clearly defined. The only indication in the original Residency Directives was that the condition would be fulfilled if the resources were "higher than the level of resources below which the host-Member State may grant social assistance to its nationals".[29] The Court defined the concept of sufficient resources broadly. National measures restricting residence have to proportionate to the aim of protecting the host-State's finances;[30] Member States are precluded from limiting the

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[23] European Commission, *Completing the Internal Market* (White Paper), (1985) COM (85) 310 final, p. 26.

[24] A. van der Mei, *Free Movement of Persons within the European Community* (2003), Oxford: Hart, p. 44.

[25] K. Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42(5) *Common Market Law Review* 1245, p. 1245.

[26] F. G. Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13(5) *European Law Journal* 591-610, p. 596.

[27] Ex-workers required a pension "providing sufficient resources", whilst students only needed to "assure" the national authorities by statement of their resources.

[28] See the Recital and Article 1 Directive 90/364 on the right of residence; Recital and Article 1 Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity; Recital and Article 1 Directive 90/366 on right of residence for students (amended by Directive 93/96).

[29] Article 1 Directive 90/364 on the right of residence.

[30] Opinion of Advocate General Ruiz in Case C-408/03 *Commission v Belgium* ECLI:EU:C:2005:638, para. 36 - 39.

migrants' means of proof which may be relied upon;[31] and a failure to provide documentation cannot automatically result in expulsion.[32] Most famously, the Court has stated that recourse to social assistance cannot result in the automatic expulsion of the Union Citizen,[33] and that even if individuals do not have sufficient resources as required under the Residency Directives, they can still be entitled to a right of residence if the burden they place on Member State finances is not unreasonable (as stated in the Directives).[34]

The sufficient resources condition can be seen as the ultimate limitation to the free movement of persons and a relic of its economic foundation. It demonstrates that, despite a shift towards protecting economically inactive persons, EU law will not confer a right of residence to someone that cannot support themselves financially, either through engaging in meaningful employment or through self-sufficiency. The condition represents a difficult balancing act the Court must perform between ensuring citizenship rights and facilitating free movement, whilst at the same time preserving welfare systems. By including economically inactive migrants within their 'scope of solidarity', the Member State in question is likely at some point to incur financial costs due to granting them that right. However, as Jacobs notes, after a certain period of lawful residence it becomes inappropriate to apply these conditions to individuals (even economically inactive ones) seeking to claim support from the host-state.[35]

3 CITIZENSHIP OF THE EUROPEAN UNION

The Residency Directives set the stage for the development of non-economic integration. However, the most important development in the protection of economically inactive persons came through the establishment of Citizenship of the Union in the Treaty of Maastricht. The following section will explain the concept of Union Citizenship, before explaining the main provisions in the Treaty and their interpretation by the Court of Justice.

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[31] Case C-424/98 *Commission v Italy* ECLI:EU:C:2006:192, para. 37.
[32] Case C-408/03 *Commission v Belgium* [2006] ECLI:EU:C:2006:192.
[33] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 43 - 44.
[34] C. O'Brien, *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart Publishing, p. 43.
[35] F. G. Jacobs (n 26), 596.

3.1 Citizenship of the European Union

Citizenship can be described as a legal concept that "describes membership of, and participation in, a defined community or state, carrying with it a number of rights and duties which are, in themselves, an expression of the political and legal link between the state and individual".[36] In other words, it is a legal status that permits the individual to access to the rights and protections that accompany the status of citizen. It presupposes a legal status of equals associated with political empowerment, the enjoyment of rights, and full membership of a political community.[37] However, it also determines which individuals do *not* enjoy membership and rights This means that it can be used as a tool of exclusion as well as inclusion, particularly in the context of Europe given the sensitivity and difficulty in conferring citizenship status and rights to Europeans akin to those that exist in nation-states.[38]

When explaining Union Citizenship, many commentators use start with T.H. Marshall, who outlined the progressive introduction of civil, political, and social rights since the industrial revolution, that replaced the previous divides of "class, function and family".[39] Whilst these rights are varied, it is suggested that Marshall's framework of rights is founded on two core concepts: equality and the right to justice.[40] However, there is no precedent to dictate what foundational rights must accompany the status citizen. Marshall himself conceded that there was no 'universal principle' determining which rights and duties citizenship should entail, but that these can shift and change over

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[36] S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (1996) Kluwer Law: The Hague, p. 13; see also N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(1) *CMLRev* 1597, p. 1601; S. O'Leary, *European Union Citizenship: Options for Reform* (1996) IPPR: London (see also Section 4.4.2 on market citizenship).

[37] D. Kochenov, 'On Tiles and Pillars: EU citizenship as a Federal Denominator', in D. Kochenov (ed.) *Citizenship and Federalism: The Role of Rights* (2015) CUP: Cambridge, p. 4.

[38] J. Shaw, 'The Interpretation of European Union Citizenship' (1998) 61(3) *Modern Law Review* 293, p. 305.

[39] Ibid, p. 297; T. H. Marshall, *Citizenship and Social Class* (1950), CUP: Cambridge, p. 151; D. Chalmers, *European Union Law* (2014) (3rd Ed), CUP: Cambridge, p. 469; C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (2010), OUP: Oxford, pp. 433 – 434; D. Bellamy, 'Evaluating Union Citizenship: Belonging, Rights, and Participation within the EU' (2009) 12(6) *Citizenship Studies* 597.

[40] E. Guild, *The legal elements of European identity* (2004) The Hague: Kluwer, p. 54.

time and space.[41] As it is not a nation-state, but rather a transnational trading block and incomplete democracy founded on the idea of economic integration, comparisons between Union and national citizenship are not always particularly useful. The rights and duties applicable to citizens are often defined by the political, historical, and social context of the state in question, and thus there is no reason for Union Citizenship to mirror that of the nation state in terms of the way it functions and its underlying principles.[42]

As the previous chapter explain, a market-based form of citizenship existed in the EU well before Union Citizenship. This provided many of the rights and protection associated with having the status of citizen of a community. The difference between the two forms of citizenship is that market-based citizenship is linked to economic activity, rather than political participation in a society. What Union Citizenship sought to contribute was an attempt to broaden the horizon of opportunities of individuals by empowering them with the help of rights not secured by reason of the economic status,[43] i.e., a form of European *social* citizenship, to complement the traditional market citizenship that already existed.

At the time of its establishment, Union Citizenship was not seen as a new constitutional settlement for the status and rights of economically inactive migrants, but rather as a "cynical exercise in public relations",[44] and a "pie in the sky" with very limited concrete role to play in European integration.[45] Its inclusion is suggested to be more the more the result of Spanish concerns about the cross-border policing of terrorism than about extending free movement rights.[46] This would explain the extremely limited provisions on Citizenship contained within the Maastricht Treaty.[47] Article 8 established

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[41] J. Manza, and M. Sauder, *Inequality and Society* (2009) New York: W.W. Norton & Co, pp. 149 – 150.

[42] N. Shuibhne, 'The Resilience of Market Citizenship' (2010) 47 *CMLRev* 1597, p. 1601.

[43] D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, p. 222.

[44] J. Weiler, 'Citizenship & Human Rights', in J.A. Winter, D.M. Curtin, A.E. Kellermann, and B. de Witte (eds.) *Reforming the Treaty on European Union* (1996) Kluwer: The Hague, p. 68.

[45] H.U. Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?', in A. Rosas and E. Antola (eds.) *A Citizens' Europe* (1995) Sage: London, p. 141; F. Wollenschläger (n 20), p. 302.

[46] C. Powell, 'Spanish Membership of the European Union Revisited' (2003), in S. Royo and P. Manuel (Eds), *Spain and Portugal in the European Union: The first fifteen years* , London: Frank Cass and Company, p. 126 – 127.

[47] See Article 8, Treaty on European Union (29.7.1992) *OJ C 191.*

Union Citizenship as being an addition to Member State nationality. Article 8a provided the right "to move and reside freely within the territory of the Member States", although this was "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". Other rights included the right to vote and stand in municipal elections in a host-Member State (Article 8b), the right to consular protection in third countries (Article 8c), and the right to apply to the European ombudsman (Article 8d). With such limited provisions contained in the Treaty, it fell upon the Court to interpret the precise scope of such rights, as will be explained in the following section.

3.2 The (expansive) early Citizenship case-law on

Despite the apparently limited scope of the Treaty provisions on Union Citizenship, there was much speculation over its precise nature and scope, as well as its direction and ultimate destination.[48] Its unknown nature was gradually resolved through a series of decisions in the 1990s and 2000s that emphasised the conditional nature of accessing social protections, whilst significantly extending the residence and equal treatment rights of economically inactive persons.[49] The seminal case of Union Citizenship is *Martínez Sala*,[50] where the Court held that a Spanish national residing lawfully in Germany for over 20 years could not be denied equal treatment with regard to accessing child benefit,[51] solely because her national residence permit had expired and she was yet to receive a replacement. The case was ground-breaking insofar as the Court linked EU citizenship with the Treaty right to non-discrimination, as unlike the four fundamental freedoms Union

[48] For example, see J. Shaw 'The Many Pasts and Futures of Citizenship in the EU' (1997) 22(6) *European Law Review* 22 (6), pp. 554–572; J. Weiler, 'European Neo-Constitutionalism: In search of Foundations for the European Constitutional Order' (1996) 44(3) *Political studies*, pp. 517–533; D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4(4) *Journal Political Philosophy* 337–358.

[49] H. Verschueren 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?' (2015) 52(2) *Common Market Law Review* 363, p. 364.

[50] Case C-85/96 *María Martínez Sala* ECLI:EU:C:1998:217.

[51] Defined as a family benefit under Article 1(u)(i) Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2–50; see also Court of Justice, judgment of 12 May 1998, *Martínez Sala*, para. 24.

Citizenship did not contain any Treaty-based equal treatment provision.[52] *Martinez-Sala* excited many commentators about the prospect of a far-reaching Union Citizenship that could extend the right to equal treatment far beyond the realms of economic activity and ensure legal status purely on the basis of factual residence,[53] as it suggested that mobile EU citizen were covered by the principle of equal treatment even when concerning full access to all social benefits in a host-Member State.[54]

In *Baumbast*,[55] the Court held that the UK's decision to reject a derived right of residence to Mr Baumbast's Colombian wife was disproportionate, even though he arguably failed to meet the conditions laid down in Directive 90/364 which was applicable to him as a non-worker. This required him to have health insurance to cover *all* risks, however, his insurance did not cover emergency treatment in the UK.[56] Despite this, the Court held that Mr Baumbast could rely upon [Article 21 TFEU] directly to enforce his residence rights and derived rights for his family.[57] *Baumbast* demonstrates the importance the Court placed on the primary law right to move and reside under (now) Article 21 TFEU. This was rhetorically, as the Court claimed that "Union citizenship is destined to be the fundamental status of nationals of the Member States",[58] and also substantively, as the Court made the conditions and limitations contained in secondary legislation subordinate to the primary law right of free movement, which could be relied upon directly notwithstanding the applicability of Directive 90/364.

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[52] Articles 8(2) EC (now Articles 20 & 21 TFEU) and Article 6 EC (now Article 18 TFEU) respectively.

[53] J. Shaw 'A View of the Citizenship Classics: Martinez Sala and Subsequent Cases on Citizenship of the Union', in Maduro and Azoulai (eds.) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) Oxford: Hart; see also C. Closa, 'The Concept of Citizenship in the Treaty of the European Union' (1992) 29(6) *Common Market Law Review* 1137–1169; C. Vincenzi 'European citizenship and free movement rights in the United Kingdom' (1995) *Public Law* 259–275; E. Meehan, 'Citizenship and the new European Community' (1993) 64(2) *Political Quarterly* 172–186.

[54] S. Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Cambridge: Intersentia, pp. 75 – 88, p. 82.

[55] Case C-413/99 *Baumbast* ECLI:EU:C:2002:493.

[56] Ibid, para. 89.

[57] C. Timmermans, 'Martinez Sala and Baumbast revisited', in Maduro and Azoulai (eds.) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) Oxford: Hart, p. 345–355.

[58] *Baumbast,* para. 82.

Zhu & Chen concerned a Chinese couple that had a child in Northern Ireland, which is formally part of the United Kingdom, however, under the Belfast Agreement, those born in the territory of Northern Ireland can choose to have Irish nationality instead of, or as well as, British nationality. Baby Chen's parents opted for her to have dual nationality, meaning she was technically an Irish national residing in the UK. The Court held that an Irish minor citizen was entitled to rely directly on [Article 21 TFEU], however, it also emphasised that under Directive 90/364 Member States could require that these persons have sickness insurance in respect of all risks and sufficient resources to avoid becoming a burden on the social assistance system of the host-Member State.[59] Despite the family situation not being covered by Directive 90/364 (which only provided a right to reside for dependant family members, not for carers of 'dependent' Union Citizens),[60] the Court held that the refusal of a residence right for a parent of a Union Citizen would "deprive the child's right of residence of any useful effect", meaning that the parent required a right to reside for an indefinite period, although the state can impose the same conditions as required for the Union Citizen.[61] *Zhu & Chen* confirmed that Union Citizenship as an "independent source of rights" not reliant on other provisions of law to give it further effect.[62] Moreover, it is another example of the Court reading beyond the wording of the Directive in order to provide protection to certain individuals.

Trojani concerned a homeless French national who was living and working at a Belgian Salvation Army centre in return for 'pocket money', food, and shelter. His application for the Belgian minimex social assistance benefit was denied as Belgium considered that he did not have sufficient resources as required under Directive 90/364. The Court conceded that Mr Trojani claimed the minimax precisely due to his lack of financial resources, which was an explicit requirement for a right of residence under Directive 90/364.[63] The Court also conceded that, unlike *Baumbast*, denying a right of residence would not go beyond what was necessary to pursue the objective of protecting the

[59] Case C-200/02 *Zhu & Chen* ECLI:EU:C:2004:639, para. 26 - 27.
[60] *Zhu & Chen*, para. 42 - 44.
[61] Ibid, para. 45 – 47: the Union Citizen "is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State".
[62] F. G. Jacobs (n 26), p. 606
[63] Case C-456/02 *Trojani* ECLI:EU:C:2004:488, paras. 33 – 35.

Member State's social assistance system.[64] However, the Court then held that Mr Trojani was not necessarily prohibited from relying on the right to equal treatment under [Article 18 TFEU]. It outlined three situations where an application for social assistance must be granted.[65] The first two were if they (i) were engaged in genuine economic activity, or (ii) have resided in the host-state for a "period of time" (*à la* Martínez Sala). *Trojani* added a third situation: if a Member State granted a residence permit to the individual based on national law, any decision not to grant social benefits or recognise this residence could violate the principle of non-discrimination under Article 12 EC, regardless of the individual's status under Directive 90/364. The Member State would still be permitted to remove the individual if they no longer fulfilled the necessary conditions for a right to reside, however, this could not be the automatic result of a claim for social assistance.[66] *Trojani* pushed the scope of Union Citizenship to its limit: regardless of their status under EU primary or secondary legislation, if the individual was in possession of a *national* residence permit, this by itself could be used for an *EU* right to equal treatment, which could only be denied if the Member State actively rescinded their residence permit.[67]

The Court applied a similar broad approach in the case of students. In *Grzelczyk*, Belgium denied a claim for minimum subsistence payments for a French student in the final year of his studies. This was arguably in line with Directive 93/96, as Article 1 stated that students must assure national authorities that they were in possession of sufficient resources to avoid becoming a burden on the host-state's social assistance system during their studies, and Article 4 stated that they would have a right of residence as long as these conditions were met. A simple reading of this provision suggested that students who no longer fulfilled such conditions were not entitled to rely upon the Directive. However, the Court held that denying a right of residence could never be the 'automatic consequence' of a request of social assistance.[68] Moreover, the Member State must demonstrate "a degree of financial solidarity" with the migrant student, assuming the difficulties are temporary and the individual does not become an "unreasonable" burden on the host

[64] Ibid, para. 36.
[65] Ibid, paras. 41 – 44.
[66] Ibid, para. 45.
[67] N. Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) *CMLRev* 889, p. 930 – 931.
[68] *Grzelczyk*, para. 43.

state.[69] The Court's reasoning introduced a subtle distinction between 'reasonable' burdens, which should be permitted, and burdens so 'unreasonable' that they break this bond of financial solidarity between host-state and migrant student.[70]

The Court also used the introduction of Union Citizenship to extend the scope of free movement provisions, as established earlier in its case-law. For example, in *Bidar*, the Court used Union Citizenship to find that the legal situation had changed since earlier cases, reversing those decisions, and holding that the principle of non-discrimination under [Article 18 TFEU] was also applicable in the case of maintenance grants for students.[71] However, Member States could still require a 'genuine link' between applicant and host-state, which could be expressed through a 'sufficient level' of integration, thereby permitting an economically inactive student to access student grants. The Court held that the UK rule, which required three years' residence to establish such a link, was in principle permitted.[72] However, as it made it impossible for nationals of other Member States to demonstrate 'integration' in any way other than three years' residence, the Court found that it was too restrictive.[73] As Mr Bidar had undergone a significant portion of his secondary education in the UK, this was sufficient to establish a 'genuine link' with the host society.[74]

The Court used a similar approach in the context of jobseekers. In *Collins*, it held that a 'genuine link' between the jobseeker and the employment market could be established through a 'reasonable period' of residence within which the candidate 'genuinely' sought work.[75] Furthermore, it held that the introduction of Union Citizenship added to the protection of jobseekers, and meant that Member States must grant social benefits "intended to facilitate access to employment in the labour market".[76] That said, Union Citizenship did not alter the case-law of the Court on service recipients, as cases such as

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[69] Ibid, para. 44.
[70] D. Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13(5) *European Law Journal* 623–646; C. O'Brien (n 31), p. 43.
[71] Case C-209/03 *Bidar* ECLI:EU:C:2005:169, paras. 39 – 39; *Lair*; Case C-197/86 *Brown* ECLI:EU:C:1988:323; see F. G. Jacobs (n 26), p. 603.
[72] *Bidar*, para. 52.
[73] Ibid, para. 61.
[74] Ibid, paras. 60 – 62.
[75] Case C-138/02 *Collins* ECLI:EU:C:2004:172, para. 69.
[76] Ibid, para. 63; see also Case C-258/04 *Ioannidis* ECLI:EU:C:2005:559, para. 22.

Bickel & Franz (which took place after its introduction),[77] were decided on the basis of them being recipients of services, meaning that it was unnecessary to consider them on the basis of Union Citizenship,[78]

The main examples of the Court applying the limitations and conditions contained in the Directives were at the expense of the Member States. For example, in *Commission v Netherlands*, the Court held that [Article 21 TFEU] provided a directly effective right to free movement, which could only be subject to limitations contained in the Residency Directives.[79] The Dutch rule, which required proof of sufficient resources for a period of one year, regardless of the actual length of stay was held to be "manifestly disproportionate" to the objective of protecting the Member State from unreasonable burdens.[80] The Court also held that a Belgian rule which meant that a failure to produce supporting documents necessary for a residence permit led to automatic order for deportation "impairs the very substance of the right of residence directly conferred by Community law", and as such was disproportionate restriction on Union Citizenship and Directive.[81]

These early cases significantly expanded the rights available to economically inactive persons, even if this nexus of rights was not as far-reaching as those available to workers.[82] The Court linked Union Citizenship and national residence with equal treatment under Article 18 TFEU; expanded the scope of equal treatment under EU law to include social benefits such as unemployment benefit for jobseekers and student maintenance grants;[83] established a right of residence directly under [Article 21 TFEU]; and dictated that any restriction based on secondary law had to be assessed in view of its proportionality.[84] This meant that the individual circumstances of the

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[77] Case C-274/96 *Bickel & Franz* ECLI:EU:C:1998:563.

[78] F. G. Jacobs (n 26), p. 594.

[79] Case C-398/06 *Commission v Netherlands* ECLI:EU:C:2008:214, paras. 27.

[80] Ibid, paras. 28 - 29.

[81] Case C-408/03 *Commission v Belgium*, paras. 67 - 68.

[82] This was the case even after the adoption of the 'Residency Directives': Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.7.1990, p. 26–27; Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257, 19.10.1968, p. 13–16; Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993, p. 59–60; See D. Kostakopoulou 'Nested "Old" and "New" Citizenships in the European Union' (1999) 5(3) *Columbia Journal of European Law*, 389–414, pp. 404–405.

[83] K. Hailbronner (n 25), p. 1249.

[84] N. Shuibhne (n 67), p. 931.

claimant would always be relevant in assessing the legitimacy of the authorities' action.[85] However, even during this era of expansive case-law, Union Citizenship was not a 'new' area of law, but rather an extension of some of the rights that were previously only available to market actors.[86] It was therefore an attempt to "generalise a status of social integration already widely acquired, although in a more limited way", with the extension of the right to non-discrimination being the main development.[87] Whilst there was a shift away from economic activity, which was no longer a prerequisite for protection under EU law,[88] Citizenship has always been a residual freedom, as the Court always begins its analysis under the economic freedoms if possible.[89]

4 One Directive to Rule Them All: Directive 2004/38

Directive 2004/38 had the purpose of unifying the fragmented legal landscape consisting of several Directives and Regulations into one coherent legislative instrument.[90] It repealed nine pre-existing Directives and amended the Worker's Regulation. For the economically active, the Directive changes little in terms of obtaining and retaining that status, particularly in the case of inability to work, unemployment, or higher education,[91] although it does codify many of the rights established through the case-law of the Court as well as adding new ones. For economically inactive persons, whilst the Directive is in part a response to Member States' concerns over the reach of Union Citizenship, it did not "turn back the wheel" in terms of social

[85] C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016) *DG for Employment, Social Affairs and Inclusion* FreSsco Contract: VC/2014/1011, p. 22.
[86] See the Opinion of Advocate General Sharpston in Case C-34/09 *Zambrano* ECLI:EU:C:2010:560, para. 3. This is opposed to the right to the genuine enjoyment of Union Citizenship under Article 20 TFEU, as developed in Case C-34/09 *Zambrano* ECLI:EU:C:2011:124 and later cases.
[87] S. Giubboni (n 54), p. 80.
[88] F. Wollenschläger (n 20), p. 302.
[89] To that effect, see Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECLI:EU:C:1996:70, para.22; see also *Trojani*, where the Court analyzed Mr Trojani's position as a worker before his position as a Union Citizen
[90] As stated in the Directive, it amends Regulation (eec) No 1612/68 on freedom of movement for workers within the Community and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
[91] K. Hailbronner (n 25), p. 1259.

protection.[92] It did tighten the rules in certain respects, however, in others it further strengthened the right of residence of economically inactive persons, by adding various categories of residence and extending equal treatment rights.[93] The following section will provide an outline of the main provisions and protections contained within the Directive. This will provide a basic overview of the terms, rights, and limitations included within it, which will assist when explaining the Court's *acquis* following the adoption of the Directive.

4.1 The Right to Reside under Directive 2004/38

Directive 2004/38 fully regulates the rules on residence rights for both economically active and inactive EU Citizens. It divides residence into three categories based on the time spent in the host-state: (i) short term residence under Article 6; (ii) medium-term under Article 7; and (iii) long-term/permanent residence under Article 16.[94]

Under Article 6, EU citizens have a right to reside in a host-Member State for up to three months without any conditions or formalities, other than the requirement to hold a valid identity card or passport.[95] Whilst their residence is almost unconditional, they have very limited rights during this period. Recital (21) of the Directive states that "it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence", which suggests that, due to a virtual absence of solidarity, short-term residents enjoy very limited equal treatment protection, at least in terms of entitlement to social assistance.[96]

Under Article 7(1), individuals have a right to reside in a host-Member State for a period between 3 months and 5 years as long as they: (a) are a worker or self-employed person; (b) have sufficient resources for themselves and their

[92] F. Wollenschläger (n 20), p. 319.
[93] Ibid.
[94] Using the distinction as outlined by C. Barnard, 'EU Citizenship and the Principle of Solidarity' (2005) Oxford: Hart Publishing, p. 160; and A. Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) *32 European Law Review* 787, p. 791.
[95] P. Minderhoud, 'Sufficient Resources and Residence Rights under Directive 2004/38', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Intersentia: Cambridge, pp. 47-73, p. 48.
[96] A. Somek (n 91), p. 791.

family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance; (c) are enrolled at a private or public establishment; or (d) are a family member accompanying the Union Citizen. The Directive states that all residents under Article 7 "shall have a right of residence as long as they meet the conditions set out therein".[97] Article 7(3) explains that individuals can retain the status of worker or self-employed if they are (a) temporarily unable to work due to illness or accident, (b) unemployed and register with a jobcentre following a period of over 12 months' employment, (c) are unemployed and register with a jobcentre following a period of under 12 months' employment (which can be limited to six months), or (d) embark on vocational training.[98] Article 7 therefore establishes a conditional right of residence for longer-term residents in a host-state, indicating a limited amount of solidarity between EU migrant and host-state that is conditional upon them abiding by certain criteria.[99] It should be noted that (in line with idea of market citizenship), assuming the individual obtains worker-status, the conditions of sufficient resources and sickness insurance do not apply to them.[100]

Article 16 provides the right of permanent residence: a new inclusion within the Directive which is stated to "strengthen the feeling of Union citizenship and is a key element in promoting social cohesion", and once obtained should be unconditional "in order to be a genuine vehicle for integration into the society".[101] Under Article 16(1), Union citizens residing "legally for a continuous period of five years" have the right to permanent residence. However, the Directive is silent on the precise conditions and limitations accompanying this status, including the meaning of the "legally" and "continuously". Permanent residence is not subject to the Chapter III conditions, which means that after five years, economically inactive citizens no longer have to possess sufficient resources or comprehensive sickness insurance. This means that permanent residents "partake fully in the blessings of national solidarity" as they are entitled to almost exact parity with Member State nationals (and EU migrant workers) under national conceptions of

[97] Article 14(2) Directive 2004/38.
[98] If the individual is *not* involuntarily unemployed, then this must be linked to the individual's previous profession
[99] A. Somek (n 94), p. 791.
[100] K. Hailbronner (n 25), p. 1259; P. Minderhoud (n 95), pp. 47-73, p. 48.
[101] Rectials (17) & (18), Directive 2004/38.

solidarity.[102] The only requirement on permanent residents in that they remain physically present in the host-state territory, which can be lost if absent from the host-state for a period exceeding two consecutive years.

Family members derive residence status from a Union Citizen that satisfies the conditions required for a right of residence under the Directive.[103] They are defined as a spouse, registered partner, direct descendant under the age of 21 and dependant, and dependant direct relatives in the ascending line.[104] Member States shall "facilitate entry and residence" for other family members that are dependent on a Union Citizen, or the partner of a Union Citizen with whom they are in "a durable relationship, duly attested".[105] They can also gain their residence status independently of the Union Citizen in the case of the death or departure of the Union citizen,[106] or the termination of the marriage or registered partnership.[107]

The Directive also provides a right of residence for jobseekers. Article 7(3) grants jobseekers the ability to retain the status of worker if seeking a job following becoming involuntarily unemployed. Furthermore, Article 14(4)(b) states that if the Union citizen enters the Member State in order to seek employment, then they "may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged". The Court has interpreted this provision as conferring a limited right of residence to jobseekers.[108]

4.2 Limitations on the Right to Reside

Directive 2004/38 directly transfers the requirement that economically inactive individuals must have "sufficient resources and sickness insurance" in order to "not become an unreasonable burden on the social assistance system of the host Member State" from the earlier Residency Directives. The Commission has stated that the idea of 'sufficient resources' must be

[102] A. Somek (n 94), p. 791.
[103] See Article 6(2), 7(1)(d), and 16(2) Directive 2004/38.
[104] Article 2(2) Directive 2004/38.
[105] Article 3(2) Directive 2004/38.
[106] Article 12 Directive 2004/38.
[107] Article 13 Directive 2004/38.
[108] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, paras. 56 – 57; Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037, para. 26.

interpreted in line with the Directive's objective of facilitating free movement, so long as this does not result in an unreasonable burden on the host Member State's social assistance system.[109]

There is a lack of clarity over the definition of this term, which is the result of difficult negotiations in the legislative process. Denmark, Germany, and the Netherlands considered that Member States should be able to unilaterally set the threshold, whilst the Commission considered that this would not be possible, given the range of cash and non-cash resources that should be considered, the origin of such resources, and that a person's situation will change over time.[110] The result was a typical compromise that included both considerations. Under Article 8(4), Member States "may not lay down a fixed amount which they regard as sufficient resources but must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which Member State nationals become eligible for social assistance". The Directive's language is confusing: it prohibits Member States from laying down fixed amounts, and yet goes on to set a minimum threshold based on social assistance benefits.[111] This apparent contradiction is indicative of the tension at the heart of the Directive regarding the granting of social benefits to economically inactive persons.

The Commission has also stated that Member States can only expel individuals if they cannot prove that they fulfil the conditions applicable to their residence status.[112] However, it is unclear whether simply not having sufficient resources, or claiming (and being denied) social assistance benefits is enough to justify this expulsion of the individual.[113] The Directive states that an expulsion measure shall not be the "automatic consequence" of the individual seeking recourse to social assistance in a host-Member State.[114] The normative reason behind this is that persons exercising their right to residence should not become "an unreasonable burden on the social assistance system of the host Member State".[115] This suggests that individuals should not be

[109] Commission Communication on guidance for better transposition and application of Directive 2004/38/EC, COM (2009) 313 final, p. 8.
[110] P. Minderhoud (n 92), pp. 50 – 51.
[111] Ibid, p. 50.
[112] Case C-215/03 *Oulane* ECLI:EU:C:2005:95, para. 55; Case C-408/03 *Commission v Belgium*, para. 66.
[113] K. Hailbronner (n 25), p. 1260.
[114] Ibid, p. 1261.
[115] Recital 10, Directive 2004/38.

expelled from the host-state so long as they do not represent an unreasonable burden on the host-state, even if for a limited period they may not have sufficient resources and therefore place a *reasonable* burden on the host-state.[116] Article 14 states that short-term residents have a right of residence as long as they do not become an *unreasonable* burden. For medium-term residents, this right to reside is dependent on them meeting the conditions contained therein and having sufficient resources not to become a "burden" on the host state.[117] This suggests that medium-term residents have a stricter limitation imposed upon them, as they cannot become any burden, even if reasonable.[118] This is strange, given that medium-term residents have a greater link of solidarity with the host-state. In other aspects the Directive makes no distinction between short-term and medium-term residents, and Article 7 residents are in fact in a stronger position as Member States are obliged to take into account the personal circumstances of the individual claiming social assistance.[119] As such, the precise scope of the sufficient resources or unreasonable burden limitations are still unclear.

4.3 Equal Treatment Rights & Limitations

Directive 2004/38 contains a general equal treatment provision under Article 24(1): "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens (and family members) residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty". However, the Directive also includes limitations on this general right. Article 24(2) states that there is no obligation to grant social assistance to EU citizens during the first three months of residence, or a "longer period" for jobseekers. It furthermore restricts the granting of student maintenance grants and loans to persons who are not workers, self-employed persons, or those with permanent residence status. Whilst it is incorrect to

[116] D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208, p. 1186. D. Kostakopoulou (n 67); see Opinion of Advocate General Villalon in Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2015:666, para. 97; D. Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 *CYELS* 270-301, p. 294-296.

[117] As contained in Articles 14(1), 14(2), and 7(1)(b) of Directive 2004/38.

[118] A. Somek (n 94), p. 798.

[119] Ibid, p. 799.

claim, as has been done, that this excludes social benefits from the scope of application of EU law,[120] it does definitely allow for stricter conditions to be imposed on the social assistance entitlement. The provision maintains the distinction between economically active and inactive persons, and whilst the former can obtain stronger equal treatment rights by gaining permanent resident status, the five years' residence requirement means that it is difficult to see how this can be obtained without engaging with the market during this period.[121]

5 The Case-law on Union Citizenship following the Adoption of Directive 2004/38

Directive 2004/38 significantly changed the legal landscape for both economically active and inactive EU citizens. It introduced new forms of residence, established specific equal treatment rights, and laid down new limitations and conditions. As the Court has defined these concepts and provisions more clearly, it has been harshly criticised for engaging in politics, abandoning its previously progressive trajectory, and even "dismantling" Union Citizenship.[122] The following section will explain the development of the *acquis* on Directive 2004/38 by looking at the general trends in the Court's approach towards its interpretation. It will then explain the consequences of this approach for precarious workers.

5.1 Early Case-law

One of the first cases indicative of the Court's approach towards the interpretation of the Directive is *Förster*.[123] Whilst the facts of the case took

[120] K. Hailbronner (n 25), p. 1252.

[121] Ibid, p. 1263.

[122] See, amongst others, U. Šadl and S. Sankari, 'Why did the Citizenship Jurisprudence Change?', in D. Thym, *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing; C. O'Brien, 'The ECJ sacrifices EU Citizenship in vain: *Commission v United Kingdom*' (2017) 54(1) *CMLRev* 209; S. Giubboni (n 54).

[123] Case C-158/07 *Förster* ECLI:EU:C:2008:630. For more information on the decision see O. Golynker, 'Case C-158/07, Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep, Judgment of the Court (Grand Chamber) of 18 November 2008' (2009) 46(6) *Common Market Law Review,* pp. 2021–2039.

place prior to the adoption of Directive 2004/38, the Court's *obiter dictum* statements regarding the Directive demonstrate a shift in approach. *Förster* concerned a German student in Netherlands, who was working and receiving a study grant during her studies. However, she was asked to re-pay the money she received once her employment had ceased, as this grant was only available to workers and those resident for over five years. Ms Förster claimed that her link with the host-society meant that the host-state was obliged to assist her thorough financial solidarity, as was the case in *Bidar* and *Grzelczyk*.[124]

Advocate General Mazak applied a similar approach to earlier cases, finding that notwithstanding the fact that Member States are "under no obligation" to grant maintenance aid for studies prior to acquiring permanent residence, and "thus not before five years have expired", a proportionality assessment had to be placed upon the national rule.[125] However, the Court made a clear departure from the earlier decisions. It applied the same wording as previous cases but changed the substance of the test dramatically. Whilst in *Bidar* three years' residence was just one indicator used to consider if a genuine link existed, in *Förster* the Court accepted the Dutch rule defining five years' legal residence as the *only* way of proving a sufficient degree of integration with the host-state.[126] This condition was by itself held to be proportionate in pursuing the aim of guaranteeing a genuine link with the Member State.[127] Despite the non-applicability of Directive 2004/38, the Court gave weight to it in its reasoning. It emphasised the importance of the right to permanent residence under Article 16(1) Directive 2004/38, which also requires five years residence to acquire and in fact is a requirement for entitlement to student grants and financing under Article 24(2).[128]

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[124] On this issue, see M. Jesse, 'The Legal Value of 'Integration' in European Law' 17(1) *European Law Journal*, pp. 172–189; S. O'Leary, 'Equal Treatment and EU Citizens: A new chapter on cross-border educational mobility and access to student financial assistance' (2009) 34(4) *European Law Review*, pp. 612–627; see also A. Hoogenboom, 'CJEU case law on EU Citizenship: normatively consistent? Unlikely! A response to Davies "Has the Court changed, or have the cases?"' (2018) *Maastricht University Blog*, available at: https://www.maastrichtuniversity.nl/blog/2018/11/cjeu-case-law-eu-citizenship-normatively-consistent-unlikely-response-davies%E2%80%99-%E2%80%98has

[125] Opinion of Advocate General Mazak in Case C-158/07 *Förster* ECLI:EU:C:2008:399, para. 130 – 131.

[126] D. Carter and M. Jesse (n 116), p. 1189.

[127] *Förster*, paras. 52 – 54. D. Carter and M. Jesse (n 116), p. 1189.

[128] *Förster*, para. 55.

This shifted the Court's approach from a qualitative one based on an open list of factors, to a quantitative test that sets the 'sufficient level of integration' as five years' residence only, without changing the wording of the test at all.[129] Other factors, such as attending compulsory or higher education institutions, were no longer relevant. The Court also showed more deference to the EU legislature as it applied the understanding of integration based on economic activity or permanent residence as contained in Directive 2004/38, even though the Directive did not apply to the facts of the case. This suggested that, as long as the national measure complied with the Directive's limitations, the Court would not double guess it by applying the principle of proportionality.[130] As such, the *Förster* decision may have been a harbinger of a more formal approach towards citizenship cases based on a more literal reading of Directive 2004/38,[131] despite the Directive not actually applying in the case.

The first major cases where the Directive did apply concerned the newly introduced concept of permanent residence under Article 16(1). In *Ziółkowski & Szeja*,[132] the Court was asked whether residence granted on the basis of *national* law could qualify the individuals for permanent residence on the basis of Article 16(1), even if such residence was not in compliance with the Directive. In this case the applicants were residing purely on the basis of German national humanitarian law, were economically inactive, and had insufficient resources to obtain a right of residence under Article 7. The Court had already held in *Lassal* that only residence completed "in accordance with earlier European Union law instruments" should be considered when determining whether there has been five years residence under Article 16(1),[133] which already suggested a departure away from the Court's reasoning in *Trojani*, where national residence was held to give rise to rights under EU law.

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[129] M. Jesse (n 124); S. O'Leary (n 124), p. 622.

[130] D. Carter and M. Jesse (n 116), p. 1198; K. Hailbronner (n 25), p. 1253.

[131] N. Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice', in P. Sypris (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012), CUP: Cambridge, pp. 331 – 362, p. 350.

[132] Joined Cases C-424/10 and C-425/10 *Ziółkowski & Szeja* ECLI:EU:C:2011:866.

[133] Case C-162/09 *Lassal* ECLI:EU:C:2010:592, para. 40; M. Jesse & D. Carter, 'Life after the *Dano*-Trilogy: Legal Certainty, Choices and Limitations in EU Citizenship Case Law', in N. Cambien, D. Kochenov, & E. Muir, *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (2020) Leiden: Brill Nijhoff, p. 146.

The Advocate General took an inclusive approach that was more in line with the Court's reasoning in *Trojani*. Using the Court's decision in *Dias*,[134] he argued that Article 16(1) was above all a tool to assist with the integration of EU Citizens in a host-state. This meant that length of residence on the basis of national law, as well as EU law, should be considered in addition to other 'qualitative factors'.[135] The use of *Dias* is arguably unhelpful, as the outcome of the case was that periods spent incarcerated should *not* count towards obtaining permanent residence under the Directive,[136] which would not seem to be comparable to *Ziółkowski*.

The Court did not follow the AG, instead applying a more textual/literal reading of the Directive. The Court held that the definition of 'legal' and 'continuous' residence for 5 years under Article 16(1) must be interpreted autonomously from national law.[137] There is no reference to national law in Articles 7 or 16(1), which suggests that for the purposes of these provisions, only residence under the Directive is relevant. Logically, this means that only residence in compliance with Article 7 can lead to permanent residence status under Article 16(1). That said, periods of residence completed before the entry into force of the Directive or even before the Member State's accession which *are* compliant with the Directive can give rise to permanent residence rights.[138]

The Court applied a similar approach in *Alarape & Tijani*.[139] Ms Alarape had worked briefly in self-employment and her son was in full-time education. Following her divorce in 2010 she claimed permanent residence status, however, this was rejected as the UK considered that the necessary conditions had not been met as she had only worked for two years. The Court was asked to consider whether residence based on Article 12 Regulation 1612/68, which granted a right of residence to primary carers of children pursuing studies in a host-state in order to not deprive the child of rights conferred by EU law,

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[134] Case C-325/09 *Dias* ECLI:EU:C:2011:498, para. 64; Opinion of Advocate Genera Bot in Joined Cases C-424/10 and C-425/10, *Ziółkowski & Szeja* ECLI:EU:C:2011:575, para. 53.

[135] Opinion of Advocate Genera Bot in *Ziółkowski & Szeja*, paras. 53–54; M. Jesse & D. Carter (n 133), p. 146.

[136] *Dias*, para. 64.

[137] *Ziółkowski & Szeja*, para. 47; M. Jesse & D. Carter (n 133), p. 146 - 147.

[138] Ibid, para. 63; see also M. Jesse, 'Joined Cases C-424/10, Tomasz Ziółkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin' (2012) 49(6) *CMLRev* 2003.

[139] Case C-529/11 *Alarape & Tijani* ECLI:EU:C:2013:290.

must be taken into account for the purposes of Article 16(1) Directive 2004/38.[140]

The Court held that permanent residence for a third-country national is dependent on both the Union citizen and family member satisfying the conditions laid down in the Directive.[141] It used the reasoning in *Ziolkowski*, i.e., that Article 16(1) residence requires residence in compliance with Article 7 of the Directive, to find that only "periods of residence satisfying the conditions laid down in Directive 2004/38" may be considered for the purposes of permanent residence, meaning that residence based solely on Regulation 1612/68 cannot have any effect on acquiring a right of permanent residence under Directive 2004/38.[142]

These cases demonstrate the autonomous value of the Directive. An individual cannot rely on periods of residence based on national law or other EU legislation to obtain permanent residence under the Directive. In other words, a (permanent) right of residence under the Directive must be compliant with the conditions set out in the Directive itself. This effectively retreats from the Court's previous approach of combining national residence with EU-based rights, like in *Trojani*. This can be compared to *Förster* which established a closed system of residence, whereby the conditions for legal residence and accompanying equal treatment rights are defined and granted exclusively by Directive 2004/38. In *Förster* this link was less explicit than the permanent residence cases, although the Court endorsed a Dutch rule that transposed the Directive (and made a clear link between permanent residence and study grants).[143]

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[140] Opinion of Advocate General Bot in Case C-529/11 *Alarape & Tijani* ECLI:EU:C:2013:9, para. 25; see also *Baumbast*, para. 73.

[141] *Alarape & Tijani*, para. 33 – 34.

[142] Ibid, para. 35; see *Ziółkowski & Szeja,* paras. 46 – 47..

[143] In para. 55 of *Förster*: 'Directive 2004/38 […] provides in Article 24(2) that, in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families (i.e. students) the host Member State is not obliged to grant maintenance assistance for studies […] to students who have not acquired the right of permanent residence'.

5.2 The Saga of the Special Non-contributory Cash Benefits

The main turning point in the development of the law is often suggested to be a line of cases concerning social benefits known as special non-contributory cash benefits (SNCBs) under Regulation 883/2004. These benefits were added to the Regulation in the 2004 revision to the Regulation 1408/71 and are in their own annex given that they do not fall under any of the categories listed in the body of the Regulation. This meant that, for the first time, there were benefits within the Regulation that had "characteristics both of the social security legislation … and of social assistance",[144] and therefore there were social benefits that could potentially fall under both the Regulation (which covers social security) and Directive 2004/38 (which covers social assistance). The SNCB 'saga' consists of four cases: *Brey*, *Dano*, *Alimanovic*, and *Garcia-Nieto*, with *Dano* (and the difference between it and the *Brey* decision) often framed as the most important.[145]

The first SNCB case is *Brey*, which concerned a retired German couple whose claim for an Austrian pension supplement was rejected due to their insufficient income (the pension supplement was designed precisely to top-up the low income of pensioners).[146] The Court rejected the argument of the Commission that the inclusion of the pension supplement as an SNCB under Regulation 883/2004 meant that it could not be classified as social assistance under Directive 2004/38.[147] It held that Regulation 883/2004 is a conflict of laws instrument that seeks to ensure that individuals are subject to, and protected by, one national legislative social security system only.[148] As such, it does not encroach on the competence of Member States to define the conditions necessary to claim social benefits.[149] Given the divergent purposes of the

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[144] Article 70, Regulation 883/2004.

[145] Case C-140/12 *Brey* ECLI:EU:C:2013:565; Case C-333/13 *Dano* ECLI:EU:C:2014:2358; *Alimanovic*; Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114; see also D. Carter and M. Jesse (n 113), p. 1180.

[146] *Brey*, paras. 16 – 17.

[147] *Brey*, paras. 57 - 58; Opinion of Advocate General Wahl in *Brey*, paras. 55 – 57.

[148] *Brey*, paras. 40; see also Case C-2/89 *Kits van Heijningen* ECLI:EU:C:1990:183, para. 12; Case C-275/96 *Kuusijärvi* ECLI:EU:C:1998:279, para. 28; Case C-619/11 *Dumont de Chassart* ECLI:EU:C:2013:92, para. 38.

[149] *Brey*, para. 41; Opinion of Advocate General Wahl in *Brey*, paras. 50 – 53. In the context of other social benefits, see Case 110/79 *Coonan* ECLI:EU:C:1980:112, para. 12; Case 275/81 *Koks* ECLI:EU:C:1982:316, para. 9; *Kits van Heijningen*, para. 19; Case C-227/03 *van Pommeren-Bourgondiën* ECLI:EU:C:2005:431, para. 33; Case C-347/10 *Salemink* ECLI:EU:C:2012:17, para. 38; Case C-106/11 *Bakker* ECLI:EU:C:2012:328, para. 32; *Dumont de Chassart*, para. 39.

legislative instruments, it was considered that EU law required an autonomous definition of social assistance. It relied on the Opinion of Advocate General Wahl, who linked three Directives applying to different areas of law to create a comprehensive definition.[150] He considered that all three Directives contain an "imprecise and broad concept of social assistance", and an aim of limiting rights of residence from "a common desire to protect the public purse".[151] In doing so, he defined it as assistance claimed by someone who "does not have stable and regular resources which are sufficient to maintain himself and his family, and who is likely to become a burden on the social assistance system of the host Member State".[152]

The Court held that Member States retain the ability to determine the criteria for obtaining social assistance, and that "there is nothing to prevent the granting of social security benefits … being made conditional upon meeting the necessary requirements for obtaining a legal right of residence".[153] Mr Brey's eligibility for the pension supplement would suggest that he did not have sufficient resources to avoid becoming an unreasonable burden. However, the Court applied the limitation on automatic exclusions as used in *Grzelczyk*, finding that national authorities must first carry out "an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned".[154] When doing so, they need to consider "a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole", and should demonstrate a "certain degree of financial solidarity" with the EU Citizen, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[155] This meant that as the Austrian rule *automatically* barred EU Citizens from claiming the pension supplement,

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[150] Opinion of Advocate General Wahl in *Brey*, point (4), paras. 58 – 66. Concretely, Directive 2003/86/EC on the right to family reunification *OJ L 251, in particular* Article 7(1)(c) therein; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents *OJ L 16*; and Directive 2004/38.

[151] Opinion of Advocate General Wahl in *Brey*, para.50-53

[152] Case C-578/08 *Chakroun* ECLI:EU:C:2010:117, para. 48; see also Case C-291/05 *Eind* ECLI:EU:C:2007:771, para. 29.

[153] *Brey*, para. 44.

[154] *Brey*, para. 63 – 64.

[155] *Brey*, para. 72.

it violated both Articles 7(1)(b) and 8(4) of the Directive, as well as the principle of proportionality.[156]
The decision in *Brey* is reminiscent of the Court's approach pre-Directive 2004/38, as it applied a more purposive or teleological approach based on primary law and vague formulae in order to achieve its vision of justice in this particular case.[157] Despite nominally claiming that EU citizens require a right of residence to claim social assistance benefits, its reasoning suggests that the principle of proportionality means that every single claim must be assessed on its individual merits, assessing the effect that granting this benefit would have on the financial stability of the welfare system overall.

Perhaps the most well-known case of the SNCB saga is *Dano*.[158] The case concerned a Romanian mother living in Germany with her son and supported materially by her sister. She was issued with a "residence certificate of unlimited duration" and received child benefit and maintenance payments on behalf of her son. However, her claim for an SGB II benefit (basic provision for jobseekers) was rejected on the basis that she did not have a right to reside under the Directive, as national authorities had already held that she had insufficient resources to provide for herself, had not worked previously in Germany, and was not actively seeking employment. The Court held that as she was not a worker and did not have sufficient resources, she could not rely on the right to equal treatment under Article 24(1).[159] Simply put, *Dano* confirms that individuals cannot claim equal treatment under Article 24 unless they have a right to reside under Article 7 of Directive 2004/38 or hold the status of permanent residence.[160]

Despite receiving the most attention in the literature, the *Dano* decision is unsurprising. The Directive explicitly states that individuals shall have a right of residence provided for in (Article 7) as long as they meet the conditions set out therein.[161] Furthermore, if permanent residents must comply with the

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[156] *Brey*, para. 77.
[157] P. Minderhoud and S. Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive', in: D. Thym (ed.) *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU (*2017) Oxford: Hart Publishing, p. 197–198; N. Shuibhne (n 67); C. O'Brien (n 31), p. 49; see also C. O'Brien (n 119), p. 216.
[158] *Dano*.
[159] Ibid, para. 82; M. Jesse & D. Carter (n 133), p. 162 – 163.
[160] D. Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40(2) *European Law Review* 249-262; N. Shuibhne (n 67); M. Jesse & D. Carter (n 133), p. 148.
[161] Article 14(2) Directive 2004/38.

conditions laid down in Article 7 to obtain permanent residence status under Article 16(1), then it stands to reason that they must comply with the conditions of Article 7 during the initial five-year period of residence if they wish to claim equal treatment and social benefits under the same Directive.[162]

Like *Ziółkowski*¸ the Court assessed legal residence and equal treatment rights exclusively within the autonomous framework created by Directive 2004/38 and did not consider any potential quantitative or qualitative factors or 'links' between Ms *Dano* and Germany outside of those laid down in the Directive.[163] The Court's decision in *Dano* is criticised for ignoring the obligation to assess the individual situation of Ms Dano, simply finding that her application for social assistance was proof of insufficient resources.[164] It is alternatively suggested that the Court applied an implicit proportionality assessment that determined Ms Dano had insufficient resources and/or was an unreasonable burden.[165] This is despite the fact that Ms Dano was more arguably self-sufficient and less of a burden than the applicants in *Brey*.[166]

The above said, it should be noted that the Court was not asked about the sufficiency of Ms Dano's resources. In fact, the facts of the case explicitly state that "the main proceedings concern persons *who cannot claim a right of residence in the host State by virtue of Directive 2004/38*" (emphasis added).[167] As such, the Court was unconcerned about the potential sufficiency of Ms Dano's resources, focusing solely on whether she could claim social assistance despite not having a right to reside under the Directive. As the Court stated: "according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right … under Directive 2004/38. Therefore … they cannot invoke the principle of non-discrimination in Article 24(1) Directive".[168] From this perspective, the *Dano* decision is less controversial. If the question is simply whether an individual without a right

[162] D. Carter and M. Jesse (n 113), p. 1192.
[163] M. Jesse & D. Carter (n 133), p. 148.
[164] P. Minderhoud (n 95), pp. 47-73, p. 48.
[165] D. Kramer (n 115), pp. 291 – 293.
[166] N. Shuibhne (n 67), p. 933; D. Carter and M. Jesse (n 113), p. 1203; G. Davies, 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) 25(10) *Journal of European Public Policy* 1442 – 1460, p. 1454.
[167] *Dano*, para. 44.
[168] *Dano*, para. 8.

to reside can rely on the principle of equal treatment, the answer is "obviously not", and there is no precedent that would suggest anything different.[169]

The third decision in the SNCB saga, and probably the most important for precarious workers, is *Alimanovic*. The case concerned a Swedish mother and her daughter that worked intermittently in Germany for 11 months before lodging an application for social minimum subsistence benefits.[170] These were granted for a period of eight months before they were rescinded following a change in national law. Under Article 7(3)(c) Directive 2004/38, individuals retain the status of worker for at least six months if they become involuntary unemployed during the first twelve months of employment. The question was therefore whether the applicants could retain their status as workers beyond this initial 6-month period.

Advocate General Wathelet considered that a distinction should be made between first-time jobseekers and those that have been engaged in employment for less than a year and subsequently retained this status for a six-month period. He suggested that the limitation of six months retained worker status for the latter group would be an "appropriate, albeit restrictive", transposition of Article 7(3) as "its automatic consequences for entitlement to subsistence benefits under SGB II seem to go beyond the general system established by that directive".[171] The Court rejected this approach, in favour of more literal interpretation of the Directive. It held that under Article 7(3)(c) Union citizens can retain the status of worker for a minimum of six months, however, as this period had passed Germany was under no obligation to continue treating them as workers. The applicants still had a right to reside as jobseekers under Article 14(4)(b) of the Directive, however, the express derogation in Article 24(2) meant that they could be denied the social assistance benefit in question.

Like *Ziółkowski* and *Dano*, in *Alimanovic* the Court assessed residence and equal treatment rights solely under the Directive, with primary EU law playing little to no role. Unlike pre-Directive 2004/38 case-law, it ignored any

[169] G. Davies, 'Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency' (2016) College of Europe Research Paper 02 / 2016, p. 8.
[170] A good summary is provided by N. Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016), pp. 911–913.
[171] Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, paras. 103.

possibility of finding a 'genuine link' between the individual and the Member State,[172] or any financial solidarity due to temporary difficulties. It also felt no need to test the national measure under the principle of proportionality, as according to the Court the system of retention of worker "takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity", meaning that the German rule adhering to the Directive guaranteed "a significant level of legal certainty and transparency … while complying with the principle of proportionality".[173] This suggests that, at least for the purposes of Article 7(3), the Court considers that the Directive itself undertakes an adequate proportionality assessment.[174] The Court also departed from the test laid down in *Brey* to determine what an 'unreasonable' burden is under the Directive. Instead of assessing the impact of each individual claim of social benefits on the social assistance system as a whole, the Court held that "while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[175]

Alimanovic continues the strict and literal interpretation of Directive 2004/38. As such, the final outcome of the case is unsurprising. That said, some of the Court's reasoning is questionable. It claims that Article 7(3) takes into consideration "various factors" characterising the situation of each individual applicant, when in fact it only takes into consideration one factor: time spent in genuine employment in the host-state. Furthermore, the claim that the accumulation of granting certain social benefits would be "bound to" result in an unreasonable burden on the host-Member State has no empirical evidence to support it, and arguably provides unlimited deference to Member States, who can deny any social assistance benefit to EU Citizens on the basis that it is "bound to" undermine the financial stability of the welfare system.

The final case of the SNCB saga is *Garcia Nieto*.[176] The case concerned a Spanish couple (that were not married or in a registered partnership) that moved to Germany in 2012. The mother moved in April with their common child to take

[172] P. Minderhoud (n 95), pp. 62-63.
[173] *Alimanovic*, para. 60 – 61.
[174] D. Kramer (n 115), p. 295.
[175] *Alimanovic*, para. 62. This approach was also applied in *Garcia Nieto*, para. 28 – 29
[176] *Garcia Nieto*.

up employment, whilst the father moved in June of the same year with his child from a previous relationship. The father applied for the SCG II benefit from July until September 2012, however, this was denied because he had not been residing in Germany for longer than three months.[177] The Court held that father and son were not entitled to this benefit as Article 24 Directive 2004/38 contained an explicit derogation that allowed the host-state to deny social assistance during the first three months of residence.[178] The Court and Advocate General both emphasised that this limitation, according to Recital 10 of the Directive, seeks to maintain the "financial equilibrium of the social assistance systems of the Member States".[179] The Court also made a link with the system of retention of worker status in *Alimanovic*, asserting that the German rule excluding such persons from social assistance claims guarantees a "significant level of legal certainty and transparency … while complying with the principle of proportionality".[180]

Whilst *Garcia Nieto* is unsurprising in the sense that EU citizens are not entitled to social assistance during the first three months of residence, the distinctions that the Court makes between family members are less understandable. The father and son were not considered as family members of an EU Citizen engaged in genuine employment, which would have granted them derived rights. To the casual reader, it may seem strange that the Court continually referred to the applicants as the 'Pena-Garcia' family, and yet treated Ms Garcia-Nieto's partner and his child as being (at least legally speaking) totally separate from her. This was despite her being in gainful employment, subject to German social security legislation, and supporting the family though her income.[181] Whilst the decision may seem morally unjust for the family in question, unmarried couples are not recognised as family members under the Directive.[182] There is an obligation on Member States to "facilitate entry and residence" of "the partner with whom the Union citizen has a durable relationship, duly attested".[183] However, this provision does not

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[177] It should also be noted that mother and common child were entitled to such benefits due to the mother's economic activity, however, father and son were not seen as 'family members' deriving rights under the Directive; see also M. Jesse & D. Carter (n 133).

[178] *Garcia Nieto*, para. 44. Opinion of Advocate General Wathelet in Case C-299/14 *García Nieto* ECLI:EU:C:2015:366, para. 70.

[179] Ibid, para. 45.

[180] Ibid, para. 49.

[181] Ibid, para. 28 – 29.

[182] Article 2(2) Directive 2004/38.

[183] See Article 3(2)(b) Directive 2004/38.

mean that they should automatically be granted entry and residence, but rather merely places "an obligation to confer a certain advantage, by comparison with applications for entry and residence of other nationals of third States" to these persons.[184] It is indisputable that the couple were in a "durable relationship, duly attested". However, given the weak obligation contained in this provision, it is unclear what protection it would provide to the Pena-Garcia family. Nonetheless, the case potentially undermines the Directive's claim that "in order to maintain the unity of the family in the broader sense", and that Member States should "examine" the situation of persons not included in the definition of family members under the Directive, taking into account "their relationship with the Union Citizen or any other circumstances".[185]

6 Evaluating Social Protection under Directive 2004/38

The system of social protection under Directive 2004/38 has come under intense criticism for effectively abandoning the traditional tenets of citizenship due to scepticism towards migration. The following section will briefly evaluate the legitimacy of the Court's approach and the protection afforded under the Directive, which will assist when suggesting realistic solutions to the problems faced by precarious workers. It will first outline the main criticisms directed at the Court and will then explain how many of these criticisms are based on a flawed understanding of the Court's pre-Directive 2004/38 approach. Instead, the Court's more recent approach can be justified by the greater legal value of the Directive and its stated aim of pursuing a literal approach to interpretation rules where possible.

6.1 Criticisms of the Court

The Court's approach towards Directive 2004/38 has been criticised, especially following the SNCB saga, for engaging in politics. Specifically, it is argued that the Court is restricting the free movement rights of EU migrants in order to quell the nationalist tide rising in Europe, part of which is seen as a

[184] Case C-83/11 *Rahman* EU:C:2012:519, para. 21; see also Opinion of Advocate General Wathelet in Case C-673/16 *Coman* ECLI:EU:C:2018:2, para. 94; Opinion of Advocate General Bobek in Case C-89/17 *Banger* ECLI:EU:C:2018:225, para. 57.
[185] Recital (6), Directive 2004/38.

scepticism of granting rights to EU citizens.[186] This, it is argued, constitutes a "dismantling project" of EU Citizenship by abandoning its inclusionary approach and gradual separation from its market-based confines.[187] This is suggested to be a "spectacular retreat from the magnificent and progressive destinies" of transnational solidarity, towards the original market-logic which has "overwhelmingly re-emerged" during times of crisis.[188]

The *Dano* decision is usually highlighted as the crucial moment for overturning the constitutional dynamic of the pre-Directive approach, that promoted economically inactive citizens' access to the welfare systems under the conditions of Member State nationals.[189] However, *Förster* is also claimed to represent a shift away from the "constitutional narrative" on Union Citizenship based on primary law, and an "undeclared backtrack" on this system that characterised the pre-Directive era.[190] The Court's reasoning is suggested to be "superficial" for its reluctance to assess the proportionality of the five-year rule, instead making a "rather dubious bow" before the Citizenship Directive.[191] That said, such criticisms tend to ignore the link between permanent residence and student financing, which was emphasised by the Court and is crucial to the political compromise leading to the Directive's adoption.[192] Even the Court's decision in *Brey* is also criticised for "preparing the ground" for a shift towards a strict functional interpretation and de-constitutionalisation of citizenship, thereby representing a "paradigmatic retreat to a sort of interpretative legalistic minimalism, according to which secondary law rules strictly determine the applicative limits of the Treaty".[193] This this claim is strange insofar as the *Brey* decision seems more like an outlier that is more reminiscent of the pre-Directive approach than preparing the ground for *Dano* and *Alimanovic*.[194]

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[186] U. Šadl and S. Sankari (n 122), p. 109; see also C. O'Brien (n 122).
[187] C. O'Brien (n 122), p. 210; N. Shuibhne (n 67); E. Spaventa, 'Earned Citizenship – understanding Union Citizenship through its scope', in D. Kochenov, *EU Citizenship and Federalism: The Role of Rights* (2017) Cambridge: CUP, p. 204.
[188] S. Giubboni (n 54), pp. 76 – 77.
[189] Ibid, p. 84.
[190] Ibid, p. 83; M. Dougan, 'The Bubble that Bursts: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens', in M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (2013) Oxford: Hart Publishing, p. 141.
[191] F. Wollenschläger (n 20), p. 323.
[192] See M. Jesse (n 137), pp. 2003–2017.
[193] S. Giubboni (n 57), p. 83.
[194] D. Carter and M. Jesse (n 115).

In essence, the Court is argued to have shifted away from a "predominantly rights-opening to predominantly rights-curbing assessments of citizenship rights".[195] In doing so, it has "poured the content of the primary right to equal treatment into a statement in secondary law", which "turns the standard approach to conditions and limits on its head – the latter no longer temper equal treatment rights; they constitute the rights".[196] In other words, the Court has switched from the primary-law approach, i.e. secondary law is a tool to assist in the interpretation of primary law, to a secondary-law approach, which sees the Directive as having primary law status in itself.[197]

Outside influences can influence any court decision, given that they are decided upon by human beings (i.e., judges), whose biases and opinions can filter through despite their best intentions to remain objective.[198] As Advocate General Wathelet noted in *Alimanovic*, the *Dano* judgment had caused an "unusual stir" given the "importance and sensitivity of the subject".[199] However, to make an argument that the Court is "abandoning" EU Citizens, it must surely be shown that it has departed from its traditional methods of interpretation, thereby undermining legal coherency in order to reach desired outcomes in certain cases. However, as the following section shows, there is a convincing argument to suggest that this is not the case.

6.2 Unwarranted Nostalgia?

A point that is often forgotten in the literature on the SNCB saga is that the Court's pre-Directive approach can be (and was) criticised for precisely the same reason as it is now, namely for undermining the balance between primary and secondary law. The only difference is that in earlier cases, the Court was accused of ignoring the literal meaning of secondary legislation to reach 'just' outcomes in individual cases. For example, in *Baumbast* and *Grzelczyk*, a simple and literal reading of the applicable legislation would

[195] N. Shuibhne (n 67), p. 902.
[196] Ibid, pp. 909–910.
[197] Ibid, p. 915.
[198] A.C. Hutchinson and P. T. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36(1/2) *Critical Legal Studies Symposium* 119-245, Stanford Law Review
[199] Opinion of Advocate General Wathelet in *Alimanovic*, para. 4.

permit the denial of residence rights. By ignoring the conditions contained in the Directive, the Court was accused of effectively deviating from secondary legislation without saying so.[200] In both cases, the Court used the principle of proportionality, or alternatively 'solidarity' (which seems to be synonymous),[201] to find that national measures transposing the Residency Directives violated EU law.

Hailbronner suggests that these decisions had "an absence of a convincing methodology and tendency to interpret secondary Community law against its wording and purpose", and that the Court used the "magic key" of proportionality to find the national measures in violation of the Treaty freedoms.[202] Instead, a simple reading of the applicable Directives suggests that, if a EU Citizen no longer fulfils its conditions, they should not be able to rely upon it.[203] Somek agrees, suggested that the legislation would grant "full authority" to qualify and limit the primary law right to free movement: "as long as Member States stay within the limits established by Community legislation, their own implementing measures are not subject to (proportionality)".[204] As such, the Court's pre-Directive approach arguably limited the scope of secondary law by neglecting the will of the Union legislature,[205] thereby undermining the ability of Member States to protect their welfare system from unreasonable burdens posed by EU Citizens.[206]

The point here is not to assert one approach over the other, but to demonstrate that the Court was, and continues to be, in a difficult position, and has to perform a delicate balancing act. It was asked to define the constitutional relationship between pre-existing secondary EU law,[207] and the Treaty provisions Union Citizenship and equal treatment.[208] Union Citizenship was placed on top of, rather than revising or replacing, secondary rules on residency. This meant that the Court was required to "fill out" the Treaty provisions on EU Citizenship and define their precise relationship with pre-

[200] K. Hailbronner (n 25), pp. 1250 – 1253.
[201] C. O'Brien (n 34), pp. 43-44.
[202] K. Hailbronner (n 25), p. 1251.
[203] Ibid, pp. 1251 - 1252.
[204] A. Somek (n 94), p. 795.
[205] F. Wollenschläger (n 20), p. 305.
[206] M. Jesse & D. Carter (n 133), p. 140.
[207] In particular, the Residency Directives 90/364/EEC; 68/360/EEC; and 93/96/EEC.
[208] See above steps 1 and 2.

existing secondary legislation.[209] As it amended its case-law to reflect the new legal situation, it is unsurprising that the Court opted for its classic teleological interpretation of the law, particularly as the Residency Directives did not contain specific equal treatment provisions.[210] It was also confronted with situations in which adhering to secondary legislation would result in some strange and unjust outcomes. A Spanish national residing in Germany for over 20 years would be denied a child benefit simply because the national authorities were tardy in replacing her residence permit. A student would have to sacrifice their 4-year degree in the final year due to temporary financial difficulties, despite having worked and therefore contributed to a host-society for three years. Thus, the story is not as simple as saying that the Court abandoned its previously perfect approach in favour of reactionary populist politics. Rather it has already been caught in a difficult relationship between primary, secondary, and national law since the establishment of Union Citizenship.

6.3 The Greater Legal Value of Directive 2004/38?

It can also be argued that Directive 2004/38 has a greater legal value than the previous Residency Directives, which justifies the Court giving it a higher legal value. Directive 2004/38 is a unifying document that explicitly seeks to remove the "sector-by-sector, piecemeal approach" to free movement and residence rights, which was a direct response to the confusing layers of primary and secondary law that governed the rights of economically inactive individuals exercising their free movement rights.[211] It reconfigured the legal landscape by repealing nine Directives and amending the Worker's Regulation.[212]

The Court's approach towards Directive 2004/38 can be seen as the mirror-image of its approach towards reconciling primary and secondary law in view

[209] K. Lenaerts, and J.A. Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2013), p. 25.
[210] See for example, T. Nowak, 'The rights of EU Citizens: a legal-historical analysis', in Van der Harst et al, (ed.) *European Citizenship in Perspective* (2018) Cheltenham/Northampton MA: Edward Elgar.
[211] Recital 4, Directive 2004/38.
[212] Concretely, Directive 2004/38 repeals Regulation (EEC) No 1612/68, and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

of Union Citizenship, but this time the Court is attempting to adapt to a new legal landscape created by Directive 2004/38. A key difference is that Directive 2004/38, unlike its predecessors, was not adopted through the flexibility clause, but rather has equal treatment, the freedom of movement for workers, and Union Citizenship as its legal bases. Furthermore, it governs the rights of *all* EU Citizens (including both economically active and inactive). Given its all-encompassing nature, which is different than the previous 'piecemeal' system, it is unsurprising that it has a different relationship with primary law.

Directive 2004/38 also included entirely new concepts from the EU legislator, such as the distinction between short-term, medium-term, and permanent residence, as well as a catch-all equal treatment provision.[213] Its rights, obligations, and limitations are more clearly defined and are the result of the EU's (albeit imperfect) democratic decision-making process.[214] As such, it is logical for the Court to shift towards a stricter reliance on the wording of the Directive and adhering to the choices of the EU legislator.[215]

Finally, the Court has stated that an objective of Directive 2004/38 is to create a legally certain and transparent system, whereby the situation is clear for applicants and Member states alike.[216] This is a reaction to the Court's previous approach, which can be criticised for creating vague and uncertain formulae that strengthened the position of individual applicants *vis-à-vis* the State.[217] Confusing terms such as 'unreasonable burden', 'automatic consequences', and 'temporary problems' meant that a reasonable interpretation of these concepts based on EU secondary law may be subsequently found to be unlawful due to another vague principle being established by the Court. The case-by-case assessments dictated by the Court's old approach are difficult for national administrators, especially from the perspective of legal certainty and workability.[218] They provide little guidance as to exactly when a Member State can legally deny a claim to protect the integrity of the national welfare system, something that has always

[213] Art. 16(1) Directive 2004/38, plus Recital (17); Article 24 Directive 2004/38.
[214] M. Van den Brink, 'The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?' (2019), p. 134.
[215] M. Jesse & D. Carter (n 205).
[216] See, for example, *Alimanovic*, para. 61; *Garcia-Nieto*, para. 49.
[217] For more on this point, see D. Carter and M. Jesse (n 113); M. Jesse & D. Carter (n 205).
[218] N. Shuibhne (n 67), p. 913.

been permissible under secondary rules.[219] In contrast, the current approach allows individuals to know "without any ambiguity, what their rights and obligations are", and as such guarantees "a significant level of legal certainty and transparency in the context of the award of social assistance".[220] Hailbronner refers to these as "generally applicable rules", which are beneficial for national administrators and applicants alike as everyone knows where they stand.[221] A Member State now knows that, assuming they comply with the ordinary meaning of the Directive's rules, this will not be second-guessed by the Court of Justice.

6.4 Literal & Teleological Interpretations of the Directive 2004/38

It can be argued that the Court's recent approach is in fact more in line with its explicit, albeit theoretical, approach to legal interpretation.[222] This is based on the classic textual, contextual, and purposive/teleological approach to interpretation that is common in legal systems.[223] Under this approach, assuming the ordinary meaning of a text is clear, the Court should stick to that interpretation, and should only go beyond this into contextual or teleological arguments if a textual reading is inadequate. The Court has historically been criticised for lacking consistency when it comes to the legal value given to textual and/or teleological arguments.[224] However, evidence suggests that in recent years the Court has increasingly focused on textual arguments.[225] The Court's recent approach to Directive 2004/38 can be seen as part of this trend.

It should also be noted that the *Tedeschi* principle suggests that a Treaty provision on free movement cannot be invoked if a restriction of that

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[219] S.K. Schmidt, 'Extending Citizenship Rights and Losing it All: Brexit and the Perils of 'Over-Constitutionalization', in D. Thym (ed.) *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing, pp. 19 - 23; see also U. Šadl and S. Sankari (n 119), p. 98.
[220] *Alimanovic*, para. 61; *Garcia Nieto*, para. 49.
[221] K. Hailbronner (n 25).
[222] K. Lenaerts, and J.A. Gutiérrez-Fons (n 205).
[223] G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (2013) Oxford: Hart Publishing, p. 281.
[224] Ibid, pp. 280–283.
[225] Ibid, pp. 285–287.

movement is permitted under EU secondary legislation.[226] The Court has explicitly stated that the right to non-discrimination under Article 18 TFEU only applies in situations where a more specific equal treatment provision does not.[227] Doing otherwise would effectively mean deciding the case twice, only the second time without any derogations contained in the secondary legislation. Whilst this may have been justifiable pre-Directive 2004/38 given the convoluted relationship between primary and secondary law, it is difficult to make this argument in light of Directive 2004/38. An overly purposive approach would effectively ignore the existence of secondary legislation entirely. This runs counter to the principles of legal certainty and inter-institutional balance enshrined in Article 13(2) TFEU,[228] and may result in a situation whereby potentially no social benefits could ever be denied from EU migrants.[229] That said, a purely literal interpretation will ignore the context and real-life consequences of individual cases, the social or historical circumstances behind the legislation, the weight given to multiple purposes associated with it, and the context in which the applicable word or phrase is placed.[230]

The distinction between literal and teleological interpretations is not always clear cut: some consideration of a rule's purpose is inherent when interpreting any legal rule.[231] As such, some purposive understanding of the law is always necessary. This is complicated by the fact that Directive 2004/38 has multiple purposes. For example, the Court has considered the purpose of Directive 2004/38 to be both preventing individuals from becoming an unreasonable

[226] Case C-5/77 *Tedeschi* ECLI:EU:C:1977:144; Case C-573/12 *Alands* ECLI:EU:C: 2014:2037. See A. Cuyvers, 'The EU Common Market', in E. Ugirashebuja, J. Eudes Ruhangisa, T. Ottervanger and A. Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) Brill Nijhoff: Leiden, p. 299.
[227] Opinion of Advocate General Bobek in Case C-581/18 *RB* ECLI:EU:C:2020:77, para. 51; Opinion of Advocate General Richard de la Tour in Case C-709/20 *CG* ECLI:EU:C:2020:515, para. 46; Opinion of Advocate General Jacobs in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* EU:C:1993:276, para. 12.
[228] K. Lenaerts, and J.A. Gutiérrez-Fons (n 208), p. 7.
[229] M. Van den Brink (n 213), p. 134.
[230] P. Schlag, 'On Textualist and Purposivist Interpretation (Challenges and Problems)', in T. Perišin and S. Rodin, (eds.) *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (2018), Oxford: Hart Publishing, pp. 19, 24–27; M. Jesse & D. Carter (n 133), pp. 152 – 153.
[231] Ibid.

burden,[232] and to facilitate and strengthen the right to free movement.[233] This does not represent a "switching" of the Directive's objectives as has been claimed.[234] It is not unusual for a Directive to have multiple objectives, in the case of Directive 2004/38 the Court has stated that whilst the *general* objective of the Directive is to facilitate and strengthen free movement, the *specific* objective of Article 7 is to prevent unreasonable burdens.[235]

7 Implications for Non-standard and Precarious Workers

The final section of this chapter will outline the implications of the system of social protection under Directive 2004/38 for non-standard and precarious workers. It will compare Union Citizenship to social citizenship as it is understood at the national level. Following this, it will explain the type of citizenship that is available under the Directive: namely, one based on 'earned' citizenship, with economic activity the only sure way to earn this status and accompanying rights. Finally, it will explain what this means for non-standard and precarious workers, looking at how (i) it creates an autonomous and precarious system of rights, (ii) it shifts the assessment of an individual's burden from an individual to a systemic one, and (iii) it reduces the level of social benefit entitlement to EU migrants.

7.1 No safety net of Social Citizenship

Union Citizenship was originally seen as an opportunity for the Union to depart from its market-oriented approach towards the protection of its citizens.[236] Expanding free movement rights beyond the limits of economic activity was suggested to be an important factor in "liberating" the Union from its economic preoccupation and preparing the way for a true community of citizens.[237] As Kochenov states, citizenship is fundamentally about

[232] *Dano*, para. 71.
[233] Case C-456/12 *O & B* ECLI:CU:C:2014:135, para. 41; Case C-165/16 *Lounes* ECLI:EU:C:2017:862, para. 36; Case C-483/17 *Tarola* ECLI:EU:C:2019:309, para. 23, 49.
[234] D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) *Common Market Law Review* 17–50, p. 25.
[235] Opinion of Advocate General Szpunar in Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:512, para. 57.
[236] D. Kochenov (n 43), p. 217.
[237] Ibid; K. Hailbronner (n 25), p. 1245.

protecting human dignity and freedom from commodification, rather than making the scope of the available citizenship rights dependent on economic considerations: i.e., the poorest and most marginalised in society should have the same social protections as the rich and powerful, rather than lose out on social protections due to their marginal economic status.[238] Extending free movement rights to *all* European citizens, regardless of their economic status, would alleviate many of the problems faced by non-standard workers. It would mitigate against the gaps in the law by providing residual protection, even if their employment status is uncertain due to being in precarious employment. This is the idea of 'residential egalitarianism', whereby once an individual is residing in a host-state, they should be entitled to equal treatment with nationals of that state in every aspect of life.[239] This is opposed to the idea of 'market egalitarianism' (or market citizenship), whereby equal treatment is dictated by one's engagement with the market.

The problem is that the 'residential egalitarianism' promoted by some would put in danger the links of solidarity that maintain the legitimacy of the national welfare state.[240] The close relationship between welfare entitlement, the nation state, and the shared sense of identity and solidarity through joint participation in society is a key factor in providing the moral force required to justify and legitimise policies of redistribution and social solidarity.[241] Opposed to this, national conceptions of solidarity mean that those engaged in genuine employment are considered as forming part of the inter-dependence of society and shared identity of the state.[242] Such ideas of solidarity do not extend as far to those outside of employment, and the Court needs to be careful not to undermine this "fundamental aspect" of the nation-

[238] D. Kochenov (n 43), p. 220.
[239] D. Kramer (n 116), p. 279.
[240] S. Mantu, 'Concepts of Time and European Citizenship' (2013) 15 *European Journal of Migration and Law* 447, p. 458.
[241] M. Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of National Welfare States? ' in C. Barnard and O. Odudu (eds), *The Outer Limits of European Union Law* (London: Hart, 2009); See also, M. Dougan and E. Spaventa, 'Wish you weren't here … New Models of Social Solidarity in the European Union', in M. Dougan and E Spaventa (eds), *Social Welfare and EU Law* (London: Hart, 2005); F. Pennings, 'EU Citizenship: Access to Social Benefits in other Member States' (2012) 28(3) *International Journal of Comparative Labour Law and Industrial Relations* 307.
[242] F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015), p. 81 - 82; D. Schiek, 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611, p. 617.

state by doing so.[243] Whilst it is argued that Member State scepticism towards providing rights to economically inactive persons is not a good reason to dismiss a non-commodified idea of citizenship at the Union level,[244] the realpolitik of the situation suggests that stretching concepts of intra-European solidarity further than is welcomed by Member States and their populations could actually result in the retrenchment of the social protections currently available. As Giubboni pessimistically puts it: "a democratic and socially inclusive future of European citizenship is hardly compatible with the political dynamics currently dominant in the Union".[245]

In light of the above, it must be concluded that despite its contribution towards a more socially minded Europe, Union Citizenship in its present form does not offer a genuinely unconditional right to move and reside that would establish a meaningful social citizenship that could alleviate the problems caused by market citizenship. It does not replicate the kind of residual social protection that exists at the national level that would provide access to social security and welfare, and nor does it replicate civil and political rights that also exist.[246] In short, it does not provide the answer to the social injustices caused by a system based primarily on economic participation.[247]

7.2 'Earned' Union Citizenship with (continued) Market Dominance

Instead of a system of social citizenship based on residential egalitarianism, that available under Directive 2004/38 is one in which the individual must 'earn' their citizenship rights before they are entitled to the full range of rights and benefits available under Union Citizenship.[248] The ability to earn citizenship rights is based nominally on time: i.e., the longer the individual is lawfully present the more protection they obtain.[249] That said, economic activity is the only guaranteed way of obtaining the strongest protections available. This creates a stratified system of rights, with different categories of

[243] K. Hailbronner (n 25), p. 1265.
[244] C. O'Brien 'I trade, There I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643, p. 1679.
[245] S. Giubboni (n 54), pp. 76 – 77.
[246] D. Kramer (n 116), p. 274
[247] C. O'Brien (n 243), p. 1651.
[248] Using the terminology as applied in D. Kramer (n 116), p. 274.
[249] S. Mantu (n 239).

persons obtaining different levels of protection, including some that have a right to reside but can be denied social benefits.[250] This requires the individual to bear responsibility for their integration into the host-state, and only obtains the full benefits of citizenship once the required conditions have been fulfilled.[251] In other words, instead of assisting with the integration of the migrant, the individual has responsibility to integrate themselves into the host-state before they can obtain the full range of rights available under Union Citizenship.[252]

Under this system there is a built-in assumption that short-term residents will be self-sufficient, and as such they are not entitled to social assistance under Article 24(2) Directive.[253] This means that any claim to social assistance will render them an unreasonable burden and thus they lose protection under the Directive.[254] For medium-term residents, they must earn their social protection by complying with the conditions laid down in the Directive. They exist in a form of 'denizenship', insofar as they have limited rights for a specific period, until they are considered to have sufficiently integrated and therefore earn their full inclusion in society.[255] Long-term residents are entitled to full inclusion, and thus enjoy a form of social citizenship that is almost "in its full Marshallian meaning".[256] This is the "high end of proving belonging and worthy socio-economic behaviour",[257] and as opposed to other forms of residence, acts as a "genuine vehicle for integration" into the host-state.[258] It overrides any financial reservations of the Member State and confers a recognition that the citizen has integrated into the host-society to the extent that he or she deserves to share in the burdens and benefits of that society.[259]

[250] D. Kramer (n 116), p. 279.
[251] Ibid, p. 275.
[252] Ibid, p. 274 - 275.
[253] S. Mantu (n 239), p. 454.
[254] Ibid, p. 292.
[255] G. Standing, *The European Precariat: The New Dangerous Class* (2011).
[256] D. Kramer (n 116), p. 296.
[257] D. Kramer, 'From worker to self-entrepreneur: The transformation of *homo economicus* and the freedom of movement in the European Union' (2017) 23 *EurLawJ* 172, p. 185.
[258] Recital (18) Directive 2004/38; *Ziółkowski & Szeja,* para. 41.
[259] D. Kramer (n 116), p. 297.

This system is fundamentally based on time insofar as time acts as the formal precondition for the acquisition and retention of rights under the Directive.[260] This means that economic activity is no longer the *sole* producer of entitlement to EU citizenship and social rights.[261] In fact, permanent residence becomes the single most important factor for individuals 'earning' their social citizenship rights through integration.[262] It is stronger than worker status, which can be lost due to lack of (or engaging in the wrong kind of) economic activity. However, despite the Directive being fundamentally based on time, engaging in economic activity is still arguably the only way to obtain the most protected status under the Directive.[263] Workers are immediately entitled to all social protections, whilst mere residents must be lawfully resident for five years before acquiring the same level of social rights.[264] Moreover, the idea of time spent lawfully resident is ingrained with an integration through work philosophy.[265] It is questionable if EU citizens can obtain permanent residence status at all without engaging in economic activity at some point. If not economically active, the EU Citizen must be self-sufficient for an entire five-year period (including any time spent as a student) which requires them to demonstrate sufficient resources for an entire five-year period (or period of study). This makes obtaining permanent residence status all but impossible to anyone but the wealthiest of citizens, who in any event are unlikely to require to protections available under the Directive.

To conclude, the Directive does not act as a tool for positive citizenship, or receptive solidarity, which suggests that to achieve equality and realise social citizenship individuals, particularly the most vulnerable groups in society, require active and positive rights such as welfare entitlement to further their integration.[266] Instead, it merely recognises their integration by affording more protective status and protections to those that have already demonstrated their ability to reside on the basis of the Directive.[267] More secure forms of status such as permanent residence are therefore a recognition

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[260] S. Mantu (n 239), p. 454.
[261] Ibid, p. 455.
[262] D. Kramer (n 116), p. 296.
[263] S. Mantu (n 239), pp. 454 – 455; C. O'Brien (n 243), p. 1647.
[264] Ibid, p. 459.
[265] Ibid, p. 456.
[266] D. Schiek, 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' (2017), p. 349; M. Jesse & D. Carter (n 133), p. 157.
[267] D. Kramer (n 256), pp. 185-186; see also D. Kramer (n 116).

of the economic contribution made over that period, rather than a "tool" for further integration.[268]

This creates a highly individualistic system of citizenship that places the emphasis on the individual to become self-sufficient, with the Directive's role limited to laying down the conditions allowing them to realise this.[269] It encourages (or dictates) market participation and discourages social benefit entitlement as this can disincentivise work and burden the welfare system.[270] As such, it adheres to the 'responsibility' model of welfare that focuses on activating labour market policies and imposes punitive measures for those not able to meet the requirements, thereby effectively making social protection subordinate to employment.[271] Under this perspective, gaps created by the Directive are unproblematic as any difficulties the individual encounters are attributable to their unwillingness to engage in work.[272] The market therefore becomes synonymous with morality: fairness is redefined in terms of labour market participation and competition between workers, rather than solidarity among citizens and between citizens and state.[273] As the following chapters of thesis show, this is often simply untrue, with gaps created by the Directive that can result in the individual losing protection despite them engaging (or seeking to engage) meaningfully with the market.

7.3 An Autonomous and Precarious System

The first consequence of this system is that it Directive 2004/38 is autonomous from other provisions of law, potentially creating a precarious system of residence rights for EU migrants. The Court's decisions explained in this chapter show that if an individual does not have a right to reside under EU law, then this will result in them falling outside the scope of application of Citizenship rules entirely. They no longer have the option of relying directly on Treaty provisions.[274] In recent cases the Court has re-affirmed the principle

[268] Ibid, p. 185.
[269] Ibid, p. 176.
[270] C. O'Brien (n 243), pp. 1672 – 1673.
[271] Ibid, p. 1647.
[272] D. Kramer (n 256), p. 176; D.W. Carter, 'Inclusion and Exclusion of Migrant Workers in the EU', in M. Jesse (2020) *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020) CUP: Cambridge, p. 317.
[273] C. O'Brien (n 243), p. 1647.
[274] See D. Thym (n 233), p. 21.

that Member States can refuse social assistance benefits to economically inactive citizens that do not have sufficient resources under Article 7.[275] It has also found that individuals residing on the basis of Article 7 must have comprehensive sickness insurance to avoid becoming "an unreasonable burden on the public finances of that Member State".[276] This means that whilst Member States must affiliate a citizen to its public sickness insurance system where that person is subject to the legislation of the host-state, they are entitled to charge the individual for this provision in order to protect against unreasonable burdens.[277] In these cases, the individual is unable to rely directly on Treaty provisions if they are excluded from protection through the Directive.

As well as primary law, Directive 2004/38 is also autonomous *vis-à-vis* other EU secondary legislation. However, this is not always at the expense of the individual. For example, a right of residence granted to carers of children in compulsory education under the Workers' Regulation does not need to comply with the sufficient resources and comprehensive sickness insurance requirements under Directive 2004/38.[278] The Court held that the EU legislature did not intend to impose restrictions on such persons under the Directive,[279] and therefore this provision must be applied independently of other the provisions of European Union law governing free movement rights, such as the Directive.[280] The Court has also held that the derogations contained in Article 24(2) Directive 2004/38 only apply to situations where the individual is residing on the basis of the Directive.[281] In this case, as an individual was not relying on Article 14(4)(b) for a right to reside but on the carers of children in compulsory education provision within the Workers Regulation, the derogation contained in Article 24(2) could not be used against them.[282] Advocate General Pitruzzella even considered that individuals whose residence was based solely on Article 10 Regulation 492/2011 (i.e., not based on Directive 2004/38) could not rely on equal treatment under Article 24(1) (as

[275] Case C-709/20 *CG* ECLI:EU:C:2021:602, para. 78.
[276] Case C-535/19 *A* ECLI:EU:C:2021:595, para. 55.
[277] Ibid, para. 58.
[278] Case C-480/08 *Teixeira* ECLI:EU:C:2010:83, para. 70; C-310/08 *Ibrahim* ECLI:EU:C:2010:80, para. 59.
[279] *Teixeira*, para. 53.
[280] Ibid, para. 57.
[281] Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:794, para. 65.
[282] Ibid, para. 69.

was the case in *Dano*).[283] However, the Court held that it would be paradoxical to exclude persons residing on the basis of Regulation 492/2011 from social assistance simply because they started looking for work: it would result in the situation whereby the parent or carer would end up having stronger social protection by *not* looking for work.[284]

The Directive is also autonomous *vis-à-vis* the Charter, meaning that individuals gain little by way of residual protection from it. Despite the Charter gaining increasing prominence in the Court's decision-making process since Lisbon, in Union Citizenship and Directive 2004/38 cases its importance is diluted as the Court is stricter in finding it to be applicable than in other areas of EU law.[285] Specifically, the Court has found that situations are outside the scope of EU law entirely (a requirement for the Charter to apply) if the individual does not meet the Directive's conditions. For example, in *Iida* a third country national could not rely on the Charter as he did not have a derived right of residence under Directive 2004/38, nor had he applied for long-term residence under Directive 2003/109,[286] despite him being eligible for long-term residency under the latter Directive.[287]

In *Dano*, the Court held that Regulation 883/2004 did not intend to lay down the conditions for eligibility to SNCBs, and the eligibility criteria for granting them could not be considered as 'implementing' EU law as is required under the Charter. This, the Court argued, was because Regulation 883/2004 is a coordinating conflict-of-laws instrument that ensures the individual is subject to one Member State legal system, and while it classifies certain social security benefits, it leaves the competence to determine the conditions for accessing these benefits to the Member States.[288] This is based on the principles that EU law does not detract from Member States' freedom to organise their social

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[283] Opinion of Advocate General Pitruzzella in Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:377, para. 46. It should be noted that Article 10 Regulation 492/2011 uses the precise same wording as did the former Regulation 1612/68 (Article 12).
[284] *Jobcenter Krefeld v JD*, para. 71.
[285] C. Barnard (n 39), p. 435; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) *8(3) ECLR 375*, p.386-387.
[286] Case C-40/11 *Iida* ECLI:EU:C:2012:691, para. 78-79.
[287] S. Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law* 137, p.144.
[288] See Opinion of Advocate General Wathelet in Case C-333/13 *Dano* ECLI:EU:C:2014:341, para. 146.

security systems,[289] and that the Charter does not in any way extend the competences of the European Union.[290] As such, it is logical that eligibility criteria do not fall under the Regulation.[291] Whilst this argument is convincing in the context of Regulation 883/2004, in the case of Directive 2004/38 it is less so. The Court claims that the conditions for social benefits eligibility "result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation".[292] However, Directive 2004/38 explicitly and precisely dictates at least some of the situations in which social assistance benefits are conferred to EU Citizens, which includes SNCBs.

This creates a situation where the individual can be excluded from relying on the Charter because the Member State has concluded that they do not have sufficient resources. However, surely by subjecting an individual to a right-to-reside test based on Article 7(1)(b), the situation inherently falls within the scope of EU law, even if the Member State rightly concludes that this assessment does not confer them a right to reside.[293] In other words, rejecting a right of residence on the basis of EU law is "within the scope" of EU law. Excluding individuals from relying on the Charter in these cases arguably undermines the Court's own *acquis* which suggests that when determining the conditions for the granting of social security benefits, "Member States must comply with (Union) law",[294] as well as decisions where the Charter has applied when Member States exercise discretion granted through EU secondary law.[295]

Directive 2004/38 is also autonomous from national law. This is a reversal from *Trojani*, where national residence status was sufficient to allow the individual to rely on the EU right to equal treatment.[296] This has created a

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[289] Case C-70/95 *Sodemare* ECLI:EU:C:1997:301, para. 27; Case C-238/82 *Duphar & Others* ECLI:EU:C:1984:45, para. 16; Joined Cases C-159/91 & C-160/91 *Poucet & Pistre* ECLI:EU:C:1993:63, para. 6.

[290] *Dano*, para. 88.

[291] See D. Thym (n 233), p. 48.

[292] *Dano*, para. 90.

[293] H. Verschueren (n 49), p. 387.

[294] Case C-208/07 *von Chamier-Glisczinski* ECLI:EU:C:2009:455, para.63; see also Case C-157/99 *Peerbooms & Geraets-Smits* ECLI:EU:C:2001:404, paras.45–46; H. Verschueren (n 49).

[295] For example, in the context of asylum claims under Regulation 343/2003. See Joined Cases C-411/10 and C-493/10 *N.S.* ECLI:EU:C:2011:865, paras.65–68; see also K. Lenaerts (n 281), p. 380.

[296] *Trojani*, para. 43; D. Thym (n 160), p. 258.

confusing situation regarding the status of national residence certificates that are based on Directive 2004/38. The Court has consistently held that whilst national residence permits do not give rise to concrete rights under EU law, they do "prove the individual position of a national of a Member State with regard to provisions of (Union) law".[297] What this means in practice has been the subject of debate. Advocate General Trstenjak considered that, by adopting Directive 2004/38, the EU legislator intended to create an independent right of residence based on EU law, and that recognising national residence would create unforeseen situations and disturb the balance between the financial and social interests.[298] However, Advocate General Kokott considered that national residence permits were relevant, highlighting previous cases where they were used, and argued that the origin of residence right is not important.[299] The Court has sided more with Trstenjak's perspective, holding that the declaratory character of national residence permits/certificates means that they cannot be used to either find an individual's residence either lawful or unlawful under EU law.[300]

That said, in *Brey* the Court held that national residence certificates can be used to determine the individual circumstances surrounding an applicant's claim in a specific case, even if they do not confer rights by themselves. In this case the national authorities granted Mr Brey a residence certificate (indicting that they considered him to be lawfully resident) after they had denied him the pension supplement.[301] As such, when determining the lawfulness of the individual's residence, Member States should consider "… the fact that those factors have led those authorities to issue him with a certificate of residence".[302] This suggests that, whilst national residence permits do not give rights under EU law, they can indicate that the individual satisfies the requirements under the Directive (this was how the referring Austrian court

[297] *Royer*, para. 31; Case C-459/99 *MRAX* ECLI:EU:C:2002:461, para.74; Case C-408/03 *Commission v Belgium*, para. 63; see also Opinion of Advocate General La Pergola in Case C-85/96 *Martinez Sala* ECLI:EU:C:1997:335, para. 22.

[298] Opinion of Advocate General Trstenjak in Case C-325/09 *Dias* ECLI:EU:C:2011:86, paras. 75-80

[299] Opinion of Advocate General Kokott in Case C-434/09 *McCarthy* ECLI:EU:C:2010:718, paras.51-53

[300] *Dias*, para.54

[301] Opinion of Advocate General Wahl in *Brey*, para. 93.

[302] *Brey*, para. 78.

interpreted the *Brey* decision).[303] This situation can be distinguished from *Ziolkowski*, as in *Brey* the applicants were issued with an "EEA citizen registration certificate", issuable under Austrian legislation to those persons who "enjoy the right of residence under EU law",[304] whereas in *Ziolkowski* the applicants' residence permit was based on national humanitarian law. *Dano* is more difficult to reconcile with this logic, given that she had been issued with a "residence certificate of unlimited duration for EU nationals, which was re-issued in 2013".[305] That said, the Court felt it unnecessary to consider Ms Dano's position under the Directive as the national authorities had already concluded that she did not meet the conditions required under Directive 2004/38 to obtain a right of residence.

7.4 Systemic in Place of Individual Assessments

Another consequence of the system of social protection under Directive 2004/38 is that there is less space for individual assessments when determining whether an individual has a right of residence/sufficient resources, is an unreasonable burden, etc.[306] Prior to the adoption of Directive 2004/38, the Court required Member States to make an individualised proportionality assessment of the Union Citizen's situation and whether they deserve financial solidarity.[307] Even in *Brey*, the Court held that national authorities must consider "a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole".[308] However, in more recent cases the role of the individual assessment has been "radically downgraded", with little regard for the principle of proportionality.[309] This is most clear in cases such as *Alimanovic* and *Garcia Nieto*,[310] where the Court has adopted a systemic test that is based on the idea

[303] H. Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' (2013) 16 *European Journal of Migration* 147, pp.174 – 175; see also Case C-408/03 *Commission v Belgium*, para.63

[304] Article 53 Austrian Settlement and Residence Act (NAG). The Austrian legislation seemingly conflating the situations of "EEA nationals" and "EU law".

[305] *Dano*, para. 36.

[306] As the Court formulated in *Grzelczyk* and other cases; see C. O'Brien (n 31).

[307] D. Kramer (n 113), p. 291.

[308] *Brey*, para, 64.

[309] N. Shuibhne (n 67), p. 913; see also G. Davies (n 165), pp. 51, 55.

[310] To use the terminology as applied by D. Thym (n 233), p. 28.

that a single application for benefits could "scarcely be described as an 'unreasonable burden', however, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[311] In *Dano*, it is suggested that the Court made an implicit assessment of Ms Dano's situation by asserting that she moved to Germany "solely" in order to obtain social assistance and that would mean that she was an unreasonable burden.[312] However, the referring court had already established that she was unlawfully resident, and the Court did in fact claim that national authorities should consider her financial situation without taking into account the benefit claimed.[313] That said, even if an individual assessment was made, there is no reason that she should have been granted a right to reside: she could not claim a right of residence either as a worker or jobseeker, and she did not have sufficient resources as required under the Directive. In short, she is one of the clearest examples of an individual that is not entitled to residence rights or social assistance under EU law.[314]

The shift to a more systemic test and greater deference being granted to Member States will inevitably result in weaker social protections for those on the borderline between lawful and unlawful residence. The previous system was based on an *ex-post* assessment, whereby the Member State was in principle obliged under Article 18 TFEU to grant social assistance, although granting this would mean the individual could be placed on the "thorny path" of receiving the benefit but subsequently faces an expulsion order due to becoming an unreasonable burden.[315] This has been replaced by an *ex ante* assessment, whereby Member States may now withhold social assistance benefits from Europeans making use of their free movement rights without having to consider whether to formally expel the individual or not.[316] It should be noted that *ex post* assessments are not necessarily more protective than *ex ante* ones. Is it really more desirable to be able to claim a social benefit, only to subsequently find that this has resulted in an expulsion decision against the individual, rather than having a benefit claim denied but not facing an

[311] *Alimanovic*, para. 62.
[312] D. Kramer (n 116), p. 293; *Dano*, para. 78.
[313] *Dano*, para. 80.
[314] G. Davies (n 165), p.1454.
[315] D. Schiek (n 265), p. 361.
[316] Ibid; See also D. Kramer (n 256), p. 185.

expulsion order, seeing as the initial claim suggests that the individual would prefer to remain in the host-state?[317]

The increased deference granted to Member States arguably results in unjust outcomes. For example, in *Commission v UK*, the Commission claimed that the UK practice of checking individuals' residence status upon an application for social benefits amounted to "systematic checking" of individuals residence status, which is prohibited under Article 14(2) Directive 2004/38. The Court held that this testing was not systematic, as "it is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside".[318] However, this system is argued to be wholly systematic and exclusionary as it effectively meant that no economically inactive EEA migrant applying for social benefits could ever have a right to reside, given that "any benefit application is deemed to dissolve any claim to self-sufficiency".[319] Furthermore, "there is no starting presumption of lawful residence, or starting position of citizenship-based eligibility that is then limited and, in some cases, checked".[320] In fact, as the individual's status is checked solely because they have a made an application, it is arguable that there is a presumption of illegality. By granting such deference to Member States, the Court risks endorsing national practices that systematically check individuals' residence status upon their application for social assistance, thereby pre-emptively finding that their social benefit application is "bound to" result in an unreasonable burden being placed on the host-Member State. In practice, this means that a mere application for social assistance is enough to demonstrate a lack of resources and therefore exclude them from lawful residence.[321] It also removes the distinction between 'reasonable' and 'unreasonable' burdens, thereby resulting in the situation where "any recourse to social assistance pre-empts legal residence status".[322]

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[317] A. Somek (n 94), p. 797.

[318] Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para. 83.

[319] C. O'Brien (n 122), p. 212; M. Jesse & D. Carter (n 133), p. 165.

[320] Ibid; Ibid.

[321] Although, it should be emphasized that whilst Ms Dano was excluded from social assistance benefits, she continued (before and after the decision) to receive Child Benefit (social security) for her son, which was unaffected by her social assistance claim. See also, M. Jesse & D. Carter (n 133).

[322] D. Thym (n 233), p. 42.

7.5 Less Entitlement to Social Benefits

The final implication from the system of social protection under Directive 2004/38 is that it makes it more difficult to claim social benefits generally if the individual is not classified as a worker. Primarily, this results from inconsistency regarding the definitions relating to different kinds of social benefits under EU law, namely social security and social assistance.

Social security is unharmonised at the EU level, and is only coordinated through Regulation 883/2004.[323] While the Regulation's previous versions only applied to workers, the 2004 version applies to "non-active persons".[324] This suggests that it now applies to anyone subject to the legislation of a Member State, regardless of their economic status,[325] leading to claims that the new Regulation only required *factual* residence, rather than *legal* residence, to claim the social security benefits listed therein.[326] This would mean that Member States could not impose a legal right-of-residence test on such benefits.[327] However, the SNCBs in *Brey*, *Dano*, *Alimanovic* and *Garcia Nieto* were all also included in the Regulation, having the nature of both social security and social assistance, and thus fell under the concept of social assistance within Directive 2004/38 and could have a right-to-reside test applied to them.[328] In contrast, Directive 2004/38 only refers to 'social assistance' and makes no reference to social security benefits or welfare generally,[329] suggesting that it does not apply to social security benefits.

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[323] Except through the idea of 'social advantages' under Regulation 492/2011 (see section X)
[324] Recital (42) Regulation 883/2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–98; See C. O'Brien (n 121), p. 222.
[325] Article 2, Regulation 883/2004; see also Article 11 of Implementing Regulation No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42; see also Internal Labour Organisation (2010). Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009. Switzerland: International Labour Office, p.7.
[326] H. Verschueren (n 302), pp. 147–79.
[327] E. M. Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (2014) *European Parliamentary Research Service* 140808REV1, pp.16–17.
[328] See Opinion of Advocate General Wahl in *Brey*, para. 48.
[329] The exception being Article 8(4) Directive 2004/38. This provisions is the *only* reference to social security, where it is stated that the threshold for determining sufficient resources shall not be higher than "the minimum social security pension paid by the host Member State".

Despite this apparent difference in the rules relating to social security and assistance, the Court has applied an inconsistent, confusing, and arguably cynical usage of the terms 'social security', 'social assistance', and 'social benefits', which it seems to use interchangeably.[330] The Court rejected the Commission's argument in *Brey* that there should be a strict delineation between social security and social assistance, with the Regulation only applying to the former, and the Directive only applying to the latter. It found that such an approach would impinge upon the Member State competence in the area of social security,[331] would create "unjustifiable differences" between Member State classification of social benefits, potentially undermining the effectiveness of EU law.[332] Instead, it used Advocate General Wahl's "imprecise and broad" yet all-encompassing concept of social assistance, which includes any benefit aimed at individuals that do not have "stable and regular resources" and who is likely to become "a burden on the social assistance system of the host Member State".[333] Therefore, any benefit meeting this assessment will be classified as social assistance under Directive 2004/38, regardless of its status under Regulation 883/2004. This applies not just to SNCBs, but social security benefits proper. *Commission v United Kingdom* concerned right-to-reside tests imposed upon applicants of Child Benefit and Child Tax Credits.[334] These were not SNCBs,[335] but fell under Chapter 8 of Regulation 883/2004 on family benefits, and therefore "must be regarded as social security benefits".[336] However, the Court found that there is "nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to (a right to reside test)".[337] This means that any social benefit, so long as it has some characteristics of social assistance such as being taxpayer funded or non-contributory in nature,[338] can be subjected to a right-to-reside through national law on the basis of Article 7

[330] Compare in *Brey*, paras. 44 (general reference to "social benefits"), and 77 (where the Court refers to social security benefits having an effect on the social assistance system).
[331] Opinion of Advocate General Wahl *Brey*, paras. 50 – 53.
[332] *Brey*, para.59
[333] Opinion of Advocate General Wahl in *Brey*, paras. 48 – 49; see also *Eind*, para.29. The Court followed the Advocate General precisely in this regard, see *Brey*, paras. 58–59.
[334] Case C-308/14 *Commission v. United Kingdom*.
[335] Indeed, the original complaint included special non-contributory cash benefits, but these were removed following the Brey and Dano decisions. See Case C-308/14 *Commission v. United Kingdom* ECLI:EU:C:2016:436, para. 27.
[336] Case C-308/14 *Commission v United Kingdom*, para. 60.
[337] Ibid, para. 68.
[338] Ibid, para. 58.

Directive 2004/38.[339] The Court relied upon paragraphs 83 of *Dano* and 44 of *Brey* to justify a restriction on granting social benefits in general, despite these cases only concerning SNCBs which have characteristics of both social assistance and security.

The Court's approach seems to ignores any potential differentiation of benefits under EU law and assumes that there is one general rule applicable to all social benefits.[340] This has been criticised for undermining the political compromise at the heart of both legislative instruments,[341] and creating an "improper hierarchical dominance" of the Directive over the Regulation.[342] That said, the Regulation is a coordinating instrument that does not determine "the life and death" of welfare restrictions.[343] As has been explained in this chapter, Directive 2004/38 is an all-encompassing instrument that governs the conditions under which Member States must grant social assistance, and where they can derogate from this. Whilst at a doctrinal level the Court's approach towards social benefits may be justified, the ability of migrants to claim social benefits is suggested to be crucial to any claims of Union Citizenship having a social nature, thereby making their entitlement to such benefits highly important for their social protection.[344] As such, by making them more difficult to access, the Court arguably makes the realisation of a more socially minded Europe more difficult to achieve.

8 CONCLUSION

EU migrants residing in another Member State and not meeting the *Lawrie-Blum* criteria have very limited rights under EU law. That said, as this chapter has explained, non-economic free movement integration has developed significantly since being included in the Treaty of Maastricht. This was initially based on limited Treaty provisions that were given a broad scope through teleological interpretations by the Court. However, since the adoption of the Directive 2004/38, the Court has been much stricter in its interpretation of the Directive's provisions, preferring to stick to the letter of

[339] C. O'Brien (n 122), p. 220; M. Jesse & D. Carter (n 133), p. 166.
[340] C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart, p. 51.
[341] H. Verschueren (n 302), pp. 159–165; see also C. O'Brien (n 121).
[342] S. Giubboni (n 54), pp. 83 - 84.
[343] M. Dougan (n 240), pp. 152-158
[344] C. O'Brien (n 243), p. 1672.

the law wherever possible, and has granted much more deference to Member States when determining who has sufficient resources, is an unreasonable burden, etc. Despite criticisms of its recent case-law, the Court's approach towards Directive 2004/38 is in line with its theoretical method of judicial reasoning, which can be (at least for the most part) justified in light of the wording and objectives of its provisions. However, the Court's shift from its previous teleological approach to its recent literal one does create problems for precarious workers as it creates gaps in the law where such workers may lose legal protection. EU migrants cannot rely on other provisions of European or national law if falling outside the Directive's categories, meaning that those not meeting the *Lawrie-Blum* criteria may be pushed into a precarious legal situation. Furthermore, the strict interpretation of the Directive has resulted in less space for proportionality assessments and an overall reduction in the level of social benefits that can be claimed by non-workers, especially those seeking employment.

While Union Citizenship has contributed to the "humanising" of the system by adding to the protections that previously existed,[345] it has not created a genuine form of social citizenship that provides residual protection to precarious workers when they are not recognised as having the status of worker under EU law. Instead, it creates a precarious system based on the idea of 'earned citizenship', whereby the individual can only gain protections by demonstrating their integration into the host-state. Whilst this is nominally assessed on the basis of time, in practice the requirement to carry out economic activity is still the only way to gain the highest form of legal status. Moreover, the Directive is based on neoliberal concepts of 'responsibility' and 'activating' labour market policies that reinforce the sense of individualism and responsibility at the heart of the system and is liable to exclude individuals that are unable to meet the individualist demands required under it, and furthermore contributes towards a system where migrants are viewed with increasing scepticism and hostility.

[345] D. Kramer (n 256), p. 182.

Part III: Case Studies

Chapter 6: Part-time & On-Demand Workers

1 INTRODUCTION

The previous part of this thesis explained how EU migrant workers obtain protection under the law: i.e., through the classification of worker under the *Lawrie-Blum* criteria,[1] as well as the more limited level of protection provided through non-economic free movement rights such as Union Citizenship and Directive 2004/38.[2] The final part of this thesis will examine the situation of three specific types of precarious worker: (i) part-time, on-demand and other limited forms of employment, (ii) short-term, temporary, and intermittent employment, and (iii) false self-employment and precarious forms of self-employment. Each of these case studies will assess the level of protection currently available, how engagement with precarious forms of employment may result in a lack of protection and suggest ways in which their protection could be improved within the political and constitutional limitations of the EU legal order (as explained in Part I). The following chapter will examine the situation of workers whose employment is precarious due to its limited nature, i.e., the amount of work performed (or the contractually agreed amount of work) renders the work precarious. When an individual is engaged in part-time employment with very few hours; on an on-demand or zero-hour contract with no fixed schedule; or works in platform work with very similar effects, then this is liable to significantly affect the level of social protection available to them.

The chapter will first define what kinds of part-time and limited forms of employment should be considered as precarious. It will then outline the legal problems facing precarious part-time workers, in the context of the genuine economic activity requirement within the *Lawrie-Blum* criteria that distinguishes between genuine and marginal employment and the

[1] Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

position of those not meeting this under Directive 2004/38. Following this, it will outline the protections that are lost due to the part-time worker not holding the status of worker under both free movement and social law. It will finally look at the wider implications for this dichotomy in the law, looking at the situation of the unprotected European precariat of 'illegal' part-time workers.

2 Precarious forms of Limited Employment

Part-time work cannot be considered as precarious *per se*. It is a broad category encompassing various positions: part-time work is defined under EU law as anything "less than the normal hours of work of a comparable full-time worker'".[3] It is a long-standing form of non-standard work, although its use has increased in recent years.[4] As such, it cannot be considered as inherently precarious or even undesirable. Part-time workers overall report higher levels of job satisfaction with regard to working conditions and general health when compared to full-time workers.[5] Shorter working hours can allow an individual to reconcile work with family responsibilities and can be beneficial for employees as it avoids the social, psychological, and economic costs of unemployment.[6] However, other forms of part-time work can be highly precarious. For example, this can also involve working very few hours (known as 'marginal' part-time work), particularly when the limited nature for the employment is involuntary, i.e., the worker would prefer more hours. Another example is employment where the worker is provided with no fixed working schedule or income, known as on-demand and zero-hour contract work. Both of these employment relations risk creating a situation where the employer has significant power over the employee, and the employee has very limited security in

[3] Directive 97/81/EC; see also S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, p. 22.

[4] A. Broughton et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels, p. 69.

[5] Ibid, p. 70.

[6] A. Bogg, 'The regulation of working time in Europe', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 287.

terms of a fixed work schedule and/or income (i.e., the hallmarks of precarious work).[7]

2.1 Marginal Part-time Work

Marginal part-time work, i.e., where an employee works very few hours, can be differentiated from normal part-time work due to its limited nature. This is particularly the case if the worker would prefer more working hours than they currently have, also known as underemployment.[8] Such employment is not a 'marginal' issue in Europe: research suggests that there has been a significant increase in the amount of marginal employment over recent years, and that over a quarter of part-time workers would prefer more hours.[9] Marginal and underemployment is not spread evenly across the EU. For example, in the Netherlands where over 50% of all work is part-time, just 4,5% of part-time workers consider their position to be involuntary, whilst in Greece around 70% of part-time workers would prefer more hours.[10] Furthermore, women are overrepresented in marginal employment, making up around 60% to 70% of part-time worker.[11] Moreover, this part-time work is often clustered in occupations that have poor pay and low job quality.[12]

Therefore, whilst workers may wish to engage in limited employment for a variety of reasons, those engaged in marginal work and underemployment in general face a significant degree of insecurity, and may even be working in the informal economy, whereby they have little

[7] Ibid, pp. 272 - 273.

[8] Ibid, p. 273; see also S. Lee, D. McCann, & J.C. Messenger, *Working Time around the World: Trends in Working Hours, Laws and Policies in a Global Comparative Perspective* (2007) Routledge: London, p. 58.

[9] S. McKay (n 3), p. 25; see also P. Schoukens and A. Barrio, 'The changing concept of work: when does typical work become atypical' (2017) 8(4) *ELLJ* 306, p. 325; C. Lang, S. Clauwaert, & I. Schomann, 'Working Time Reforms in Time of Crisis' ETUI Working Paper 2013.04, p. 15.

[10] P. Schoukens and A. Barrio (n 9), p. 325.

[11] A. Bogg (n 6), p. 271.

[12] Ibid, p. 271; S. Lee, D. McCann, & J.C. Messenger (n 8), pp. 64 – 78.

choice but to work in casual working relationships.[13] This kind of employment results in reduced job security, fewer career opportunities, less training, lower pay and in general lower job satisfaction.[14] It can often result in poverty and social exclusion, as marginal part-time workers do not "generate enough income to provide for the future".[15]

2.2 On-demand Work, Zero-hour, and Platform Work

On-demand work is where a worker has no, or a very limited, working schedule and is dependent on their employer to provide them work, thereby holding the employee's working situation entirely in their hands. This provides much insecurity to the worker and grants significant power to the employer, making this a highly precarious form of employment.

Possibly the clearest example of on-demand work is the situation of zero-hour contracts. This is where a worker is engaged on a formal contract of employment, thereby being on a company's books, but has no guarantee of working hours or remuneration.[16] They are requested to perform activities at certain times, usually on a weekly or monthly basis. Zero-hour contracts are usually constructed in such a way that workers can theoretically reject a request to work made by their employer, however, in practice their exploitable position means that any refusal can result in future hours being significantly reduced or lost entirely.[17] While they are not permitted in all Member States, their use has increased steadily since the Global Financial Crisis. For example, the United Kingdom saw their use increase over a decade from 20,000 to over 1,5 million.[18] Whilst it is still early to assess the economic consequences of the COVID-19 pandemic, initial data suggests that so far it has resulted in a significant

[13] Ibid, p. 273; see also S. Lee, D. McCann, & J.C. Messenger (n 8), p. 55.
[14] A. Broughton (n 4), p. 70.
[15] S. McKay (n 3), p. 24.
[16] A. Bogg (n 6), p. 278; P. M. Cardoso et al, 'Precarious Employment in Europe' (2014).
[17] A. Broughton (n 4), p. 121.
[18] P. M. Cardoso et al (n 16).

drop in the number of hours people are working per week.[19] Zero-hour contracts are, almost without exception, highly precarious in nature.[20] As well as the exploitable situation they place the worker in, they often elude national employment legislation, creating more precariousness and risking downward pressures on wages and social standards.[21] Many zero-hour contracts workers are thus left without any recourse to social protection.[22] This can affect their rights under both employment and migrant law, throwing into doubt their legal status or ability to claim social security benefits.[23]

Another example of precarious on-demand employment is platform work. This is employment provided or mediated by an online platform, and where work of varied forms can be exchanged for payment.[24] It involves a triangular situation between platform, worker, and client, whereby the service is generally provided on-demand by the client through the platform or app, and the platform worker usually has very little relationship with the client for whom they are providing services. Equally, the worker often has a weaker relationship with the platform than between a typical worker and employer.[25] All parties participate in the relationship, and their complicated relationship makes it difficult to determine who is the employer.[26] This means that the rights of platform workers must be assessed under both in the context part-time work as well as self-employment, as their blurred status between paid- and self-employment means that they are two sides of the same coin: if they are

[19] OECD, *OECD Employment Outlook 2020: Worker Security and the COVID-19 Crisis* (2020) OECD publishing: Paris.
[20] A. Broughton (n 4), p. 121.
[21] U. Oberg, 'Precarious Work and European Union Law' (2016), p. 34.
[22] A. Adams, M.R. Freedland, & J. Prassl, 'The Zero-Hours Contract: Regulating Casual Work, or Legitimising Precarity' (2015) *Oxford Legal Studies Research Paper No. 11/2015*, p. 3.
[23] A. Broughton (n 4), p. 121.
[24] Z. Kilhoffer *et al*, 'Study to gather evidence on the working conditions of platform workers' (2020) *Directorate-General for Employment Social Affairs and Inclusion - Report VT/2018/03*, Luxembourg: Publications Office of the European Union, p. 40.
[25] *Ibid*, p. 41.
[26] A. Rosin, 'Platform Work and fixed-term employment regulation' 12(2) *European Labour Law Journal* 156-176, p.162

classified as workers rather than self-employed, then they will still have the same problems as other forms of on-demand workers: the amount and schedule of work can be varied by the employer with little or no notice, and any rejection of such demands are likely to push the worker into social exclusion and/or poverty.[27] In fact, the situation is likely to be worse as their fate is determined by an algorithm rather than individuals. 'Platform work' is a general term that covers a wide (and increasing) range of workers.[28] This chapter, with its focus on precarious platform workers working limited hours, will focus on lower-paid types of platform work, such as food delivery and private transport companies like *Deliveroo* and *Uber*.

3 Marginal Work & Genuine Economic Activity

The main legal factor determining whether marginal and on-demand workers gain or lose legal protection is the 'genuine economic activity' element of the *Lawrie-Blum* criteria. As was explained in Chapter 4, if employment is not considered to be "genuine and effective" under this assessment then it is rendered "marginal and ancillary", which can result is a loss of protection for the worker. The Court distinguishes between the *quality* of the work and the *quantity* that it is performed, and the limitations that it places upon this aspect of the *Lawrie Blum* criteria. The actual classification of the worker's employment as either genuine or marginal is undertaken by national courts and authorities, meaning that the social protection of marginal and on-demand workers is not just a matter of the interpretation of the law by the Court but requires an investigation into how such rules are applied at the national level and enforced at the European level.

The following section will assess how precarious part-time workers may lose protection due to the genuine economic activity requirement. It will

[27] S. McKay (n 3), p. 24.

[28] N. Bodiroga-Vukubrat, A. Poscic, and A. Martinovic, 'Making a Living in the Gig Economy: Last Resiort or a Reliable Alternative?', in G. G. Sander, V. Tomljenovic, and N. Bodiroga-Vukubrat (eds.), *Transnational, European, and National Labour Relations: Flexbbility and the New Economy* (2018) Springer: Gham, p. 61

first explain how the Court has traditionally relied on a quantitative assessment of genuine economic activity, based on the amount the individual workers, however, in recent years it has gradually moved towards a more qualitative understanding of employment, looking at the nature of the worker's employment with the employer. It will further look at the situation for marginal and on-demand workers "on the ground" in the Member States, to assess their level of protection regardless of how the genuine economic activity requirement is interpreted by the Court of Justice. As a proposed solution, it will put forward a presumption of employment based on the existence of an employment contract, that can be rebutted using a qualitative assessment of the employment in question.

3.1 CJEU Approach: Quantity over Quality?

The Court has traditionally used a quantitative approach towards determining whether employment is genuine or not. This means that, when the Court is making its assessment, most weight is given to the *quantity* of the work performed: i.e., the number of hours worked, the level of remuneration received, etc. It has interpretated this rule broadly, holding that "low remuneration, the rather low productivity of the person, or the fact that (s)he works only a small number of hours per week do not preclude that person from being recognised as a worker".[29] As such, the origin or amount of remuneration they receive is irrelevant, even if this is below the minimum wage or entitlement for social benefits,[30] as is their level of productivity [31] The Court has also traditionally applied a quantitative approach to determining genuine economic activity in the context of on-demand and casual workers,

[29] Case C-46/12 *L.N.* ECLI:EU:C:2013:97, para. 41; see also Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284, para. 21; Case 344/87 *Bettray* ECLI:EU:C:1989:226, para. 15; Case C-3/90 *Bernini* ECLI:EU:C:1992:89, para. 16.

[30] Case C-14/09 *Genc* ECLI:EU:C:2010:57, para. 25; Case C-213/05 *Geven* ECLI:EU:C:2007:438, para. 27; Case C-444/93 *Megner & Scheffel* ECLI:EU:C:1995:442, para. 18; Case C-139/85 *Kempf* ECLI:EU:C:1986:223

[31] Case C-188/00 *Kurz* ECLI:EU:C:2002:694, para. 32; see also, amongst others, Case 53/81 *Levin* ECLI:EU:C:1982:105, para. 16; *Kempf*, para. 14.

finding that the irregular nature and limited duration of the employment, as well as the limited number of hours, could render it marginal and ancillary.[32] That said, the Court has "only in exceptional circumstances" actually concluded that employment is marginal and ancillary through a quantitative approach.[33] It has held that working just 10 or even five hours a week will not necessarily render the employment 'marginal'.[34]

3.2 A Shift towards Qualitative Considerations?

In recent years, the Court has included more *qualitative* elements when assessing whether employment is genuine or not, placing more focus on the individual's employment and contractual situation. For example, in *Genc*, the Court stated that the fact that a person works for "only a very limited number of hours" may be an indication that the activities performed are marginal and ancillary, however, it went on to state that "independently" of the limited amount of remuneration and hours, an "overall assessment of the employment relationship" could mean that the activity is real and genuine, thereby granting the individual worker status under [Article 45 TFEU].[35] The Court expanded on this "overall assessment", stating that the national court should take into account factors relating to "not only the number of working hours and level of remuneration but also 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 relative collective agreement in conjunction with the fact that her contractual relationship with the same undertaking has lasted for almost four years", as these are also "capable of constituting an indication that the professional activity in question is real and genuine".[36]

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[32] Case C-357/89 *Raulin* ECLI:EU:C:1992:87, para. 14.

[33] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:150 para. 24.

[34] Case 171/88 *Rinner-Kühn* ECLI:EU:C:1989:328, para. 11; See also *Genc*.

[35] *Genc*, para. 26.

[36] Ibid, para. 27.

Genc is one of the few examples of the Court using this qualitative approach to distinguish genuine from marginal activity in the context of free movement law. However, the Court has also applied a more quality-based and holistic approach in case-law concerning age discrimination. For example, in *O v Bio Phillippe Auguste*, the Court again stated that "independently of the limited amount of the remuneration for and the number of hours" it could not be ruled out that following "an overall assessment of the employment relationship" that the activity should be considered as real and genuine".[37] In *Abercrombie & Fitch*, the Court again held that it was necessary "to take into account factors relating not only to the number of working hours and level of remuneration but also to the right to paid leave, to the continued payment of wages in the event of sickness, to a contract of employment which is subject to the relevant collective agreement, to the payment of contributions and, as appropriate, the type of those contributions".[38] The above cases demonstrate that the Court has been more willing to consider more qualitative aspects relating to the employment in question, such as the existence and form of an employment contract, the fact that the worker receives collectively agreed pay and working conditions or employment-based rights such as the right to paid annual leave, the right to sick pay, rather than simply looking at quantitative factors like the number of hours worked or remuneration received. In this regard, a link can be made with cases such as *Ninni-Orasche*, where the Court had held that the permanent or long-term nature of employment is irrelevant when determining whether the individual is a worker for the purposes of Article 45 TFEU.[39]

3.3 National Application: A problem of enforcement?

The balance of competences within the European Union, and in particular the absence of a well-defined, universal definition of worker under EU law, means that significant discretion is left to Member States

[37] Case C-432/14 *O v Bio Philippe Auguste* ECLI:EU:C:2015:643, para. 24.
[38] Case C-143/16 *Abercrombie & Fitch Italia v Antonio Bordonaro* ECLI:EU:C:2017:566, para. 20.
[39] Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:600.

when determining who is a worker under national regulations. As such, regardless of the Court's approach towards the genuine economic activity aspects of the *Lawrie-Blum* criteria, an individual's status is largely dependent on regulations and practices applied within Member States. While historically there have been few tensions in this area, in recent years some Member States have adopted increasingly restrictive rules that potentially do not comply with the more recent approach of the Court, and risk excluding many marginal and on-demand workers from the status of worker and the rights accompanying that classification.

Often Member States impose strict conditions relating to working hours and income before migrant workers can obtain the legal status of worker, which seems to undermine the Court's *acquis* in this area.[40] For example, Romania imposes a *de facto* threshold of full-time work before the individual obtains worker status. Other states impose working-time requirements that range from around 10% to 50% of full-time work, and even in states that do not impose formal working time requirements, often administrators use *de facto* thresholds in their case-by-case assessments of individuals' situations.[41] Some Member States impose earning requirements. For example, Italy imposes a formal earning requirement of €7.000 per year, whilst others have de facto thresholds in their case-law. Often these thresholds work in combination: in order to earn a certain level of income the individual needs to work a specific number of hours, and *vice versa*.[42] These thresholds seemingly undermine the Court's assertion in its earlier case-law that Member States should not be able to fix and modify the definition of worker unilaterally through national laws, without any control by the EU, as this would make it possible for Member States to "exclude at will certain categories of persons".[43]

[40] See C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016).
[41] Ibid, p. 24.
[42] Ibid, p. 24 – 25.
[43] Case 53/81 *Levin* ECLI:EU:C:1982:105, para. 11.

Some Member States comply with the requirement for case-by-case assessments by using formal thresholds relating to remuneration or working hours to automatically recognise worker status. This means that case-by-case assessments still apply, at least in theory, for those not meeting the threshold. An example can be seen from the United Kingdom, which whilst no longer a member of the European Union, provides good insight as it as it demonstrates how far Member States can when limiting these rights, as well as more flexible systems that may arguably comply with the Court's *acquis*. The UK's 'Primary Earnings Threshold' (PET) automatically classifies individuals as workers if they earn £166 gross per week.[44] Despite setting an earnings requirement, the UK maintained that it was in line with the Court's *acquis* as it claimed there is "no minimum amount of hours which an EEA national must be employed for in order to qualify as a worker".[45] However, O'Brien et al assert that the earnings requirement functions as a *de facto* working time requirement for those in the lowest income brackets.[46] It means that (as of 2022), a minimum wage worker earning £9,50 per hour would have to work 17 hours per week to be automatically recognized as a worker.[47] Other Member States, such as the Netherlands, impose similar, albeit slightly more sophisticated systems, with the actual calculation dependent on a number of legislative instruments, and based on whether the individual's income exceeds 50% of the social assistance standard or they work at least 40% of normal full-time employment hours.[48] For students specifically, they must work 12 hours per week to automatically obtain worker status, which is more-or-less the same as 40% of full-time requirement. Like the United Kingdom, if these criteria are not met, a case-by-case assessment will take place that considers various factors.

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[44] Based on 2019/20 rates. See https://www.gov.uk/government/publications/rates-and-allowances-national-insurance-contributions/rates-and-allowances-national-insurance-contributions

[45] See Home Office, European Economic Area nationals: qualified persons (Version 6.0) (December 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759064/eea-qualified-persons-v6.0ext.pdf, p. 12

[46] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 64.

[47] Current national minimum wage is taken from https://www.gov.uk/national-minimum-wage-rates.

[48] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 27.

These systems provide a level of flexibility that, at least in principle, may comply with the Court's *acquis*. However, they leave a lot of discretion to Member States. In particular, they leave much power to national decision makers that are often poorly equipped to apply *acquis* from the Court of Justice and are susceptible to political direction coming from superiors or central Government.[49] Second, some Member States can be highly selective in terms of the indicators from the Court's *acquis* that they actually use. The UK, for example, whilst referring to the court's *acquis*, completely omits the more-recent, qualitative criteria laid down in *Genc* and other cases, such as the existence of an employment contract, the applicability of a collective agreement, the right to annual paid leave, etc.[50]

This flexible approach can be used as a smokescreen for systems that undermine the Court's *acquis* by imposing *de facto* earnings and working requirements, whilst having the façade of requiring case-by-case assessments. This is often the case with Member States that adopt a 'reject now, justify later' approach, that generally assumes migrants do not meet the requirements necessary to obtain legal status under national law.[51] Many of those rejected will not have the knowledge or resources to challenge the decision against them, thereby acting as a *de facto* barrier to many. However, if an individual challenges such a measure, the Member State will often back-down in order not to run the risk of the Court of Justice finding that their national rules are contrary to EU law. This reduces the possibilities of challenges arriving at the Court through the preliminary ruling procedure. Furthermore, the Commission would seem to have little interest in challenging these practices, at least when compared to other matters considered to be more important, such as the rule of law and ensuring fair competition. It seems that these practices apparently do not fall into the "most important breaches of EU law

[49] T. Kruis, 'Primacy of European Union Law - from Theory to Practice' (2011), p. 278
[50] *Genc*, para. 27.
[51] C. O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017); C. O'Brien, 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' (2016).

affecting the interests of its citizens and businesses",[52] as prioritised by the Commission.

4 Precarious Part-time Workers under Directive 2004/38

The distinction between genuine and marginal economic activity also has implications for an individual's free movement rights under Directive 2004/38, as this instrument regulates the residence and equal treatment rights of both persons on the genuine economic activity divide. However, it is unclear from the text of the Directive what the status is (if any) of marginal workers that do not meet the genuine economic activity requirement. The following section will explain the distinction between marginal and genuine work under Directive 2004/38, looking at their treatment under the Directive and national applications of it. Following this, it will assess whether treating marginal workers as having sufficient resources may be more appropriate than their treatment as jobseekers, as is the most common practice.

4.1 The Binary Distinction between Economic Activity and Inactivity

The position of 'marginal' workers under Directive 2004/38 is unclear, however, there seems to be little by way legal effects or individual/proportionality assessments for marginal workers that do not meet the genuine economic activity criterion. Whilst there is limited case law on marginal workers, there are some examples in cases concerning students of migrants engaging in employment but not sufficiently enough to confer worker status. In these decisions the Court will classify the individual as either a worker or student, with no intermediary statuses or rights for those falling in between these categories. That said, the Court has at times used the individual's (albeit limited) employment within its reasoning, even if this is not decisive for the outcome of the

[52] European Commission Communication, 'EU Law: Better results through better application' (2017/C 18/02), p. 14.

case. This can be seen in *Grzelczyk*, where the Court explicitly mentions the fact that Mr Grzelczyk "defrayed his own costs", in part through performing "various minor jobs".[53] Advocate General Alber suggested that "the holding of occasional student jobs", or in other words marginal work activity, would "scarcely satisfy" the *Lawrie-Blum* criteria.[54] However, the fact that Mr Grzelczyk was able to support himself financially and only sought social benefits during the final stage of his degree, seemed to influence the Court's decision as it held that the Member State should demonstrate financial solidarity with Mr Grzelczyk.[55]

Grzekczyk can be compared to *Förster*.[56] In this case the applicant worked during her studies in "various kinds of paid employment", and later in a "paid work placement in a Dutch special school".[57] Unlike Mr Grzekczyk, however, Ms Förster was actually recognised as a worker during this period, until her employment activity become so small as to render it marginal and ancillary. However, this time the Court gave no weight to her previous worker status or current marginal work activity, holding simply that she was no longer entitled to study financing as her employment status meant that she could no longer be considered as a 'genuine' worker. In conformity with the stricter and more literal approach to interpreting the Directive explained in Chapter 5, the Court applied a binary approach that did not leave space for any kind of individual or proportionality assessment to her situation.

The flip side of this is that, assuming the individual is engaged in genuine activity, then the binary approach means they will fully realise that status. In *L.N.*,[58] a 'European citizen' (nationality unknown) worked at an international wholesale firm for three months before starting a full-time course at Copenhagen Business School and claiming Danish educational

[53] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 10.
[54] Opinion of Advocate General Alber in Case C-184/99 *Grzelczyk* ECLI:EU:C:2000:518, para. 94.
[55] *Grzelczyk*, para. 44
[56] Case C-158/07 *Förster* ECLI:EU:C:2008:630.
[57] Ibid, p. 16 – 17.
[58] Case C-46/12 *L.N.*

assistance, which was denied as "his principal objective in coming to Denmark was to pursue a course of study", meaning he was a student rather than a worker.[59] The Court held that "the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration".[60] As soon as the genuine economic activity criterion is satisfied, they must be entitled to the study grant on the basis of Article 7 Regulation 492/2011, and therefore would not need to rely on Article 24(2) Directive 2004/38.[61] Overall, however, it can concluded that the Court's binary approach to Directive 2004/38 means that once an individual's employment status becomes 'marginal and ancillary', rather than 'genuine and effective' they will lose the protection available to workers under the Directive. That said, without specific case law in this area, it is difficult to know how the Court would react to such a situation.

4.2 Marginal Workers as Jobseekers

The status of marginal workers can be compared to those who, having lost the status of worker under Article 7 Directive 2004/38, retain a residual status as a jobseeker under Article 14(4)(b).[62] Whilst jobseekers obtain a right of residence under the Directive, Member States are only required to provide them with a "reasonable period of time" in which to apprise themselves of employment offers corresponding to their occupational qualifications and to take necessary steps to become engaged.[63] In *G.M.A.* the Court was asked whether a Member State could require a jobseeker to have a genuine chance of being employed before they granted a residence permit for more than three months. [64] It found that the Directive is silent on the minimum time period that Member States must provide for a right to reside on the basis of Article 14(4)(b)

[59] Ibid, para. 19.
[60] Ibid, para. 47.
[61] Ibid, para. 48 - 49.
[62] See Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para. 56; Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037, para. 34.
[63] *G.M.A.*, paras. 26 - 27.
[64] Ibid, para. 9.

Directive 2004/38.[65] The only indication is the pre-Directive case of *Antonissen* which suggests that a six-month period would be acceptable.[66] The Court held that jobseekers should have a "reasonable period of time" to acquaint themselves with the job market, during which the Member State cannot require the individual to demonstrate that they have a "genuine chance of being engaged".[67] After this "reasonable period" has ended, the Member State can demand that the jobseeker is able to "provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged" in order to maintain their residence status.[68]

Despite their diminished status and rights, jobseekers do have more protection under the Directive that other types of non-workers. The wording of Article 14(4)(b) actually refers to expulsion decisions (for example, on the basis of being an unreasonable burden) when they concern workers or *jobseekers genuinely seeking employment* (emphasis added). Jobseekers derive their rights through Article 45 TFEU, rather than Article 21, and as such cannot be subject to the unreasonable burden limitation so long as they are genuinely seeking employment. As Advocate General Szpunar has stated, the unreasonable burden limitation is a specific objective of Article 7 only, and therefore does not apply to Article 14(4)(b), which comes under the Directive's general object of facilitating the right to move and reside freely throughout the Union.[69]

However, treating marginal workers as jobseekers is also suggested to be inappropriate insofar as it can impose requirements that are inappropriate or impossible to comply with if they are already engaged in marginal or on-demand work. Jobseekers have very few social rights,

[65] Ibid, para. 34.
[66] Ibid, para. 38 – 39; Case C-292/89 *Antonissen* ECLI:EU:C:1991:80, para. 10.
[67] Ibid, para. 43 - 45.
[68] Ibid., para. 46.
[69] Opinion of Advocate General Szpunar in Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:512, para. 57.

in particular the right to welfare entitlement.[70] They cannot rely on Regulation 492/2011 and therefore do not have the right to the same social advantages as Member State nationals.[71] Recent case-law suggests that they are excluded from all social assistance entitlement under Article 24(2) Directive 2004/38, which in recent decisions also seemingly encompasses *Collins*-type benefits "intended to facilitate access to employment in the labour market".[72] It is unclear whether the Court's reasoning means that *all* jobseeker allowance benefits that are non-contributory will fall under Article 24(2) of the Directive, or whether benefits have do not have a dual-nature (i.e. they solely focus on an individual's entry into the labour market) still do not fall under this derogation. That said, it is difficult to see a situation where a non-contributory jobseeker benefit would *not* have the dual objective of facilitating entry onto the labour market whilst contributing to the individual's subsistence. Moreover, the Court's rejection of Advocate General Wathelet's argument in *Alimanovic* that different rules should apply to different types of jobseekers, with an individual assessment based on proportionality being applied to those that have previously been in employment in the host-state,[73] means that it is highly unlikely that the Court would treat marginal workers differently from classic jobseekers, despite the concretely different factual position between marginal worker and jobseeker proper.[74]

This arguably undermines the main objective of Directive 2004/38, which is to facilitate the right to move and reside freely throughout the Union,

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[70] O. Golynker, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity' (2005).

[71] Case C-316/85 *Lebon* ECLI:EU:C:1987:302, para. 27

[72] D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208, p. 1204; see also C. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53(4) *CMLRev* 937, pp. 948 - 949; O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart, pp. 53-56.

[73] Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, paras. 104 - 105.

[74] D. Carter, 'Inclusion and Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020) Cambridge: CUP.

as it does not protect the Member State against unreasonable burdens, but simply denies protection to those engaged in employment. Furthermore, it is questionable how appropriate it is to apply labour market activation policies, which can require the worker to apply for jobs or prove that they have sufficient resources, to those already in employment, as some Member States do.[75] That said, whilst the Court has endorsed activation policies in principle, it has also stated that the individual must be given time to seek a job at their skill level, and cannot be denied jobseeker status simply because they do not accept a job below their skill level or outside their field of expertise.[76] The application of activating labour market policies to those already in employment, even marginally, means that the worker effectively has two jobs: their marginal/on-demand employment, and complying with the conditions national authorities require to maintain the status of jobseeker.

4.3 Sufficient Resources as Residual Residence for Marginal Workers?

In the absence of individual assessments or special protection for marginal workers, it may be more appropriate to treat marginal or on-demand workers as having sufficient resources under Article 7 than as jobseekers under Article 14(4)(b). A benefit for such workers would be that the social assistance derogation under Article 24(2) would not apply to them, and it would allow them to maintain a right to reside in a host-state without having to register with a job centre and adhere to the connected conditions. However, it would also mean that Member States could require them to have sufficient resources and thus they could in principle lose their residence status under Article 7 for becoming an unreasonable burden.

Whilst this would seem to be a big shift in the approach to dealing with marginal workers, the Court recently alluded to such an approach in the

[75] C. O'Brien, E. Spaventa, & J. De Coninck (n 38), p. 31. See also Section 6.4.3.

[76] *G.M.A.*, paras. 26 – 27 and paras. 47-48; see also Opinion of Advocate General Szpunar in Case C-710/19 *G.M.A.* ECLI:EU:C:2020:739, paras. 75 – 76.

case of *Bajratari*.[77] The case concerned the right of residence of minor EU citizens, who were supported by their Albanian father, who had been working irregularly in non-standard employment following the expiration of his residence card and work permit. The national court had determined that the children did not satisfy the requirement of self-sufficiency provided for in Article 7(1)(b) of the Directive and did not consider the income of their father.[78] However, the Court held that a minor EU citizen has sufficient resources under Article 7(1)(b) even if these resources were obtained through their father's income, which was earned "without a residence card and work permit".[79] The Court also considered that although technically "illegal" resources, the father had lived "for the past 10 years without needing to rely on the social assistance system of that Member State".[80]

The decision can be applied by analogy to the situation of marginal workers to suggest that they would have sufficient resources even if not satisfying the *Lawrie-Blum* criteria. In *Bajratari*, the Court did not consider the "unlawful" nature of the employment and only focused on the self-sufficiency of the citizen, as well as the fact that they did not seek recourse to public funds. As such, if a citizen is engaged in marginal work activity and does not require recourse to public funds, there seems little reason why they could not establish a right to reside under Article 7(1)(b) Directive 2004/38 as in *Bajratari*. If fact, such an approach would make more sense, given that the marginal worker's activity is not unlawful. The Court's reasoning would actually suggest that even those engaged in casual and irregular employment (i.e., other forms of "unlawful" employment) could obtain a right to residence under the Directive.

[77] *Bajratari*.
[78] Ibid, para. 14.
[79] Ibid; See also Opinion of Advocate General Szpunar in Case C-93/18 *Bajratari* ECLI:EU:C:2019:512, para. 70.
[80] Ibid, para. 46.

4.4 The Treatment of Marginal Workers under National Law

The situation "on the ground" for marginal workers is, like under Directive 2004/38, unclear. Some Member States are generous in granting worker status to individuals engaged in marginal forms of employment. For example, in *Tarola* Advocate General Szpunar noted that whilst the applicant was "a part-time worker who works for a period of less than 13 (hours per) week and whose work is not regular", it did not result in them losing the status of worker under Irish law.[81] However, other Member States impose conditions and limitations on marginal workers that potentially undermine their social protection. As O'Brien et al note, these can exclude individuals from worker status because they perform multiple jobs on different employment contracts, each of which may be limited to a few hours or a short period of time.[82] Whilst some that fail this test are deemed to be economically inactive, in the vast majority of Member States cases these persons are classified as jobseekers.[83] However, marginal working jobseekers often also face additional limitations on their rights and protections. For example, in some Member States, for example Bulgaria, Cyprus, Finland, Greece, and Italy, they face temporal limitations on their status, and in others (for example Belgium, Malta, Portugal, Slovakia, and Sweden), they have to prove that they have a genuine chance of finding employment to maintain their status.[84] Some Member States, such as Denmark, France, Germany, Poland, and the United Kingdom, go as far as to combine these temporal limitations with a test of genuinely seeking employment.[85] As well as their status on the labour market, this assessment can also include looking at the individual's integration into the host-state, their language proficiency,

[81] See footnote 8 in the Opinion of Advocate General Szpunar in Case C-483/17 *Tarola* ECLI:EU:C:2018:919.
[82] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 26; C. O'Brien (n 72), p. 975.
[83] Ibid, pp. 31, 68-69; C. O'Brien (n 72), p. 975. These states include: Belgium, Bulgaria, Cyprus, Czechia, Denmark, Finland, France, Germany, Greece, Italy, Malta, Netherlands, Portugal, Romania, Slovakia, and the United Kingdom.
[84] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 31 - 32.
[85] Ibid.

previous claims for social benefits, the personal circumstances of the individual, as well as previous evidence of searching for employment.[86]

In a number of Member States, employment in marginal work will not suffice in demonstrating that they have a genuine chance of employment. O'Brien et al highlight Belgium, where an individual can be working around 11 hours a week in employment which is classified as 'marginal and ancillary', and furthermore could not even demonstrate their genuine chance of being employed or obtain a right to reside as a jobseeker.[87] Another individual was found to not be a jobseeker, despite being engaged in 'genuine and effective employment' for three months, which subsequently became marginal work once their hours were reduced.[88] Furthermore, the strict UK rules that require the individual to have either (i) an offer of employment, or (ii) be waiting on the result of recent interviews,[89] would exclude individuals that are engaged in marginal employment.

Perhaps most problematic of all is the tendency for some Member States to conflate the legal distinction between jobseekers and economically inactive citizens by combining the tests of 'genuinely seeking employment' with that of 'sufficient resources' when assessing whether "the jobseeker is or has become an unreasonable burden".[90] This means that the individual must both genuinely seek employment whilst simultaneously not becoming an unreasonable burden on the host-Member State.[91] This conflated test undermines the wording, historical background, and underlying purpose of both Directive 2004/38 and the constitutional settlement between workers and citizens under EU law.[92] It effectively swaps jobseekers status from having limited rights under

[86] Ibid, p. 31.
[87] Ibid, p. 68.
[88] Ibid.
[89] Ibid.
[90] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 34.
[91] D.W. Carter, 'Inclusion and Exclusion of Migrant Workers in the EU', in M. Jesse (2020) *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020) CUP: Cambridge, p. 316.
[92] Ibid

Article 45 TFEU, to being an economically inactive citizens under Article 21.[93] However, EU law dictates those residing on the basis of Article 45 TFEU can *never* become an unreasonable burden, meaning that this requirement cannot legally be imposed upon a jobseeker.[94] Jobseekers have their own specific restrictions and limitations (for example relating to social assistance), and therefore to impose the unreasonable burden limitations upon them conflates two separate bases of residence under EU law.

5 The Free Movement Rights of Precarious Part-time Workers

So far, this chapter has explained the distinction between genuine and marginal economic activity, and what this means for the legal status of precarious part-time workers. The following section will look at the concrete rights of workers that are available under the *Lawrie-Blum* criteria, and the extent to which these can be lost due to the individual's marginal worker status. The following section will look at free movement rights, however, it will not cover residence rights as these have been discussed in the context of Directive 2004/38 (see Chapter 5).

5.1 Employment-based Rights

Under Article 45(3) TFEU, Member State nationals are entitled to leave their home state and reside in a host state for the purposes of pursuing an employment activity.[95] Under the market-making rationale of the internal market, any national rules which "preclude or deter" nationals leaving their home state in order to exercise their rights under Article 45

[93] C. O'Brien (n 72), p. 950.

[94] See, for example, Case C-46/12 *L.N.* ECLI:EU:C:2013:97, para. 47; see also C. O'Brien 'I trade, There I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643, p. 1663.

[95] See, amongst others, Case C-363/89 *Roux* v *Belgian State* ECLI:EU:C:1991:41, para. 9; Case C-18/95 *Terhoeve* ECLI:EU:C:1999:22, para. 38; Case C-370/90 *Singh* ECLI:EU:C:1992:296, para. 17; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, para. 95.

TFEU will constitute a violation of the freedom of movement for workers.[96] Further specific protections relating to accessing and the conditions of employment were conferred through Regulation 1612/68, now Regulation 492/2011.[97] This Regulation prohibits directly discriminatory criteria in relation to taking up certain jobs, as well as indirectly discriminatory measures that cannot be justified under either Article 45(3) TFEU or any objective reasons in the public interest.[98] Article 45 TFEU also applies to certain non-discriminatory measures that restrict access to employment.[99] However, the Court will not preclude non-discriminatory national measures that restrict access to employment if the restrictive effect is "too uncertain and indirect".[100] Whilst the Court has applied a restriction-based approach in some cases concerning the freedom of movement for workers,[101] the discrimination approach is the "most firmly entrenched", at least compared to the other freedoms.[102] Finally, the Court has found that Article 45 TFEU can be applied in horizontal situations,[103] however, it is unclear whether the same applies for Article 3 of Regulation 492/2011.[104] By failing to meet the genuine economic activity criterion, it is possible that precious part-time workers are denied even these basic rights relating to accessing and conditions of employment.

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[96] Case C-10/90 *Masgio* ECLI:EU:C:1991:107, para. 18-19; *Terhoeve*, para. 39; *Bosman*, para. 96

[97] Regulation 492/2011 of 5th April 2011 on freedom of movement for workers within the Union *L 141/1*.

[98] Case C-237/94 *O'Flynn* ECLI:EU:C:1996:206, para. 20; Case C-57/96 *Meints* ECLI:EU:C:1997:564, para. 45; Case C-187/96 *Commission v Greece*, para. 19.

[99] *Bosman*, para 96.

[100] Case C-190/98 *Graf* ECLI:EU:C:2000:49.

[101] For example, Case C-40/05 *Lyyski* ECLI:EU:C:2007:10. In this case the Court considered a Swedish rule requiring a teachers in state schools to undertake a period of training a special Swedish school could be justified on the basis of improving the education system. See also *Bosman*.

[102] C. Barnard, *The Substantive Law of the EU* (4th Ed) (2013) OUP: Oxford, p. 281.

[103] Case C-281/98 *Angonese* ECLI:EU:C:2000:296.

[104] Ibid, para 22.

5.2 Social Security

The objective of facilitating the cross-border movement of workers requires that they are entitled to equal treatment in terms of social security entitlement. Traditionally, the inclusion of migrant workers into national social security systems has been relatively uncontroversial, with Member States establishing normative ideas on how equal treatment between foreign workers and Member State nationals could be used as a means of facilitating free movement even before the Treaty of Rome, predominantly through international agreements confirming the right of migrant workers to social security.[105]

Social security entitlement is governed by the Social Security Coordination Regulation, which coordinates social security rules across the internal market.[106] The Union's lack of competence to harmonise social security entitlement means that coordination is necessary as it preserves national social security systems, which do not just reflect variations in national wealth, but "also reflect deep-seated differences in cultural attitudes and traditions in social values".[107] The Regulation therefore seeks to find a balance between providing an adequate level of protection to migrants residing in a host-state, whilst respecting the diversity of national social security systems.[108] The Social Security Coordination Regulation is primarily based on seeking guarantee equality of treatment for workers under the different national legislation for the persons concerned.[109] It is also aimed ensuring the aggregation of

[105] C. Barnard, 'Free Movement vs. Fair Movement: Brexit and Managed Migration' (2018), pp. 208 – 209.
[106] Regulation 883/2004. The coordination of social security in the EU is also governed by Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems; see F. Pennings, 'Coordination of Social Security on the Basis of the State-of –Employment Principle: Time for an Alternative?' (2005) 42(1) *CMLRev* 67, p. 68.
[107] M. Shanks, 'The Social Policy of the European Communities' (1977), p. 376.
[108] H. Verschueren, 'EU Free Movement of Persons and Member State Solidarity Systems: Searching for a Balance', in E. Guild & P.E. Minderhoud (Eds) *The First Decade of EU Migration and Asylum Law* (2012), p. 51.
[109] See Recital 5, Regulation 883/2004.

time periods for the conferral of benefits,[110] and guarantees the possibility of exporting benefits, with any derogations from this being interpreted strictly.[111] These principles effectively mean that benefits accrued in one Member State can be transferred to another, even if the worker moves from one Member State to another (or has family there).[112]

Regulation 883/2004 functions on a conflict-of-laws basis that aims to ensure that the individual is subject to one national system only, meaning that it can have stark consequences for workers whose employment is (or previously has been) connected to a host Member State.[113] Once the national system has been determined, under the *lex loci laboris* (the state-of-employment) principle the host-state legislation is applicable to the worker immediately from the starting date of employment.[114] They will be covered under this the state of employment even if residing in a different state.[115] The only exception are the infamous 'special non-contributory benefits', which are non-exportable. Whilst they must be granted to nationals from other Member States, they can be limited to persons residing in the territory of the host-state.[116] Given that national social security systems are often linked to employment, it would the make the exercise of free movement rules less attractive if their inclusion within such systems were not guaranteed and they were to fall between the gaps in the law.[117] This would risk placing downward pressures on social security standards, thereby potentially undermining the objective

[110] Recitals 10 and 14, Regulation 883/2004.
[111] Recitals 33 and 37, Regulation 883/2004.
[112] F. Pennings, 'Principles of EU coordination of social security', in F. Pennings & G. Vonk (eds.), *Research Handbook on European Social Security Law* (2015) Camberley: Elgar Publishing.
[113] Ibid, p. 321; Case 302/84 *Ten Holder* ECLI:EU:C:1986:242, para. 20.
[114] For some recent examples of how this works in practice, see Case C-784/19 *Team Power Europe* ECLI:EU:C:2021:427, para. 34; Case C-610/18 *AMFB & Others* ECLI:EU:C:2020:565, para. 42.
[115] F. Pennings (n 106), p. 68.
[116] Ibid, p. 75.
[117] Ibid, p. 69; F. Pennings (n 112), p. 324; see also Case 24/75 *Teresa & Silvana Petroni* ECLI:EU:C:1975:129, para. 13.

of ensuring a continued improvement of living standards throughout the Union.[118]

This is arguably the situation for precarious part-time workers. If they do not possess the status of worker under EU law, then they can potentially be excluded from social security benefits under Regulation 883/2004. As was discussed in Chapter 5, there has been much discussion over whether Regulation 883/2004 should be based on *factual*, rather than *legal* residence, meaning that mere residence in a host-state would entitle them to social security benefits under the Regulation, regardless of their employment status.[119] If this were the case, it would it would provide precarious part-time workers with a residual level of protection as they would be entitled to social security benefits regardless of whether their employment is genuine or marginal. However, the Court's case law suggests that the Regulation does not stretch that far. Despite accusations that the Court uses the Regulation to justify decisions that create "harmonising effects" despite it being a coordination Regulation,[120] the Court has held that Member States fully retain the competence to determine the precise conditions for obtaining social security benefits under their legislation, although this must be done in conformity with EU law.[121] It has gone so far as to permit the imposition of right-to-reside tests even for social security benefits that are classified as family benefits under Regulation 883/2004.[122] This suggests that marginal workers could be excluded from social security benefits by way of the application of a right to reside test. That said, their classification as jobseekers should, at least in theory, mean that they are entitled to social security benefits under the Regulation, even if such persons can be excluded from social assistance benefits under Article 24(2) Directive 2004/38, which includes social security benefits that some elements of social assistance.

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[118] F. Pennings (n 106), p. 69.

[119] H. Verschueren, Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' (2013) 16(2) *European Journal of Migration and Law* 147-179; see also the Opinion of Advocate General Wahl in Case C-140/12 *Brey* ECLI:EU:C:2013:337.

[120] F. Pennings (n 112), p. 322.

[121] Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para. 90; see also Opinion of Advocate General Wathelet in Case C-333/13 *Dano* ECLI:EU:C:2014:341, para. 146.

[122] Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, paras. 67- 68.

5.3 Social Assistance and Social Advantages

The market-building logic behind Article 45 TFEU requires more than just social security entitlement. There are many benefits and advantages that are not classified as social security under Regulation 883/2004, but exclusion from which would undermine the level playing field between migrant and native workers, placing the former at a disadvantage on the labour market. As such, the *lex laboris* principle extends beyond social security. The Court has expanded the rights of workers through Article 7(2) Regulation 492/2011, which states that EU migrant workers "shall enjoy the same social and tax advantages as national workers". The Court has held this to be a specific expression of the principle of equal treatment enshrined in Article 45(2) TFEU and must be accorded the same interpretation as that provision.[123]

The Court has held that the term 'social advantages' includes any social benefit conferred by the state, regardless of its status as social security or social assistance.[124] It extends beyond advantages conferred to individuals due to their status as workers. In *Even*,[125] the Court held that the term covers any benefit or advantage "generally granted to national workers primarily because of their objective status as workers or *by virtue of the mere fact of their residence on the national territory*" (emphasis added).[126] This means that workers are not just entitled to benefits available to native workers, but to any social benefit or other advantage available to Member State nationals by reason of them being a Member State national and/or resident within the host-state. This means that it covers "all advantages by means of which the migrant worker is able to improve his living and working conditions and promote his social advancement".[127] The Court has extended the concept so far as to include

[123] C-287/05 *Hendrix* EU:C:2007:494, para. 53; C-20/12 *Giersch and Others* EU:C:2013:411, para. 35; Joined Cases C-401/15 to C-403/15 *Depesme and Others* EU:C:2016:955, para. 35; Case C-447/18 *UB* ECLI:EU:C:2019:1098, para. 39.

[124] Case 1/72 *Frilli v Belgium* ECLI:EU:C:1972:56, para. 13, 14.

[125] Case 207/78 *Criminal proceedings against Gilbert Even* ECLI:EU:C:1979:144.

[126] Ibid, para. 22.

[127] E. Ellis, 'Social Advantages: A New Lease of Life' (2003) 40 *CMLRev* 639, p. 644

a right to have court proceedings undertaken in German,[128] or a discount card for public transport discount following the death of a spouse,[129] if these rights are available to nationals of host-state. The main limitation to Article 7(2) is that an ex-worker cannot obtain rights for children born after his or her employment relationship has ended,[130] and that individuals must actually be working in order to obtain these rights, even if the social advantages in question are available to residents.[131]

Precarious part-time workers failing the *Lawrie-Blum* criteria due to their marginal employment status are not entitled to more generous social assistance benefits or wider social advantages. Furthermore, their classification as jobseeker will not provide them with protection due to the derogation from granting social assistance benefits to jobseekers under Article 24(2) Directive 2004/38. Moreover, if they are classified as self-sufficient person but do not have a right of residence under the Directive, then they will not be entitled to social assistance benefits.[132] This suggests that, regardless of their status under the Directive, marginal workers are not entitled to obtain more generous social assistance benefits and social advantages.

5.4 Derived Family Rights

The Court has stressed that the principle of equal treatment includes all areas of life which could constitute obstacles which impede the mobility of workers, even those "conditions of integration of such family in the environment of the host country".[133] As such, to fully exercise the rights under Article 45 TFEU, the social entitlements available to migrant

[128] Case C-137/84 *Ministère Public v Mutsch* ECLI:EU:C:1985:335, para. 17.
[129] Case 32/75 *Cristini* ECLI:EU:C:1975:120.
[130] Case C-43/99 *Leclere* ECLI:EU:C:2001:303, para. 59.
[131] E. Ellis (n 125), p. 648; see Opinion of Advocate General Jacobs in Case C-43/99 *Leclere* ECLI:EU:C:2001:97, para. 96.
[132] *Dano*, paras. 68 – 69; for a recent example, see Case C-709/20 *CG* ECLI:EU:C:2021:602, para. 75.
[133] Case 76/72 *Michel S* ECLI:EU:C:1973:46, para. 13.

workers must also be available for their family members.[134] This commitment to remove obstacles for the integration of the worker's family into the host country is now contained in Recital 6 to Regulation 492/2011. The Court has further stated that this requires Member States to ensure that there are the "best possible conditions" for such integration to take place.[135]

The reasoning for this can be seen from *Reed*, where the Court held that granting permission for an "unmarried companion" to reside with the applicant, "can assist his integration in the host State and thus contribute to the achievement of freedom of movement for workers".[136] For the migrant worker to fully integrate into a host-society, it was considered necessary for the worker's spouse, or in this case unmarried partner, to accompany them, and therefore fell within the concept of social advantages under Article 7(2).[137] The Court has also applied this reasoning in *Carpenter*, albeit in the context of service provision under Article 56 TFEU,[138] where it held that free movement law "could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse".[139] Simply put, the migrant worker needs their family (particularly a spouse/partner) to have equal rights in order for the worker to fully exercise their free movement rights. Furthermore, these derived rights facilitate free movement by reimbursing expenses incurred by the worker or compensating for costs that they may incur in relation to their family members.[140] The Court has emphasised the de-commodifying nature of derived family rights, holding that the granting of such benefits "enables one of the parents to devote himself or herself to the raising of a young child" and "is capable of reducing that worker's

[134] Ibid, para. 14-16.
[135] See Case C-308/89 *Di Leo* ECLI:EU:C:1990:400, para. 13; Case C-413/99 *Baumbast*, para. 50; see Opinion of Advocate General Mengozzi in Case Opinion of AG Mengozzi in Case C-291/05 *Rachel Nataly Geradina Eind* ECLI:EU:C:2007:407, para. 56
[136] Case 59/85 *Reed* ECLI:EU:C:1986:157.
[137] Ibid, para. 28; see also E. Ellis, 'Social Advantages: A New Lease of Life' (2003), p. 648.
[138] Case C-60/00 *Carpenter* ECLI:EU:C:2002:434
[139] Ibid, para. 39.
[140] F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015), p. 90.

obligation to contribute to family expenses".[141] If they are not entitled to such derived family rights they may have to take time off work or incur financial losses as a result. This will place them at a disadvantage compared to Member State nationals and other migrant workers that are entitled to such derived benefits.

EU migrant workers also derive rights for their children, who under Regulation 492/2011 are entitled to state education under the same conditions as Member State nationals. The Court has held that this includes basic social security benefits for the child and guardian.[142] Once the child is independent, which is established on a case-by-case basis, they must obtain social advantages by themselves.[143] In recent years the Court has considered the fundamental rights of the child to a greater extent, for example finding that national authorities must check whether a denial of social assistant benefits to a parent would risk violating the child's fundamental rights which require them to stay in dignified conditions with their parents/guardians.[144]

6 THE SOCIAL RIGHTS OF PRECARIOUS PART-TIME WORKERS

The loss of worker status under the *Lawrie-Blum* criteria affects not just an individual's position under free movement law, but also under EU social law. The following section will examine the rights that are available to workers under EU social law, and the extent that precarious part-time workers may lose protection from these. It will also examine additional problems that marginal; on-demand; and platform workers may face from specific social legislation due to their limited employment.

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[141] Case C-212/05 *Hartmann* ECLI:EU:C:2007:437, para. 26; see also Joined Cases C-245/94 and C-312/94 *Hoever and Zachow*, paras. 23 - 25; *Bernini* , paragraph 25.

[142] *Lebon*, paras. 12-13 *Bernini*, paras. 26; *Giersch*, para. 40; Case C-401/15 *Depesme* ECLI:EU:C:2016:955, para. 40; Opinion of Advocate General Pitruzzella in *Jobcenter Krefeld v JD*, para. 74-75.

[143] *Lebon*, para. 12; Article 10 (1) and (2), Regulation 1612/68. See *Bernini*, paras. 25, 29; Case C-337/97 *Meussen* ECLI:EU:C:1999:284, para. 19; *Giersch*, para. 39; *Depesme*, para. 39.

[144] Case C-709/20 *CG* ECLI:EU:C:2021:602, paras. 90-91. See Articles 1,7, and 24 of the Charter.

6.1 The Part-time Work Directive

Directive 97/81/EC concerning the Framework Agreement on Part-time Work is an important piece of social legislation for those engaged in limited forms of employment.[145] It was adopted by way of the 'social' legislative method, which allows the social partners of the Union representing management and labour to effectively draft much of the content of EU legislation through Framework Agreements.[146] The Framework Agreement is annexed to the Directive, and can be relied upon by individuals against the state in the same manner Directives, i.e., assuming that the provisions are sufficiently clear and precise.[147]

The Directive seeks to ensure that there is equal treatment between full-time and part-time workers in respect to employment conditions,[148] and that the rights contained in the Agreement should apply on a *pro rata temporis* basis "where appropriate".[149] This means that part-time workers should receive a proportional share of all the rights and protections that are available to full-time workers.[150] The definition of part-time work is left to national authorities and the Directive does not contain a definition, however, the Court has accepted that full-time work constitutes "a basic normal working time of 40 hours per week and 8 hours per day", and that anyone working less than this can be considered as a part-time worker.[151] The Part-time Work Directive is also linked to equal treatment

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[145] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work.

[146] This uses the procedure as explained in Article 155(2) TFEU. See S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social"' (2017) 13 *European Constitutional Law Review* 23-61, p. 28.

[147] Case C-268/06 *Impact* ECLI:EU:C:2008:223, paras. 57 – 58; see also Advocate General Kokott in Case C-268/06 *Impact* ECLI:EU:C:2008:2 , para. 87; Case 152/84 *Marshall* [1986] ECLI:EU:C:1986:84, paras. 46 - 49, and Case C-187/00 *Kutz-Bauer* ECLI:EU:C:2003:168, paras. 69 and 71.

[148] Clause 4, Annex, Directive 97/81.

[149] Clause 4(2)

[150] N. Kountouris, 'EU Law and the regulation of 'atypical' work', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 259.

[151] Case C-313/02 *Wippel* ECLI:EU:C:2004:607, paras. 45 – 46.

and opportunities between men and women in employment, insofar as women can face indirect discrimination by being disproportionately engaged in part-time work when compared to full-time male comparators.[152] That being said, the Directive does not prohibit differential treatment that can be justified on objective grounds, or where the application of the *pro-rata* principle is inappropriate.[153]

Despite the protections it affords, the Part-time Work Directive has been described as "essentially cautious",[154] which is suggested to have resulted in its uncontroversial adoption.[155] That said, its adoption through the "democratic, transparent, inclusive, and accountable" 'social method' method is suggested to ensure a good balance between market and social rights.[156] It is also suggested that the Court has given the Directive more "backbone" through its interpretation of it.[157] Despite this, for precarious part-time and on-demand workers its protection is limited, in some cases significantly.

Despite the Part-time Work Directive formally being based on a subsidiary approach that defers to national laws and practice when determines who falls under its scope, the Court has stated that Member States must not undermine the objectives sought by the Directive through their classification of who is a worker, thereby depriving it of its

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[152] Case C-38/13 *Małgorzata Nierodzik* ECLI:EU:C:2014:152 , para. 28.

[153] A. Koukiadaki & I. Katsaroumpas, 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017) *PETI Committee, DG for Internal Policies: Citizens' Rights and Constitutional Affairs*, p.69; S. Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU law?' (2013) 32(1) *Yearbook of European Law* 30-56, p. 31.

[154] P. Davies & M. Freedland, 'The role of EU Employment Law and policy in the de-marginalisation of part-time work: A study in the interaction between EU regulation and Member States Regulation', in S. Sciarra, P. Davies & M. Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union* (2004), CUP: Cambridge, p.77.

[155] A. Davies, 'Regulating Atypical Work: Beyond Equality?', in N. Countouris & M. Freedland (eds), *Resocialising Europe in a Time of Crisis* (2013), CUP, p. 243.

[156] This uses the procedure as explained in Article 155(2) TFEU. See S. Garben (n 146), p. 28.

[157] N. Kountouris (n 148), p. 256.

effectiveness.[158] However, unlike other EU social legislation using the subsidiary approach which refers to the *Lawrie-Blum* terminology, the Court has not explained what the threshold to Member State discretion is. The Court has only stated that it should be assessed whether the employment relationship in question is "substantially different from an employment relationship between an employer and a worker", for example whether they are entitled to sick pay, maternity/paternity pay, and other benefits.[159]

The deference granted to Member States in defining who falls under the Directive's scope means that precarious part-time workers risk being excluded. Moreover, the lack of *Lawrie-Blum* terminology used by the Court in cases concerning Directive 97/81/EC suggests that even those meeting it may not be protected. The consequence of this is that precarious part-time workers may not be protected from discrimination *vis-à-vis* full-time workers or entitled to *pro rata temporis* rights.[160] This differential treatment is likely to produce labour market segmentation and dualizations that result in downward pressures on wages and social standards.[161] In fact, employers could be encouraged to use marginal and on-demand employment as a means of undercutting the rights and standards of workers generally.[162]

The Exclusion of Casual and On-demand Workers

On-demand workers face an added risk insofar as Member States can make use of a derogation contained in Clause 2 of the Framework Agreement that permits them to exclude "part-time workers that work on a casual basis" from its scope.[163] There is a safeguard to this, however,

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[158] See, for example in the case of the Part-time Work Directive, Case C-393/10 *O'Brien* EU:C:2012:110, paras. 34 – 35; see also Opinion of Advocate General Kokott in Case C-393/10 *O'Brien* ECLI:EU:C:2011:746, paras. 36 – 37.

[159] Case C-393/10 *O'Brien* EU:C:2012:110, paras. 45.

[160] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart, p. 93.

[161] N. Kountouris (n 150), pp. 255 - 256.

[162] On this point, see S. Peers (n 151).

[163] Clause 2(1) & 2(2) Directive 97/81.

as this exclusion must be explicit and must be "reviewed periodically" to ascertain whether the objective reasons underlying them remain valid.[164]

Even outside the explicit derogation for casual workers, on-demand workers can be excluded from the scope of the Directive if their situation cannot be compared to a full-time comparator. *Wippel* concerned a worker whose working schedule was determined "on a case-by-case basis by agreement between the parties", meaning that she worked irregularly and did not have a fixed income.[165] Ms Wippel claimed that during her employment she had "virtually no liability for holiday pay, sick pay and termination payments", which undermined, in part, the principle of equal treatment under the Part-time Work Directive.[166] In its decision, the Court held that the Directive applied to workers assuming they (i) have a contract of employment; and (ii) work fewer hours than a comparable full-time worker.[167] However, the national legislation in *Wippel* made no distinction between full-time and part-time work, meaning that there could be no discrimination between the two.[168] The crucial point is that the Part-time Work Directive can only provide protection in situations where there is a difference in treatment between a part-time and comparable full-time worker, either from the same establishment or by reference to applicable collective agreement, or national laws or practices.[169] However, the Court distinguished Ms Wippel's employment from full-time work, finding that the latter has fixed working schedules and salaries, and generally do not allow for the possibility of refusing work. It found that "there is therefore no full-time worker comparable to Ms Wippel within the meaning of the Framework Agreement", and as such there could not be no "less favourable treatment" required under it.[170]

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[164] S. Peers (n 151), p. 31.

[165] *Wippel*, para. 19

[166] Ibid, para. 22.

[167] And assuming the Member State has not made use of the casual workers derogation under Clause 2(2). See *Wippel*, para. 40.

[168] *Wippel*, para. 50.

[169] Ibid, para. 58.

[170] Ibid, paras. 59-60, 62; see also A. Bogg (n 6), p. 286.

The logical conclusion of the *Wippel* decision is that, due to a lack of suitable comparator, all on-demand, zero-hour, platform, or other casual workers can potentially be excluded from the scope of the Directive, regardless of whether the Member State has made use of the explicit exclusion under Clause 2(2). As on-demand workers by definition do not have fixed working schedules, which are often arranged on a case-by-case basis and provide workers with the ability to turn down work, there can apparently be no discrimination with full-time workers.[171] This is suggested to constitute "obtuse judicial reasoning" that uses a circular argument to exclude on-demand and casual workers from social protection purely because of their status as on-demand and casual workers.[172] This situation is highly problematic as it may result in many kinds of on-demand workers, including those working for platform-based services who can be in the most precarious working situations, being excluded from vital social protections.[173] Given the nature of platform work, with its on-demand nature, limited amount of hours, uncertainty of work schedules, and the focus on 'tasks' rather than working time, many platforms workers are likely to be excluded from the protections provided under Directive 97/81/EC.

Promoting Part-time and precarious employment?

Directive 97/81/EC is also criticised for promoting part-time work, which has encouraged flexible and precarious forms of employment, thereby undermining its effectiveness. It has its roots in the European Employment Strategy as it seeks to regulate some flexible employment relations, however, it also promotes certain flexible practices, in this case part-time work, as a tool to foster job creation and economic growth.[174] Its preamble stresses the need to "to promote the employment and equal opportunities for women and men … by a more flexible organisation of

[171] A. Koukiadaki & I. Katsaroumpas (n 153), pp. 70-71, 72-73.
[172] A. Bogg (n 6), p. 287; A. Davies (n 155), p. 244.
[173] N. Kountouris (n 150), p. 260; Z. Kilhoffer (n 24), p. 140.
[174] D. Ashiagbor (n 160), p. 78; N. Kountouris (n 150), pp. 249 – 250; M. Bell, 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37(1) *European Law Review* 31, pp. 36.

work".[175] Moreover, Clause 5 of the Framework Agreement obliges Member States and social partners to "identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them".[176] These provisions that promote part-time work are suggested to have contributed to a "false perception" that part-time work is *per se* beneficial for workers.[177] However, as this chapter has shown, whilst this is true for some workers, for other part-time work results in a less secure and more exploitable position.

Directive 97/81/EC does not create a comprehensive system of protection for part-time workers.[178] Its promotion of part-time work has arguably resulted in more precarious working situations, and its exclusion of on-demand and casual work from its scope means that it does not provide protection to a quickly growing group of precarious workers. This situation risks normalising precarious part-time employment relationships.[179] In order to provide more protection to part-time workers, the Court should first use the *Lawrie-Blum* criteria as an absolute floor below which the Member States cannot go when classifying workers for the purposes of the Directive. Moreover, it should recognise the shifting nature of labour markets and the rise of on-demand and platform work and use this to provide adequate protection to such workers on the basis of the Directive.

6.2 The Working Time Directive

Marginal and on-demand workers also obtain protection through the Working Time Directive.[180] This Directive derives from the Union

[175] Recital (5), Directive 97/81/EC.
[176] Clause 5(1), Framework Agreement on Part-time Work, Annex to Directive 97/81/EC.
[177] A. Davies (n 155), p. 233.
[178] N. Kountouris (n 150), p. 256.
[179] Ibid, p. 264.
[180] Originally Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, subsequently Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

competence to legislate in the field of health and safety of workers, conferred through the Single European Act. It is a health and safety measure that establishes a floor of rights and does not aim to regulate the functioning of the internal market.[181] In fact, the Court removed a provision dictating that minimum rest periods include Sundays, as it was unclear why this would improve the health and safety of workers.[182] The sole focus is to improve the "physiological and psychological capabilities of the individual", although establishing a floor of health and safety rights will also likely mitigate against employment practices that create downward pressures on social standards by seeking competitiveness through increased flexibility.[183]

The Directive sets lower limited for, *inter alia*, daily and weekly rest periods, maximum working time, the right to paid annual leave, working during unsociable hours, and on-call work.[184] It does not prohibit Member States from adopting rules more favourable to workers.[185] Whilst the Directive is more focused on excessive, rather than limited, employment,[186] it does offer some important protections to marginal part-time and on-demand workers in precarious working situations. Most notably, this is through a broad definition of working time that gives rise to rights such as *pro rata* annual paid leave, and compensation *in lieu*.

The concept of working time under the Directive is important for calculating the individual's *pro rata* paid annual leave or the compensation *in lieu*. This is important for precarious workers, particularly those working casually or on-demand, who may be excluded from such benefits and who are often required to perform tasks ancillary

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[181] Case C-84/94 *United Kingdom v Council* ECLI:EU:C:1996:431, para. 15.
[182] Ibid, para. 37; see also S. Garben (n 146), p. 30.
[183] J. Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (2003) Hart Publishing, p. 96.
[184] See A. Bogg (n 6), p. 267.
[185] Article 15 Directive 2003/88. See also Case C-282/10 *Dominguez* EU:C:2012:33, para. 48; Case C-337/10 *Neidel* EU:C:2012:263, para. 35; Case C-219/14 *Kathleen Greenfield* ECLI:EU:C:2015:745, para. 39; Case C-385/17 *Hein* EU:C:2018:1018, para. 30; Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981, para. 34.
[186] A. Bogg (n 4), p. 272.

to their main employment that may not be included as 'working time'. The Court has stated that time spent on site constitutes working time, even if on-call, however, time spent away from work may not count, even if the worker is on-call (although there are some exceptions to this).[187] The Court has asserted that to find time spend on-call at the place of work was not working time would undermine the worker's fundamental rights.[188] However, the Court has been accused of not respecting national subsidiarity and the role of collective agreements under the Directive.[189]

Time not spent working will not be covered by the Directive, even if the worker is "on the books" of the employer and receives compensation. *Heimann* concerned the German *Kurzarbeit Null* plan, whereby employers could extend an employment contract for a dismissed worker for one year, however, during this period the worker had no obligation to work, and the employer no obligation to pay a salary.[190] The individual's annual paid leave was calculated on a *pro rata temporis* basis, which as the applicant did not work during this period meant that he was not entitled to anything. The Court considered that since their situation is *de facto* comparable to that of part-time workers the *pro rata* principle should apply.[191] However, as no hours were worked, this calculation resulted in zero. Moreover, the Court felt that any obligation on the employer to pay for annual leave on top of the basic salary would make it less likely that they would make use of the social plan.[192] The decision has been criticised for negating the entitlement to compensation *in lieu* on termination of employment through principle of *pro rata*, which is difficult to reconcile with case-law addressing interaction between sick leave and paid annual leave.[193] It also suggests that on-demand workers that have a formal contract of employment, but do not actually perform any economic activity, will not be entitled to annual paid leave.

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[187] Case C-303/98 *Simap* ECLI:EU:C:2000:528, para. 50.
[188] Case C-151/02 *Jaeger* ECLI:EU:C:2003:437, para. 47.
[189] A. Bogg (n 6), p. 284.
[190] Joined Cases C-229/11 and C-230/11 *Heiman & Toltschin* ECLI:EU:C:2012:693.
[191] Ibid, paras. 32 – 34.
[192] Ibid, paras. 26 – 30.
[193] A. Bogg (n 6), p. 289.

Under the Directive, Member States must also ensure that undertakings record working time through adequate systems of time-registration.[194] In *CCOO*, the Court held that the absence of a time-registration system meant that it was "not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done".[195] As such, Member States are obliged to ensure that employers set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.[196] This is helpful for on-demand and platform workers, who may often have to perform additional tasks alongside their employment which is not recognised by the platform or employer.

Under Article 7, every worker is entitled to at least four weeks annual paid leave, which may not be replaced by compensation *in lieu*, except where the employment relationship is terminated.[197] This means that a national measure depriving the individual of entitlement to paid annual leave or compensation *in lieu* will be contrary to the Directive,[198] and cannot be subject to any preconditions.[199] If a worker moves onto a contract with different hours, then a new period of annual paid leave calculation must be made from this date using the *pro rata* principle,[200] and any reduction in working hours cannot affect annual leave already accumulated.[201] It covers 'normal' remuneration, which includes basic salary and supplementary payments.[202] The Court has held that the right

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[194] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:402.
[195] Ibid, para. 47; see also Opinion of Advocate General Pitruzella in Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:87, paras. 57 – 58.
[196] *CCOO*, para. 60.
[197] Joined Cases C-131/04 & C-257/04 *Robinson-Steele & Michael Clarke* ECLI:EU:C:2006:177, para. 58; Case C-350/06 *Schultz-Hoff* ECLI:EU:C:2009:18, para. 60; Case C-155/10 *Williams & others* ECLI:EU:C:2011:588, para. 26.
[198] Case C-173/99 *BECTU* ECLI:EU:C:2001:356, para. 49;
[199] Ibid, para. 53; Case C-350/06 *Schultz-Hoff* ECLI:EU:C:2009:18, para. 28.
[200] Case C-219/14 *Kathleen Greenfield* ECLI:EU:C:2015:745, para. 37-38.
[201] Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* ECLI:EU:C:2010:215, paras. 32-34; Joined Cases C-229/11 and C-230/11 *Heimann & Toltschin* ECLI:EU:C:2012:693, paras. 34-35; Case C-415/12 *Bianca Brandes* ECLI:EU:C:2013:398, para. 33; *Kathleen Greenfield*, para. 34.
[202] *Williams & others*, para. 31.

to annual paid leave is protected under Article 31(2) of the Charter and can in some instances be relied upon by individuals in situations where they cannot rely on the Working Time Directive.[203] This right provides protection to precarious part-time workers by reducing the pressure of having to forego paid annual leave during periods of low income, whilst compensation *in lieu* enhances the worker's employment security by ensuring that they have can receive some financial security during periods of inactivity.[204]

Such benefits are particularly useful for platform workers, who may risk being excluded from such protections.[205] Specifically, they often do not have adequate systems for recording working time, and do not have a site of work and time spent 'on-call' is done from their home or in a public place, which can make this very difficult to assess.[206] That said, the Court has held that for Firefighters, time spent 'on-call' at their home constituted working time as they were required to be available within eight minutes, which significantly reduced the opportunities for the workers to perform non-work activities.[207] Moreover, if the worker does not have a fixed place of work, then time spent travelling each day between their homes and the premises of the first and the last customers constitutes working time.[208] Such principles could be applied to platform workers, as any time spent with the app turned on, regardless of the worker's physical location, should be classified as working time, including travelling periods. The app itself could then be used as a means of time recording. This would protect platform workers during periods of time that they are waiting and/or monitoring new incoming jobs or offers by classifying this as working time.

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[203] Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871; Case C-684/16 *Tetsuji Shimizu* ECLI:EU:C:2018:874. This point is discussed in more detail in the context of the Charter of Fundamental Rights.
[204] A. Bogg (n 6), pp. 281 – 282.
[205] Z. Kilhoffer et al (n 24), p. 152.
[206] *Ibid*, p. 151.
[207] Case C-518/15 *Matzak,* ECLI:EU:C:2018:82, para. 63; see also Case C-580/19 *RJ* ECLIËU:C:2021:183, para. 47; compare with Case C-344/19 *DJ* ECLI:EU:C:2021:182, paras. 54 – 56.
[208] *CCOO*, para. 45.

Despite some important protections, the Working Time Directive is suggested to do little to protect from the "immense control" the employer has over precarious workers.[209] Furthermore, it is argued to be old-fashioned in the context of modern labour markets as it does little for those with limited hours.[210] As such, it is suggested that future legislation should be more aimed at setting minimum hours rather than maximum hours.[211] However, it should be emphasised that the Working Time Directive is a health and safety instrument that cannot set a minimum number of hours, as this does not affect the health of the worker except in the wider sense of it potentially pushing them into poverty.

6.3 Equal treatment between Men and Women

Precarious part-time workers can also gain indirect protection through EU rules on equal treatment at work. These ensure that there is equal treatment between marginalised groups that face discrimination in the workplace and the dominant group. Whilst not affecting precarious workers directly, such rules can protect vulnerable and marginalised groups that are often overrepresented in precarious work.[212] This is most common between men and women, with the latter overrepresented in part-time, marginal, and on-demand employment, and who can face discrimination when compared to full-time, male comparators.

Equal pay between men and women was laid down in Article 119 EEC (now 157 TFEU) and recognised as a general principle of EU law in *Defrenne*, when the Court famously held that European integration had a "double aim" that was "at once economic and social", and that it required the elimination of all discrimination.[213] However, this right also had a social aim insofar as the Union's strategic economic and employment policy goal was to further the inclusion of women in the workforce to

[209] A. Bogg (n 6), p. 285.
[210] U. Oberg (n 21), p. 34. This is in reference to a number of MEP questions posed to the European Commission regarding zero-hour contract work.
[211] H. Collins, K.D. Ewing, and A. McColgan, *Labour Law* (2012) CUP: Cambridge, p. 310.
[212] D. Ashiagbor (n 160), p. 81-82.
[213] Case 43/75 *Defrenne v Sabenna (No 2)* ECLI:EU:C:1976:56, paras. 12, 19.

improve competitiveness.[214] Originally, these equal treatment rules only related to remuneration, with working conditions not covered under the Treaty.[215] This led to a number of Directives concerning equal treatment of men and women at work.[216] This patchwork of Directives has now been subsumed into the overarching Directive 2006/54, on equal opportunities and equal treatment of men and women.[217] The fundamental right to equal treatment between men and women in "all areas, including employment, work, and pay" is now enshrined in Article 23 of the Charter. EU rules now cover transgender persons, at least in the context of gender reassignment,[218] and permit positive action as a means to counter "*de facto* inequalities which may arise in society".[219]

Importantly, these rules cover indirect discrimination between men and women, for example on the basis of full-time and part-time work, if the differential treatment cannot be explained by other factors.[220] The Court will thus find national measures constitute indirect discrimination between men and women if the latter are put at a particular disadvantage when compared to the former, due to the overrepresentation of women

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[214] S. Fredman 'Discrimination Law in the EU' (2000) *Legal Regulation of the Employment Relation*, p. 188; M. Bell (n 172), p. 32.

[215] Case 149/77 *Defrenne v Sabenna (No 3)* ECLI:EU:C:1978:130, paras. 23-24; see also Opinion of Advocate General Capotorti in Case 149/77 *Defrenne* ECLI:EU:C:1978:115, pp. 1383-1384.

[216] See, for example, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

[217] Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[218] Case C-13/94 *P v S & Cornwall County Council* ECLI:EU:C:1996:170.

[219] Case C-407/98 *Abrahamsson* ECLI:EU:C:2000:367, para. 48.

[220] Case 96/80 *Jenkins* ECLI:EU:C:1981:80, para. 13; Case C-170/84 *Bilka* ECLI:EU:C:1986:204, para. 29.

in part-time work.[221] In this respect, the Court has held that if a "much lower proportion of women than of men" work full time, then the exclusion of part-time workers from occupational pension schemes can be contrary to the rules on equal pay, if the measure could not be explained by other factors.[222]

Such rules cover not just equal pay for equal work, but also situations where women do not receive the same pay for work "of equal value".[223] The Court has been praised for adopting an effects-based approach that considers the everyday social realities of women, which requires more than simple negative non-discrimination to realise genuine equality.[224] That said, women can face problems proving discrimination given the number of variables that are often involved, and the national court must take many factors into account such as whether a significant amount of evidence collaborates the claim that the measure has a more unfavourable impact upon women.[225] Furthermore, differential treatment can be justified if they "correspond to a real need on the part of the undertaking" and are appropriate and necessary in achieving the objectives pursued.[226] Arguments justifying such measures need to be specific and supported by evidence.[227] Like the Working Time Directive, the rules on equal treatment are linked explicitly with the *Lawrie-Blum* definition of worker, which is used to determine who falls under its scope. This means that women engaged in marginal part-time or on-demand employment who do not meet the criteria are unlikely to be protected.

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[221] Case C-167/97 *Seymour-Smith and Perez* ECLI:EU:C:1999:60, para. 58; see also Case C-109/88 *Danfoss* ECLI:EU:C:1989:383, para. 20 – 21; Case C-381/99 *Susanna Brunnhofer* ECLI:EU:C:2001:358, para. 51.

[222] *Bilka*, para. 29.

[223] Case C-624/19 *K and others v Tesco Stores Ltd* ECLI:EU:C:2021:429, para. 33.

[224] S. Burri and S. Prechal, 'EU Gender Equality Law' (2008) Luxembourg: Office for Official Publications of the European Communities, p. 16.

[225] *Seymour*, para. 62; Case C-127/92 *Enderby* ECLI REF, para. 17.

[226] *Bilka*, para. 36.

[227] S. Burri and S. Prechal (n 224), p. 16.

6.4 The Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union (The Charter) can, in some instances, provide residual protection to individuals when they are unable to rely on secondary legislation, for example due to the horizontal nature of the situation. The Charter of Fundamental Rights built on the 1961 and 1989 Charters, and originally had a similar legal value as it was not binding on Member States. The Charter was conferred primary law status in Article 6(1) TEU of the Treaty of Lisbon. Ostensibly, it contains a number of rights and principles that provide protection to marginal and on-demand workers, such as the right to collective bargaining and action; fair and just working conditions; an annual period of paid leave; the protection of young persons; and social security and social assistance benefits; and assistance to "combat social exclusion and poverty". That said, there are a number of factors which limit the ability of individuals to rely upon the its provisions.

First, the Charter's provisions can only be invoked where a right is provided under EU secondary law. The Court applied this approach prior to the Charter having primary law status, using the principle of non-discrimination to provide protection to individuals when they could not rely on the rights available under secondary legislation.[228] The Court found that the secondary legislation in question did not establish the right to equal treatment, which was found in "various international instruments and constitutional traditions common to the Member States".[229] Therefore, in order to ensure the full effectiveness of that fundamental right, the national court had to set aside any provision of national law conflicting with it.[230] That said, the Court rarely mentioned the Charter in its decisions, instead focusing on general principles.[231]

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[228] Case C-144/04 *Mangold* ECLI:EU:C:2005:709; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21.

[229] *Mangold*, para. 74; *Kücükdeveci*, para. 20.

[230] *Mangold*, para. 76 – 77; *Kücükdeveci*, paras. 50 – 51.

[231] N. Lazzerini, '(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: *AMS'* (2014) 51 *CMLRev* 907, pp. 909-910; Opinion of Advocate Geeneral Tizzano in Case C-144/04 *Mangold* ECLI:EU:C:2005:420, para. 54.

Since the Treaty of Lisbon, the Court has increasingly referred to the Charter, albeit in a haphazard manner.[232] In *Egenberger*, the Court set out a clear formula for when the Charter's provisions (in this case the right to non-discrimination under Article 21) could be relied upon.[233] Advocate General Tanchev that Article 21 Charter was not a subjective right that had horizontal application between private parties, meaning that it could not apply where the applicant could not rely on secondary legislation.[234] However, the Court held that non-discrimination of the grounds of religion or belief, protected under Article 21 Charter, was a "mandatory" general principle of EU law that is "sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them",[235] and did not need to be made more specific by provisions of EU or national law.[236] *Egenberger* can be understood as a continuation of the non-discrimination general principles case-law,[237] with the only difference being that the Court uses the "mandatory" nature of Article 21, rather than solely the 'general principle' of non-discrimination. The Court has applied the same formula in more recent cases,[238] finding that "Article 21(1) … is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds".[239] Granting certain provisions of the Charter "mandatory effect" is suggested to demonstrate that the Court takes the Charter's elevated primary law seriously.[240]

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[232] For example, see Case C-147/08 *Römer* ECLI:EU:C:2011:286 in the context of discrimination on the basis of sexual orientation, and Case C-391/09 *Runevic-Verdyn & Wardyn* ECLI:EU:C:2011:291 in the context of discrimination on the basis of ethnic origin. See L. Lourenço, 'Religion, discrimination and the EU general principles' gospel: *Egenberger*' (2019) 56(1) *CMLRev* 193, p. 201-202.

[233] Case C-414/16 *Vera Egenberger* ECLI:EU:C:2018:257.

[234] Opinion of Advocate General Tanchev in Case C-414/16 *Vera Egenberger* ECLI:EU:C:2017:851, para. 119.

[235] *Egenberger*, para. 76.

[236] *Egenberger*, para. 78.

[237] L. Lourenço, 'Religion, discrimination and the EU general principles' gospel: *Egenberger*' (2019) 56(1) *CMLRev* 193, p. 200.

[238] Case C-68/17 *IR v JQ* ECLI:EU:C:2018:696, paras. 69-70.

[239] Case C-193/17 *Markus Achatzi* ECLI:EU:C:2019:43, paras. 76-77.

[240] L. Lourenço (n 235), pp. 202-204.

Precarious workers also face the difficulty that only a very limited number of provisions are likely to have "mandatory effect" and therefore can be relied upon. From the text of the Charter, it is not clear which provisions are rights that can be invoked by individuals, and which are 'principles' that require implementation beforehand, given that the Charter uses both terms without ever providing a concrete definition for either.[241] This meant that there was initially confusion over the precise nature and effect of many of its provisions.[242] In particular, there was disagreement over the legal value of the Charter's social rights. Whilst some argued that they should be of lesser value than other provisions within the Charter, others argued that social rights could be denied to individuals *per se*.[243]

Traditionally, social rights have not been given the freestanding status that rights such as non-discrimination have. Even in cases concerning Article 31(2) of the Charter on the right to annual paid leave, the Court has tended to decide these cases solely through Article 7 Directive 2003/88. For example, Advocate General Trstenjak considered that, whilst the wording of Article 31(2) suggested a higher legal value than other provisions in the Solidarity Chapter, he did not think that this could be relied upon in situations where secondary legislation did not apply.[244] However, in its decision the Court omitted the Charter entirely, deciding the case on the basis of a harmonious interpretation of Article 7 Directive 2003/88.[245] This was despite the referring court explicitly stating that this

[241] On this, see T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 *CMLRev* 1201, pp. 1202-1203.
[242] S. A. de Vries, 'The *Bauer* et al and *Max Planck* judgments and EU citizens' fundamental rights: an outlook for harmony' (2019) 1 *European Equality Law Review* 16, p. 24; S. Peers and S. Prechal, 'Article 52: Scope and Interpretation of Rights and Principles', in S. Peers, T. Hervey, J. Kenner, and A. Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2014) Hart: London, p. 1506.
[243] T. Lock (n 239), p. 1210; D. Schiek, 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611, p. 627-628.
[244] Opinion of Advocate General Trstenjak in Case C-282/10 *Maribel Dominguez* ECLI, para. 75.
[245] Case C-282/10 *Maribel Dominguez* ECLI:EU:C:2012:33, paras. 28-31.

was not possible due to a *contra legem* interpretation.[246] The Court was criticised for hiding away from the most difficult issue in the case,[247] and for muddying the waters by confusing the already unclear terms of rights and principles throughout the judgment.[248]

The case of *AMS* suggested that the Charter's Solidarity Chapter provisions may not be relied upon.[249] *AMS* concerned Article 27, which refers to the obligation for workers and their representatives to be "guaranteed information and consultation in good time". The Court held that a French rule circumventing the requirement to place a union representative on company boards was not in conformity with Article 3(1) of Directive 2002/14.[250] However, Article 27 could not be applied directly, as it was clear from the wording of the provision that for the article to be fully effective, it needed to be given more specific expression in Union or national law.[251] The Court distinguished Article 27 from 21, finding that the latter was sufficient in itself to confer a directly effective right on individuals.[252]

Following *AMS*, it was suggested that the Solidarity provisions should be considered as principles, rather than rights that could be relied upon.[253] However, in recent cases the Court has confirmed that at least one of the Solidarity Chapter provisions has mandatory effect. In *Bauer & Broßonn* and *Shimizu (Max Plank)*,[254] both of which concerned the right to annual leave that could not be converted into compensation *in lieu*

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[246] L. Pech, 'Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*' (2012) 49 *CMLRev* 1841, p. 1856.
[247] Ibid, p. 1850; see also N. Lazzerini (n 229), p. 914.
[248] Ibid, p. 1858.
[249] Case C-176/12 *Association de médiation sociale (AMS)* ECLI:EU:C:2014:2.
[250] *AMS*, para. 29. Directive 2002/14 gives further effect to Article 27 Charter by establishing a general framework for informing and consulting employees.
[251] Ibid, para. 45.
[252] Ibid, para. 47.
[253] C. Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82(2) *Modern Law Review* 350, p. 354; S. A. de Vries (n 238), p. 24.
[254] Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871; Case C-684/16 *Tetsuji Shimizu* ECLI:EU:C:2018:874.

following either the termination of the contract (*Shimizu*), or the death of the worker (*Broßonn*), and which is protected under Article 31(2) Charter. Article 7 Directive 2003/88 could not be relied upon in these cases,[255] however, the Court held that the right to annual leave is a "particularly important principle", or alternatively an "essential principle",[256] of EU social law from which there may be no derogations.[257] Unlike Article 27, the Court held that Article 31(2) is "both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law".[258] Given that the legislation in question implemented Directive 2003/88, it was held to be within the scope of EU law. [259] That said, there are limits to the mandatory effect of Article 31(2). In Joined cases *TSN & AKT*,[260] the Court held that the Working Time Directive does not govern situations where Member States go beyond the minimum protection required under it, whilst also not limiting the possibility of going beyond this minimum.[261] As the national rule in question did not affect the minimum right to four weeks' annual paid leave, any restrictions on their leave could not adversely affect its coherence or the objectives pursued through the Directive or Article 31(2).[262]

The Court's *acquis* on the Charter shows that some of the rights contained within it have 'mandatory' effect, meaning that they are free-standing rights that can be applied in situations where secondary legislation does not apply.[263] The Court has used this approach in the context of Article 21 and Article 31(2), both of which can provide marginal and on-demand workers protection in situations where secondary legislation does not

[255] It should be noted that in the context of *Bauer and Broßonn,* the Directive could be relied upon in *Bauer*, but not in *Broßonn* due to the horizontal nature of the situation.
[256] *Bauer and Broßonn*, para. 58; *Tetsuji Shimizu*, para. 69.
[257] *Bauer and Broßonn*, para. 38; *Tetsuji Shimizu*, para. 19.
[258] *Bauer and Broßonn*, para. 84-85; *Tetsuji Shimizu*, para. 73-74.
[259] *Bauer and Broßonn*, para. 53; *Tetsuji Shimizu*, para. 50; see S. A. de Vries (n 238), p. 22.
[260] Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981.
[261] *Ibid*, para. 34-35.
[262] *Ibid*, para. 51.
[263] S. A. de Vries (n 240), pp. 27-28; see also E. Frantziou, 'Joined cases C-569/16 and C-570/16 Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable' (19 November 2018) *European Law Blog*.

apply. For a Charter provision to be relied upon, the right must be (i) unconditional, and (ii) "mandatory".[264] This suggests that provisions which refer to "national laws and practices" (which includes most social provisions) are unlikely to be capable of being applied directly.[265] That said, provisions like Article 31(1) that places a limitation on maximum working hours are likely to have mandatory effect. This suggests that in a situation like *CCOO*, a national practice of inadequate recording of working time would violate Article 31(1) Charter, even if the Directive could not be relied upon (as was the view of the Advocate General).[266] Other provisions that may have mandatory effect are the right of workers to conclude collective agreements and 'defend their interests' through strike action under Article 28; the right to unjustified dismissal under Article 30; and the right to maternity and paternity leave under Article 33(2).

A problem for marginal and on-demand workers is that the Charter only applies when the situation is "within the scope" of EU law.[267] However, if the individual cannot rely on secondary legislation due to them not meeting the genuine economic activity requirement, then they are unlikely to be able to rely on the Charter. This would be troubling, as it would mean that the Union's fundamental social rights are in fact linked to economic activity. That said, the Court has stated that where Member States exercise discretion (for example determining whether employment is genuine or not), this must comply with the Charter.[268]

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[264] S. A. de Vries (n 240), p. 25; see also L. S. Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' (25th February 2019), *EU Law Analysis*.

[265] C. Barnard (n 253), p. 355; S. A. de Vries (n 242), p. 25.

[266] *CCOO*. On the horizontal applicability of Article 31(2), see Opinion of Advocate General Pitruzzella in Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:87, paras. 96-98.

[267] Case C-617/10 *Akerburg Frannson* ECLI:EU:C:2013:105, para. 21.

[268] Joined Cases C-411/10 and C-493/10 *N.S.* ECLI:EU:C:2011:865, paras.65–68; see also K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European Constitutional Law Review* 375, p. 380.

6.5 The Directive on Transparent & Predictable Working Conditions: (Finally) Protecting Marginal Workers?

Precarious part-time and on-demand workers gain protection through Directive 2019/1152 on transparent and predictable working conditions in the European Union. The Directive was adopted through the Social Pillar, which despite being a non-binding policy instrument, has become the catalyst for the adoption of legislation and non-binding recommendations and communications becoming something of catch-all basis for social legislation.[269] The Directive lays down certain rights and protections that are beneficial to part-time workers, in particular those engaged in marginal, on-demand, and casual forms of employment.[270] It provides the worker a right to be informed about their rights and protections, which is welcome given such workers insecure and vulnerable position. Furthermore, Article 9 provides workers with the right to start another job outside the work schedule established with the first employer. This provides more flexibility to the employee and reduces the power of the employer over them, as an undertaking cannot prohibit a marginal worker from supplementing their income thorough additional employment.

Under Article 10, workers have the right to a minimum predictability of work. It states that "where a worker's work pattern is entirely or mostly unpredictable" then the worker shall not be required to work unless the work "takes place within predetermined reference hours and days" and "the worker is informed by his or her employer of a work assignment within a reasonable notice period".[271] If this is not done, then the worker can refuse such requests "without adverse consequences", and are entitled to compensation if the employer unexpectedly cancels their work assignment. This right is likely to be highly beneficial for marginal

[269] Proposal for a Council Recommendation on access to Social Protection for Workers and the self-employed COM (2018) 132 final; Decision 2016/334 on establishing a European Platform to enhance cooperation in tackling undeclared work; European Platform Undeclared Work, Work Programme 2017-18 (Update 19-20 October 2017)
[270] Directive 2019/1152 on transparent and predictable working conditions in the European Union *OJ L 186*.
[271] Article 10(1), Directive 2019/1152

workers, who often have little choice but to accept unreasonable demands and changes from the employer to maintain their employment and income stability. Under Article 11, Member States shall undertake measures that will prevent abusive practices within on-demand work, such as limitations of the use of duration of such contracts, a rebuttable presumption of the existence of an employment contract with a minimum number of paid hours, or "equivalent measures that ensure effective prevention of abusive practices".[272] The Directive explicitly refers to casual workers such as zero-hour contract workers, domestic or voucher-based workers, platform workers, and short-term workers who can be excluded under EU social law. Whilst it does not prohibit zero-hour contracts, the recital indicates that workers who have no guaranteed working time, including those on zero-hour and some on-demand contracts are in "a particularly vulnerable situation", and thus the Directive should apply to them "regardless of the number of hours they actually work".[273]

The Directive is suggested to be a good start for the expansion of social and employment rights through the Social Pillar and has the potential to "significantly improve" the overall balance between social and economic values in the EU and respond to numerous social challenges that have arisen since the financial crisis.[274] That said, despite positive developments, the legislation fails to fully address the structural imbalance between the EU's competences in the internal market and social fields.[275] It also contains neoliberal influences, insofar as it seeks to

[272] See Article 11, Directive 2019/1152

[273] Recital (11) & (12), Directive 2019/1152 on transparent and predictable working conditions in the European Union.

[274] S. Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review* 210, p. 212, 224; B. Bednarowicz, 'Workers' rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?' (24th April 2019).

[275] D. Schiek, 'A Constitution of Social Governance for the European Union', in D. Kostakopoulou & N. Ferreira (eds.), *The Human Face of the European Union: Are the EU Law and Policy Humane Enough?* (2016) CUP: Cambridge, p. 37.

it seeks to improve working conditions while "ensuring labour market adaptability",[276] and "the necessary flexibility for employers".[277]
How the Directive will affect the protection of on-demand and marginal workers remains to be seen. Whilst it does provide concrete rights and protections, it is unclear how effective these will be or what protection it will provide to workers than do not meet the *Lawrie-Blum* criteria. The final version of the Directive removed the inclusion of the *Lawrie-Blum* criteria, which was moved to the recital, and was ultimately based on the subsidiary approach linking it to national definitions. This could mean that Member States will be able to exclude some precarious workers from its scope, however, it is likely that the Court will, like other social legislation, use the *Lawrie-Blum* as a floor which ensures the effectiveness of the Directive. Precarious workers may gain further protection from the fact that the Directive does not apply to individuals that work less than 12 hours per month, which is an improvement on the 32 hours contained in Directive 91/533/EEC, which in some respects was the predecessor to the Directive 2019/1152, albeit with more limited scope.[278] 12 hours a month (or approximately three a week) would cover all but the most marginal of part-time workers. It will be interesting to see how the Court interprets this instrument once the transposition date has passed.

7 The Wider Consequences of excluding Precarious Part-time Workers

The final part of this chapter will explore some of the wider social implications for the exclusion of precarious part-time workers from the protections explained so far in this chapter. By failing to meet the genuine economic activity aspect of the *Lawrie-Blum* criteria, precarious part-time workers are excluded from almost all social protections available to them under EU law, including both free movement and social law. This means that it is no longer enough just to engage with the market, instead one

[276] Article 1(1) Directive (EU) 2019/1152.
[277] Recital (1), Directive (EU) 2019/1152.
[278] Article 1(2)(a) Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

must engage sufficiently in the 'right type' of work. The most flexible, insecure, and precarious positions are likely not to be the 'right type' of work that gains protection under EU law.

Therefore, EU law creates a form of dualism in the labour market, whereby there is a group of workers engaged in more standard forms of employment that enjoy all the rights and protections available under EU law due to their status as workers. There is another group, however, that is excluded from protection. This commodifies their labour and undermines their social protection. The following section will explain how this dualism is liable to (i) undermine the bonds of market solidarity that the system of legal protection rests upon, and (ii) exclude precarious part-time workers from legal protection, thereby commodifying their labour and creating downward pressures on social standards.

7.1 Breaking the bonds of Market Solidarity

Conferring such social protections, in particular social benefits, to 'outsiders' that have only recently entered the host-state requires some form of legitimacy and normative reasoning. In the European Union, this is often discussed in term of the level of solidarity that exists between the worker and the host-society, which demands the outsider's inclusion and protection.[279] A system based on protecting individuals due to their economic participation is based on the idea of *market solidarity*, which suggests that there is solidarity between different members of society as this is necessary for the functional division of labour on a market.[280] This is linked to Durkheim's concept of organic solidarity, which suggests that solidarity in modern societies derives from individuals performing distinct but interconnected roles, and the mutually advantageous reciprocity of their actions,[281] rather than 'mechanical' solidarity associated with conforming to a dominant culture.[282] The

[279] A. Somek, 'Solidarity decomposed: being and time in European Citizenship' (2007) 32 *European Law Review* 787, p. 801; F. de Witte (n 140).
[280] F. de Witte (n 138), p. 81.
[281] Ibid, pp. 81 - 82; D. Schiek (n 243), p. 617.
[282] Ibid, p. 81; E. Durkheim, *The Division of Labour in Society* (1984), pp. 68 – 86.

"interdependency between actors and the mutually advantageous nature of their transactions" means that all "are engaged in the effective division of labour … and (all) should derive the same social entitlements from that economic engagement".[283] Market solidarity ensures that individuals are compensated through their participation in the market though access to these social entitlements. This suggests that anyone engaging in the division of labour on the market should obtain certain rights and obligations under market solidarity to ensure they are able to prosper within that society,[284] regardless of their background or nationality.

Migrants are already disadvantaged on the labour market when compared to Member State nationals. They often have more limited social and cultural capital, meaning that they have fewer social connections and less cultural knowledge necessary to build relationships.[285] They are more likely to be engaged in precarious employment, and are less likely to be involved in collective action or join a trade union, making them a source of cheap, malleable labour than can be easily exploited.[286] Market solidarity mitigates these negative effects, by seeking to ensure that there is a "space of freedom" from the market where the migrant's hopes, needs, and aspirations can be realised without having to worry about market pressures.[287]

Given the dichotomy between market and social integration, Member States remain largely free to define the generosity of the social rights and protections available to their own citizens, however, market solidarity dictates that they must include non-national EU migrants when determining the level of protection available.[288] Simply put, no-one in modern society is independent. We all share in the active participation and proper functioning of the economy and therefore should all share in

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[283] F. de Witte (n 140), p. 84
[284] Ibid, p. 82.
[285] M. Savage, et al., *Social Class in the 21st Century* (2015); see also P. Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (1984).
[286] D. Schiek (n 275), p. 20; G. Standing, *The European Precariat: The New Dangerous Class* (2011), p. 65.
[287] F. de Witte (n 138), p. 82
[288] Ibid, p. 86.

the benefits accrued from this. It is difficult to argue that one should be entitled to more or less protection simply because they come from another Member State, or because their employment is not 'valued' as much as other positions.[289] The COVID-19 pandemic has shown that just because an individual's employment is 'lower' skilled or paid, it does not make it less valuable to society.

7.2 The European Lumpenprecariat

The idea of market solidarity and the equality of treatment between migrant workers and native populations is what distinguishes European integration from other free-trade areas, as workers are able to counter the negative effects of free trade by themselves, and the improvement of their working and living conditions is placed at the heart of the system.[290] However, this legal dichotomy creates a dualism in the labour market, whereby genuine workers are entitled to market solidarity (and all the rights and protections that this provides), whilst marginal workers are excluded from solidarity and entitled to very little, if any, social protection.

This places citizens into 'deserving' or 'non-deserving' categories, or more bluntly labels them as 'good' or 'bad' citizens, depending on whether they fulfil the conditions required of them.[291] This is suggested to represent a 'totalitarian' mind-set where only 'good' European citizens need protection.[292] On the other hand, it also creates a second-class of citizens who have an inferior form of citizenship which is "devoid of any

[289] Ibid, p. 84.
[290] D. Schiek, 'EU Social Rights and Labour Rights and EU Internal Market Law' (2015) *European Parliament DG for Internal Policies* IP/A/EMPL/ST/2014-02 PE 563.457, p. 21 - 22.
[291] L. Azoulai, 'Transfiguring European Citizenship: from Member State territory to Union Territory, in D. Kochenov (ed.), *EU Citizenship and Federalism* ((2015) Cambridge: CUP, p. 178.
[292] D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, p. 226.

transnational protective status".[293] In particular, the "less affluent or disabled" are relegated to irrelevance and their rights unprotected.[294] These second-class migrants then become part of a group of 'tolerated' citizens within the EU legal order.[295] Despite not facing any formal expulsion order, their legal status is technically irregular and they have very limited if any social protections. This creates a disenfranchised, indentured, and exploited class of workers that carries greater risks for society, such as homelessness, greater healthcare needs, and increased crime.[296]

This group can be described as a 'Lumpenprecariat',[297] made up of "illegal migrants, living unlawfully in other Member States without equal treatment guarantees",[298] rights of residence and equal treatment, or even protection under the Charter as they fall outside the scope of EU Law.[299] They are more likely to be in lower-paid or less formal work, and include groups such as women engaged in care or reproductive work, young persons, disabled persons, ethnic minorities, etc. [300] This dichotomy creates a danger that free movement, and potentially all social protection under EU law, becomes the preserve of capitalist-class workers, leaving the 'working proletariat' at greater risk of poverty.[301] It risks creating an elitist model of free movement that alienates the working poor and effectively awards rights on the basis of socio-economic class.[302] While traditional proletarian workers are likely to gain

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[293] S. Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Intersentia: Cambridge, pp. 75 – 88, p. 85.

[294] D. Kochenov (n 290), pp. 225 - 227.

[295] N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015), pp. 926–927.

[296] C. O'Brien (n 72), p. 965

[297] D. Schiek, 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' (2017), p. 360. This can be seen as an update of the traditional Marixt term of 'proletariat'.

[298] D. Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40(2) *European Law Review* 249-262.

[299] As the Court made explicit in *Dano*, paras. 89–91; See N. Nic Shuibhne (n 293), pp. 914–915.

[300] C. O'Brien (n 92), pp. 1661 – 1672; C. O'Brien (n 72), p. 940.

[301] C. O'Brien (n 72), p. 940.

[302] Ibid, p. 939.

protection under EU law (due to their SER-based employment), those on the most flexible, casual, and precarious employment that is most likely to lose out. As such, this is worse than simply reinforcing the "dogmatic ideal of a good market citizen".[303] It means that simply engaging with the market is no longer enough, the workers must engage with right type of work, which is one of consistency, security, and stability, which is out-of-step with increased flexibility and insecurity in modern labour markets.[304] This contributes to long-standing criticisms that the EU is a 'rich person's club' that benefits affluent cosmopolitans over working class migrants. Most troubling, it creates a system whereby "the weak and the needy" are provided the least protection.[305] In some circumstances, for example in the context of discrimination in work or ensuring the basic conditions relating to health and safety at work, EU provides significant protection that should not be trivialised. However, for the subject matter of this chapter, i.e., the European *Lumpenprecariat* on the margins of economic activity, it is suggested that the law provides rights to those "who do not need them and only when they do not need them".[306]

7.3 Labour Commodification & Downward Pressures on Social Standards

Lastly, creating this dualism in the labour market by excluding precarious part-time and on-demand workers from legal protection is liable to result in downward pressures being placed on wages and social standards. This is because their exclusion from social protection results in them becoming more reliant on the market for their survival, known

[303] D. Kochenov, 'The Citizenship of Personal Circumstances in Europe', in D. Thym (ed.), *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing, p. 51.
[304] C. O'Brien (n 72), p. 938; C. O'Brien (n 92), p. 1650.
[305] D. Kochenov (n 303), p. 51.
[306] P. Minderhoud and S. Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive' (2017), p. 207.

as labour commodification.[307] Social institutions, whether it be the parishes and workhouses of the industrial era, the employment security of the SER, or the benefits and protections provided under the modern welfare state, ensure that individuals are protected to varying degrees from the pressures of the market and the commodification of their employment.[308] However, the principle always remains the same: labour will be commodified if the individual is forced to rely on the market rather than social institutions.[309] Moreover, this dualism is liable to create more inequality in terms of bargaining power between labour and capital.[310] Labour is better able to protect and promote its own interests if acting in a unified and coherent fashion, rather than the workforces splitting between migrant and native, or marginal and genuine, worker. If the former is split off and easily exploited, this can undercut the standards of the organised, less exploited workforce as it intensifies competition between them and lowers their price.[311] In essence, if a sizeable degree of the labour market is treated unequally and has significantly reduced social protection, then there is a higher risk of downward pressures on working and living conditions generally.[312] This suggests that a more inclusive approach seeking to ensure equality of treatment between migrant and native workers, and permanent and temporary workers, will protect all workers from the deregulatory pressures arising from the use of internal market rules to undermine social standards, and even contribute towards an *upward* spiralling of wages and social conditions.[313] Not only does it secure a fairer, more

[307] F. Behling, and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970.

[308] D. Ashiagbor, 'Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration' (2013), p. 305; see also G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990); G. Standing, *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (2017) London: Biteback; S. Rosewarne, 'Globalisation and the Commodification of Labour: Temporary Labour Migration: The Economic and Labour Relations Review' (2010), pp. 99–110.

[309] G. Esping-Andersen (n 306), p. 35.

[310] F. de Witte (n 140), p. 82

[311] C. O'Brien (n 72), p. 964; D. Schiek (n 297).

[312] D. Schiek (n 290), pp. 23-24.

[313] Ibid; D. Schiek (n 275).

equitable distribution of life chances for EU citizens, but it will also generate more growth and jobs, and improve the overall functioning of the internal market.[314]

Ironically, the exclusion of precarious workers from protection may result in increased negative sentiment towards migrants, as their exploited position is perceived by some as undermining the wages and social standards of the general population. This can result in a vicious spiral, whereby increasingly strict migration and employment policies are adopted to quell this sentiment, which in turn results in the migrant worker becoming more commodified, resulting in further downward pressures on wages and social standards.[315]

8 Solution: A Rebuttable Presumption of Genuine Activity?

By failing to meet the *Lawrie-Blum* criteria, EU migrant workers engaged in precarious forms of part-time employment can lose their legal status and rights under Article 45 TFEU, Directive 2004/38, and much of EU social law. Their differential treatment has a number of negative consequences: it undermines the idea of market solidarity upon which the internal market is based, and is liable to create an under-class of *lumpenprecariat*, i.e., precarious workers who have very limited or no legal protection under EU law. Not only does this place the worker at risk of poverty and destitution, arguably undermining the Union's claims of a commitment to social protection, but also creates downward pressures on social standards which may undercut the wages and social standards of workers in general.

This exclusion of precarious part-time workers indicates the need for a broad definition of worker and the effective enforcement of this. However, it must also be recognised that the constitutional and political limits of European integration mean that extending the scope of worker

[314] M. Ferrera, 'Modest Beginnings, Timid Progresses: What's next for Social Europe?', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge, pp. 18 - 19.
[315] D. Schiek (n 297).

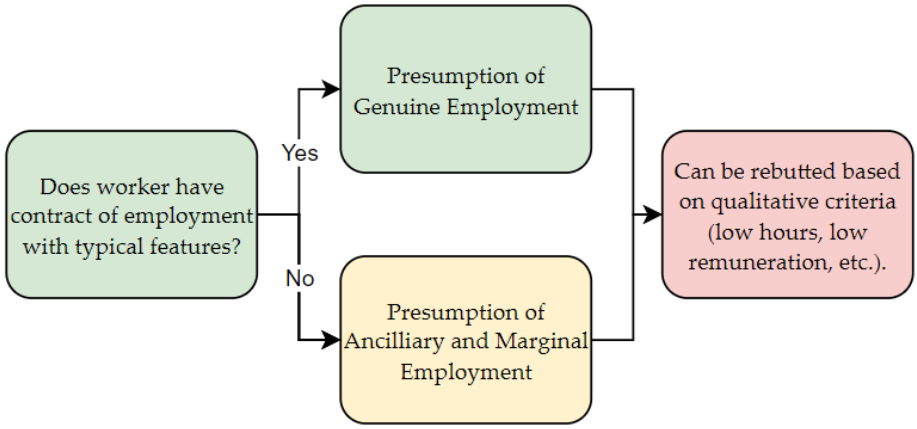
protection too far is also likely to undermine the idea of market solidarity and the legitimacy of the Union, which is still largely based on a sharp division between market and social competences. The Court may be able to protect against, or at least mitigate, the negative effects of this lack of protection for marginal workers, whilst preserving the constitutional foundations of the EU, by adopting a 'presumption of genuine activity' test that can be used when assessing whether an individual's economic activity is 'genuine', and consequently whether they gain worker status under the *Lawrie-Blum* criteria.

When determining the factors to be assessed, the Court has traditionally used a quantitative approach that examines the amount of work, or the number of hours performed, when assessing whether economic activity is genuine. More recently, it has taken a more qualitative approach looking at the nature of the employment, including the existence of employment-based rights. Both of these approaches may be problematic. The quantitative approach can mean that precarious part-time workers without a fixed work schedule, such as on-demand, zero-hour, or platform workers, are unable to demonstrate that they work enough for their employment to be considered genuine, and the demand that they 'prove' that they have performed a sufficient number of hours per week is likely to place them in an even more insecure and exploitable position. Under the qualitative approach, the requirement of a formal contract of employment with basic employment rights and protections may mean that the most casual or irregular working situations are not covered. This could mean that the most exploited and insecure workers are further denied legal protection.

A more balanced approach may be to apply a 'presumption of genuine activity', based on elements of both approaches, which would offer a higher level of social protection by including more workers within its scope, whilst still adhering to the core legal distinction between economic activity and inactivity. To do this, the Court should effectively switch its reasoning. Instead of finding that an individual can be classified as a worker, despite working very few hours, following an overall assessment of the employment relationship, the Court should say that, assuming the worker has an employment contract that contains the main elements of

employer-employee relationship under national law, then there should be a rebuttable presumption that the economic activity performed is genuine. This presumption could then be rebutted if, notwithstanding the existence of an employment relationship, the activity in question is performed to such a small extent that it renders the activity marginal. This may risk excluding individuals that are engaged in genuine employment but do not have the formal features of an employment relationship. To safeguard against this, a reversal of the presumption could apply: the individual's employment could be presumed to be marginal, however, this could be rebutted through a quantitative evaluation of the individual's economic activity.

Figure 3: A Legal Presumption of Genuine Employment



Interestingly, the European Commission has proposed a similar system in its recent Proposal for a Directive on improving working conditions in platform work.[316] In Article 4, the Proposal lays down the rules for when platform workers should be considered as paid- or self-employed. Assuming the relationship meets the criteria laid down in paragraph 2, "the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship". Under Article 5, Member States must establish a system for

[316] Proposal for a Directive on improving working conditions in platform work COM (2021) 762 final.

"any of the parties to rebut the legal presumption referred to in Article 4". If the digital platform (i.e., the employer) challenges this presumption, then the "burden of proof shall be on the digital labour platform" to demonstrate this. It remains to be seen whether this presumption of paid employment will be adopted in the final text of the Directive. However, it could act as a precedent for the use of a presumption of genuine activity test under the genuine economic activity requirement.

9 Conclusion

This chapter has assessed the level of protection that is available to precarious part-time workers under EU law and has made suggestions as to how this protection can be improved within the legal space that is available. Such workers have been defined as workers engaged on contracts with an extremely limited working schedule, or those engaged on an on-demand or zero-hour basis without a fixed working schedule or income. Whether they obtain legal protection or not is primarily based on whether they meet the genuine economic activity requirement within the *Lawrie-Blum* criteria. Traditionally, this has been based on quantitative factors relating to the amount of work undertaken, however, recently the Court has applied a more comprehensive approach that also assesses qualitative elements relating to the nature of the employment relationship. That said, the division in competences between Union and Member State means that this classification is mainly undertaken by national authorities that predominantly use quantitative elements and do not consider the mor recent *acquis* of the Court.

If unable to meet the genuine economic activity requirement, or national implementations of it, the worker is liable to lose many rights and protections. Under Directive 2004/38, the strict approach of the Court means that there is limited space for granting legal status and rights outside of worker status. Instead, marginal workers are treated as jobseekers, reducing their protection and subjecting them to various conditions and limitations. This can be highly problematic as it means that they have to comply with strict conditions to maintain this status (i.e., national activating labour market policies), which may be not reasonable or even feasible for those already engaged in employment.

The Court's approach in *Bajratari* may offer residual protection to precarious part-time workers, as it would suggest that they can be treated as having "sufficient resources" under the Directive, rather than being jobseekers.

Precarious part-time workers are liable to lose their free movement rights under Article 45 TFEU, such as the right to access employment, residence rights, and important social security rights such as family benefits that are necessary for the worker's integration into the host-society. They may also lose protection under EU social law that is linked to the *Lawrie-Blum* criteria, such as the Working Time Directive, the Directive on Predictable and Transparent Working Conditions, and Equal Treatment legislation. This is also likely to be the case under the Part-time Work Directive, despite this instrument in principle being based on the subsidiary approach to determining who falls under its scope. Furthermore, casual and on-demand workers can lose protection under this Directive if a Member State excludes them from its scope or if there is no full-time comparator, regardless of the application of the *Lawrie-Blum* criteria. Again, this suggests that those on the most insecure and exploitable contracts are likely to receive the least protection.

The exclusion of such workers from protection has wider societal consequences. It undermines the concept of market solidarity that is crucial to the freedom of movement for workers in the EU, and moreover risks creating an under-class of *Lumpenprecariat*, i.e., precarious workers that have limited or no legal protection under EU law due to not meeting the *Lawrie-Blum* criteria. This is not only likely to put the worker at risk of poverty and destitution, thereby undermining the Union's claims of a commitment to social protection and social justice but may also create dualisations in the labour market that are likely to place downward pressures on social standards and undercut the wages of both native and migrant workers. This chapter has proposed shifting the Court's focus to looking primarily at the nature of the employment, i.e., the existence of an employment contract and employment-based rights, which would lead to a presumption of genuine activity, which could then be rebutted if, regardless of the existence of an employment contract, the work is performed to such a small extent that it should be considered as marginal

and ancillary. This would mitigate at least some of the problems resulting from the genuine economic activity requirement whilst adhering to the Union's constitutional and political limitations in terms of how far the rights of workers can be extended to those on the margins of economic activity.

Chapter 7: Intermittent Workers

1 INTRODUCTION

The second case study will assess the situation of intermittent workers. These are persons who, due to being engaged in casual, agency, or other short-term work, face periods of economic inactivity during their working career which can undermine their employment security and place them in a precarious situation. This chapter will use a broad notion of intermittent work that includes not just those engaged on fixed-term contracts or through employment agencies, any employment that is not permanent, and which can result in periods of economic inactivity and employment insecurity. Therefore, it can also include on-demand and platform, given that workers engaged in such employment will likely also face periods of economic inactivity during their working carer.

The following sections will first explain what forms of intermittent employment are precarious, looking at fixed-term, employment agency, and other forms of temporary and short-term employment. Following this, it will examine the situation of intermittent workers under free movement law, specifically Directive 2004/38.[1] It will examine their ability to retain the status of worker and to obtain permanent residence status, as well as the relationship between the different statuses under the Directive. Next, it will look at the supplementary protection intermittent workers receive through EU social law, in particular the Fixed-term Work Directive, the Employment Agency Directive, and the Charter of Fundamental Rights and the Directive on Transparent and Predictable Working Conditions.[2] Finally, it will look at the wider consequences for intermittent workers and what this means for their overall level of social protection, before suggesting a system of residual protection that would provide employment security to such workers whilst adhering to the limitations of the Union.

2 PRECARIOUS FORMS OF INTERMITTENT EMPLOYMENT

Intermittent employment can be defined as work which, by reason of its short-term or casual nature, means that the worker is liable to spend periods of time in economic inactivity during their working career. This includes temporary employment such as fixed-term and agency-placed work, as well as other forms of work that can be considered temporary under a broader, holistic understanding of intermittent employment.

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
[2] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP *OJ L 175, 10.7.1999*; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work *OJ L 327, 5.12.2008*; The Charter of Fundamental Rights of the European Union (2012 consolidated version) *OJ C 202 7.6.2016*; Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union PE/43/2019/REV/1 *OJ L 186, 11.7.2019.*

2.1 Fixed-term Work

Fixed-term work is defined as an employment relationship where the end of the employment contract is related to reaching "a specific date, completing a specific task, or the occurrence of a specific event".[3] This is different from the SER model, under which most contracts were permanent or open-ended. Fixed-term work existed before the 2008 Financial Crisis and was in decline prior it, however, since the crisis it has increased.[4] In fact, for those entering the labour market now, fixed-term employment is increasingly the norm rather than the exception, with their use increasing following the COVID-19 pandemic: OECD data suggests that current employees engaged on fixed-term contracts are not having them renewed, and permanent contracts are being replaced with temporary ones.[5] Fixed-term employment allows entry into employment and opportunities for valuable experience for workers who might otherwise not be able to attain such, for example younger persons with less working experience. As such, fixed-term work is a trade-off between, one the one hand, reduced job security as the worker does not have a permanent contract, while on the other hand providing valuable work experience that may ultimately result in a permanent employment position.

In general, fixed-term workers report a high degree of financial and job insecurity, which can have significant negative effects on their mental health.[6] On average they receive lower pay and have fewer employment rights than permanent workers.[7] Unlike part-time work, there is little distinction between precarious and non-precarious forms of fixed-term work: a solid majority of fixed-term workers in Europe are in their position involuntarily would prefer a permanent contract.[8] This is particularly the case for fixed-term workers that are engaged on consecutive fixed-term contracts, often without the opportunity of making this employment permanent, even after several years of service. This creates a significant power imbalance between the worker and employer which pushes the intermittent work towards social exclusion, undermines solidarity between workers, and distorts competition.[9] The perceived precariousness associated with fixed-term work varies across Member States. Those with strong traditions of employment protections and more permanent, open-ended contracts see fixed-term work as highly precarious, however, in Southern Member States fixed-term contracts have become more normalised.[10]

2.2 Employment Agency Work

Employment agency work is defined as employment where a worker is engaged on a contract with a work agency "to work temporarily under its supervision and direction".[11] Agency work

[3] Clause 3, Framework Agreement on fixed-term work, in Directive 99/70/EC; see also S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, p. 18.
[4] Ibid.
[5] OECD, *OECD Employment Outlook 2020: Worker Security and the COVID-19 Crisis* (2020) OECD publishing: Paris.
[6] A. Broughton et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels, p. 96.
[7] Ibid, p. 95; S. McKay et al (n 3), p. 18.
[8] A. Broughton (n 6), p. 103.
[9] S. McKay et al (n 3), pp. 18 – 19.
[10] Ibid, p. 18.
[11] Directive 2008/104/EC on temporary agency work, Art. 3; See also S. McKay et al (n 3), p. 28.

is inherently temporary by nature, as can be seen through its regulation under EU law.[12] Like most forms of precarious employment, its use has increased significantly since the Global Financial Crisis.[13] Agency work disproportionately affects younger workers, women, and migrants: 57% of agency workers in Europe are under 30,[14] a significant majority are women,[15] and many are migrants.[16] Like fixed-term work, employment agency work is suggested to assist younger workers and long-term unemployed to get (back) into meaningful employment. However, in practice it tends to create precarious working conditions, and the 'transition rate' from agency work to permanent work is very low, particularly for migrant workers.[17] Furthermore, it creates a complex system of legal rights and entitlements than is applicable to those directly employed, which is likely to negatively affect agency workers and opens up the system for abuse.[18] On average, agency workers are paid less than comparable permanent workers.[19] Agency work also has societal implications as it can de-incentivise companies from up-skilling their own staff. Furthermore, during times of crisis, companies tend to lay off flexible agency workers before their core workforce,[20] or even replace their core workforce with agency workers.[21] Agency staff can be used to circumvent requirements on employment protections and social security contributions, thereby undermining social rights across the Union. As such, agency work is one of the most precarious forms of non-standard employment.

2.3 Other forms of Intermittent Employment

Intermittent work must be seen as encompassing more than just fixed-term and employment agency work. Individuals engaged in casual or zero-hour work, short-term employment, or platform work, may also find themselves moving between jobs regularly and therefore having to spend periods of time in economic inactivity. As such, all precarious workers discussed in this thesis are likely to face some of the issues relating to intermittent workers. Platform work does not easily fit inside the definition of legislation such as the Fixed-term or Employment Agency Directives, at least without some inventive readings of the law.[22] However, the nature of platform work means that those engaging with an app are likely to do it intermittently. As such, the issues affecting intermittent workers will also affect platform workers. This broad understanding of intermittent workers can be seen from the Court's case-law: *Alimanovic* concerned individuals "in temporary jobs lasting less than a year",[23] whilst in *Tarola* the worker

[12] Directive 2008/104/EC refers explicitly *temporary* agency work.
[13] S. McKay et al (n 3), p. 28.
[14] Eurociett, 2012.
[15] S. McKay et al (n 3), p. 29.
[16] Ibid.
[17] A. Broughton (n 6), p. 110.
[18] Ibid.
[19] Ibid.
[20] S. McKay et al (n 3), p. 29.
[21] G. Standing, *The European Precariat: The New Dangerous Class* (2011) Bloomsbury, London.
[22] See A. Rosin, 'Platform Work and fixed-term employment regulation' 12(2) *European Labour Law Journal* 156-176, p.166-167.
[23] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para. 27.

was engaged on a basis short-term in both paid- and self-employment.[24] These cases demonstrate how regularly moving between jobs is increasingly the norm for many workers.

3 PROTECTION OF INTERMITTENT WORKERS UNDER DIRECTIVE 2004/38

Intermittent workers do not face problems meeting the *Lawrie-Blum* criteria, which they are deemed to have met during short-term periods of employment. Instead, difficulties can arise in terms of retaining this status during periods of economic inactivity, or when trying to secure permanent residence status under Directive 2004/38, both of which would provide employment security during periods of economic inactivity. The following section will examine the system of worker retention and the system of permanent residence under Directive 2004/38, in view of the Court's strict and literal approach towards its interpretation.

3.1 Retaining Workers Status: The Court's Case-law

The Court has long held that the "mere fact" that a contract of employment is fixed term in nature "cannot necessarily lead to the conclusion" that once it is completed the worker "is automatically to be regarded as voluntarily unemployed".[25] However, those seeking to retain the status of worker, or obtain the status of jobseeker, following a period of economic activity must comply with certain requirements such as registering with a job centre and genuinely seeking employment (as was explained in Section 5.4.1). The following section will outline the Court's case-law on the interpretation of Article 7(3) Directive 2004/38.

Saint Prix

Saint-Prix concerned the ability of women to retain the status of worker under Directive 2004/38 if they temporarily give up work due to pregnancy. There was no specific provision in the Directive that covered this situation, which the UK lower courts had considered to be a conscious decision by the EU legislator,[26] which could be inferred from a literal reading of the text. However, as Advocate General Wahl concluded, it would create a strange situation where women were protected in the case of illness, but not in the case of pregnancy.[27] It would furthermore represent "blatant disregard for the principle of non-discrimination on grounds of sex", as is protected under Article 23 Charter.[28] The Court agreed, finding that there was nothing in Article 7(3) to suggest that it "lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status".[29] That said, the Court did not read the new situation into Article

[24] Case C-483/17 *Tarola* ECLI:EU:C:2019:309, para. 9.
[25] Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:600, para. 42.
[26] C. O'Brien 'I trade, There I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643, p. 1666; *Secretary of State for Work and Pensions v JS* [2010] UKUT 131 (AAC), para. 22.
[27] Opinion of Advocate General Wahl in Case C-507/12 *Jessy Saint Prix* ECLI:EU:C:2013:841, para. 33.
[28] Ibid, para. 40.
[29] Case C-507/12 *Jessy Saint Prix* ECLI:EU:C:2014:2007, para. 38.

7(3) directly.[30] Instead, it decided the case under Article 45 TFEU, finding that the constraints requiring a woman to give up work during pregnancy and "the period needed for recovery" does not necessarily deprive her of worker status.[31] The fact that she was "not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement".[32] However, given that the situation could not be read into the Directive directly (with the Court rejecting the idea that could be equated with temporarily illness),[33] the case was ultimately decided under Article 45 TFEU.

Alimanovic

The Court's generous approach in *Saint Prix*, based on Article 45 TFEU, can be compared to cases like *Alimanovic*, where it has been much stricter in its approach when interpretating the system of worker retention. *Alimanovic* concerned intermittent workers in the truest sense: mother and daughter Alimanovic were engaged in 'temporary jobs' lasting less than a year before becoming unemployed.[34] Following this, the Alimanovic family received the *Arbeitslosengeld II* (subsistence allowance for the long-term unemployed) social benefit, however, this was rescinded by the local authorities after eight months due to a change in the national regulations.[35] The Court held that intermittent workers in the situation of the Alimanovic family could only maintain a right to reside if they either retained the status of worker under Article 7(3)(c), or as a jobseeker under Article 14(4)(b) which protects them for "as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged".[36] However, as Germany had already conferred worker status upon the Alimanovic family for eight months (two months more than is required under the Directive for those in employment for less than 12 months), it was under no obligation to confer this status any longer. The applicant could still retain a right of residence as jobseekers under Article 14(4)(b), which meant that in principle they could rely on the right to equal treatment under Article 24(1), however, the derogation in Article 24(2) meant that Germany could deny them social assistance.[37]

The Court's decision went against the Opinion of Advocate General Wathelet, who considered that a distinction should be made between jobseekers that have just moved to another Member State to seek employment, and those (like the Alimanovic family) who are looking for work after a period of employment in the host-state.[38] He considered that denying them social assistance would represent an "appropriate, albeit restrictive, transposition of Directive 2004/38", and that "its automatic consequences for entitlement to subsistence benefits seem to

[30] Ibid, para. 30. The Court rejected the suggestion that a pregnant woman's situation could be equated with temporarily illness.
[31] *Saint Prix*, para. 40.
[32] Ibid, para. 41.
[33] Ibid, para. 30
[34] *Alimanovic*, para. 27.
[35] Ibid, para. 30.
[36] Ibid, para. 56.
[37] Ibid, para. 57-58.
[38] Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, para. 87 et seq.

go beyond the general system established" under it.[39] In his view, Member States must make an individual assessment that takes into account, *inter alia,* "the amount and regularity of the income received by the citizen of the Union, (and) also the period during which the benefit applied for is likely to be granted to them".[40] He then made a link with the Court's 'real-links' case-law,[41] stating that this link should prevent the automatic exclusion of these social benefits on the basis of a single condition of entitlement (i.e., time spent in receipt of the benefit).[42] He considered that the national rule "prevents other factors which are potentially representative of the real degree of connection of the claimant with the relevant geographic labour market being taken into account … goes beyond what is necessary to achieve its aim".[43] Interestingly, whilst the Court rejected the Advocate General's approach, Italy does make this distinction between first-time jobseekers and those already in the country, with the latter group having an extended period of a year rather than six months before they lose worker status.[44]

The Court adopted a much stricter approach, finding that an individual assessment was unnecessary as the Directive establishes "a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant".[45] According to the Court, this allows individuals to know their rights and obligations, and guarantees a significant level of legal certainty and transparency while complying with the principle of proportionality.[46] Finally, the Court asserted that whilst an individual claim for social assistance could not represent an unreasonable burden on the host-state, the cumulative claims of such benefits was "bound to" result in one being placed on it.[47]

Alimanovic represents a strict interpretation of Article 7(3) when compared to *Saint Prix*, as well as the Advocate General's Opinion, which would allow for more protection for ex-workers than first-time jobseekers. The difference in the Court's reasoning is that pregnant women can rely upon Article 45 TFEU directly, however, jobseekers must rely on Article 14(4)(b) of the Directive. This approach is based on the idea that jobseekers obtain residence rights under Article 14(4)(b) Directive 2004/38, whilst as pregnant women are not covered under the Directive, they rely directly on Article 45 TFEU. Advocate General Wathelet has criticised this approach for misunderstanding the Directive. In his Opinion in *Gusa*, he argued that the structure and wording of Article 14(4)(b) "do not support a view of that provision as providing the basis for a right of residence".[48] The fact the provision applies 'by way of *derogation'* means that it only applies when a right of residence has been lost. It does not grant rights, but rather protects jobseekers from expulsion "as long as they can provide evidence that they are

[39] Ibid, para. 103.
[40] Ibid, para. 106.
[41] See, for example, Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458 and Case C-209/03 *Bidar* ECLI:EU:C:2005:169.
[42] Opinion of Advocate General Wathelet in *Alimanovic*, paras. 107 – 108
[43] Ibid, para. 109.
[44] C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016) *DG for Employment, Social Affairs and Inclusion* FreSsco Contract: VC/2014/1011, p. 32.
[45] *Alimanovic*, paras. 59 – 61.
[46] Ibid, paras. 59 – 61.
[47] Ibid, paras. 62.
[48] Opinion of Advocate General Wathelet in Case C-442/16 *Gusa* ECLI:EU:C:2017:607, para. 69.

continuing to seek employment and they have a genuine chance of being engaged".[49] He also considered that the purpose of the Directive would be undermined as this approach would treat a first-time jobseeker "who has never paid any contributions, even though he has contributed to the tax and social security system of the host Member State, in the same way as an employed person".[50] Whilst such as approach would provide more protection to ex-working jobseekers, the Court has confirmed in more recent that jobseekers' sole right of residence is based on Article 14(4)(b).[51] Notwithstanding the views of AG Wathelet, the Court's approach adheres to the literal/purposive approach it purports to adhere to. Where the situation is covered under Directive, the Court will apply these rules strictly. However, where the situation is not covered by the secondary legislation, the Court will use Treaty provisions and loose formulae in order to come to an outcome in line with the purpose of the law.

Prefeta

Subsequent case-law has been more in line with the stricter approach of *Alimanovic* when deciding cases under Article 7(3). *Prefeta* concerned the rights of Polish workers during the country's accession to the EU.[52] The applicant worked in the UK from 2009 to 2011 before ceasing employment due to a non-work-related injury. He therefore qualified as an 'accession worker requiring registration', however, the registration was only belatedly completed in January 2011, two months before he was forced to stop working. He registered as a jobseeker but was denied income-related Employment Support Allowance on the basis that he had not been working for an uninterrupted period of 12 months following the granting of his residence certificate and before becoming unemployed. The Court held that as he obtained a certificate registering his employment only in January 2011, he had not been working as a registered accession worker for 12 months and therefore could not retain the status of worker.[53] It was considered that if the UK were not able to restrict the application of Article 7(3) Directive 2004/38 to individuals "without having first completed 12 uninterrupted months of registered work", this would undermine the effectiveness of the derogations within the Act of Accession, nearly to "restrict the right of economically inactive accession state nationals to reside in the United Kingdom for the purpose of seeking work".[54] As it was put by Advocate General Wathelet: "it is not sufficient for him to work. He must have been allowed to do so".[55]

The is a very narrow interpretation of the worker retention rules laid down in the Act of Accession and Directive 2004/38. The Advocate General claimed that the applicant needed to be allowed to work in the host-state, however, he was factually engaged in employment for 20 months, even if technically only two of these were as a 'registered worker'. This logic is not at all convincing: if a worker is granted a job in a host-state and pays social security contributions and income tax whilst there, but is not granted formal residence status by the national authorities due to administrative errors, how does this restrict the right of "economically inactive accession state nationals to reside in the United Kingdom for the purpose of seeking

[49] Ibid, para. 70.
[50] Ibid, para. 76
[51] Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037.
[52] Case C-618/16 *Prefeta* ECLI:EU:C:2018:719.
[53] Ibid, para. 52.
[54] Ibid, para. 47.
[55] Opinion of Advocate General Wathelet in Case C-618/16 *Prefeta* ECLI:EU:C:2018:125, para. 70.

work", as the rule was suggested to do by the UK. To borrow the words of Advocate General Wathelet, this seems to be an "appropriate, albeit restrictive" interpretation of the Accession Act.[56] Furthermore, it creates a situation whereby workers from accession countries can be working and paying taxes, and yet are not recognised as being lawfully resident and therefore excluded from social protection. This is liable to commodify the labour of such workers, resulting in their social exclusion as well as distorting the labour market and creating downward pressures of wage rates and labour standards.

Tarola

A final example can be seen from the case of *Tarola*, which concerned a Romanian national working in Ireland during August and September 2013, and from 8th July to 22nd July 2014.[57] His application for jobseeker's allowance was denied because he had "not worked for more than a year and the evidence produced was insufficient to establish Ireland as his habitual residence", as was required under national law.[58] However, the Court held that the Irish lower court had "misread" the Directive when it concluded that Article 7(3)(c) only applied to fixed-term workers.[59] It was considered that the wording of the provision, in particular the use of the word *or*, meant that individuals retained the status of worker for no less than six months in two situations: (i) when they finish a fixed-term contract and become involuntarily unemployed as result (e.g. *Alimanovic*), and also (ii) when an individual becomes involuntarily unemployed *during the first 12 months of employment*.[60] The Court held that Article 7(3)(c) applies "in all situations in which a worker has been obliged, for reasons beyond his/her control, to stop working in the host state before one year has elapsed, regardless of the nature of the activity or the type of contract".[61] As such, assuming the individual is involuntarily unemployed (i.e. for any reason beyond their control), they will retain the status of worker, regardless of the form or type of their employment contract. This meant that, even though the applicant worked for just two weeks before becoming involuntarily unemployed, he could still retain the status of worker for at least six months, assuming he complied with the conditions of Article 7(3).[62]

The *Tarola* decision represents a broader interpretation of the Directive, albeit one that adheres to the approach of applying a literal approach to the Directive wherever possible. Through this literal interpretation, the Court considered that the word 'or' created two scenarios in which worker status could be retained, which covered all situations where a worker is forced to cease work. However, in a "gentle nudge" to Member States, the Court emphasised that they could still exclude certain persons working for short periods from social security entitlement, assuming this is also the case for Member State nationals.[63]

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[56] Using the terminology in *Alimanovic*, para. 103.
[57] *Tarola*.
[58] Ibid, para. 12.
[59] M. Cousins, 'Establishing and Retaining a Right of Residence as A Worker under EU law: Tarola v Minister for Social Protection' (2016) *Bepress*, available at: https://works.bepress.com/mel_cousins/98/; see also [2016] IEHC 206, para. 28.
[60] *Tarola*, paras. 30-31.
[61] Ibid, para. 48.
[62] Ibid, para. 54.
[63] Ibid, para. 56; see also Opinion of Advocate General Szpunar in Case C-483/17 *Tarola* ECLI:EU:C:2018:919, para. 55; F. Strumia, 'Unemployment, Residence Rights, Social Benefits at Three Crossroads in the Tarola Ruling' (13th

3.2 No Social Assistance for Jobseekers? Intermittent Workers and the 'Alimanovic Trap'

The Court's stricter approach towards Directive 2004/38 has made it more difficult for those on the fringes of economic activity to claim social benefits. A clear example of this is in the context of intermittent workers claiming social assistance benefits during periods of economic inactivity where they do not retain the status of worker. Specifically, the Court's recent approach suggests that jobseekers may struggle to claim social assistance benefits that assist with access to the labour market.

Following the establishment of Union Citizenship, the Court held that it was no longer possible to exclude jobseekers the entitlement of social benefits "of a financial nature intended to facilitate access to employment in the labour market".[64] Even before the adoption of Directive 2004/38, the distinction between these job seeking benefits, and social assistance benefits more broadly, was unclear and arbitrary.[65] However, since the adoption of Directive 2004/38, the Court's approach seems to have created a situation whereby non-contributory jobseekers' allowance, and other social assistance benefits meeting the *Vatsouras* / *Collins* description, have become inaccessible to jobseekers. If a social benefit has a social assistance-like function, then it can be derogated from under Directive 2004/38, regardless of whether it facilitates access to employment or not.[66] This paradox can be understood as the 'Alimanovic trap', which can be most clearly explained by comparing the decisions of *Dano* and *Alimanovic*. In *Dano*, the applicant was denied a SGB II (Jobseeker) benefit as, according to the Court, she was not in employment or actively looking for work, and only entered Germany in order to claim social assistance benefits. However, *Alimanovic* also concerned SGB II (Jobseeker) benefits, and yet the applicants this time were actively seeking employment but were also denied these benefits due to the derogation on social assistance contained in Article 24(2), suggesting that, at least in the context of the of SGB II (Jobseekers) benefits, these are inaccessible to jobseekers insofar as it is difficult to imagine a situation where a jobseeker would be entitled to them.[67] Furthermore, the Court's interpretation of Directive 2004/38 may mean that any means-tested benefit as covering minimum subsistence costs necessary to lead a life in keeping with human dignity would be excluded from jobseekers.[68] As such, it is suggested that in cases such as *Tarola* (and potentially *Alimanovic*) applicants should be entitled to the social benefit in question under the *Vatsouras*/*Collins* doctrine, thereby negating any need to assess their potentially retained worker status under Article 7(3).[69] To exclude them from

April 2019), *EU Law Analysis*. Available at: http://eulawanalysis.blogspot.com/2019/04/unemployment-residence-rights-social.html.

[64] Joined Cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:344, para. 37; Case C-138/02 *Collins* ECLI:EU:C:2004:172, para. 63; Case C-326/00 *Ioannidis* ECLI:EU:C:2003:101, para. 22;

[65] F. Wollenschläger, 'The Judiciary, the legislature and the evolution of Union Citizenship', in P. Syrpis (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012) CUP: Cambridge, p. 324.

[66] C. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *CMLRev* 937, p. 947.

[67] C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart, pp. 53–56; M. Jesse & D. Carter, 'Life after the *Dano*-Trilogy: Legal Certainty, Choices and Limitations in EU Citizenship Case Law', in N. Cambien, D. Kochenov, & E. Muir, *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (2020) Leiden: Brill Nijhoff, p. 164.

[68] D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208, p. 1204; see also C. O'Brien (n 64), pp. 948 - 949; O'Brien (n 67), pp. 53-56.

[69] M. Cousins (n 59).

such benefits risks creating distortions on the labour market and pushing those excluded from protection into social exclusion.

3.3 Retaining Worker Status: A Proportionate System?

Intermittent workers are also affected by the Court's strict interpretation of Directive 2004/38 that leaves little room for individual assessments. This is because, in the context of Article 7(3), the Court has held that considers that this constitutes a "gradual system" which "seeks to safeguard the right of residence and access to social assistance" and "takes into consideration various factors characterising the individual situation of each application for social assistance and, in particular, the duration of the exercise of any economic activity".[70] According to the Court, national measures that apply this system guarantee a "significant level of legal certainty … while complying with the principle of proportionality".[71] This effectively means that any measure complying with this provision, even strictly, will automatically be considered to be proportionate and will forgo the need for an individual assessment.[72]

The actual proportionality of this system can be questioned. In *Saint Prix*, the Court held that Article 7(3) is not an exhaustive list of situations where individuals can retain the status of worker and had to read into the law an additional situation (the latter stages of childbirth) in which EU Citizens could retain the status of worker for a "reasonable period".[73] The Court felt it necessary to decide the case on the basis of Article 45 TFEU, which in itself suggests that Article 7(3) is not as comprehensive a system as the Court has made out in recent cases. Furthermore, rather than considering "various factors characterising the individual situation of each application", Article 7(3) appears to consider only one factor: namely, time spent engaged in genuine employment. Advocate General Wathelet was critical of this 'one-size-fits-all' approach, finding that such rules do not allow the Member State to undertake an "overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned".[74] He considered that the "requirement of an individual examination actually concerns the application for social assistance and not the lawfulness of the residence", which would suggest that whilst individual residence status could be determined through a strict application of Article 7(3), any benefit claim requires an individualised assessment of factors such as the income of the citizens and the period they planned to claim the benefits.[75]

The Court has repeatedly asserted that the objective of Article 7 is to prevent "Union citizens who are nationals of other Member States from becoming an unreasonable burden" on the

[70] *Alimanovic*, para. 60; see also Case C-299/14 *Garcia-Nieto* ECLI:EU:C:2016:114, para. 49 in the context of Article 6 Directive 2004/38.
[71] *Alimanovic*, para. 61; see also *Garcia-Nieto*, para. 49 in the context of Article 6 Directive 2004/38.
[72] D. Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 *CYELS* 270-301, pp. 294 – 295.
[73] *Saint Prix*, paras. 38 - 41.
[74] Opinion of Advocate General Wathelet in *Alimanovic*, para. 104.
[75] Ibid, para. 105; see also *Brey*, paras. 78 – 79.

host-state.[76] However, is Article 7(3) really proportionate to this aim if it restricts the entitlement of social assistance to an entire class of persons, regardless of whether they factually represent an unreasonable burden on the state? The Court has dismissed this as the accumulation of such claims is "bound to" result in an unreasonable burden, however, this claim can apparently be made by Member States without any evidence, empirical or otherwise, to support it.

3.4 Intermittent Workers & Permanent Residence

Intermittent workers can gain indirect protection once they obtain the status of permanent residence under Article 16(1) Directive 2004/38. Permanent residence status provides individuals with full equal treatment comparable to genuine workers for as long as they remain physically present in the country. As such, obtaining this status would provide intermittent workers with a high level of legal protection, as they obtain the same level of employment security as is available to Member State nationals. However, the Court's strict approach towards interpreting the Directive means that any period of time that the worker is legally considered to be economically inactive may undermine their claim to permanent residence under 16(1).

The Court has held that permanent residence status under Article 16(1) requires the individual to reside in conformity with Article 7 of the Directive for the entire five-year period. This means that any period of residence that does not satisfy the Directive will not be regarded as lawful residence required for permanent residence under Article 16(1).[77] Any periods spent unlawfully resident, residence based on national law, and periods of voluntarily inactivity, can therefore eliminate the individual's claim to permanent residence status. The confusion over permanent residence can be seen from the Court's case-law, where applicants that seemingly have a right to permanent residence need to invoke their rights through separate provisions, such as Article 7(3). For example, in *Tarola* it suggested to be difficult to see how "any reasonable deciding officer" could conclude that Mr. Tarola did not have permanent residence.[78] Furthermore, in *Gusa*, the Court stated that the applicant did not claim to have permanent residence status in when making his claim,[79] however, it was not clear from the facts of the case why he could not claim his permanent residence,[80] a point which was alluded to by Advocate General Wathelet.[81]

Another challenge intermittent workers face in obtaining permanent residence status is that, in order to retain the status of worker under Article 7(3) following a period of economic

[76] Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para. 74; *Alimanovic* 7, para. 50; Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114, para. 39; *Tarola*, para. 50; Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:809, paras. 36 – 37; Case C-709/20 *CG* ECLI:EU:C:2021:602, paras. 76 – 77; Case C-535/19 *A* ECLI:EU:C:2021:595, paras. 58 – 59.
[77] Case C-424/10 and C-425/10, *Ziółkowski & Szeja* ECLI:EU:C:2011:866, paras. 45 – 46; see also See also D. Kramer, 'A Right to Reside for the Unemployed Self-employed: The case *Gusa* (C-442/16)' *European Law Blog*. Available at: https://europeanlawblog.eu/2018/01/10/a-right-to-reside-for-the-unemployed-self-employed-the-case-gusa-c-444216/.
[78] M. Cousins (n 59).
[79] Case C-442/16 *Gusa* ECLI:EU:C:2017:1004, paras. 21.
[80] D. Kramer (n 77).
[81] Opinion of Advocate General Wathelet in Case C-442/16 *Gusa* ECLI:EU:C:2017:607, paras. 35 – 36.

activity, the worker must register with a job centre. This means that they must often comply with national activation policies in order to maintain their status. At a basic level this is logical: if the individual wants to retain a right of residence whilst looking for a new job, then they should comply with national requirements for jobseekers. On the other hand, it seems that this is the only option for intermittent workers to retain a right of residence during periods of economic inactivity. What then, is the situation for 'voluntary' workers, i.e., intermittent workers that are not currently engaged in economic activity, however, for whatever reason do not wish to register with a jobcentre and meet the conditions necessary for that? O'Brien notes that some EU citizens conduct their own job searches outside of the structures of national job centres in order to avoid creating a burden on the state, but later find that this period has left them with a status gap when they are unable to prove that they were lawfully resident under the Directive.[82] If an individual has worked for a period of time in the host-state, has contributed to its public finances, and has not claimed social benefits during their stay, should they really lose their residence status under the Directive due to not working for a period of time? It is impossible to say that they would place any kind of a burden on the host-state, unreasonable or otherwise.[83] This arguably undermines the Directive's main objective of facilitating the exercise of the primary and individual right to move and reside,[84] and is inappropriate in realising the objective of Article 7 to ensure that Member States can protect themselves against an unreasonable burden being placed on their welfare system.[85] To punish EU citizens by removing their legal status and rights under the Directive because they have taken a short break from employment, or have not complied with the necessary activating labour market policies associated with maintaining the status of jobseeker, seems disproportionate and unfair.[86]

3.5 Application at National Level

Most Member States adhere to Article 7(3) of the Directive insofar as they place a six-month limit on worker status retention in the case where the worker was engaged for less than 12 months, and do not place a limitation on worker status retention where the individual is engaged in employment for over 12 months.[87] Furthermore, the majority allow intermittent workers that do not retain the status of worker to access social benefits applicable to jobseekers. However, some Member States, such as Italy, Portugal, Netherlands (and the United Kingdom when it was a Member), in principle do not allow jobseekers to claim social assistance benefits entirely, and more Member States do not adhere to the *Collins* principle that jobseekers should be entitled to social benefits that "facilitate access to the labour market".[88] Even where such benefits are not excluded from jobseekers, Member States often impose requirements such as that jobseekers must have either sufficient resources not to become a burden on the state or

[82] C. O'Brien (n 67), p. 52.
[83] C. O'Brien, E. Spaventa, & J. De Coninck (n 42), p. 18.
[84] Recital (3) Directive 2004/38; *Brey*, para. 53; *Tarola*, para. 23; *Bajratari*, para. 47.
[85] Recital (10) Directive 2004/38; *Brey*, para. 54; *Dano*, para. 70; *Alimanovic*, para. 50; *Tarola*, para. 17; *Bajratari*, para. 37.
[86] C. O'Brien, E. Spaventa, & J. De Coninck (n 44), p. 68; see also S. Wright, 'Welfare-to-work, Agency and Personal Responsibility'.
[87] C. O'Brien, E. Spaventa, & J. De Coninck (n 44), p. 70.
[88] Ibid, p. 68.

must have a 'real-link' with the Member State or labour market in question.[89] Similar to the situation of marginal part-time and on-demand workers, the decision to recognise an individual's residence is undertaken by national decision-makers on a case-by-case basis. In the UK, 'intermittent' or 'erratic' work is explicitly noted as less likely to be considered as constituting 'genuine' work.[90] Furthermore, involuntarily unemployed workers are treated the same, regardless of whether the employment was terminated during the first 12 months or after this date.[91]

Another problem faced by intermittent workers at the national level is that in a number of Member States, a brief period of economic inactivity can 'reset' their residence clock, meaning that the citizen must be lawfully resident for another full five years in order to obtain permanent residence status.[92] This practice punishes individuals for taking time out of the labour market and for not becoming a jobseeker. Ironically, this punishes people for not claiming support from the host-state even though they are less likely to place a burden on it. It also creates an administrative barrier to claiming permanent residence status, as some migrant workers, especially those in the most marginal and precarious of jobs, may find it difficult to prove that they have been in continuous employment for five years, constantly meeting any necessary pay and hourly-working thresholds. Consequently, they may find that some periods of residence are discounted and that their 'residence clock' restarts several times before they can obtain permanent residence status.[93]

This practice of resetting the clock on lawful residence arguably underlines the Court's case-law on permanent residence. It has held that absences of two years do not affect the acquisition of permanent residence status, even if this was realised prior to the coming into force of the Citizenship Directive.[94] Furthermore, in *Dias* the Court stated that the aim of Article 16(1) was to integrate EU citizens, "not only on territorial and time factors but also on qualitative elements",[95] and that absences from the host Member State can be compared to periods of time spent residing in a host Member State without having a right of residence.[96] This meant that Article 16(4) should be applied by analogy to periods completed without the condition governing entitlement to a right of residence of any kind having been satisfied.[97] The Court considers that, where an individual has performed a period of lawful residence for 5 years, subsequent periods of absence for less than two years should not affect (but not count towards) the acquisition of permanent residence, i.e. the residence clock should not be automatically turned back.[98] A suggestion here would be to create an analogy with unlawful residence, insofar as residence outside of that provide for in Article 7 should not count towards obtaining permanent residence status, however, this should also not result in discounting any previous period of residence that was in compliance with Article 7.

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[89] Ibid, p. 33.
[90] Ibid, p. 26. C. O'Brien (n 66), p. 975.
[91] Ibid, p. 70.
[92] C. O'Brien (n 66), p. 959; C. O'Brien, 'The ECJ Sacrifices EU citizenship in vain: Commission v United Kingdom' (2017) 54(1) *CMLRev* 209, p. 237.
[93] C. O'Brien (n 66), p. 976.
[94] Case C-162/09 *Lassal* ECLI:EU:C:2010:592, para. 58.
[95] Opinion of Advocate General Trstenjak in Case C-325/09 *Dias* ECLI:EU:C:2011:86, para. 106.
[96] Case C-325/09 *Dias* ECLI:EU:C:2011:498, para. 63.
[97] Ibid, para. 63.
[98] C. O'Brien (n 26), p. 1664.

4 INTERMITTENT & FIXED-TERM WORKERS AND EU SOCIAL LAW

In line with the division between market and social competences in the European Union, there are extremely limited powers for the Union to legislate in the area of employment security (i.e., providing protection to workers during periods of economic inactivity). That said, there is some social law that applies to intermittent workers, such as the Fixed-term Work and the Employment Agency Directives, as well as the Charter and the recently adopted Directive on Transparent and Predictable Working Conditions. The protection afforded under these instruments shall be explained below.

4.1 The Fixed-term Work Directive

Directive 1999/70 concerning the framework agreement on fixed-term work regulates fixed-term work in the EU.[99] It establishes a principle of equal treatment to ensure that fixed-term workers are not treated less favourably than 'comparable permanent workers', unless this can be justified on objective grounds.[100] The *pro rata temporis* principle applies where appropriate, to ensure that fixed term workers have the same *pro rata* rights as their permanent peers, with the Directive also aimed at preventing "abuse arising from the use of successive fixed-term contracts or relationships",[101] which seek to protect permanent workers from the use of fixed-term work as a means of undercutting their rights and standards.[102] This can reduce labour market segmentation,[103] and restrict the abuse of such contractual relations.[104]

Like the Part-time Work Directive, the Fixed-term Work Directive was adopted through the 'social method', which allows social partners to effectively draft the content of EU legislation through Framework Agreements.[105] Its focus on *pro rata* rights and prohibiting abuse of fixed term work contracts suggests that the Directive has a predominantly social aim. That said, it was adopted as part of the European Employment Strategy, which includes the aim of promoting flexible working arrangements as a tool to foster job creation and economic

[99] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP *OJ L 175*.
[100] Clause 4 Annex, Directive 1999/70; Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 138; Case C-677/16 *Mantero Mateos* EU:C:2018:393, para. 41; Case C-596/14 *de Diego Porras* EU:C:2016:683, para. 37; Clause 3(2) Annex to Directive 1999/70. See C. Barnard, *EU Employment Law* (4th Ed) (2012) OUP: Oxford, pp. 439-440.
[101] Case C-268/06 *Impact* ECLI:EU:C:2008:223, para. 89; see also N. Kountouris, 'EU Law and the regulation of 'atypical' work', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 261.
[102] A. Koukiadaki & I. Katsaroumpas, 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017) *PETI Committee, DG for Internal Policies: Citizens' Rights and Constitutional Affairs*, p.69; S. Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU law?' (2013) 32(1) *Yearbook of European Law* 30-56, p. 31.
[103] N. Kountouris (n 101), pp. 255 - 256.
[104] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart, p. 92-93.
[105] This uses the procedure as explained in Article 155(2) TFEU. See S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social"' (2017) 13 *European Constitutional Law Review* 23-61, p. 28.

growth.[106] It is furthermore linked to the Union's flexicurity agenda: despite not mentioning the term specifically, the Directive makes many references to both the concepts of flexibility and security and should therefore be seen in this context.[107] That said, the Fixed-term Work Directive does not actively promote the use of fixed-term contracts like the Part-time Work Directive promotes part-time work.[108]

An important protection for intermittent workers under the Directive is the restriction on the repeated use of fixed-term contracts. The successive use of fixed-term contracts is one of the most precarious forms of employment that exists, as it can lock the individual into a never-ending cycle of temporary employment, pushing them towards poverty and social exclusion. It furthermore creates dualisations on the labour market that can affect the rights of permanent workers. Under Clause 5 of the Framework Agreement Member States are required to introduce one or more of the following measures: (a) objective reasons for justifying the renewal of such contracts, (b) limits on the maximum total duration of successive contracts, or (c) limits on the number of contract renewals.[109] Clause 8(3) states that Member States cannot use the Framework Agreement to reduce the general level of protection appliable to workers engaged in their first or successive fixed-term contract.[110]

The Court has held that, under Clause 5, it is not possible to "determine sufficiently" the level of protection that should be implemented through it, and as such is not "unconditional and sufficiently precise" to be relied upon by individuals.[111] However, the Court has also held that this provision contains an obligation on Member States to "adopt appropriate measures to deal with such a situation", which must be proportionate, sufficiently effective, and act as a sufficient deterrent to ensure that the Framework Agreement is fully effective.[112] This obligation requires them to adopt at least one of the measures contained in Clause 5(1),[113] although the Court will also consider whether other effective measures exist that prevent the abuse of successive fixed-term contracts,[114] as long as this does not reduce the protection applicable to fixed-term workers to a level below the minimum set by the Framework Agreement.[115]

Measures violating Clause 5 can be justified on the basis of "the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out".[116] Measures cannot be justified if fixed-term contracts are used when the employer's needs are in fact "fixed and permanent".[117] There is not an obligation to create new permanent

[106] See Rectials (5), (6), and (7) in Directive 1999/70. See also Ibid; M. Aimo, 'In Search of a European Model for fixed-term work in the name of the principle of effectiveness' 7(2) *European Labour Law Journal* 232, p. 234.
[107] N. Kountouris (n 101), pp. 249 – 250; M. Bell, 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37(1) *European Law Review* 31, pp. 36; M. Aimo (n 104), p. 234.
[108] M. Aimo (n 106), p. 235; D. Ashiagbor (n 104), p. 93.
[109] Clause 5, Directive 1999/70.
[110] Joined Cases C-378/07 to C-380/07 *Angelidaki and others* ECLI:EU:C:2009:250, para. 208.
[111] Case C-268/06 *Impact* ECLI:EU:C:2008:223, paras. 78-79; see also N. Kountouris (n 99), p. 261.
[112] Case C-212/04 *Adeneler and Others* ECLI:EU:C:2006:443 paras. 94; *Angelidaki and others*, para. 158.
[113] Ibid, para. 91; Case C-251/11 *Huet* ECLI:EU:C:2012:133, para. 38; N. Kountouris (n 99), p. 262.
[114] *Angelidaki and others*, paras. 184 – 187.
[115] Ibid, para. 149.
[116] *Adeneler and Others*, para. 75.
[117] Case C-16/15 *María Elena Pérez López* ECLI:EU:C:2016:679, para. 52; See also *Angelidaki and others*, para. 88; Joined Cases C-103/18 & C-429/18 *Sánchez Ruiz and Fernández Álvarez and Others* ECLI:EU:C:2020:219, para. 77.

jobs, however, an employer cannot fill permanent posts by hiring temporary staff "so that the precarious situation of workers is perpetuated".[118] This provision has been used to preclude national rules that prohibit absolutely the conversion of fixed-term contracts into permanent ones.[119] It has also been used to find that a national practice of only recognising contracts concluded within 20 days of the previous one expiring as 'successive' was held to be "so inflexible and restrictive" that it would "allow insecure employment of a worker for years".[120]

That said, the concrete legal value of the obligation under Clause 5 is limited. The Framework Agreement only applies to successive fixed-term employment contracts (i.e., not the first or single use of a fixed-term contract),[121] however, Clause 5(2) confers discretion to Member States to determine under what conditions fixed-term employment contracts shall be regarded as either "successive" or "of indefinite duration".[122] Furthermore, the Court has accepted that the "temporary need for replacement staff" may constitute an objective reason to justify the successive use of fixed-term contracts.[123] This can apply even if the employer's needs for temporary staff are recurring or even permanent.[124] In fact, the Court had accepted that the use of 13 fixed-term contracts within 11 years was justified it served the employer's temporary staffing requirements.[125] Furthermore, successive fixed-term contracts can be objectively justified where there is an absence of workers in the labour market to fill the required needs.[126] The Court has held that this can occur in sectors that require flexibility, for example, in higher education where there is a risk of granting tenure to a greater number of teachers than is necessary,[127] and a need to "enrich" university teaching in certain areas.[128] Given that this was a permanent need of the university, there was "no limitation as to the maximum duration and the number of renewals of those contracts".[129] Overall, it is suggested that the Court is willing, or perhaps over-eager, to accept justifications put forward by Member States to defend the use of successive fixed-term contracts.[130]

An recent example of the weak obligation under Clause 5 can be seen from the recent case of *Baldonedo Martin*, where an interim civil servant worked as a groundsperson in a temporary position that was open until "such time as the post was filled by an established civil servant".[131] After eight years working in the same position, her employment was terminated without notice, which she claimed undermined her rights as she was engaged in *de facto* permanent employment. The Court held that there was differential treatment as other workers in similar

[118] *María Elena Pérez López*, para. 55.
[119] *Adeneler and Others*, para. 105.
[120] Ibid, para. 85.
[121] *Angelidaki and others*, para. 90; Case C-177/18 *Baldonedo Martin* ECLI:EU:C:2020:26, para. 70; Case C-144/04 *Mangold* EU:C:2005:709, paras. 41 – 42; Case C-586/10 *Bianca Kücük* EU:C:2012:39, para. 45.
[122] See *Adeneler and Others* paras. 81; *Huet*, para. 39; Case C-619/17 *de Diego Porras* EU:C:2018:936, para. 79; *Baldonedo Martin*, para. 71.
[123] *Bianca Kücük*, para. 46.
[124] Ibid, para. 38.
[125] Ibid, para. 30.
[126] *Angelidaki and others*, paras. 101-102.
[127] Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13 *Raffaella Mascolo and others* ECLI:EU:C:2014:2401, para. 95.
[128] Case C-190/13 *Samohano* ECLI:EU:C:2014:146, para. 50.
[129] Ibid, para. 59 - 60.
[130] N. Kountouris (n 99), p. 261.
[131] *Baldonedo Martin*.

roles to the applicant were entitled to compensation on termination of their contract.[132] However, this could be justified on the basis that this compensation was based on compensating for the "unforeseen nature" of the termination and undermining the stability of their employment.[133] In the applicant's case, her employment was terminated due to a foreseeable event: namely, filling her position with an established civil servant.[134] As such, it was not relevant that "the person concerned held the same position of employment continuously and constantly".[135] The decision seems to effectively permit fixed-term contracts of indefinite duration that can be terminated immediately and with zero compensation.

The decision is also hard to reconcile with past judgments of the Court, for example that selection procedures must have "objective and transparent criteria" to assess whether a fixed-term contract renewal responds to a genuine need and is proportionate.[136] Moreover, the Court has held that situations whereby a worker is engaged in fixed-term contracts until the vacant position has been filled permanently when the individual has occupied "within the framework of several appointments, the same uninterrupted position for several years and has exercised, constantly and continuously, the same functions" will be covered by Clause 5.[137] The Court stated that this practice undermines the legal obligation on employers to organise "… a selection procedure aimed at filling said vacant position definitively and his employment relationship having therefore been implicitly extended from year to year".[138] The mere fact that the worker has agreed to this situation does not remove or alleviate the abusive behaviour of the employer in relation to the abuse of successive fixed-term contracts.[139] It is particularly difficult to reconcile the Court's assertions in *Sanchez Ruiz* with *Baldonedo Martin*. The only difference between the two cases is that Ms Baldonedo Martín's contract was never formally renewed. The decision risks allowing Member States to avoid their obligations under Clause 5 by implementing fixed-term contracts of indefinite duration, that can easily be terminated once a more appropriate worker has been found.

The overall level of protection against the abuse of successive fixed-term contracts is arguably low.[140] It leaves too much room for Member States to define successive contracts and determine the conditions of their use.[141] Furthermore, inconsistent decisions by the Court, such as *Sanchez Ruiz* and *Baldonedo Martin*, potentially create an inconsistent and arbitrary system where a measure's validity is entirely dependent on the whims of the Court. By granting too much discretion to Member States, the Court is suggested to contribute to the "false perception" that non-standard work is beneficial for workers,[142] which can normalise precarious employment

[132] Ibid, para. 39.
[133] Ibid, para. 46; see also Case C-619/17 *de Diego Porras* EU:C:2018:936, para. 72.
[134] Ibid, para. 47.
[135] Ibid, para. 72 – 73.
[136] Joined Cases C-22/13, C-61/13 to C-63/13 & C-418/13 *Raffaella Mascolo and others* ECLI:EU:C:2014:2401, paras. 99 – 104.
[137] *Sánchez Ruiz*, para. 61; See also Opinion of Advocate General Kokott in Joined Cases C-103/18 & C-429/18 *Sánchez Ruiz and Fernández Álvarez and Others* ECLI:EU:C:2019:874, para. 44.
[138] *Sánchez Ruiz*, 61.
[139] Ibid, para. 114.
[140] S. Kamanabrou, 'Successful Rules on Successive Fixed-term Contracts?' 33(2) *International Journal of Comparative Labour Law and Industrial Relations* 221-240, p. 225.
[141] Ibid.
[142] A. Davies, 'Regulating Atypical work: beyond equality' (2013), in N. Countouris & M. Freedland (Eds.), *Resocialising Europe in a Time of Crisis* (2013), CUP: Cambridge, 230-249, p. 233.

relationships.[143] This is particularly troubling in the case of fixed-term work given that, which unlike part-time work, are disadvantaged on the job market simply by being engaged on such a contract.[144] Furthermore, unlike part-time work, fixed-term work actually makes it harder to perform personal responsibilities such as childcare alongside work.[145]

4.2 The Employment Agency Directive

Some intermittent workers are engaged on short-term contracts through employment agencies, which is regulated under Directive 2008/104 on temporary employment agency work.[146] The Employment Agency Directive is often included within the Non-standard Work Directive cluster; however, it is different from the Part-time or Fixed-term Work Directives both in terms of form and substance which has resulted in it providing less protection. First, despite attempts to adopt it under the 'social method', the Union's social partners failed to produce any concrete Framework Agreement to form the basis of a Directive.[147] As such, it was ultimately adopted through the ordinary legislative channels, limiting its scope and effect.[148] It also has stronger links with the concepts of flexicurity and competitiveness. It focuses on providing greater flexibility to companies as well as improving protection for agency workers,[149] and also makes an explicit link with the concept of 'flexicurity', stating that it strikes "a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation".[150] As such, it has clear market-based aims and seeks to actively promote employment agency work.[151] The original proposal even contained a provision obliging Member States to remove restrictions on agency work.[152] Whilst this did not make it into the final text of the Directive, the Commission has stated that the Directive does not oblige Member States to lift unjustified restrictions and prohibitions on the use of employment agencies.[153] This has been confirmed by the Court, which has held that Article 4(1) of the Directive only places an obligation on Member States to "review" their national legal framework and inform the Commission of the results.[154] It does not oblige national courts to set aside national rules prohibiting or restricting the use temporary employment agencies.[155]

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[143] N. Kountouris (n 101), p. 264.
[144] Ibid; A. Davies (n 142), pp. 243-244.
[145] A. Davies (n 140), pp. 233-234; see also S. Freedman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 *Industrial Law Journal* 299.
[146] Directive 2008/104/EC on temporary agency work *OJ L 327*.
[147] Directive 2008/104/EC of 19 November 2008 on temporary agency work (L 327/9). See Recital (7).
[148] S. Garben (n 105), p. 28.
[149] Taken from Commission website: https://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=207
[150] Recital (8), Directive 2008/104/EC. See also Communication from the European Commission on the Social Agenda (2005), COM/2005/0033 final.
[151] N. Kountouris (n 101), pp. 249 – 250; M. Bell (n 107), p. 36.
[152] European Commission, 'Explanatory memorandum of proposal' COM (2002) 149 final, p. 11 – 13; See N. Kountouris (n 101), pp. 262-263.
[153] European Commission, 'Report on the Application of Directive 2008/104/EC on Temporary Agency Work' COM (2014) 176 final.
[154] Case C-533/13 *AKT* ECLI:EU:C:2015:173, paras. 28.
[155] Ibid, paras. 32.

The Directive does contain an obligation on Member States to take appropriate measures against national rules and practices designed to circumvent the protection it provides.[156] However, it also contains the broadest range and most vaguely phrased exceptions of the three Directives,[157] and permits opt-outs for workers engaged permanently with employment agencies and collective agreements.[158] It is limited to "basic working and employment conditions" under Article 3(1)(f), meaning that the Court cannot apply it in the far-reaching manner that it did to Directives 97/81/EC and 99/70/EC.[159] Finally, those engaged through employment agencies cannot rely on the Fixed-term Work Directive, even if their employment is time limited.[160]

4.3 The Charter of Fundamental Rights

The Charter of Fundamental Rights provides little protection to intermittent workers. As the previous chapter demonstrated, individuals can only rely on provisions of the Charter that have "mandatory effect", such as Articles 21 and 31(2), in situations where they cannot rely on secondary legislation. This would indicate that fixed-term workers can rely on these provisions to enforce their equal treatment and employment rights. The Court considered the application of Articles 20 and 12 Charter to fixed-term workers in the case of *Baldonedo Martin*. It held that the national measure was not one which was "sufficiently effective and a sufficient deterrent to ensure that the measures taken pursuant to the framework agreement are fully effective", as required under Clause 5.[161] This meant that it pursued a "different objective" from Clause 5 of the Framework Agreement, and as such could not therefore be regarded as "implementing EU law" as is required for the Charter to be relied upon.[162] This creates a circular argument: if the measure were an effective and sufficient deterrent then it would not permitted under the Framework Agreement. However, if it is not an effective and sufficient deterrent then it cannot be precluded under the Charter as it is not implementing EU law. However, it does open the possibility of Article 21 Charter being relied upon by fixed-term workers, even if it only provides protects again discrimination for vulnerable groups overrepresented in fixed-term and short-term work, such as young persons.

4.4 Transparent and Predictable Working Conditions

Directive 2019/1152 on transparent and predictable working conditions in the European Union lays down certain rights and protections that can be beneficial for fixed term and intermittent workers.[163] As well as the provisions on informing workers about their rights and protections, which is likely to benefits intermittent workers, under Article 8 of the Directive, 'trial periods' are limited to a maximum of six months. Furthermore, Member States are obliged to ensure

[156] See Article 5(5) Directive 2008/104 of 19 November 2008 on temporary agency work.
[157] N. Kountouris (n 101), pp. 254 – 255.
[158] Article 5(2) Directive 2008/104; see also N. Kountouris (n 101), pp. 254 – 255.
[159] N. Kountouris (n 101), pp. 256-257.
[160] Case C-290/12 *Della Rocca* ECLI:EU:C:2013:235, paras. 39-40.
[161] *Baldonedo Martin*, para. 59 - 61; See also *de Diego Porras*, para. 92 - 94.
[162] *Baldonedo Martin*, para. 63.
[163] Directive 2019/1152 on transparent and predictable working conditions in the European Union *OJ L 186*

that the length of any probationary period is proportionate to the expected duration of the contract and the nature of the work. The application of multiple trial periods is also prohibited; however, longer periods can be justified if necessary due to the nature of the employment or in the interest of the worker. Finally, under Article 12 of the Directive, workers have the right to request an employment contract with more predictable and secure working conditions after six months' employment, and the Member State must provide a "reasoned written reply" within one month of request, or three months for smaller companies. It remains to be seen how strictly the Court will interpret the rights and obligations contained in the Directive, and whether this will be in an inconsistent manner that confers more rights to employers than employees, as it has done with the Fixed-term Work Directive.

5 The Wider Consequences for Intermittent Workers

This chapter has shown that the legal protection for intermittent workers is limited. The system of worker retention and permanent residence under Directive 2004/38, and its strict application by the Court, means that intermittent workers can lose legal status entirely. Furthermore, as jobseekers they are excluded from social assistance benefits intended to assist them in finding employment. Moreover, EU social law provides little additional protection to support individuals' employment security. The following section will assess some of the consequences for intermittent workers of this weak system of protection.

5.1 Intermittent Workers: Neoliberal Market Citizens?

The principles of neoliberalism underlying the law have far-reaching consequences for intermittent workers. They are expected to engage with the labour market in order to obtain social protection, and any failure to adequately engage with it is seen as their own responsibility.[164] As such, it is claimed that EU law does not seek to protect individuals from market forces, but views participation in the labour market and the only real means of achieving social justice, with the role of the law as simply to lay down the conditions that allow them to realise the goal of market self-sufficiency.[165] This ignores class antagonisms and commodification processes that often are key in determining an individual's prosperity.[166]

The responsibility model of welfare means that EU law accepts the practice of activation labour market policies that seek to encourage individuals into employment through punitive measures for those that are unable to do so.[167] As such, they are viewed not as individuals to be protected but inactive economic targets that need to be 'activated'.[168] Furthermore, this responsibility model is based on the idea that social benefits system should be aimed at decreasing the burden of the welfare system.[169] The Court has endorsed labour market

[164] D. Kramer, 'From worker to self-entrepreneur: The transformation of *homo economicus* and the freedom of movement in the European Union' (2017) 23 *EurLawJ* 172, p. 176.
[165] Ibid.
[166] Ibid, p. 186.
[167] C. O'Brien (n 26), p. 1647.
[168] Ibid, p. 1644.
[169] Ibid, p. 1672 - 1673.

activation policies, finding that Member States may demand that jobseekers perform certain tasks such as registering with the national body responsible for jobseekers, approaching employers with letters of application, attending job interviews, etc., in order to maintain their legal status.[170] That said, it has also rejected some of the most punitive measures, finding that Member States must take into account "the situation of the national labour market in the sector corresponding to the occupational qualifications of the jobseeker", which means that just because a jobseeker declines an offer of employment that does not correspond to their qualification level, this cannot be used to find that the individual has lost the status of jobseeker under Article 14(4)(b) Directive 2004/38.[171] Overall, the system of social protection for intermittent workers is highly individualistic and places almost all of the responsibility for their protection on the workers themselves.[172] This is also true for EU social law that applies to intermittent workers, such as the Fixed-term Work and Employment Agency Directives, which are suggested to contain much of the 'flexi', but little of the 'curity', in the flexicurity model of welfare.[173]

5.2 Dualisations in the Labour Market

The precarious system of protection for intermittent workers is liable to create dualisations in the labour market, which can undermine the social standards available to intermittent workers. Like the situation of marginal part-time and on-demand workers, creating differences in the level of support available to migrant and native workers, or between different types of intermittent workers, is liable to create differences in protection that can place pressures on the level of social protection overall. This is the idea of labour commodification: i.e., that excluding intermittent workers from social protection results in them becoming reliant on the market for their survival rather than through social institutions.[174] This means that a chunk of the labour market is treated unequally and has significantly reduced social protections, which creates a higher risk of downward pressures on working and living conditions.[175] This functions in a similar manner to the downward pressure explain in the previous chapter on part-time work. However, it should be noted that the extent to which differential treatment in the context of intermittent work will affect overall employment and social standards is reduced when compared to part-time and on-demand work, given that the starting level of protection available to intermittent workers is less than for part-time workers.

EU law does not create explicit dualisations in the labour market for intermittent workers due to differentiating between different types in the legislation itself, as, for example, the Part-time Work Directive does. That said, the seemingly inconsistent and arbitrary decisions of the Court

[170] Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037, paras. 46 - 47.
[171] Ibid, paras. 26 - 27, para. 47; see also Opinion of Advocate General Szpunar in Case C-710/19 *G.M.A.* ECLI:EU:C:2020:739, paras. 75 – 76.
[172] C. O'Brien (n 26), p. 1646.
[173] C. O'Brien (n 66), p. 953; M. Aimo (n 106), p. 234.
[174] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990), p. 35; F. Behling, and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970.
[175] D. Schiek, 'EU Social Rights and Labour Rights and EU Internal Market Law' (2015) *European Parliament DG for Internal Policies* IP/A/EMPL/ST/2014-02 PE 563.457, p. 23-24.

as to when successive contracts are permitted or not, as well as the lack of social protection available under the Employment Agency Directive, may have a similar effect insofar as it creates a sub-class of worker that is not entitled to the same rights and protections as others.

5.3 Social Exclusion

As well as creating dualisations in the labour market that undermine social standards, the lack of safety net for intermittent workers, particularly EU migrants working in a host-state, means that there is little by way of employment security, i.e., protection or cushioning for intermittent workers when they are moving between jobs, under EU law.[176] This lack of protection is damaging for the intermittent workers, as it may push them into poverty and social exclusion, undermining a key objective of the Union.[177] The Union's treatment of intermittent workers is another example of the law not protecting those that need it most: individuals engaged in low-paid work that require state support during periods of inactivity. It is argued that such a system is hardly likely to win firm support among those it excludes and commodifies.[178]

6 SOLUTION: ELEVATED EMPLOYMENT SECURITY FOR INTERMITTENT WORKERS?

A suggestion that may mitigate at least some of these problems could be to re-think the level of protection that is afforded to intermittent workers during periods of inactivity, although this should be tempered against the division between market and social competences in the European Union and the lack of powers (or legitimacy) in the areas of welfare and redistribution. An option could be to reconsider Advocate General Wathelet's suggestion in *Alimanovic* that jobseekers first arriving in the host-state and those who are seeking employment after a period in work should not be treated in the same manner, as a more generous approach for those who are economically inactive following a period of employment would provide them with a higher level of protection. This could be combined with the idea alluded to by the Court in *Bajratari*, that as long as the individual is not a burden on the host-state's welfare system, a right of residence should be provided. The Court could presume that an individual will be residing lawfully following a period of economic activity, either (i) as a worker if meeting the conditions under Article 7(3), (ii) as a jobseeker if meeting the conditions under Article 14(4)(b), or (iii) as having sufficient resources under Article 7(1) if not meeting either of these conditions. However, this presumption could be rebutted on the basis that the individual poses an unreasonable burden on the host-Member State. This approach would ensure a higher level of security for EU migrant workers during periods of inactivity, thereby mitigating some of the negative consequences explained above, without undermining Member States' prerogative to construct their welfare systems and determine its overall generosity.

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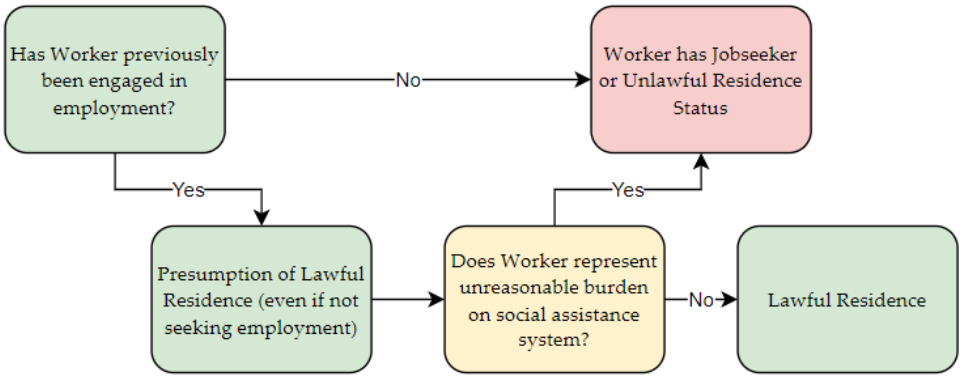
[176] C. O'Brien (n 66), p. 953; S. Mantu, 'Concepts of Time and European Citizenship' (2013) 15 *European Journal of Migration and Law* 447, p. 459.

[177] Article 3 TEU; see also M. Dawson & B. de Witte, 'The EU Legal Framework of Social Inclusion and Social Protection', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge.

[178] D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, p. 219.

Figure 4: Intermittent Workers' Presumption of Legal Residence



7 CONCLUSION

This chapter has assessed the level of protection that is available to intermittent workers under EU law and made suggestions as to how this protection can be improved within the legal space available. Intermittent employment should be understood broadly, including not just fixed-term work (which is increasingly common in modern labour markets), but any worker, including fixed-term or part-time work, platform work, agency work, bogus self-employment, casual employment, or any other form of non-standard work that may result in them facing an intermittent working pattern.

Intermittent workers face a loss of protection due to a lack of employment security being available at the European level to protect them during periods of inactivity, with Directive 2004/38 providing very limited protection during these periods. The Court's strict interpretation of Article 7(3), while in general a coherent representation of the Court's stated methods of interpretation, creates a restrictive system that can exclude intermittent workers from certain social benefits or even legal status during periods of inactivity. This can lead to a strange situation, whereby an individual has engaged in a host-state's labour market and contributed to its public finances, thereby representing no unreasonable burden, but can still be excluded from legal status merely by leaving their employment and not meeting the conditions required under EU or national law to retain the status or worker or obtain the status of jobseeker. It furthermore means that those losing worker status may not be able to access job-seeking benefits, such as those falling under the *Collins/Vasouros* definition. The strict interpretation of Directive 2004/38 also has consequences for claiming permanent residence, insofar as even a brief period of economic inactivity can result in the Member States denying the worker the ability to obtain permanent residence after five years of residing in the host-state as they must be lawfully resident for a full five-year period. As such, even a short period of unlawful residence (which can include simply not working but also not registering with a job centre) can 're-set' the residence clock, meaning that the individual must reside for another five years before being able to obtain the most secure form of residence under the Directive.

Intermittent workers gain limited protection under EU social law during periods of inactivity. Whilst the Fixed-Term Work Directive provides some protection to workers on short-term

contracts, this is focused on job security, i.e., ensuring that temporary workers are not exploited by the successive use of such contracts, rather than employment security, i.e., providing protection during periods between jobs. Moreover, the Court's decisions are arguably inconsistent and arbitrary, resulting in outcomes which are difficult to reconcile with other decisions of the Court. The weak nature of the Employment Agency Directive, which was not adopted using the social method and has limited effect for individual workers, means that it provides very limited additional protection to intermittent workers. The Directive on Predictable and Transparent Working Conditions is likely to be beneficial to workers on short-term contracts, particularly the provisions related to initial probationary periods, however, the concrete benefit of this Directive will depend on its interpretation by the Court.

The limited protection available to intermittent workers during periods of inactivity means that such workers are placed in a precarious situation due to their employment insecurity. They are caught between the division of market and social competences, and their rights are further limited by the sensitivities surrounding the extension of social benefits and welfare entitlement to those not activity engaged in economic activity. Under this system, there is very limited solidarity between citizen and host-state. Instead, fairness is characterised in terms of labour market participation and competition between workers, with the individual's existence commodified, at least until they can claim permanent residence status (which can prove to be difficult). Intermittent workers are therefore at serious risk of social exclusion and poverty, arguably undermining the principles of the Union and resulting in the same downward pressures on wages and social standards that are applicable to precarious part-time workers, albeit to a lesser degree. Such problems may be mitigated against using a presumption of lawful residence based on a three-step determination of whether the intermittent worker is classified as (i) retaining worker status, (ii) a jobseeker, or (iii) having sufficient resources. While this would provide residual protection to intermittent workers, it would resolve all the problems faced by intermittent workers, as they face structural problems due to a lack redistributive powers at the European level and the limited effect of social law in this area.

Chapter 8: False & Precarious Self-Employed Persons

1 INTRODUCTION

The final case study that will be discussed is the situation of 'false' and 'precarious' self-employed persons. This describes the situation where the classification of the worker's status as self-employed, as opposed to paid employment, renders the employment precarious and is liable to affect the individual's protection. As with other forms of non-standard work, self-employment is not precarious *per se*. Self-employed workers have different rights and obligations, which are justified in light of the objective differences between the two kinds of worker. Those in self-employment sacrifice some of the securities associated with paid employment in order to gain more flexibility and the opportunity to receive profits from their business. However, in recent years the traditional dichotomy between paid and self-employment has blurred, meaning that workers who are objectively in an employer-employee relationship are treated as self-employed persons (known as 'false' or 'bogus' self-employment). Furthermore, some individuals may be 'genuinely' self-employed, however, denying them certain social rights is difficult to sustain in light of modern practices and the relative power imbalance between 'client' and 'contractor' (i.e., 'precarious' self-employment).

This chapter will examine the situation of precarious self-employed workers. First, it will define 'false' and 'precarious' self-employment, before looking at the distinction between genuine and false self-employment from the European and national perspective, identifying similarities and differences between the various approaches. Following this, it will assess the situation of genuinely self-employed persons who, due to the grey area between self- and paid-employment, may face many of the same risks as paid-employees. It will consider their rights under free moment and social law, including the right of self-employed persons to assembly and collectively agreed rates of pay, and ask how such rights may be protected within the space permitted by the EU legal framework.

2 PRECARIOUS FORMS OF SELF-EMPLOYMENT

Self-employment is not *per se* precarious or even undesirable. Being in charge of one's own employment is inherently associated with a degree of risk and uncertainty. This is most evident in context of social law as self-employed persons, both at the European and national level, are not entitled to a range of employment-based protections that are reserved for paid-workers. However, this lack of protection is offset by a greater degree of flexibility in setting one's working schedule and by receiving higher income through profits, rather than just a salary.

Generally speaking, self-employment is a popular form of employment. It is reported to have the "best working conditions, and satisfaction with career opportunities, job security and pay".[1] This means that using self-employment in itself as an indicator for insecurity or

[1] A. Broughton et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels, p. 84.

precariousness is unhelpful.[2] Instead, a distinction must be made between 'genuine' and 'precarious' forms of self-employment. Self-employment can be precarious where the worker is forced into a self-employed contract despite them being in a relationship of subordination with the employer. This is known as 'false' or 'bogus' self-employment. However, it should be noted that the increasingly grey area between paid- and self-employment means that even those genuinely classified as self-employed persons may be not entitled to certain social rights, such as the right to collectively agreed fees. Given their employment status and their position *vis-à-vis* the 'customer', it may be inappropriate to continue denying them this right. This is particularly the case for so-called 'dependent contractors' or platform workers that blur the boundaries between paid work and self-employment.

2.1 'False' or 'Bogus' Self-employment

'Bogus' or 'false' self-employment is the situation whereby an individual is engaged on a self-employed basis, meaning that the employer obtains the benefits of this relationship and pushes the risks onto the worker, even though their relationship with their employer is more akin to that of employer-employee.[3] These positions often have very similar characteristics to paid-employment: there is substantial continuity with a single employer over many contracts, a lack of control over working times or the ability to refuse jobs, a non-supplying of materials, constant supervision or the requirement to obey instructions on routine daily basis, etc.[4] Conversely, the activities normally associated with self-employment are missing: tendering for different contracts, negotiating the price for a service, or employing workers to perform specific jobs.[5] False self-employment is often associated with platform work, given that this involves a triangular relationship between platform, worker, and client, with the convoluted relationship between the three making it difficult to determine who is the employer.[6]

False self-employment is one of the most precarious forms of non-standard employment. The individual is placed onto a self-employed contract, normally involuntarily, taking on more risk and losing social protections as a result. This puts the individual in a weak, insecure position and places all of the power in the hands of the employer (or platform). The falsely self-employed have the longest hours and the most irregular patterns of all precarious workers.[7] It is suggested that the "vast majority" of bogus self-employed workers are labour migrants with little chance of finding other sources of income.[8] Due to their status as self-

[2] S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, p. 26.

[3] A. Broughton (n 1), p. 83; see also C. Thornquist, 'Welfare States and the Need for Social Protection of Self-Employed Migrant Workers in the European Union' (2015).

[4] F. Behling, F, and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970; A. Thornquist, 'False Self-employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market' (2015), p. 412.

[5] Ibid, p. 970.

[6] Z. Kilhoffer et al, 'Study to gather evidence on the working conditions of platform workers' (2020) *Directorate-General for Employment Social Affairs and Inclusion - Report VT/2018/03*, Luxembourg: Publications Office of the European Union, p. 41; A. Rosin, 'Platform Work and fixed-term employment regulation' 12(2) *European Labour Law Journal* 156-176, p.162.

[7] A. Broughton (n 1), p. 84.

[8] C. Thornquist (n 3).

employed workers they are not entitled to the rights and protections available to paid-employees,[9] and are often prohibited from collective bargaining or unionising.[10] The use of falsely self-employed persons is also damaging for society overall, as having self-employed persons and paid-employees performing near-identical roles in the labour market creates stark dualisations, allows employers to evade taxes and labour and insurance costs associated with paid-employment,[11] and results in a destabilisation of the labour market and a distortion of competition.[12]

2.2 Dependent Contractors & Platform Workers

Not all persons that are classified as self-employed but who are in the grey area between paid and self-employment are necessarily falsely self-employed. There is an increasing amount of work that is "somewhere between subordinate and independent work", where the worker is seen formally as independent, even though the relationship and conduct of the employer suggests the relationship is one of subordination.[13] The Court of Justice has explicitly recognised the difficulty in distinguishing between genuine and false forms of self-employment in modern labour markets.[14] Whilst national courts have generally held that platform workers such as *Uber* drivers and *Deliveroo* riders are paid-employees under national law, this is not always the case as some courts have recognised certain platform workers as being self-employed.[15] The fact that delivery riders for the same company can be classified as workers and self-employed depending on the state in question demonstrates how such persons can find themselves in the grey zone between paid- and self- employment. This grey zone includes many individuals working on platforms, who are often engaged falsely or otherwise on self-employed contracts.

These persons cannot be simply categorised into one group or another. Whilst some aspects of their employment may be similar to self-employment, they may also face similar challenges as the falsely self-employed: i.e., they are not entitled to employment rights related to holiday pay and leave, sick pay and leave, and unemployment benefits, as well as other entitlements and rights available to paid-employees.[16] They are often paid per-job, which can result in significant amounts of unremunerated work and even in real terms paid below the minimum wage. They are suggested to have "…the lowest incomes and the greatest household financial difficulty of any category of worker".[17] Furthermore, their self-employed status means that they are often barred from collective bargaining, have difficulties appealing disciplinary matters, and can even find it difficult to unionise and enforce their rights at all. The lack of

[9] F. Behling, and M. Harvey (n 4), p. 970.
[10] Ibid.
[11] A. Thornquist (n 4), p. 412. See also *Ibid*; C. Thornquist (n 3).
[12] J. Cremers, 'Non-standard employment relations or the erosion of workers' rights' (2010).
[13] S. McKay (n 2), p. 25.
[14] Case C-413/13 *FNV* ECLI:EU:C:2014:2411, para. 32-34; Opinion of Advocate General Wahl in Case C-413/13 *FNV* ECLI:EU:C:2014:2215, para. 51.
[15] See, for example, *The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952.
[16] F. Behling, and M. Harvey (n 4), p. 970.
[17] A. Broughton (n 1), p. 84.

rights can have serious implications for life, as the worker subsequently loses future benefits related to unemployment, illness, and retirement.[18]

3 THE DISTINCTION BETWEEN GENUINE AND FALSE SELF-EMPLOYMENT

The distinction between paid- and self-employment is important as it determines the basis of an individual's status and rights under EU law, either from Article 45 TFEU on the freedom of movement for workers or Article 49 TFEU on the freedom of establishment.[19] This categorisation affects their rights and protections. However, as has been recognised by the Court, this distinction is becoming increasingly difficult in the light of modern employment practices.[20] The following section will examine how the Court distinguishes between genuine and false self-employment through the subordination aspect of the *Lawrie-Blum* criteria. It will then compare the Court's reasoning with that used in national jurisdictions where there is case law, looking at any similarities, differences, and tensions that may exist.

3.1 The Court of Justice

The distinction between genuine and false self-employment is made through the subordination element within the *Lawrie-Blum* criteria. As was explained previously, there is a tension in European integration in terms of who has the competence to define who is a worker the purposes of both European free movement law and national labour law. In the context of the *Lawrie-Blum* criteria, the Court has asserted that this requires an EU-wide, uniform definition to ensure the uniformity of the law and its effectiveness.[21] The Court also applies this logic in the context of self-employment. It has held that any classification of the individual as being self-employed under national law will not prevent that individual from being classified as a worker under EU law, if their independence "is merely notional, disguising an employment relationship".[22] This means that the Court will not give a *carte blanche* to national administrations when determining who is a worker, which is important as this distinction has the potential to significantly affect the level of protection available.

When determining whether an individual's status as self-employed is "merely notional" or not, the Court has established the main factors that should be considered. In *Allonby*, it held that national courts should consider the "extent of any limitation on their freedom to choose their timetable, and the place and content of their work", with any obligation or lack thereof on the worker to accept assignments being irrelevant for this assessment.[23] This suggests that the choices and freedom of the individual to determine their working schedule, both in terms

[18] F. Behling, and M. Harvey (n 4).
[19] Case C-104/94 *Asscher* ECLI:EU:C:1996:251, para. 26; Case C-268/99 *Jany and Others* ECLI:EU:C:2001:616, para. 34; Joined Cases C-151/04 and C-152/04 *Durré* ECLI:EU:C:2005:775, para. 31.
[20] *FNV*, para. 32-34; Opinion of Advocate General Wahl *FNV*, para. 51.
[21] Case C-393/10 *O'Brien* EU:C:2012:110, paras. 34 – 35; Case C-216/15 *Betriebsrat der Ruhrlandklinik* ECLI:EU:C:2016:883, para. 36 – 37; Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 118.
[22] Case C-256/01 *Allonby* ECLI:EU:C:2004:18, para. 71; *FNV*, para. 35; see also N. Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018), p. 202.
[23] *Allonby*, para. 72.

of their time and the tasks that they perform, are crucial when making this assessment. In subsequent cases the Court has continued to place emphasis on the freedom and discretion available to the individual when assessing their employment status. In *FNV*, it held that an individual may not obtain the status of independent trader if (s)he "does not determine independently (his/her) own conduct on the market, but is entirely dependent on the principal, because (s)he does not bear any financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking".[24] This means that if the individual acts under the direction of another, in particular in relation to his or her "freedom to choose the time, place and content of (his/her) work, (he/she) does not share the employer's commercial risks, and forms an integral part of that employer's undertaking", then the worker in question will be considered as being part of the same economic unit as the undertaking 'contracting' them, and thus not be classified as being self-employed.[25] In *Iraklis Haralambidis* the Court also emphasised the importance of features of self-employment that are "typically associated with the functions of an independent service provider", such as freedom in terms of the type of work performed, the manner in which they are completed, the choice of time and place of work, and the freedom to recruit staff or subcontract out work.[26]

The Court potentially expanded the idea of subordination in *Sindicatul Familia*, where it was asked whether foster parents could be in a relationship of subordination with the state for the purposes of the Working Time Directive (which explicitly uses the *Lawrie-Blum* criteria).[27] In this case, the Court emphasised the importance of the existence of a "hierarchical relationship", which must be considered on a case-by-case basis taking into account the "factors and characteristics characterising the relationship".[28] The Court considered that as the Member State in question monitored the foster parents' contract, could suspend it, and hired specialists to supervise their activity, the existence of this "hierarchical relationship" was evidenced by "permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract".[29] One could make an argument that the Court's reasoning in a case concerning the relationship between foster parents and the state has limited implications for the status of potentially falsely self-employed persons such as Uber drivers and Deliveroo riders. However, given the all-encompassing reach of the *Lawrie-Blum* criteria, as well as the fact that the application of the Working Time Directive is very important to platform workers and other falsely self-employed persons, this decision can be applied to situations concerning falsely self-employed persons. Interestingly, the UK Supreme Court applied the hierarchical relationship principle established in *Sindicatul Familia* explicitly when determining whether *Uber* drivers were self-employed or paid employees.[30]

The Court's case-law therefore suggests that, while it will notionally leave the classification of paid or self-employment to national courts, it is willing to step in when workers are falsely classified as self-employed. In doing so, it will look primarily at the independence of the

[24] *FNV*, para. 33.
[25] *FNV*, para. 36
[26] Case C-270/13 *Iraklis Haralambidis* ECLI:EU:C:2014:2185, para. 34.
[27] Case C-147/17 *Sindicatul Familia Constanţa* ECLI:EU:C:2018:926.
[28] Ibid, para 42; see also Case C-47/14 *Holterman & Others* ECLI:EU:C:2020:574, para. 46; Case C-692/19 *Yodel* ECLI:EU:C:202:288, para. 28.
[29] *Sindicatul Familia Constanţa*, para 45.
[30] *Uber BV and others v Aslam and others* [2021] UKSC 5, para. 73.

individual, particularly in terms of their working schedule and freedom to make their own business choices. The Court's recent *acquis* suggests an even broader test, simply looking at whether there is a "hierarchical relationship" between the employee and employer, and the level of control that the latter has over the former. Both approaches, but particularly the latter, would be likely to encompass most workers on the borderline between paid and self-employment, including platform workers such as Uber drivers, Deliveroo riders, etc. Their classification as paid-workers is welcome, as it clearly provides them with more protection than if classified as self-employed contractors. However, the Court's approach has been criticised for creating a binary situation whereby an individual's level of protection is determined through their classification as paid or self-employed, rather than through the creation of new statuses or the extension of certain rights and protections to both paid and self-employed persons. The binary approach means that those not meeting the subordination condition are left without vital social protections, which can be inappropriate given their position on the labour market.[31]

3.2 National Courts

The actual classification of workers as paid or self-employed is ultimately undertaken by national authorities and courts. Therefore, to understand how such workers are treated it is necessary to briefly look at their situation in the Member States. This will allow for a comparison between the systems, that assesses the similarities and differences between them and see if any tensions exist. In doing so, it will look at Member States where there is relevant case-law on this area. Specifically, this includes the United Kingdom, which whilst no longer a Member State has seen a significant rise in both the levels of platform work and false self-employment,[32] and where there is significant case-law on the topic. It will further look at the Netherlands, France, and Spain, where there have also been legal developments in this area.

The United Kingdom

The approach of UK courts is to assess the extent that the worker assumes certain responsibilities and risks related to the employment.[33] The freedom of the worker to make their own choices regarding the employment is key, as this demonstrates whether the individual "markets his services as an independent person to the world … or whether he is recruited by the principle as an integral part of (their) operations".[34] Much emphasis is also placed on the ability of an individual to subcontract out work to another person, or as it was put by the court to do a job "either by one's own hands or by another's".[35] In *Pimlico Plumbers,* workers were

[31] E. Groshiede & B. ter Haar, 'Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13 KNV Kunsten Informatie', in M. Laga, S. Bellomo, N. Gundt, and J.M.M. Boto (eds) *Labour Law and Social Rights in Europe. The Jurisprudence of International Courts* (2018) Wydawnictwo Uniwersytetu Gdańskiego: Gdansk.

[32] Commission Working Document, '2020 European Semester: Country Report United Kingdom' SWD(2020) 527 final, p. 27.

[33] F. Behling, and M. Harvey (n 4), p. 977

[34] *Cotswold Development s Construction Ltd v Williams* [2006] IRLR 181, para. 44

[35] *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, paras. 20-23; see also [2017] EWCA Civ 51; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

considered as paid employees as the entire performance of the contract could not be transferred without stretching the "natural meaning of the contract beyond breaking-point".[36]

The most important UK case relating to falsely self-employed workers is *Uber*.[37] After decisions of the Employment Tribunal, High Court, and Court of Appeal, in February 2021 the UK Supreme Court gave its final decision, confirming unanimously that *Uber* drivers are paid employees under UK law. It placed most focus on the control exercised by *Uber* and the power imbalance between platform and drivers, as it considered these factors the most important when determining the existence of an employment relationship. It reasoned that "the more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social, and psychological vulnerability in the workplace".[38] As such, it examined the "relative degree of control exercised by Uber and drivers over the service provided to them", in particular who determines the price to passengers and who is responsible for defining and delivering the service.[39] The Supreme Court considered that the remuneration paid by *Uber* to drivers was non-negotiable; the contractual terms applicable to divers were dictated by *Uber*; who also dictated the information that was provided to drivers; they monitored drivers' job acceptances and imposed *de facto* penalties for cancellations; the control *Uber* had over the route taken by the driver and financial risks for deviations; and the restriction of communication between drivers and passengers and ensuring that there is no relationship between them outside of the *Uber* service, all meant that they the service performed by the drivers was held to be "very tightly defined and controlled by *Uber*", and that drivers were "substantially interchangeable" and had no relationship with passengers, and they had little to no ability to improve their economic position through professional or entrepreneurial skill.[40] The *Uber* case had an EU law element insofar as part of the case concerned the applicability of the Working Time Directive. The Supreme Court applied the *Lawrie-Blum* criteria and specifically used the "hierarchical relationship" definition of paid employment as applied in *Sindicatul Familia*.[41] It considered that its own approach was in line with that of the Court in this case, as it looked for the existence of a hierarchical relationship and took into account and all the circumstances of their work.[42]

Uber can be compared to the case of *IWGB v CAC & Roofoods Ltd*, where platform food delivery riders were held *not* to be paid employees.[43] The ability of the worker to sub-contract their jobs out to third parties was again considered to be very important. However, in this case the possibility of subcontracting work was held to be "genuine" and actually operated in practice.[44] There was no punishment for a rider cancelling a job so long as the job was performed, which put them in a very different position than other platform workers such as *Uber* drivers.[45] Recently the Court of Appeal agreed with the CAC, finding that the riders are

[36] [2018] UKSC 29, paras. 24, 33
[37] *Uber BV and others v Aslam and others* [2021] UKSC 5; see also [2018] EWCA 2748; UKEAT/0056/17/DA.
[38] Ibid, para. 75; see also *McCormick v Fasken Martineau DuMoulin LLP* [2014] SCC 39; [2014] 2 SCR 108, para. 23.
[39] Ibid, para. 92.
[40] Ibid, paras. 94 -101; see also [2018] EWCA 2748, para. 96; UKEAT/0056/17/DA, para. 92.
[41] Ibid, para. 72.
[42] Ibid, para. 88.
[43] *R (on application of The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Litd t/a Deliveroo* [2018] EWHC 3342 (Admin). See also TUR1/985(2016)
[44] TUR1/985(2016), para. 100; [2018] EWHC 3342 (Admin), para. 19
[45] TUR1/985(2016), para. 102; [2018] EWHC 3342 (Admin), para. 19

"genuinely not under an obligation to provide their services personally and have a virtually unlimited right of substitution".[46] This was different to Uber drivers, who are required to perform the services themselves personally. Whilst riders rarely make use of this possibility, the "unfettered and genuine right of substitution that operates both in the written contract and in practice" meant that the riders were legitimately self-employed.[47] Other factors the court considered were the fact that Deliveroo riders did not have specific working hours of particular duration or continuity; did not need to be available for work; were responsible for their phone and bike (the most essential tools of the job), which is was claimed adhered to the approach of the Court of Justice.[48] The decision meant that the riders were not eligible to renegotiate a collective agreement under UK law. The Court of Appeal held that whilst it may seem counter-intuitive not to recognise that these workers have the right to protect their interests through trade unions and collective action, given that they are genuinely self-employed this means that they have more limited rights in this respect.[49]

The Netherlands

The Netherlands has also seen a significant increase in the amount of self-employment and platform work over the past 10 years, and is currently the Member State with the fastest growth in self-employment in the EU.[50] Recently, the Dutch courts found that Deliveroo riders are paid employees under national law.[51] It was held that whilst Deliveroo riders were granted a level of freedom that could indicate self-employed status, "all other elements, including the method of payment of wages, the authority exercised by Deliveroo, and other circumstances" suggest the presence of an employment contract, rather than its absence.[52] As such, the freedom provided to Deliveroo riders was not considered to be incompatible with the classification of such persons as paid-employees, given the level of the authority and control exercised by Deliveroo.

Spain

In Spain, food delivery riders have also been held to be paid employees. The Valencian Social Court found that Deliveroo riders were paid employees, given that Deliveroo owned the means of production, set the price of the service, and the riders had little to no information about the jobs they performed.[53] Furthermore, the Spanish Supreme Court recently held that *Glovo* riders (another food delivery service), should be considered as paid employees under Spanish law.[54] In doing so, it considered that the relationship between drivers and *Glovo* had

[46] *The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952, paras. 77 – 78.
[47] Ibid, para. 76.
[48] Ibid, para. 82; see Case C-692/19 *Yodel* ECLI:EU:C:202:288.
[49] Ibid, para. 86.
[50] Commission Working Document, '2020 European Semester: Country Report the Netherlands' SWD (2020) 518 final, p. 44; European Commission Staff Working Document, 'Country Report The Netherlands 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019), p. 34.
[51] Case Number: 200.261.051 / 01; ECLI: NL: GHAMS: 2021: 392; Case 7044576 CV EXPL 18-14762 *FNV v Deliveroo* (15th January 2019) ECLI:NL:RBAMS:2019:210.
[52] Case Number: 200.261.051 / 01; ECLI: NL: GHAMS: 2021: 392, para. 3.12.1.
[53] Judgment No. 244/2018 of Labour Court No. 6 in Valencia; see A. Rosin (n 6), p.163.
[54] STS 2921/2020 *Juan Molins Garcia-Atance* ECLI:ES:TS:2020:2924.

a laboral nature, given the "defining features" of a contract of employment were fulfilled, in particular those of "dependency and alienation".[55] The court further held that, rather than the workers, it was in fact *Glovo* that controlled the businesses assets and organized the business.[56] The Supreme Court paid attention to the limited freedom of the riders, and the power that the platform had over them. In March 2021 the Spanish Parliament legislated to ensure that all food delivery drivers are treated as workers rather than self-employed persons, becoming the first parliament in Europe to do so.[57] This statutory classification is good for food delivery drivers, but risks excluding many other platform workers who are engaged through in similar relationships.

France

The French Supreme Court has also found delivery riders to be classified as workers rather than self-employed persons.[58] Whilst the French lower courts had considered that delivery riders were self-employed as they could decide on their own working hours or whether to refuse a job or not, the Supreme Court held that their relationship had aspects that suggested an employer-employee relationship, such as the ability of the platform to track the rider's position in real time, as well as the power to instruct, monitor, and sanction the rider meant that there existed a power of direction and a relationship of subordination.[59]

3.3 Comparing the National and European Approaches

There are clear similarities between the approaches of the Court of Justice and that used by many national courts. All focus on the freedom of the individual, in particular their ability to set their own work schedule and sub-contract work out, and the level of control and power of the undertaking or platform has over the worker. However, the concept of subordination as applied by the Court of Justice is arguably broader and more inclusive than that applied in some national jurisdictions. This can result in the situation whereby an individual is classified as self-employed under national labour law but would be a worker under EU law should any provisions of EU law be applicable to them. For example, the broader interpretation of subordination that exists at the European level indicates that *Deliveroo* riders would likely to considered as paid employees by the Court of Justice.[60] That said, it is also suggested that some Member States interpret the idea of subordination more broadly than the Court of Justice or

[55] Ibid, para. 8(2), p. 10.
[56] Ibid, para. 21(1), p. 18.
[57] L. Cater, 'Spain approved a law protecting delivery workers. Here's what you need to know' (11th May 2021) *Politico.eu*. Available at: https://www.politico.eu/article/spain-approved-a-law-protecting-delivery-workers-heres-what-you-need-to-know/
[58] Arret No. 1737 (28/11/2018) Cour de cassation (Chambre sociale) ECLI:FR:CCASS:2018:SO01737; A. Rosin (n 6), p.162.
[59] Ibid; See B. Fielder, N. Devernay, C. Ivey, 'Delivery Riders are Employees, not Self-employed workers, according to a French Supreme Court ruling' (November 2018). *Bird & Bird*. Available at https://www.twobirds.com/en/news/articles/2018/france/delivery-riders-are-employees-not-self-employed-workers-according-to-a-french-supreme-court-ruling.
[60] In light of the language used by the Court in *Allonby*, para. 72.

include other and newer criteria that depart from the Court's binary employee/self-employed dichotomy.[61]

There are also some stark differences between Member States and the Court of Justice, as well as across Member States. There is a difference between the UK and the EU regarding the weight given to the ability to subcontract out work for the purposes of the subordination criterion, as can be seen from the difference in status between delivery riders in the UK and elsewhere in Europe. This contrast can be seen from the case of *Dakneviciute*, which concerned the rights of self-employed persons under Directive 2004/38.[62] The UK placed much emphasis on the ability of the individual to sub-contract out work to a third party, whilst the Court of Justice said that this was not decisive in the case.

Divergent approaches between the European and national courts are logical given that the distinction between paid- and self- employment through the subordination criterion is a product of EU free movement law. This is different from national systems, that tend to be based on labour law, and therefore often do not have the same concept of subordination as EU law.[63] National systems also use fewer binary distinctions when determining the protections available to paid- and self-employed persons. For example, English law contains a "historical layering of different legal criteria for determining status", that symbolises the legal-economic evolution of employment.[64] Under this test, no individual factor (e.g. subordination) will be conclusive on its own, meaning courts may only approximate employment status on a case-by-case basis.[65] Within the British system there are not just paid-employees and self-employed persons, but also "an intermediate class of workers that are self-employed but provide their services as part of a professional undertaking carried out by someone else".[66] These individuals obtain certain rights associated with employment such as unfair dismissal, however, only paid-employees are entitled to most provision of UK labour law. This flexibility is a double-edged sword: whilst it is adaptable when confronted with changing employment norms, it also risks creating grey zones where employers have the space and incentive to exploit such legal ambiguities.[67] The Court of Justice's binary approach is also problematic, however, due to its inflexibility in providing an extension of some social rights to self-employed persons, as happens in the UK and elsewhere. It may be the case that a more effective system of social protection would be realised if the Union followed a more flexible approach, that extended certain social rights to some categories of self-employed persons. This will be kept in mind later in this Chapter when examining the situation of 'precarious' self-employed persons under EU social law.

[61] Z. Kilhoffer (n 6), p. 39.
[62] Case C-544/18 *Dakneviciute* ECLI:EU:C:2019:761.
[63] L. Nogler, 'Rethinking the Lawrie-Blum Doctrine of Subordination: A Critical Analysis Promoted by Recent Developments in Italian Employment Law' (2010), p.84
[64] S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution* (2005) REF.
[65] S. Deakin and G. Morris, *Labour Law* (2005) Butterworths; F. Behling, and M. Harvey (n 4), p. 978
[66] *Uber BV and others v Aslam and others* [2021] UKSC 5, para. 38.
[67] F. Behling, and M. Harvey (n 4), p. 978

4 THE PROTECTION OF THE SELF-EMPLOYED UNDER FREE MOVEMENT LAW

This chapter will now examine the rights and protections available to self-employed persons who are genuinely classified as self-employed but may still find themselves in a precarious working situation. It will initially look at their rights under free movement law, specifically under Article 49 TFEU and Directive 2004/38.

4.1 Protection under the Freedom of Establishment provisions

Failing to meet the subordination aspect of the *Lawrie-Blum* criteria does not result in the individual losing legal status under EU law. Instead, they derive their rights from the freedom of establishment provisions under Article 49 TFEU rather than workers under Article 45.[68] Historically, there has been little difference in terms of the level of protection available to workers and self-employed persons through free movement rights, for example relating to residence, equal treatment, and the derived rights of family members.[69] In fact, the Court has explicitly stated that, at least in the context of granting residence permits, [Articles 45 and 49 TFEU] "afford the same legal protection and that therefore the classification of an economic activity is without significance".[70] This suggests that there is a degree of equivalence between the free movement rights of self-employed and paid employed persons.

An example of this equivalence can be seen from *Meeusen,* which concerned a Belgian frontier worker who was the "the director and sole shareholder" of a company established in the Netherlands, and therefore could not fulfil the subordination condition required to be classified as a worker.[71] As such, his daughter could not derive a right to a university grant as the child of a worker under (then) Regulation 1612/68, which only applied to workers.[72] However, the fact that the child's mother worked for the father's company two days a week meant that she could derive this right from her mother's genuine employment.[73] The Court held that the relationship between the spouses was irrelevant: "the personal and property relations between spouses which result from marriage do not rule out the existence, in the context of the organisation of an undertaking, of a relationship of subordination".[74] Furthermore, regardless of the relationship between mother and father, the daughter would nevertheless obtain the same derived right to student grants through the father who was exercising his rights under the freedom of establishment.[75] This shows that both workers and

[68] Case C-104/94 *Asscher* ECLI:EU:C:1996:251, para. 26; Case C-268/99 *Jany and Others* ECLI:EU:C:2001:616, para. 34; Joined Cases C-151/04 and C-152/04 *Durré* ECLI:EU:C:2005:775, para. 31.
[69] The only difference between their treatment is that some EU secondary legislation (a notable wexaple being Regualtion 492/2011) only applies to workers under Article 45 TFEU.
[70] Case C-363/89 *Roux v Belgium* ECLI:EU:C:1991:41, para. 23.
[71] Case C-337/97 *Meeusen* ECLI:EU:C:1999:284, para. 15. This is different to *Danosa,* where the Director was held to effectively be in a relationship of subordination with the shareholders, suggesting that for Directors to be workers, they need to be different from shareholders.
[72] Article 12, (then) Regulation 1612/68 on freedom of movement for workers within the Community, now Regulation 492/2011.
[73] *Meeusen*, para. 7.
[74] Ibid, para. 15.
[75] Ibid, paras. 27 – 29.

self-employed persons are entitled to virtually the exact same rights and protections under Articles 45 and 49 TFEU.

4.2 Social Protection of Self-employed under Directive 2004/38

The free movement rights of self-employed persons are now mostly regulated through Directive 2004/38. Article 7(1)(a) grants a right of residence to "workers or self-employed persons in the host-Member State", whilst Article 7(3) on worker status retention states that a Union citizen "who is no longer a worker or self-employed person shall retain the status of worker or self-employed person". They are also included in the provisions on retaining a right of residence, the safeguards against expulsion, and equal treatment rights under Article 24. Their inclusion in Directive 2004/38 is logical, given the equivalence between the two categories in terms of their protection.

That said, following the adoption of the Directive, it was not clear to what extent the system of worker retention under Article 7(3) would apply to them, specifically the extent to which self-employed persons can become *involuntarily* unemployed, as is required to retain worker status. The Court clarified this point in *Gusa*,[76] which concerned a Romanian national who was living in Ireland since 2007, and between October 2008 and October 2012 worked as a self-employed plasterer. At that time, he ceased work due to adverse economic conditions (specifically the Eurozone crisis and the collapse of the 'Celtic Tiger') and claimed jobseeker's allowance. However, Ireland considered that once his plastering work had 'dried up', he would lose his right of residence under the Directive and could not retain it under Article 7(3). The Court first held that it could not be "inferred unequivocally" from the wording of Article 7(3), specifically the term "after having been employed", if this provision concerned just paid employees, or also included the self-employed.[77] It was also unclear from examining alternate language versions of the Directive, which used different terminology.[78] However, the Court went on to find that the term 'involuntary unemployment' should constitute any loss of occupational activity, including self-employment, "for reasons beyond the control of the person concerned, such as an economic recession".[79] Excluding self-employed persons from the system of worker retention under the Directive would undermine the objective of strengthening the right to move and reside, and the aim of converging the rights of persons in a "single legislative act" under Directive 2004/38.[80] Given that the Directive equates self-employment and paid employment for the purposes of residence and equal treatment, distinguishing between the two categories under Article 7(3) would create an "unjustified difference", given that the provision is aimed at providing continued protection for any worker whose occupational activity ceased due to circumstances beyond their control.[81]

[76] Case C-442/16 *Gusa* ECLI:EU:C:2017:1004.
[77] Ibid, paras. 29 – 30.
[78] Ibid, paras. 32 - 33; see Opinion of Advocate General Wathelet in Case C-442/16 *Gusa* ECLI:EU:C:2017:607, paras. 48 - 49.
[79] Ibid, para. 31.
[80] Ibid, paras. 40-41.
[81] Ibid, paras. 42.

Gusa continues the principle of equivalence between self-employed and paid employees under free movement law. Advocate General Wathelet made this point clear in his Opinion, repeating the long-standing principle that Articles 45 and 49 TFEU "afford the same legal protection" and therefore "the classification of the basis on which an economic activity is performed is thus without significance".[82] To exclude self-employed persons from protection would result in someone that has contributed to the Member State social security and tax system being treated the same as a first-time jobseeker that has "never carried on an economic activity in that State and has never contributed to that system".[83] What is noteworthy about the decision is that the Court so emphatically held that self-employed persons can be involuntarily unemployed. On the face of it, there is a reasonable argument that self-employed persons can never be "forced" to cease employment for economic reasons as this decision is never imposed on them: they must always actively make the final decision to close the business. However, in reality there is very little difference between the two situations, apart from the person actually making the decision to cease trading. A paid employee may find that economic conditions have led to them being let go by their employer, however, a self-employed person may well have to cease operations due to the exact same economic conditions. From this perspective, it would be unfair to exclude them from protection: it would undermine their employment security and place additional financial burdens upon them when compared to paid workers, thereby pushing them into social exclusion and creating dualisations in the labour market.

The equivalence between the protection available to paid employees and self-employed persons under the Directive can also be seen from *Dakneviciute*,[84] which concerned the retention of worker status for pregnant self-employed women. In this case, a Lithuanian national in the UK was working in paid employment for two years before becoming pregnant and subsequently deciding to work on a self-employed basis as a beauty therapist. Between July and October 2014 she did not work due to her pregnancy, and at the start of 2015 gave up her self-employed activity due to insufficient income and went back to paid employment. Her child benefit claim in August 2014 was rejected due to her having insufficient resources and therefore no right to reside. Whilst Ms Dakneviciute claimed that she should retain a right to reside for a reasonable period following her pregnancy under the *Saint-Prix* doctrine, the UK claimed that this was impossible as "a self-employed person is not required to carry out her work personally and it is open to her to continue her business by other means", meaning she would not need to take time out of the labour market.[85]

The Court confirmed that the principle laid down in *Saint Prix* that the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth may result in a woman needing to give up work temporarily, so long as she seeks to return to the labour market "within a reasonable period".[86] It then made a stronger statement of equivalence between paid employees and self-employed persons than *Gusa*, using the *Roux* terminology to state that "Articles 45 and 49 TFEU afford the same legal protection, the classification of the economic

[82] Opinion of Advocate General Wathelet in *Gusa,* paras. 73.
[83] *Gusa*, paras. 43 – 44.
[84] *Dakneviciute*.
[85] Ibid, para. 21, 40-41.
[86] Ibid, para. 28 – 29.

activity thus being without significance".[87] Denying self-employed women this right would deter them from exercising their free movement rights if they risked losing legal status due to pregnancy,[88] and furthermore treating pregnant self-employed persons and paid employees differently would create an unjustifiable difference, given that "pregnant women are in a comparable vulnerable situation, regardless of whether they are employed or self-employed".[89] The Court therefore extended the *Saint-Prix* principle to self-employed persons, finding that the physical constraints of pregnancy and childbirth "which require a woman to give up work temporarily, cannot, *a fortiori*, result in that woman losing her status as self-employed".[90]

The decision is a logical interpretation of the Directive. Moreover, the UK's approach of focusing on the ability to subcontract out work ignores the reality of self-employment and is arguably offensive towards those engaged in manual and service-based professions. If a freelance consultant ceases trading, their clients may be understandably cautious of switching to a new consultant. The same is true for beauty therapists, who are likely to have built up relationships with customers that cannot be easily replaced. As such, the Court's statement that "it cannot be assumed that such a replacement will always be possible, particularly when the activity in question involves a personal relationship or a relationship of trust with a customer" must be welcomed.[91]

5 Social Protection of Self-Employed: Social Rights

The blurred lines between paid- and self-employment means that there are also genuinely self-employed persons who find themselves in a precarious working situation as they face many of the risks and challenges that apply to paid-workers, particularly those engaged in platform and on-demand work. This is because there are persons who are classified as genuinely self-employed persons who face many of the insecurities and risks that are applicable to falsely self-employed persons yet are not entitled to the same rights and protections.[92] As Lord Justice Underhill stated in the *RooFoods (Deliveroo)* judgment, it can seem "counter-intuitive" for certain gig sector workers such as delivery riders not to have the same rights as paid-workers.[93] This is liable to affect their social rights more than free movement rights given that self-employed persons have very limited protections under EU and national social law. Whilst in principle this justified by the different situations these persons find themselves in, the following section will assert that the blurring between the two statuses, particularly in the context of platform work, means that it is no longer appropriate to deny these workers certain social rights. This section will examine specifically the right of self-employed persons to enforce collectively agreed rates of pay under EU competition law and the freedom to provide services.

[87] Ibid, para. 31.
[88] Ibid, para. 33.
[89] Ibid, para. 35 – 36.
[90] Ibid, para. 41.
[91] Ibid, para. 38.
[92] See W. Eichhorst *et al*, 'Social Protection of economically dependent self-employed workers' (2013) *European Parliamentary Committee on Employment and Social Affairs* IP/A/EMPL/ST/2012-02 PE 507.449.
[93] Lord Justice Underhill in [2021] EWCA Civ 952, para. 86.

5.1 (No Right to) Employment & Social Law

Those classified as self-employed have very limited rights under EU labour legislation.[94] They cannot invoke the *pro-rata* and equal treatment rights available under the Part-time Work, Fixed-term Work, and Employment Agency Directives.[95] They also cannot rely upon the Working Time Directive, which provides significant protections to platform workers and dependent contractors engaged on a paid-employee basis, in terms of registering working time and enforcing rights such as paid annual leave and compensation *in lieu*. This highlights the importance of gaining the status and rights of a worker, particularly for platform workers.

This difference in protection is in principle explained by the objectively different situations of each type of worker.[96] Whilst self-employed persons take on more risk, they also gain more reward, which should then be used to insure oneself against the risks of the market, much in the same way an employer covers the risks of employees working under their direction.[97] However, the traditional distinction between paid and self-employment, particularly in certain sectors such as the platform economy, is increasingly grey and arbitrary. For example, whilst Deliveroo riders are entitled to labour law rights in the Netherlands due to their classification as workers, across the English Channel in the UK they are not as they are treated as self-employed persons.

Despite the lack of applicability of EU social law to self-employed persons, the EU increasingly recognises the problems with the classic dichotomy between paid and self-employment. The Recommendation on Social Protection for Workers and the Self-employed emphasises the potentially insufficient access of self-employed persons to social protection branches that are more closely related to the participation in the labour market.[98] In this regard, it claims that the self-employed should have access to the listed social protection branches, at least on a voluntary basis, and where appropriate on a mandatory basis.[99] This suggests that the level of social protection available to self-employed persons is increasingly seen as inadequate in the context of modern employment trends. However, as a soft law coordinating instrument that does not confer concrete rights, the Recommendation is likely to only have indirect and limited relevance for self-employed persons and platform workers.[100] There have even been recent calls for the EU to adopt a Directive explicitly regulating the status of platform workers.[101] However, even this initiative seems to have little to say on improving the social rights of platform workers that are classified as self-employed persons. Most recently, the European

[94] N. Kountouris (n 22), p. 213.
[95] Z. Kilhoffer (n 6).
[96] C. Barnard, *EU Employment Law (4th Ed)* (2012) OUP: Oxford, p. 155; UK House of Lords European Union Committee, *Modernising European Union Labour Law: has the UK anything to gain?* (2007) Authority of the House of Lords: London, p. 80-81
[97] Ibid, p. 145; C.J. Cranford, J. Fudge, E. Tucker, and L.F. Vosko, *Self-Employed Workers Organize: Law, Policy, Unions* (2005) McGill-Queen's University Press: Montreal, p. 9.
[98] Recital (13), Council Recommendation on access to social protection for workers and the self-employed COM (2018) 132 final; see also Z. Kilhoffer (n 6), p. 162.
[99] Recital (18), Council Recommendation on access to social protection for workers and the self-employed COM (2018) 132 final
[100] Z. Kilhoffer (n 6), p. 162.
[101] L. Chaibi, 'Proposal for a Directive of the European Parliament and of the Council on Digital Platform Workers' (2019). Available at: https://www.guengl.eu/content/uploads/2020/11/Directive-travailleurs-des-plateformes-ENG-WEB.pdf

Commission has published a Proposal for a Directive on improving working conditions in platform work.[102] Whilst the final text of the Directive is yet to be published, from the Proposal it would seem that this instrument does little to expand the social rights of platform workers. Instead, the Directive is focused on their classification as paid workers (i.e., the distinction between paid and self-employment).

5.2 The Right to Assembly and Collectively Agreed Rates

In view of the increasingly blurred distinction between paid and self-employment, it becomes inappropriate to deny even genuinely self-employed persons certain social rights. This is not to say that it would be possible or desirable to extend all social rights that are available to workers to self-employed persons, who are in a different factual situation. As such, it is not claimed that self-employed persons should be entitled to the rights outlined in Chapter 6. However, it may be that one social right in particular is difficult to deny to precarious self-employed workers: namely, the right of collective bargaining and action, which stems from the freedom of assembly and of association, protected under Articles 28 and 12 of the Charter respectively. The right to collective action and enforcing collectively bargaining rates of pay is important as it is be highly beneficial for workers, particularly those in flexible and insecure working arrangements.[103] Collective bargaining can contribute to improvements in wages and working conditions, as well as building trust and respect between workers, employers, and other organisations, thereby fostering stable and productive labour relations.[104] They complement regulatory obligations, which can benefit all parties by ensuring that workers get a fair share of productivity gains while not impairing the capacity of employers to operate profitably.[105]

However, the blurred distinction between paid and self-employment means that certain persons who are genuinely classified as self-employed are in a very similar factual situation to paid workers in terms of their work freedom and autonomy, and yet are not permitted to improve their working conditions through collective action. In particular, 'genuinely' self-employed platform workers face problems as they often face restrictions on their working schedule, rates of pay, whether they can refuse jobs without consequences, etc., which are all set by the platform, and yet paid workers they cannot collectively organise to improve their situation As Lord Justice Underhill stated in *RooFoods*, it seems counter-intuitive that self-employed gig-economy workers cannot protect their interests through trade union action and associated rights.[106] Lord Justice Coulson went further, stating that gig economy workers have a "particular need" of the right to organise through trade union and enforce their rights.[107] The following section will examine the ability of precarious self-employed persons to enforce collectively agreed (minimum) rates of pay in the areas where such rules are prohibited: namely, within EU competition law and under the Services Directive 2006/123.

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[102] Proposal for a Directive on improving working conditions in platform work COM (2021) 762 final.
[103] S. Hayter, *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice* (2011) Cheltenham: Edward Elgar, pp. 57-59.
[104] ILO, *Collective Bargainning: A Policy Guide* (2015) Geneva: ILO, p. 4-5.
[105] Ibid, p. 5.
[106] [2021] EWCA Civ 952, para. 86.
[107] Ibid, para. 96.

5.3 EU Competition Law

EU competition law applies to all entities engaged in economic activity "regardless of its legal status and the way in which it is financed".[108] As self-employed persons meet this definition, they are classified as undertakings and as such EU competition rules apply to them, which limits their ability to enforce collectively agreed rates of pay. The seminal case on the right of self-employed persons to collectively agreed conditions is *Albany*.[109] This case concerned a collective agreement, that was agreed between an employers' and employees' association, to set up a single sectoral pension fund responsible for managing a supplementary pension scheme and to make affiliation of that fund compulsory. The Court held that the agreement in question could fall under Article 101(1) TFEU as it had an appreciable effect on trade, and its compulsory nature meant it affected the entire textile sector.[110] However, it went on to emphasise that the Union seeks to establish "not only a system ensuring that competition in the internal market is not distorted, but also a policy in the social sphere".[111] This meant that the social policy objectives pursued through collective agreements between employers and workers and that inherently restrict competition would be "seriously undermined" if they were subject to Article 101(1) TFEU when management and labour jointly seek to improve conditions of employment for workers.[112] Consequently, it was held that "agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives" fall outside the scope of Article 101(1) TFEU. As such, agreements that are concluded through negotiations between management and labour and pursue valid social policy objectives will be excluded from the scope of this provision.[113] However, two cumulative criteria must be fulfilled: (i) the agreement must be concluded between management and labour (i.e. not between undertakings); and (ii) it must be aimed at improving work and employment conditions.[114] In *Albany*, the agreement fulfilled these two criteria as it was entered into by employers' and employees' organisations and pursued a social policy objective by guaranteeing a level of pension entitlement to all workers within a sector.[115] Therefore, *Albany* both restricted the scope of Article 101(1) by excluding it from certain agreements applying to workers, and confirmed that self-employed persons cannot conclude or enforce collective agreements.

In *FNV*, which concerned the compatibility of collectively agreed minimum fees for substitute orchestra musicians (applying to both paid employees and self-employed freelancers), the Court applied the *Albany* exception, finding that although self-employed substitute musicians performed "the same activities as employees, service providers such as the substitutes at issue in the main proceedings, are, in principle, 'undertakings' within the meaning of Article 101(1) TFEU … and perform their activities as independent economic operators in relation to their

[108] For a recent example, see Case C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe* ECLI:EU:C:2017:496, para. 41.
[109] Case C-67/96 *Albany* ECLI:EU:C:1999:430.
[110] Ibid, para. 49 – 50.
[111] Ibid, para. 54.
[112] Ibid, para. 59.
[113] Ibid, para. 59 – 60; See also *FNV*, para. 23; Opinion of Advocate General Wahl in *FNV*, para. 24; Case C-222/98 *Hendrik van der Woude* EU:C:2000:475, para. 22; Opinion of Advocate General Fennelly in Case C-222/98 *Hendrik van der Woude* ECLI:EU:C:2000:226, para. 21; Z. Kilhoffer (n 6), pp. 246 – 247; E. Groshiede & B. ter Haar (n 31).
[114] *Albany*, para. 60.
[115] Ibid, paras. 62 - 63.

principal".[116] As the musicians were self-employed, they were considered not to be acting collectively as a trade union, but rather an association of undertakings.[117] As such, the agreement failed the *Albany* exception, meaning that it could not be excluded from the scope of Article 101(1) TFEU, unless such workers were engaged as self-employed workers on a false basis, and that their situation was comparable to that of employees".[118]

The Court therefore considers that agreements between self-employed persons will always fail the first part of the *Albany* exception as they inherently restrict competition.[119] This means that the Court has not extended the *Albany* exception to improve the working conditions of self-employed persons.[120] The General Court has held that farmers were undertakings as there was "no employment relationship at all" between farmers and slaughterers as the former do not work for the latter or do not make part of their undertaking, which was not affected by the farmer's ability to joint trade unions under the French Labour Code.[121] Furthermore, the Court has continued to find that minimum fee arrangements unliterally set by organisations representing professionals will fall under the Article 101(1) TFEU, and can only be justified if necessary for the implementation of a legitimate objective.[122]

The application of Article 101(1) TFEU to collective agreements between self-employed persons is criticised for its lack of flexibility, and for failing to accommodate national labour systems and the business model of many platforms.[123] Collective bargaining is suggested to be more effective than legislation at protecting against risks associated with precarious employment, for example minimum wages, insurance against accidents at work, protection against unfair dismissal, working time and rest periods, etc., meaning that this rule excludes an avenue for them to improve their working conditions, and ultimately it is likely to result in their position becoming more precarious.[124] This also arguably undermines the rights contained in the Charter, such as Article 12 which states "that everyone has the right to … freedom of association … which implies the right of everyone to form and join trade unions for the protection of his or her interests". The Charter makes no distinction between paid employees and the self-employed. Furthermore, collective agreements are specifically recognised under Article 152 TFEU, which "recognises and promotes" the role of social partners, respects their autonomy, and takes into account the "diversity of national systems".

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[116] *FNV*, paras. 23, 27; See also *Albany*, para. 60; Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens'*, EU:C:1999:434, para. 57; Case C-219/97 *Drijvende Bokken* EU:C:1999:437, para. 47; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* EU:C:2000:428, para. 67; Case C-222/98 *van der Woude* EU:C:2000:475, para. 22; Case C-437/09 *AG2R Prévoyance* EU:C:2011:112, para. 29; Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* EU:C:2013:127, paras. 36 – 37; C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* EU:C:2006:784, para. 45.

[117] *FNV*, para. 28.

[118] Ibid, paras. 30-31.

[119] Ibid, para. 27.

[120] Opinion of Advocate General Wahl in *FNV*, para. 27.

[121] Joined Cases T-217/03 and T-245/03 *FNCBV* ECLI:EU:T:2006:391, para. 58, 123; see D. Schiek and A. Gideon, 'Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities' (2018) 32(2-3) *International Review of Law, Computers & Technology* 275-294, p. 281.

[122] Case C-136/12 *Consiglio nazionale dei geologi* ECLI:EU:C:2013:489, para. 57; Joined Cases C-427/16 and C-428/16 *CHEZ Elektro Bulgaria AD* ECLI:EU:C:2017:890, para. 55; see also N. Countouris and V. de Stefano, *New trade union strategies for new forms of employment* (2019) ETUI: Brussels, p. 46.

[123] C. Bergqvist, 'Collective Bargaining and Platforms' (11th December 2020) *Kluwer Competition Law Blog*.

[124] Z. Kilhoffer (n 6), p. 247.

It is possible for the Court to extend the protections available under the *Albany* exception to certain categories of self-employed persons. For example, if an agreement does not significantly affect competition it could potentially be excluded under a *de minimis* exception.[125] The Court has already held that agreements which do not have an appreciable effect on competition can be excluded from the scope of Article 101(1) TFEU.[126] However, the problem is that any agreement between self-employed workers is by its very nature going to restrict competition, and if it did not it would likely have very little benefit for workers in the first place.

Another possibility would be to assess whether collective agreements actually have pro-competitive effects, or at least protect workers whilst having a neutral effect on competition, for example because they counter the monopoly power of big platforms.[127] Currently, the pro-competitive effects of such agreements will not be considered if the agreement is held to be restrictive by object, i.e. it is considered to be a hardcore restriction that is so damaging to competition that any actual negative or positive effects arising from the agreement are not considered at all.[128] In these situations, the Court has held that "the form, official purpose, or subjective intent of the collective agreement are immaterial", and that such considerations are "irrelevant for the purposes of applying [Article 101(1) TFEU]".[129] It will be held to restrict competition even if it is not aimed at doing so and pursues other legitimate objectives, such as social protection.[130] A solution may be for the Court to change its approach towards agreements that are anti-competitive by object by considering the effect of these agreements. The restriction by object approach is designed for hardcore restrictions that serve "no legitimate purpose".[131] However, if the agreement does serve a legitimate social purpose, then an effects-based assessment would allow for a more balanced approach that includes possible benefits and efficiencies to be included within the assessment.[132] These agreements may well be in line with core EU values and can even produce pro-competitive effects, as well as ensuring a balance between fair competition and protecting workers, thereby helping realising the Union's goal under Article 3 TEU of establishing a social market economy.[133]

A final option could be to apply the ancillary restraints doctrine to find that any restrictive elements are merely ancillary to the main agreement. This could save agreements like that in *FNV* that apply to both paid-employees and self-employed persons. These agreements could be justified if they are (i) ancillary to a traditional collective agreement; (ii) are necessary for the protection provided under the agreements, (iii) do not limit the commercial freedom of third parties, and (iv) the original collective agreement falls under the *Albany* exception.[134] In conclusion, it would seem that, despite the Court's assertion that self-employed persons

[125] Ibid, p. 250.
[126] Joined Cases C-180/98 to C-184/98 *Pavlov & Others* ECLI:EU:C:2000:428, paras. 94 – 97.
[127] C. Bergqvist, 'Collective Bargaining and Platforms' (11th December 2020) *Kluwer Competition Law Blog*.
[128] Ibid.
[129] Case C-209/17 *Beef Industry* ECLI:EU:C:2008:643, para. 21.
[130] Case C-551/03 P *General Motors v Commission* ECLI:EU:C:2006:229, para. 64.
[131] C. Bergqvist (n 127). See Case C-228/18 *Budapest Bank* ECLI: ECLI:EU:C:2020:265, paras. 82 - 86; Case C-307/18 *Generics* ECLI:EU:C:2020:52, paras. 87 - 90.
[132] C. Bergqvist (n 127).
[133] Ibid.
[134] Ibid.

cannot rely on collective agreements *per se*, tools exist in EU competition law that would permit such agreements, if they had positive effects on trade, or if the restrictive effects are ancillary to the main agreement which is to the benefit of workers.

5.4 The Freedom of Establishment and Service Provision

The setting of minimum fees, which is crucial to collective agreements between self-employed persons, is also in principle prohibited under the internal market rules on service provision. This has conflicted with collective standards that are set by organised professions.[135] Prior to Directive 2006/123, the Court had held that setting fee rates could restrict [Article 56 TFEU]. In *Cipolla & Others*, it held that an Italian rule prohibiting any derogation from minimum fees applicable to lawyers was liable to "render access to the Italian legal services market more difficult for lawyers established in (another) Member State" as it deprives them of the opportunity to compete with lawyers that are established on a stable basis in the host-state and who therefore have greater opportunities.[136] That said, such measures could be justified if pursuing an overriding reason in the public interest and proportionate, which the Court considered that the Italian rule was, as it could prevent lawyers from competing against one another through price, thereby potentially leading to a deterioration in the quality of the services provided.[137] In *Commission v Italy*, the Court held that the setting of maximum tariffs on lawyer's services could also restrict the freedom of establishment, given that foreign service providers must adapt to the host-state's rules and thus may be "deprived of the opportunity of gaining access to the market of the host Member State under conditions of normal and effective competition".[138] However, in this case it had not been demonstrated that the system "adversely affected" conditions of normal and effective competition.[139] This suggests that rules which are not proven to adversely affect market access "under conditions of normal and effective competition" will fall outside the scope of Article 56 TFEU.[140]

The setting of minimum fees is now regulated under Article 15(2)(g) of Directive 123/2006, which states that "Member States shall examine whether their legal system makes access to a service activity or exercise of it subject to compliance" with requirements such as that contained in paragraph (g), namely "fixed minimum and/or maximum tariffs with which the provider must comply". Article 15(3) states that these measures can be justified if they are non-discriminatory, pursue an overriding reason in the public interest, and are proportionate in pursuing this aim. It should be noted that as Article 15 Directive 123/2006 is contained within Chapter III on establishment, it applies to all service providers operating in the Member State in question, regardless of where they are established.[141] As such, unlike Article 56 TFEU,

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[135] N. Countouris and V. de Stefano, *New trade union strategies for new forms of employment* (2019) ETUI: Brussels, p. 46.

[136] Joined Cases C-94/04 and C-202/04 *Cipolla and others* ECLI:EU:C:2006:758, para. 58 - 59.

[137] Ibid, para. 67.

[138] Case C-565/08 *Commission v Italy* ECLI:EU:C:2011:188, paras. 50 – 51.

[139] Ibid, para. 53.

[140] V. Vandendaele, 'Commission v Germany (c-377/17): Do exceptions in tariff regulation matter?' (29th July 2019), *European Law Blog*, Available at: https://europeanlawblog.eu/2019/07/29/commission-v-germany-c-377-17-do-exceptions-in-tariff-regulation-matter/.

[141] Joined Cases C-360/15 and C-31/16 *X & Visser* ECLI:EU:C:2018:44, paras. 105-107; Case C-377/17 *Commission v Germany* ECLI:EU:C:2019:562, para. 58.

this restriction applies to situations where all the relevant elements are confined to a single Member State, i.e., "wholly internal" situations where there is no cross-border element.

Some agreements and/or practices can be excluded from the scope of the Services Directive due to the nature of the activity being performed. Under Article 2, a range of activities are excluded from its scope, including importantly under paragraph (d) services in the field of transport falling within the scope of Title V of the Treaty. The Court has considered the applicability of the Directive to private car hire services and platforms performing this service. In *Uber Spain* it held that "any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport" falls under Article 2(d) and is therefore excluded from the scope of the Directive.[142] As *Uber* was considered to be a transport company, the Services Directive did not apply. This principle has been continued by the Court in subsequent case-law.[143] This suggests that, assuming the sector in which the self-employed worker is engaged can be excluded from the scope of the Services Directive, then its provisions are not applicable to the situation at hand. As such, the setting of minimum fees by, for example, private taxi drivers, would not be covered under the Directive. However, in all other areas not falling under a specific exception under Article 2, this restriction will apply.

For situations where Article 15(2)(g) does apply, the Court has held that under this provision, Member States are allowed to introduce minimum and maximum tariffs, provided that those requirements comply with the conditions laid down in Article 15(3).[144] This means that they must be (i) not directly or indirectly discriminatory, (ii) 'necessary', which means that there must be an overriding reason relating to the public interest to justify the measure, and (iii) 'proportionate', meaning that the requirements must be suitable for securing the attainment of the objective pursued and not go beyond what is necessary to attain it, and cannot replace them with other, less restrictive measures which attain the same result.[145] This does not mean that the Member State is required to prove that "no other conceivable measure" could attain the same result, which is particularly difficult when a measure has just been introduced and there is no empirical evidence to compare it to others.[146] In *Commission v Germany*, the Court again used the reasoning that the national measure may assist in ensuring that "service providers are not encouraged … to engage in competition that results in offering services at a discount, with the risk of deterioration in the quality of services provided".[147] However, as the German rule did not pursue this aim "in a consistent and systematic manner" it could not be justified.[148]

The Court's approach to Article 15(2)(g) is similar to its pre-Directive case-law, except that this provision now applies to all service providers in the territory, regardless of where they are established. Moreover, it is suggested that Article 15(2)(g) does not allow for the exclusion of measures which do not "adversely affect market access", as was applied by the Court's

[142] Case C-434/15 *Uber Systems Spain* ECLI:EU:C:2017:981, paras. 40 – 41.
[143] Case C-320/16 *Uber France SAS* ECLI:EU:C:2018:221, paras. 21 – 23.
[144] *Commission v Germany*, para. 61; Case C-593/13 *Rina Services and Others* EU:C:2015:399, para. 33.
[145] Ibid, para. 62.
[146] Ibid, para. 64 – 65.
[147] Ibid, para. 67 – 78.
[148] Ibid, para. 89; See also Case C-169/07 *Hartlauer*, EU:C:2009:141, para. 55; Case C-168/14 *Grupo Itevelesa and Others* EU:C:2015:685, para. 76; Case C-634/15 *Sokoll-Seebacher and Naderhirn* EU:C:2016:510, para. 27.

decision in *Commission v Italy*, thereby indicating less space for justifying such measures, although the limited effect of the national measure could be a relevant factor within the proportionality assessment under Article 15(3).[149] That said, similar to the *de minimis* exception under EU competition rules, measures which do not adversely affect market access may be of limited assistance in improving the wages of precarious self-employed workers. The Court has continued to use customer protection as a valid justification insofar as it may prevent self-employed persons from competing with one another resulting in reduced quality of service overall. This principle could be applied to platform workers and other self-employed persons in precarious situations. This means that, whilst agreements on minimum rates would therefore likely fall under Article 15(2)(g) of the Services Directive, this principle could be used to justify it, assuming it meets the requirements laid down in Article 15(3).

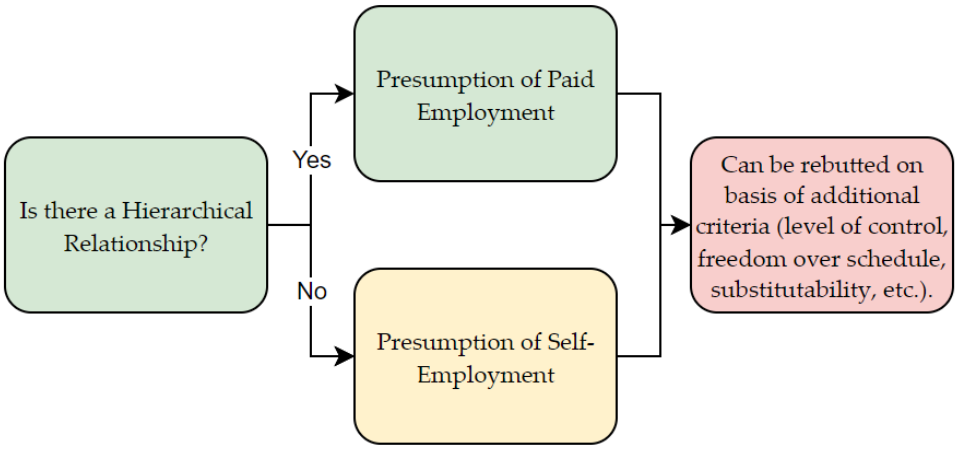
6 Suggestions: A Presumption of Paid Employment & Social Rights for Precarious Self-Employed Workers?

Falsely self-employed workers face a high level of precarity, as they are not entitled to many of the rights reserved for workers. This includes almost all worker protections under EU social law, as well as certain free movement rights like those available through Regulation 492/2011. That said, the Court has held that there is equivalence between the free movement rights under Articles 45 and 49 TFEU. This situation, whereby there is a class of workers that have no recourse to the rights available to them due to their classification as self-employed persons, is likely to lead to negative consequences for the worker, as well as creating dualisations in the labour market and placing downward pressures on social standards in a similar manner to part-time and intermittent workers.

These consequences demand that the law seeks to include those factually engaged in an employer-employee relationship, regardless of their status under national law. Whilst the Court has in principle held it is willing to do this, it could better clarify this test by adopting a presumption of paid employment. Under this system, assuming there is a 'hierarchical relationship' between the two parties, the worker is presumed to be employed by the undertaking or platform in question. A problem with this test is that it may encompass some self-employed persons (for example, those working on a sub-contracting basis) who are in a hierarchical relationship and yet are still genuinely self-employed. As such, this presumption of paid-employment based on a 'hierarchical relationship' could be rebutted based a case-by-case assessment looking at the level of freedom the individual has in terms of setting their own rates of pay, working schedule, etc.

[149] V. Vandendaele (n 140). The same reasoning has been applied in cases such as *X and Visser*, and more recently in the context of setting tariffs, Joined Cases C-473/17 and C-546/17 *Repsol Butano & DISA Gas* ECLI:EU:C:2019:308.

Figure 5: Falsely Self-employed Presumption of Employment



The European Commission recently published a Proposal for a Directive on improving working conditions in platform work, which seeks to establish a presumption of paid employment in the context of platform work.[150] Under Article 4, "the performance of work and a person performing platform work through that platform shall be legally presumed to be in an employment relationship", assuming they meet "at least two" of the criteria laid down in that provision, which includes control of the employer over the worker in terms of (a) upper limits for remuneration, (b) appearance, conduct, or performance of work, (c) supervising the work undertaken, (d) limiting freedom to accept of refuse jobs or use a subcontractor, or (e) restricting the possibility to build a client base. Whilst it remains to be seen whether this test will make the final text of the Directive, the broad terminology used in Article 4, and the fact that only two criteria need to be met, suggests that many, if not most, platform workers would be paid employees under it. That said, by using technical details relating to their employment, it may allow undertakings to change the nature of their employment relations to circumvent their obligation to classify them as workers. Furthermore, it will presumably only apply to platform workers. Whilst many of the falsely self-employed are engaged in platform work, there are many types of precarious worker that engaged in other areas; however, they will presumably not be able to rely on this presumption of paid employment. This makes this presumption different that the one suggested in this thesis, which would cover all forms of false self-employment, rather than just platform work.

This chapter also makes the case that, given the blurred lines between paid and self-employment, even genuinely self-employed persons have certain social rights, such as to conclude and enforce collective agreements, in particular the setting of minimum fees. Whilst the Court has repeatedly asserted that in the case of self-employed persons, collective agreements necessarily restrict competition (and service provision), EU law already seems to have the tools and legal space to allow these to be enforced, assuming that they meet certain conditions. In the context of EU competition law, the most appropriate and protective solution would be for the Court to examine the actual effects of the agreement, to see whether it could actually have a positive or at least a neutral effect on competition. In that case, agreements that set minimum fees that protect self-employed contractors and consumers alike by providing a high quality of service could be excluded from the scope of Article 101(1) on the basis of having

[150] Proposal for a Directive on improving working conditions in platform work COM (2021) 762 final.

positive effects. A link can be made with the Court's case-law on service provision under Article 56 TFEU, where the Court has found that the setting of minimum fees can actually be beneficial for consumers as it stops undertakings from reducing the quality of service provided through intense competition. This would also suggest that such agreements could also be justified under Article 15(3) Directive 123/2006, assuming that it complies with the other conditions of being non-discriminatory and proportionate.

7 CONCLUSION

This chapter has shown two situations where self-employed persons are in a precarious working situation. First, where the individual is falsely self-employed, i.e., where the employer hires them on a self-employed basis, despite them being in an employer-employee relationship. Second, the blurring of the lines between paid- and self-employment also means that there are situations in which an individual is 'genuinely' engaged as self-employed, and yet face many of the same risks and problems as paid-employees. An example of this can be seen from Deliveroo riders, who were classified in the UK as self-employed (whilst the UK was an EU Member State), and yet have been classified in Netherlands as workers, despite them performing the exact same role.

The Court distinguishes between genuine and false self-employment in its case-law through the subordination element of the *Lawrie-Blum* criteria. It has been willing to find that self-employed persons are workers if their classification as self-employed is merely "notional", which it has interpreted in a broad manner that would seem to encompass most falsely self-employed persons. This would also seem to be the case at the national level, given that in most dispute national courts have held that the workers are paid employees, however, there are some stark differences in approach, with national courts often being less generous than the Court of Justice, as well as differences over the idea of subordination, thereby making a uniform application of this test difficult. This chapter has proposed a presumption of paid employment based on whether there is a "hierarchical relationship" between the parties, which could be rebutted on the basis of the freedom provided to the worker in question. This is different to the presumption of paid employment included with the newly proposed Directive on Platform Work, which uses technical details and is focused solely on the situation of platform workers, rather than falsely self-employed workers in general.

For those who are genuinely classified as self-employed but who nonetheless face similar problems to self-employed persons, these persons gain sufficient protection under free movement law insofar as they have virtually the same rights and protections under Article 49 TFEU as they do under Article 45 TFEU. Under Directive 2004/38, the Court has continued to apply a principle of equivalence that ensures almost full parity between self-employed and workers. Importantly, this includes the ability to retain the status of self-employed worker, for example in situations where the individual has to cease occupational activity due to adverse economic conditions. However, self-employed persons are not entitled to rely on EU social legislation. Whilst this is in principle justified due to their different working situations, the blurring of the lines between paid and self-employment means that it is increasingly difficult to justify their exclusion from certain social rights, such as to collectively agreed rates of pay and the right to enforce such rates through collective action. This chapter concludes that such

rights could likely be enforced within the current confines of EU competition law, perhaps through application of a restriction by effect approach towards self-employed contractors, which may serve legitimate social purposes whilst having a marginal effect on competition.

Chapter 9: Final Conclusions

Following the analysis that has taken place in this thesis, it is now possible to answer the basic research question posed at the start of the thesis: i.e., *"what space is there in EU law for the legal protection of the 'European Precariat' (i.e., EU Migrant Workers engaged in precarious forms of non-standard employment)?"*

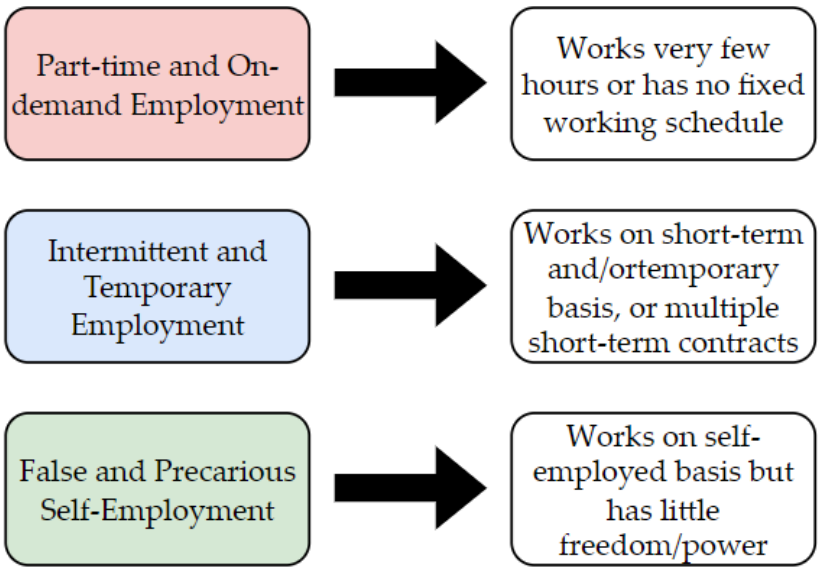
The European Precariat highlights a fundamental tension at the heart of European integration. The shift towards flexible forms of employment and competitive labour markets has resulted in increasing levels of precarious employment. However, whilst the Treaties refers to a high level of protection for workers, there are many on the margins of economic activity who, due to the distinctions in the law between worker, self-employed, non-worker, jobseeker, and others, may lose legal status and protection simply by engaging in precarious forms of work. Their legal protection is constrained by the structural limitations of the EU legal order, which has manifested itself into incomplete forms of citizenship that create gaps in the law leaving certain precarious workers with less/no legal protection. The thesis highlights three clear examples of where this protection is lacking: (i) part-time and limited work, (ii) short-term and intermittent work, and (iii) precarious forms of self-employment, and asks what the consequences of this lack of protection are, and how can precarious workers be better protected within the current confines of the EU legal order. The main conclusions of the thesis will now be explained.

1 Europe Sways with the Winds of Change

The first conclusion that can be made is that the "space" available to the legal protection of precarious workers is dictated both by the constitutional limitations of the EU and the political direction of developed nations generally, which in turn has affected the political priorities of the Union. The regulation of labour markets and protection of workers has, throughout its development, been based on a fundamental tension between, on the one hand, facilitating the expansion of markets by treating workers as a commodity that can be bought and sold, and, on the other hand, ensuring the protection of workers as individuals whose prosperity can be in conflict with market forces. This tension has resulted in an ebbing and flowing of the level of protection available to workers, from the 'free-for-all' of *laissez-faire* liberalism in the late 19th and early 20th centuries; to the more secure and protective system established through embedded liberalism, the SER, and the welfare state during the post-war era; and finally, the market-dominated approach of neoliberalism, with its focus on competitive labour market and ever-increasing employment flexibility. This shift towards neoliberal labour markets, with their focus on competitiveness and flexibility, especially when combined with events such as the Global Financial Crisis and the rise of the platform economy, has resulted in a situation whereby employment is becoming increasingly insecure and exploitative. Whilst flexible employment is not precarious *per se*, this thesis has outlined certain extreme forms of flexible employment, usually involving a high level of insecurity and power imbalance between worker and employee, that can be considered as precarious for the purposes of this thesis. These include (i) part-time work where the individual has a limited working schedule (for example, they are contracted to carry out very few hours or are employed on an on-demand or zero-hour basis); (ii) fixed-term, short-term, temporary, and other forms of intermittent

employment where the worker may face periods of economic inactivity due to their employment situation; and (iii) workers classified as being self-employed, despite have many of the risks and costs associated with work and have having little control over their rates of pay or working schedule. These have been summarised below:

Figure 6: The Main Forms of Precarious Employment



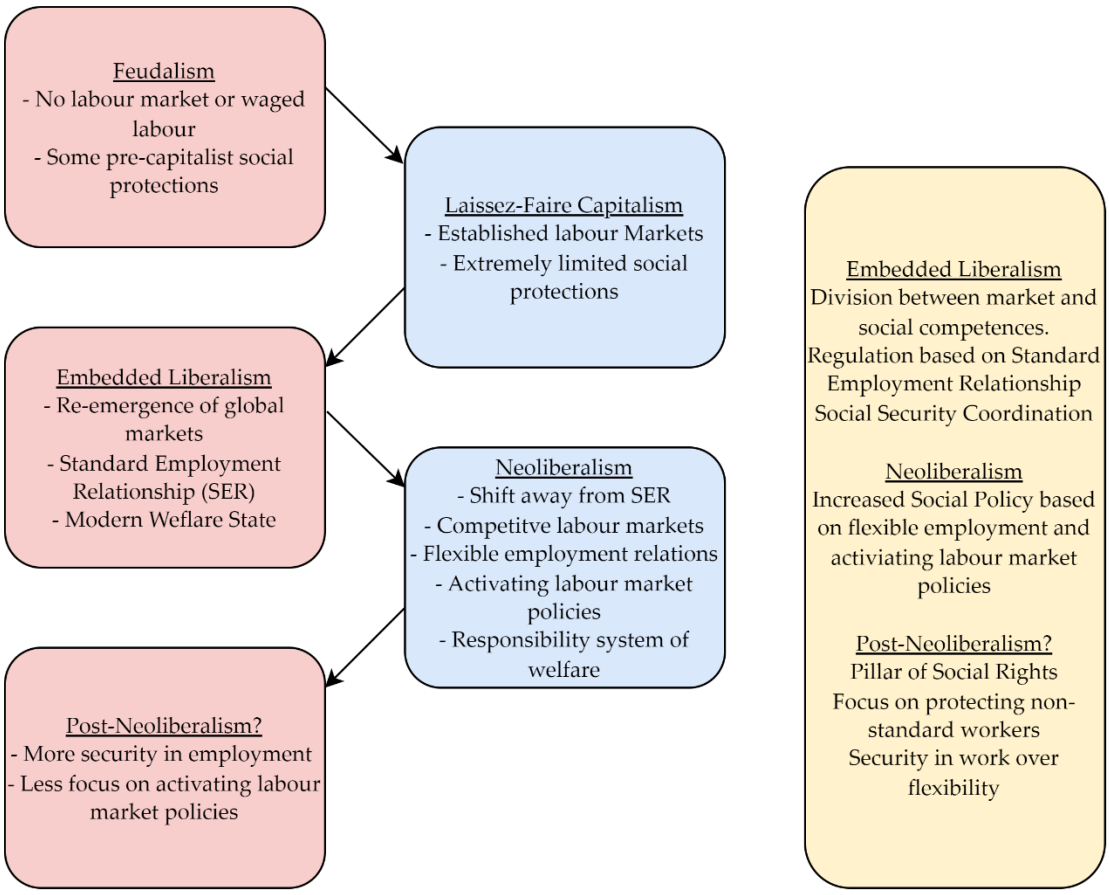
The protection of workers under the EEC, and later the EC and EU, have been heavily influenced by development of labour markets and the shift towards neoliberalism. This is unsurprising: the EU does not exist in a vacuum, and as such will inevitably be influenced by broader geopolitical and economic trends. The European Union is a representation of the wider economic and political environment of the time, and as such will inevitably reflect the priorities and interests of (or at least most of) its constituent Member States.

The EEC had strong links with embedded liberalism, particularly its clear division between market and social competences. Similarly, the influences of neoliberalism on the European Union since the 1990s are inescapable, notably with regard to social policy as the Union shifted towards individualism through its focus on competitiveness and flexibility, activating labour market policies, and the responsibility model of welfare. The ascendency of neoliberalism seemed to be unaffected by the Global Financial Crisis, with recovery measures still focused on employment flexibility and labour market competitiveness, which have resulted in an ongoing increase in non-standard and precarious forms of employment.

That said, in recent years there has, at least at the European level, been a modest but noticeable change in the direction of the wind. The insecurity resulting from the market-centred approach of neoliberalism has been noticed, and there has been more focus on secure jobs. Important new developments, such as the Social Pillar, the Revision to the Posted Workers Directive, the Directive on Transparent and Predictable Working Conditions, and the recently proposed Directives on Adequate Minimum Wages and on Improving Working Conditions for Platform Workers are clear examples of this shift in attitude. However, just how far such developments

will go in elevating the concrete legal protection of workers remains to be seen, especially as Europe faces challenges such as the COVID-19 pandemic and the cost-of-living crisis, which like the Global Financial Crisis may encourage the use of flexible working arrangements and competitive labour markets.

Figure 7: The Development of Labour Markets and European Regulation



The European Union is also limited in terms of the protection that can be provided to precarious workers by its historic and ongoing lack of competences in the area of social law, most notably in terms of social security entitlement and policies of redistribution that protect individuals' employment security, as well as its limited powers in setting minimum social standards. While the division between market and social competences was relatively unproblematic during the period of embedded liberalism, the shift towards neoliberalism, the inclusion of more market competences in the Union's legal order, as well as the accession of lower-wage Member States with a greater variety of economic and social systems, have created a more pressing need for European social integration.

The relative lack of social competences has meant that the social protection of workers has largely been pursued through policy coordination rather than hard law, which further limits the level of protection available. Policy coordination is less effective at raising social standards than hard law, and European social policy has been heavily influenced by neoliberal

principles. In particular, the EES and Flexicurity agenda focus strongly on the promotion of non-standard and flexible employment as a means of improving the efficiency of labour markets and activating labour market policies as a means of incentivising people into work and reducing public expenditure. That said, more recent policy instruments, for example the Social Pillar, suggests that the Union may be shifting its focus towards secure employment and stronger protections, rather than flexibility and competitiveness. Furthermore, the Social Pillar has resulted in the adoption of certain hard law, indicating that there is currently more space available for the adoption of legislation aimed at protecting workers.

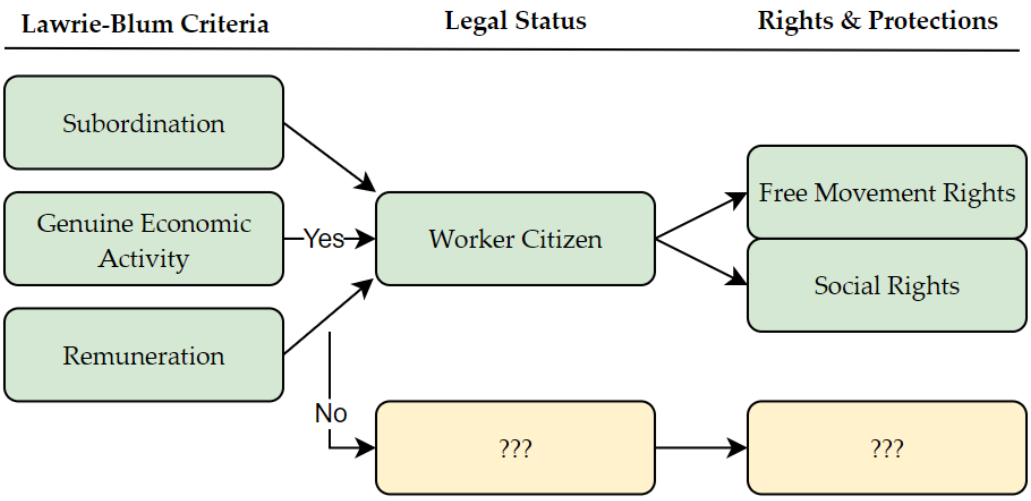
Therefore, the space available for the protection of EU Migrant Workers engaged in precarious employment is difficult to quantify. It is affected by both the political and economic conditions of the time, as well as the powers that have been conferred to the Union and which affect its ability to provide such protection. Whilst one can approve or disapprove of the political direction of the EU and its level of social competences, it is merely a reflection of its constituent parts (the Member States), which limits the level of protection that can realistically be provided within this framework.

2 PROTECTING PRECARIOUS WORKERS: PLEASE MIND THE (LEGAL) GAP

The protection of EU migrant workers is provided primarily through a series of legal classifications based on the individual's employment situation, which dictates the level of protection available to them. The definition of worker, based on the three-stage *Lawrie-Blum* criteria of (i) remuneration, (ii) subordination, and (iii) genuine economic activity, is the most important legal classification in determining who is, and who is not, entitled to protection under EU law. The division of competences also plays a role in determining whether an individual can claim worker status. The Court of Justice has long asserted that a uniform, EU-definition of worker, based on the *Lawrie-Blum* criteria, is necessary for the functioning of the internal market, however, the actual classification of who is a worker in a Member State for the purposes of immigration and labour law is undertaken by national administrations, meaning that there can be inconsistencies between European and national law in terms of the individual's status.

The Court has traditionally interpreted the *Lawrie-Blum* criteria in a broad and generous manner which would cover many flexible workers within in scope. It has also extended the criteria beyond the freedom of movement for workers, where it was first developed, into EU social law. It has applied the *Lawrie-Blum* criteria in situations where EU social legislation is silent on the definition of worker, suggesting that these instruments use the uniform, EU-based definition. However, it has also applied it in situations where the legislation refers to national definitions of work (the subsidiary approach) by using an effectiveness argument to find that the *Lawrie-Blum* criteria acts as a *de facto* lower limit that Member States must adhere to even when defining workers for the purposes of this legislation. Such an approach is logical: to do otherwise would allow Member States to undermine EU legislation and undercut other Member States through the (mis-)classification of worker under national law.

Figure 8: Worker Citizen Status under EU Law



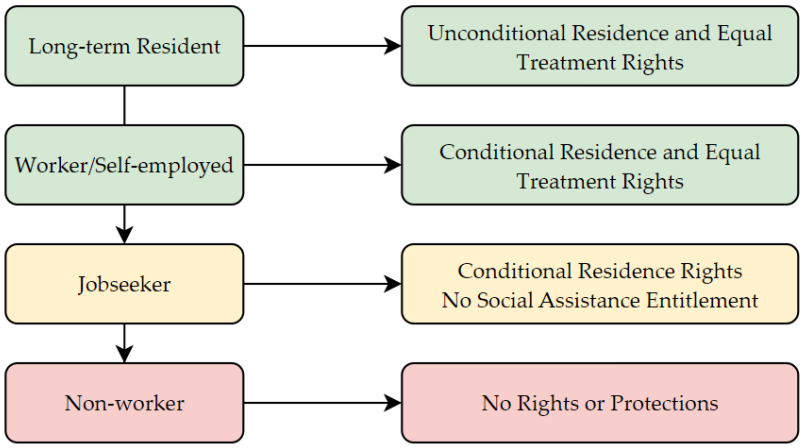
This means that for EU migrant workers engaged in precarious forms of employment, who are already on the intersection between free movement and social law, their legal classification as worker becomes doubly important, as not meeting the *Lawrie-Blum* criteria means losing access to protections under both areas of law. This all-or-nothing approach towards the classification of worker under EU law means that the *Lawrie-Blum* criteria serves a gateway function, providing the migrant worker access to the full range of free movement and social rights available under EU law. This creates a federalised form of 'market' or 'worker' citizenship, with horizontal free movement rights and vertical social rights being linked intrinsically to the *Lawrie-Blum* criteria. Whilst this provides a high level of protection for 'market insiders' who gain citizenship status, the flip side it that those not meeting the criteria are largely excluded from the law and the protections it provides.

There have traditionally been limited rights and protections available for those not meeting the *Lawrie-Blum* criteria. However, since the 1980s the Union has gradually extended free movement protections beyond workers to include economically inactive migrants, primarily through Union Citizenship and subsequently Directive 2004/38. This process has been controversial, given the sensitivity among many Member States over granting non-workers access to welfare systems, which due to the division between market and social power is still a competence largely retained by the Member States. This sensitivity has resulted in a shift in the level of protection available to non-workers, from the Court's initially generous case-law based on primary law, to a strict adherence to the text of Directive 2004/38 following its adoption.

The Court's approach towards interpreting Directive 2004/38 can be justified by the aims and increased legal value of the Directive, as well as the Court's theoretical method of judicial interpretation. However, this strict approach also means that there is still little residual protection available for those not meeting the *Lawrie-Blum* criteria. Despite notable additions to the level of protection on offer, such as the right to permanent residence, there is not a form of social citizenship that functions as a real safety net for individuals not qualifying as workers. Instead, the system is based on an idea of 'earned' citizenship, whereby the individual must adhere to the logic of the Directive, which is nominally based on time but in practice requires

sufficiently engaging with the market, in order to guarantee legal protection. This creates a stratified and conditional system that not only results in gaps in the law where precarious workers may fall into, but also reduces the situations where individual assessment may provide additional protection, as well as reducing their level of welfare entitlement.

Figure 9: The Hierarchical System of Rights under Directive 2004/38



As such, Directive 2004/38 has done little to de-commodify the system of protection for EU citizens. It continues the sharp division between the status and rights of workers, non-workers, self-employed persons, and jobseekers, with few rights or protections being made available to those not meeting the *Lawrie-Blum* criteria. In doing so, it has created a highly conditional system that may actually exclude more persons than was the case previously. It has the potential to encroach upon the rights available under Article 45 TFEU by creating new categories of persons with fewer protections that workers can fall into. As such, rather than fixing the gaps in the law, this seems to have created more and provided Member States with further possibilities to exclude certain workers from protection. The Directive also has strong links with neoliberal principles such as activation labour market policies and responsibility discourse, which suggest that participating in the market is seen as the only real way of integrating into society, thereby further limiting the protection available to precarious workers.

3 Part-time and On-demand Workers: Europe's Lumpenprecariat?

The final part of the thesis examined the situation of three types of precarious worker: (i) limited part-time and on-demand workers (including zero-hour contract) workers, (ii) short-term/temporary workers, and all those who face an intermittent working pattern, and (iii) workers engaged in false/bogus employment, or in a situation of precarious self-employment. Each study aimed to outline where and how such workers are excluded from legal protection, explain the consequences of this lack of protection for the worker and society more broadly, and finally make suggestions as to how the law could be interpreted to provide a higher level of protection whilst adhering to the Union's constitutional and political limitations.

The first case study examined the situation of workers engaged in part-time work with few hours and on-demand work without a fixed working schedule, such as platform and zero-hour contract workers. These workers can be excluded from legal protection due to failing to meet the genuine economic activity requirement within the *Lawrie-Blum* criteria. The Court has traditionally applied a broad approach to determining who is a worker under this condition, which is based on quantitative factors such as the number of hours worked. However, more recently the Court has also emphasised the importance of qualitative factors, such as the existence of an employment contract and employment-based rights. Despite the Court's increasingly holistic approach to defining genuine employment, some Member States use strict thresholds relating to working time and remuneration when making this assessment, that arguably undermines the Court's *acquis* which restricts the use of such thresholds and tends to ignore the more recent qualitative aspects emphasised by the Court.

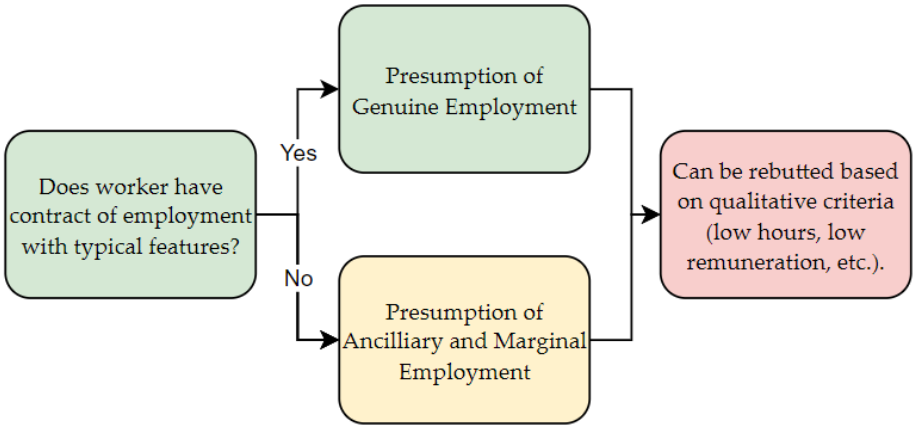
Not meeting the genuine economic activity requirement results in the worker being excluded from even the most basic free movement rights under Article 45 TFEU, such as conditions of employment and basic social security rights. Furthermore, the limited space for legal protection under Directive 2004/38 means that they are treated as jobseekers under the Directive and national implementations of it. This means that, despite being engaged in employment, the worker has limited residence and equal treatment rights. It also creates the strange situation where an individual must register with a jobcentre and comply with various requirements to maintain their lawful status in the host-Member State, despite already being engaged in economic activity. In addition, the link between the *Lawrie-Blum* criteria and EU social legislation means that those not meeting this condition are also excluded from EU social rights. In the case of on-demand workers, under the Part-time Work Directive even those that do meet the *Lawrie-Blum* criteria can be excluded from its protection due to an exception for casual workers, as well as the fact that on-demand workers without a full-time comparator cannot rely on it. This is problematic for precarious workers, as it potentially excludes all those working on an on-demand basis, most notably including platform and zero-hour contract workers, from important legal protections.

This creates a dichotomy in the law, whereby *Lawrie-Blum* workers obtain the full range of rights and benefits available under the law, whilst those not meeting the genuine economic activity requirement are excluded from virtually every protection available to workers. This legal dichotomy risks creating a class of *Lumpenprecariat* workers (the 21st century equivalent of the traditional *Lumpenproletariat*), who are who are engaged in economic activity but who have no legal protection under EU law. As well as creating problems for precarious workers themselves, this situation also undermines the concept of market solidarity (i.e., that those sharing in the productivity of the society should be included within its social institutions) upon which the internal market is based. It is furthermore likely to create downward pressures on wages and social standards that will affect the level of protection available to both Member State national and EU Migrant workers.

In light of this, it can be argued that precarious part-time workers require an inclusive system of legal protection that classifies as many people as possible engaged in economic activity as workers. Against this, however, is the constitutional limitation to European integration that the highest level of status and rights is only granted to those engaged in economic activity. As such, there must be some threshold as to when the individual can no longer be considered as

genuinely working in the host-state. Where this threshold is placed is still an open question, and furthermore is a political one that is difficult to answer in this legal study. That said, this thesis proposes a revised assessment of the genuine economic activity requirement that would provide a high level of protection to precarious part-time, adhere to the *acquis* of the Court of Justice, whilst maintaining the traditional limitations of the law. This would be to use a 'presumption of genuine activity', based primarily on qualitative factors (i.e., looking for the existence of an employment contract or employment-based rights). Assuming these elements exist, this would create a presumption of genuine economic activity, which could be rebutted using quantitative factors which prove that the extent the activity is performed renders it marginal. In order to safeguard against individuals being excluded from legal status due to not having formal aspects of employment, the test could be reversed: a marginal worker whose employment has failed the test due to insufficient qualitative factors could always prove that their employment is genuine through an assessment based on quantitative factors. This presumption of genuine activity can be linked to the system included within the Commission's recent Proposal for a Directive on Improving Working Conditions in Platform Work. That said, such a system would only work if adequately enforced, which seems unlikely given that the Commission has been reluctant to challenge Member State measures arguably undermining its current *acquis* on worker definition. It may be that new institutions, such as the European Labour Authority (ELA), could take the lead in preparing such challenges, however, this would require additional supervisory and enforcement powers to be granted to the ELA.

Figure 10: A Legal Presumption of Genuine Employment



4 *Intermittent Workers: Falling between the Gaps*

The second case study examined the situation of intermittent workers. A broad definition of intermittent work was used, which included part-time, on-demand, platform, agency workers, and even bogus self-employed persons, all of whom are likely to face periods of intermittent employment due to the insecurity associated with their employment. Due mainly to the division in competences at the European level, intermittent workers have few rights and protections during periods of economic inactivity, what is known as 'employment insecurity' (i.e., a lack of security whilst between jobs).

In particular, intermittent workers risk falling through the gaps created by the strict system under Directive 2004/38. Once their employment has ceased, the individual must comply with the criteria laid down in Article 7(3) in order to retain the status of worker, or failing that must meet the conditions required to obtain the status of jobseeker. The Court's strict interpretation of the Directive means that there are few opportunities to retain legal status outside of this system. Intermittent workers face an added problem as, even if they are able to obtain the status of jobseeker, they have a much-diminished status and fewer rights compared to workers. Notably, they can be excluded from social assistance benefits, including those intended to facilitate access to the labour market, thereby arguably undermining the Court's previous *acquis*. Periods of inactivity can also affect an individual's claim for permanent residence status, as even a short period of inactivity can result in their five-year residence timer being re-set, despite them potentially being engaged in employment and contributing to public funds through taxation, and therefore not representing any burden on the host-state, reasonable or otherwise. If this happens, the individual must reside legally for another five full years before being able to obtain this secure form of residence.

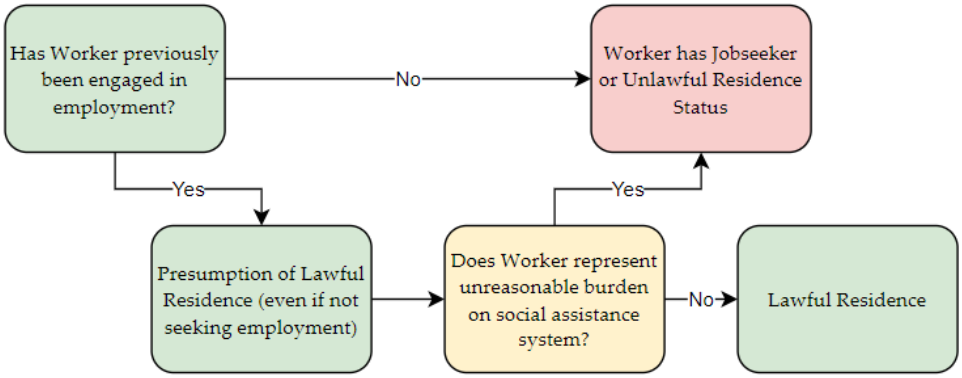
Given the sharp division between market and social competences, EU social law provides little protection to EU migrant workers during periods of economic inactivity. The Fixed-term Work Directive focuses on job security, i.e., protecting an individual whilst engaged on a temporary contract, rather than employment security. However, even this is done in an arguably ineffective and inconsistent manner. Furthermore, the Employment Agency Directive, given its limited scope and effect, does little to alleviate the problems faced by intermittent workers. While the Directive on Transparent and Predictable Working Conditions seems to provide significant additional protection to precarious workers, as it regulates the situation of temporary workers during probationary periods, it remains to be seen how this will be interpreted by the Court.

The lack of protection provided to intermittent workers means that, as well as contributing to downward pressures on social standards (like with precarious part-time workers), they are also at high risk of social exclusion. They risk being forgotten about by the law, as they lack residual bases of residence if not engaged in meaningful employment or actively looking for work. Moreover, the neoliberal influences permeating the Directive mean that its notion of social protection is linked to the idea of active labour market policies and the responsibility model of welfare, which provides the exclusionary system with a normative basis that defines social justice in terms of an individual's ability to participate in the labour market, rather than providing protection against the negative effects resulting from the labour market.

As such, there is arguably a need for greater employment security under EU law, in particular under Directive 2004/38. However, increased employment security needs to be balanced with the sensitivity around extending protections to economically inactive EU migrants, which is not feasible in view of the current constitutional limitations and political priorities of the Union and its Member States. This thesis suggests re-thinking the level of protection available to intermittent workers following a period of employment, that would ensure a level of security during periods of inactivity without undermining the Member States' power to ensure that intermittent workers do not place an unreasonable burden on their welfare systems. In this respect, the Court could re-consider the approach of Advocate General Wathelet in *Alimanovic*, who suggested that those previously engaged in employment should have a more protected

status than recently arrived jobseekers that have no connection with the host-state. Furthermore, for those who do not retain the status of worker or obtain the status of jobseeker following a period of employment, the Court could apply its decision in *Bajratari* by analogy, which would suggest that, assuming such individuals do not represent an unreasonable burden on the state, they can rely on a residual basis of residence under Article 7(2) Directive 2004/38. This presumption of sufficient resources could then be rebutted on the basis that the individual poses an unreasonable burden on the host-Member State.

Figure 11: Intermittent Workers' Presumption of Legal Residence



5 *Precarious Self-Employment: New Employment, Old Distinctions*

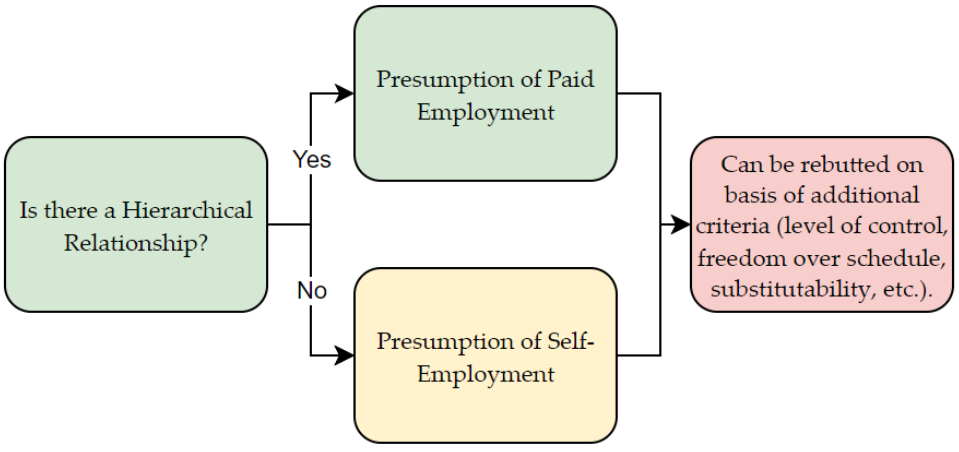
The third and final case study in this thesis is the situation of precarious self-employed persons. This was defined as false (also known as bogus) self-employment, i.e., the situation whereby the individual is classified as self-employed and as such faces the risks associated with employment (start-up/infrastructure costs, funding holiday leave, sick pay, etc.), despite them not accruing the benefits and freedoms associated with self-employment, such as setting one's own working schedule, sub-contracting out work, etc. The use of false self-employment has been propelled by technological developments such as the platform economy. Given the increasingly grey area between paid and self-employment, precarious self-employment was also defined as including those who, despite being genuinely classified as self-employed may face the same risks and challenges as those falsely engaged in self-employment. Whilst there are separate protections available to paid and self-employed workers due to their different working situations, it is argued that denying them certain social rights, for example the right to collectively agreed rates of pay, is increasingly difficult to justify in light of modern labour markets and employment norms.

EU law seeks to protect falsely self-employed workers by distinguishing between genuine and false self-employment on the basis of the subordination element of the *Lawrie-Blum* criteria. The Court will find that individuals who are classified as self-employed under national law must be considered as workers if their classification is merely "notional". The Court has a broad notion of subordination, based purely on the existence of a 'hierarchical relationship', which seems to go further than what is considered by national authorities, suggesting that there is a risk of divergent definitions at the national and European levels. That said, so far this has not posed a significant challenge for the Union, as most national systems have recognised

falsely self-employed persons (particularly in the case of platform workers) as paid workers. However, there is still a risk that such workers will be classified differently depending on what national or European court is determining the individual's status. This situation risks creating a non-uniform application of the law as individuals working for the same employer can be treated as workers or self-employed persons depending on the jurisdiction in question (as is the case with Deliveroo riders in the UK and Netherlands).

A solution could be to adopt a presumption of paid employment, whereby the existence of a 'hierarchical relationship' between the two parties creates a presumption that the individual is subordinate to the undertaking or platform. However, seeing as a 'hierarchical relationship' could encompass certain genuinely self-employed persons (for example, those working on a sub-contractor basis), this presumption could be rebutted if, following a case-by-case assessment, it could be shown that the individual has a certain level of freedom in terms of setting their own rates of pay, work schedule, etc. Interestingly, the Commission has recently included a system of legal presumption of paid employment in its Proposal for a Directive on Improving Working Conditions in Platform Work. This system ensures that those meeting certain technical requirements relating to the relationship between the platform and the worker (supervising the worker's performance, setting limits on remuneration, restricting the ability to build a client base, etc.) will be presumed to be paid workers, although this presumption can be rebutted by the worker or platform. Whilst the Directive must be welcomed as it will likely ensure greater uniformity across the internal market in terms of which platform workers are classified as paid workers, it remains to be seen whether this system will be included in its current form. Furthermore, there is a problem insofar as the Directive only applies to platform workers. However, as can be seen from the Court's case-law, many employment relationships on the borderline between paid- and self-employment are outside of platform work (for example neither of the two seminal cases, *Allonby* and *FNV*, concerned platform workers). Therefore, non-platform workers engaged on a false self-employed basis will likely not be able to rely on it.

Figure 12: Falsely Self-employed Presumption of Employment



So far, the discussion on self-employed persons is focused on the dichotomy between genuine and false self-employment. However, as the Court has stated, the grey area between paid and self-employment means that it is increasingly difficult to apply this simple binary distinction.

Genuinely self-employed persons face many of the same risks and challenges as falsely self-employed persons, and as such it is difficulty to continue denying them certain protections. In terms of their free movement rights, the Court has a long-standing tradition of ensuring a degree of equivalence between paid and self-employed workers, meaning that both have similar rights under both Articles 45 and 49 TFEU. Importantly, this includes the ability to retain the status of self-employed worker under Directive 2004/38, even where they have had to cease operations due to economic conditions. However, paid and self-employed workers do not have the same equivalence under EU social law. Whilst in most situations this can be justified on the basis that self-employed persons take on more responsibilities and accrue certain advantages that are not available to workers, and as such should not be entitled to the same employment-related benefits, in some situations even genuinely self-employed persons face a stark power imbalance between them and the employer/platform, meaning that it is increasingly difficult to deny them certain social rights. An example that was explored in this thesis was the right to collectively agreed rates of pay. In principle, self-employed persons are not entitled to collectively agreed rates of pay, as this violates both Articles 101(1) TFEU as an agreement between undertakings, as well as Article 15(2)(g) of the Services Directive which prohibits the setting of minimum fees. It has been suggested that the Court may be able to provide such workers with this right within the current legal framework, insofar as EU competition law could be interpreted in such a way that would ow space for certain self-employed workers to rely on this specific right through an effects-based assessment of the restriction caused by the collective agreement under Article 101(1) TFEU. This would allow precarious self-employed persons to be exempt from falling foul of EU competition law by setting minimum fees and enforcing collectively agreed rates of pay, whilst maintaining the prohibition on collusive behaviour that negatively affects competition in the internal market. This is similar to the approach used by the Court in cases concerning Article 56 TFEU, where it has held that the setting of minimum fees can actually be beneficial for consumers as it stops undertakings from reducing the quality of service provided through intense competition. This also suggests that such agreements could be justified under Article 15(3) of the Services Directive on the basis that removing the agreement would risk a deterioration in the quality of the service provision, assuming it meets the other requirements of being non-discriminatory and proportionate.

6 *Final Comments: Time to protect Europe's Most Vulnerable Workers?*

"A really good pair of leather boots cost $50. But an affordable pair of boots, which were sort of OK for a season or two and then leaked like hell cost about $10. But good boots lasted for years and years. A man who could afford $50 had a pair of boots that'd still be keeping his feet dry in 10 years' time, while the poor man who could only afford cheap boots would have spent a hundred dollars on boots in the same time and would still have wet feet" [151]

- Sam Vines' Boots Theory of Economic Unfairness

Sam Vines, Commander of the Ankh-Morpork City Watch in Terry Pratchett's Discworld series, questioned why the rich always seem to get richer, while the poor stay poor. The short answer is that those with the most resources and security have best opportunities in life, whilst

[151] T. Pratchett, *Men at Arms* (2014), Orion Publishing: London.

those living hand-to-mouth are easily exploited due to their economic situation. Those who have the ability to pay upfront will ultimately pay less those who will have to extend payments or borrow to purchase at all. The theory can equally be applied to the legal protection provided under EU law. Those in traditional, secure forms of employment are able to make use of the rights and protections granted under EU law, however, they are unlikely to ever need to rely on such support given their secure economic situation. Even if they do require state support, this is likely to be provided in a comprehensive and timely manner. Opposed to this, those with the most insecure and exploited working situations are likely to face additional problems relating to their employment situation. They may not be entitled to state support at all, given the limited nature of their employment, or may find that the support they receive is limited, due to them not being entitled to jobseeker benefits during periods of inactivity, or their support is limited due them being recognised as self-employed, rather than a paid worker. They are forced to circumvent a complex, arbitrary, and at times cruel system of legal status and rights, where their level of protection is affected by the precariousness of their working situation. In short, their legal status and rights are precarious, and can be lost simply because they are in a precarious working situation.

The problem is that the Union's constitutional limitations, concretely the still ongoing division between market and social rights, means that providing a high level of protection for all precarious workers, even during periods of economic inactivity, is unfeasible. Furthermore, the political priorities of the Union, which is currently fixated on 'flexibility' and 'competitiveness' means that same level of unfairness is seen as a by-product of ensuring that there is competition between workers. *The European Precariat* has made concrete suggestions as to how precarious workers can be better protected under EU law, within the constitutional and political confines of European integration. These include using legal tests that provide basic assumptions that (i) workers with employment contracts are treated as workers, (ii) those not engaged in employment maintain their residence status if not becoming a burden on the host-state, and (iii) ensuring that those on the borderline between paid- and self-employment have adequate social rights where appropriate. The common thread between these suggestions is that those in more marginal and insecure forms of employment should be given a bit more leeway when trying to prove their legal status and rights: instead of presuming that such persons are a drain to society, we should recognise their contribution and offer them a basic level of protection. In essence, there could, and should, be a little bit more heart in the system. That said, whilst the suggestions made in this thesis would significantly improve the situation of precarious workers, the constitutional and political limitations of the legal system mean that certain precarious workers are inevitably going to lose out on protection, particularly during periods of economic inactivity. However, given the barriers to improve social integration at the European level, such questions are political, rather than legal, and significantly expanding social protection would seem to be unlikely in the foreseeable future. That said, as labour markets are likely to continue the shift towards competitiveness and flexible working arrangements, the problem of precarious employment is likely to become more prominent in the future, particularly for EU migrant workers who are already overrepresented in such employment. As such, the level of protection provided to workers is likely to become an increasingly important legal and political issue in the future.

Het Europese Precariaat: Precaire Werknemers en hun Bescherming in de EU
Samenvatting (Dutch Summary)

Aan het begin van de Europese integratie was de norm dat werknemers werden ingezet via de 'standaard arbeidsverhouding' (SAV): vaste contracten, met voltijdse werktijden en arbeidsbescherming die, hoewel in bepaalde opzichten ontoereikend, een zekere stabiliteit en werkzekerheid poogden te bieden. De afgelopen decennia is deze 'standaardisering' van werkgelegenheid echter afgebroken. Naarmate de Europese economieën zich ontwikkelden en er nieuwe uitdagingen ontstonden, is de oude SAV vervangen door een 'neoliberaal' model dat, door middel van meer flexibiliteit in de werkgelegenheid, prioriteit geeft aan de ontwikkeling van concurrerende arbeidsmarkten. De SAV is vervangen door alternatieve vormen van werk: tijdelijk banen, part-time banen en andere vormen van flexibele dienstverbanden waarbij de voorheen verzekerde werkzekerheid ontbreekt. De meer extreme voorbeelden plaatsen de werknemer in een onzekere en uitbuitende situatie, waardoor hij of zij weinig zekerheid of macht heeft over zijn of haar werksituatie. Dit wordt ook wel 'precair werk' genoemd. Voorbeelden van precair werk zijn platformwerk, nul-uren en oproepcontracten, het herhaald gebruik van tijdelijke/kortlopende contracten en schijnzelfstandig ondernemerschap.

Met name arbeidsmigranten hebben vaak te maken met complexe nationale migratie- en sociale zekerheidsvoorschriften die verband houden met hun arbeidsstatus. Hierdoor bevinden ze zich op het snijvlak van twee rechtsgebieden en lopen ze het risico om van een of beide rechtsgebieden te worden uitgesloten vanwege hun onzekere arbeidssituatie. Voor arbeidsmigranten uit de EU die een precair dienstverband hebben en bescherming genieten op grond van de EU-wetgeving inzake vrij verkeer en sociaal recht, wordt het beschermingsniveau dat het rechtssysteem van de Europese Unie kan bieden (en ook biedt) beperkt door niet alleen economische als politieke ideeën over bescherming, maar ook door haar eigen grondwettelijke grenzen en de beperkte bevoegdheden die zij heeft op het gebied van het sociaal recht.

Het Europese Precariaat stelt zich de vraag welk beschermingsniveau beschikbaar is voor arbeidsmigranten uit de EU die zich bezighouden met onzekere vormen van 'atypisch' werk. Dit proefschrift definieert eerst de 'juridische ruimte' die beschikbaar is voor de bescherming van arbeidsmigranten in de EU, waarbij wordt beoordeeld hoe economische en politieke veranderingen hebben geleid tot de constitutionele en politieke beperkingen van de Europese integratie. Vervolgens wordt het wettelijk kader voor werknemers onderzocht en wordt uitgelegd hoe het beschermingssysteem is gebaseerd op een reeks juridische classificaties die hiaten in de wet dreigen te creëren en die bepaalde personen kunnen uitsluiten omdat ze een precaire baan hebben. Ten slotte onderzoekt dit proefschrift drie specifieke casussen, waarbij wordt gekeken naar (i) deeltijdwerkers, oproepkrachten en andere werknemers in beperkte werkomstandigheden, (ii) tijdelijke werknemers, werknemers met kortlopende dienstverbanden en werknemers die te maken hebben met een onregelmatig werkrooster, en (iii) werknemers die als zelfstandige werkzaam zijn ondanks het mogelijke bestaan van een werkgever-werknemer relatie. In elke casus zal het proefschrift uitleggen hoe precaire werknemers wettelijke bescherming verliezen, welke rechten en bescherming specifiek verloren gaan en de bredere gevolgen van dit verlies van bescherming. *Het Europese Precariaat* sluit af met het doen van concrete voorstellen voor de wijze waarop arbeidsmigranten uit de

EU, die onzekere vormen van niet-standaardwerk verrichten, beter kunnen worden beschermd door de instrumenten die beschikbaar zijn onder EU-recht te benutten, daarbij rekening houdend met de economische, politieke en grondwettelijke beperkingen van het rechtsstelsel.

Summary

At the start of the process of European integration, the norm was for workers to be engaged through the 'standard employment relationship' (SER): fixed, permanent contracts, with full time hours and employment protections that, while lacking in certain respects, tended to ensure a level of stability and security in work. However, over recent decades this 'standardisation' of employment has broken down. As European economies developed, and new challenges arose, the old SER was replaced by a 'neoliberal' model that prioritises the development of competitive labour markets through increased flexibility in employment. The SER has been replaced by 'non-standard' employment: temporary, part time, and other kinds of flexible employment relations without the previous assured security in work. The more extreme examples of non-standard work place the worker in an insecure and exploitative situation where they have little security in work or power over their working situation: i.e., 'precarious employment'. Examples include platform work, zero-hour and on-demand contracts, the repeated use of temporary/short-term contracts, and bogus/false self-employment.

Migrant workers in particular must often navigate complex national migration and social security rules which are linked to their employment status. This places them on the intersection between two areas of law and risks them being excluded from one or both due to their precarious employment situation. For EU migrant workers engaged in precarious employment, who derive protection under EU free movement and social law, the level of protection that the European Union legal system can (and does) provide is limited by both economic and political ideas of protection, as well as its own constitutional boundaries and the limited competences it holds in the area of social law.

The European Precariat asks what level of protection is available to EU migrant workers engaged in precarious forms of non-standard employment. The thesis first defines the 'legal space' available for the protection of EU migrant workers, assessing how economic and political changes have led to the constitutional and political limitations of European integration. It then examines the legal framework applicable to workers and explains how the system of protection is based on a series of legal classifications that risk creating gaps in the law and excluding certain individuals due to them being engaged in precarious employment. Finally, the thesis investigates three specific case studies: (i) part-time, on-demand and other workers in limited working situations; (ii) temporary, short-term and workers facing an intermittent working pattern; and (iii) workers engaged on self-employment contracts despite the possible existence of an employer-employee relationship. In each study, the thesis will explain how precarious workers lose legal protection, what rights and protections are lost, and the wider consequences of this loss of protection. *The European Precariat* concludes by making concrete proposals for how EU migrant workers engaged in precarious forms of non-standard work can be better protected by utilising the tools available under EU law, and while adhering to the economic, political, and constitutional limitations of the legal system.

Bibliography

Primary Legislation

Treaty on the European Union (Consolidated Version 2016) *OJ C 202 7.6.2016*
Treaty on the Functioning of the European Union (Consolidated Version 2016) *OJ C 202 7.6.2016*
The Charter of Fundamental Rights of the European Union (2012 consolidated version) *OJ C 202 7.6.2016*
Treaty on European Union (Consolidated Version) *OJ C 325/5 24.12.2002*
Single European Act (1987) *OJ L 169 29.6.1987*
Treaty Establishing the European Community (Consolidated Version) *25.03.1957*
Treaty establishing the European Coal and Steel Community (1951).

Regulations

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community *OJ L 257, 19.10.1968*
Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community *OJ L 149, 5.7.1971*
Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national *OJ L 50, 25.2.2003*
Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) *OJ L 166, 30.4.2004,*
Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) *OJ L 284, 30.10.2009*
Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance *OJ L 141, 27.5.2011*
Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland).

Directives

Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health *OJ 56, 4.4.1964.*
Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257, 19.10.1968

Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health *OJ L 121, 26.5.1972*

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services *OJ L 172, 28.6.1973*

Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity *OJ L 14, 20.1.1975*

Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive No 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity *OJ L 14, 20.1.1975*

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women *OJ L 45, 19.2.1975*

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions *OJ L 39, 14.2.1976*

Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer *OJ L 283, 28.10.1980*

Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes *OJ L 225 12.8.1986*

Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work *OJ L 183, 29.6.1989*

Directive 90/364/EEC of 28 June 1990 on the right of residence *OJ L 180, 13.7.1990*

Directive 90/365/EEC of the Council on the right of residence for employees and self-employed persons who have ceased their occupational activity OJ L 180/28

Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students *OJ L 180 13.7.1990*

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) *OJ L 348, 28.11.1992,*

Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students *OJ L 317, 18.12.1993*

Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time *OJ L 307, 13.12.1993*

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services *OJ L 18, 21.1.1997*
Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work *OJ L 14, 20.1.1998,*
Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP *OJ L 175, 10.7.1999*
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *OJ L 303, 2.12.2000*
Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses *OJ L 82, 22.3.2001*
Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation *OJ L 80, 23.3.2002*
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification *OJ L 251, 3.10.2003*
Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time *OJ L 299, 18.11.2003*
Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents *OJ L 16, 23.1.2004*
Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC *OJ L 158, 30.4.2004,*
Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) *OJ L 204, 26.7.2006*
Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work *OJ L 327, 5.12.2008*
Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union PE/43/2019/REV/1 *OJ L 186, 11.7.2019.*

Decisions

Council Decision 2002/177 on guidelines for Member States' employment policies for the year 2002 [2002] OJ L 60/60.
Decision 2016/334 on establishing a European Platform to enhance cooperation in tackling undeclared work; European Platform Undeclared Work, Work Programme 2017-18 (Update 19-20 October 2017)

Soft Law and Policy Documents

Interinstitutional Proclamation on the European Pillar of Social Rights (2017/C 428/09),
European Commission (White Paper), 'Completing the Internal Market' (1985) COM (85) 310 final
European Commission, 'Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic social Rights for Workers' (1989) COM(89) 568 final.
European Commission, 'Growth, competitiveness, employment: The challenges and ways forward into the 21st century' (1993) Luxembourg: Office for Official Publications of the European Communities.
Commission Communication, Proposal for Guidelines for Member States Employment Policies (1998) COM (97)497 final
European Commission, 'Explanatory memorandum of proposal' (COM(2002) 149 final
Communication from the European Commission on the Social Agenda (2005) COM/2005/0033 final
European Commission Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century (2006) COM 708 final
European Commission, Communication: Towards Common Principles of Flexicurity: More and better jobs through flexibility and security' (27th June 2007) COM (2007) 359 final
European Commission, 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social protection and Social Inclusion' COM (2008) 418 final, p. 2.
Commission Communication on guidance for better transposition and application of Directive 2004/38/EC, COM (2009) 313 final
European Commission, 'Report on the Application of Directive 2008/104/EC on Temporary Agency Work' COM(2014) 176 final.
European Commission, Establishing a European Pillar of Social Rights COM (2017) 250
European Commission, Commission Recommendation on the European Pillar of Social Rights COM (2017) 20600;
European Commission Communication, 'EU Law: Better results through better application' (2017/C 18/02)
Proposal for a Directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU COM/2017/0253 final - 2017/085 (COD)
Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Annual Growth Survey 2018, 22 December 2017.
European Commission Staff Working Document, 'Monitoring the implementation of the European Pillar of Social Rights' (2018) SWD [2018] 67 final
European Commission, 'Employment and Social Developments in Europe: Annual Review 2018' (2018) Publications Office European Union: Luxembourg.
European Commission, Proposal for a Council Recommendation on access to Social Protection for Workers and the self-employed COM (2018) 132 final
European Commission, Proposal for a Directive on transparent and predictable working conditions in the European Union (Analysis of the final compromise text with a view to agreement) (12th February 2019) 2017/0355(COD).
European Commission Staff Working Document, 'Country Report The Netherlands 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019) SWD (2019) 1018 final;

European Commission Staff Working Document, 'Country Report The United Kingdom 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019) SWD (2019) 1027 final.
European Commission Proposal for a Directive on adequate minimum wages in the European Union COM(2020) 682 final
Council Recommendation 2002/549 on the broad guidelines of the economic policies of the Member States and the Community [2002] OJ L 182/1.
European Council, Draft declaration of the European Commission on issues related to the abuse of the right of free movement of persons (2 February 2016) (OR.en) EUCO 8/16
European Council (Art. 50) guidelines for Brexit negotiations (220/17) 29th April 2017
Council Recommendation of 8th November 2019 on access to social protection for workers and the self-employed (2019/C 387/01)

International Policy Documents

High Authority, Report of the Situation of the community laid before Extraordinary Session of the common Assembly, November 1954
Article 1(a), ILO Declaration of Philadelphia, Declaration concerning the aims and purposes of the International Labour Organisation.
Spaak, P. H., et al, 'Brussels Report on the General Common Market' ('The Spaak Report') (1956) Information Service of the High Authority of the European Coal and Steel Community, Brussels.

Case Law of the Court of Justice of the European Union

Case C-75/63 *Unger* ECLI:EU:C:1964:19, p. 184-185.
Case 1/72 *Frilli v Belgium* ECLI:EU:C:1972:56
Case 76/72 *Michel S* ECLI:EU:C:1973:46
Case 152/73 *Sotgiu* ECLI:EU:C:1974:13
Case 24/75 *Teresa & Silvana Petroni* ECLI:EU:C:1975:129
Case 32/75 *Cristini* ECLI:EU:C:1975:120
Case 43/75 *Defrenne v Sabenna (No 2)* ECLI:EU:C:1976:56
Case C-48/75 *Royer* ECLI:EU:C:1976:57
Case C-5/77 *Tedeschi* ECLI:EU:C:1977:144
Case 149/77 *Defrenne v Sabenna (No 3)* ECLI:EU:C:1978:130
Case 207/78 *Criminal proceedings against Gilbert Even* ECLI:EU:C:1979:144
Case 110/79 *Coonan* ECLI:EU:C:1980:112
Case 96/80 *Jenkins* ECLI:EU:C:1981:80
Case 53/81 *Levin* ECLI:EU:C:1982:105.
Case 275/81 *Koks* ECLI:EU:C:1982:316
Case C-238/82 *Duphar & Others* ECLI:EU:C:1984:45
Case C-286/82 *Luisi and Carbone* ECLI:EU:C:1984:35
Case C-143/83 *Commission v Denmark* ECLI:EU:C:1985:34
Case 261/83 *Castelli* ECLI:EU:C:1984:280
Case C-105/84 *Danmols Inventar* ECLI:EU:C:1985:331
Case C-137/84 *Ministère Public v Mutsch* ECLI:EU:C:1985:335

Case C-170/84 *Bilka* ECLI:EU:C:1986:204
Case 302/84 *Ten Holder* ECLI:EU:C:1986:242
Case 59/85 *Reed* ECLI:EU:C:1986:157
Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284.
Case C-139/85 *Kempf* ECLI:EU:C:1986:223
Case C-316/85 *Lebon* ECLI:EU:C:1987:302
Case C-39/86 *Lair* ECLI:EU:C:1988:322
Case 197/86 *Brown* ECLI:EU:C:1988:323
Case 186/87 *Steymann* EU:C:1988:475.
Case 196/87 *Steymann* ECLI:EU:C:1988:475
Case C-186/87 *Cowan* ECLI:EU:C:1989:47
Case 344/87 *Bettray* ECLI:EU:C:1989:226,
Case C-102/88 *Ruzius-Wilbrink* ECLI:EU:C:1989:639
Case 109/88 *Danfoss* ECLI:EU:C:1989:383
Case 171/88 *Rinner-Kühn* ECLI:EU:C:1989:328
Case C-2/89 *Kits van Heijningen* ECLI:EU:C:1990:183
Case C-292/89 *Antonissen* ECLI:EU:C:1991:80
Case C-308/89 *Di Leo* ECLI:EU:C:1990:400
Case C-357/89 *Raulin* ECLI:EU:C:1992:87
Case C-363/89 *Roux v Belgian State* ECLI:EU:C:1991:41
Case C-3/90 *Bernini* ECLI:EU:C:1992:89
Case C-10/90 *Masgio* ECLI:EU:C:1991:107
Case C-370/90 *Singh* ECLI:EU:C:1992:296
Joined Cases C-159/91 & C-160/91 *Poucet & Pistre* ECLI:EU:C:1993:63
Case C-127/92 *Enderby* ECLI REF
Case C-415/93 *Bosman* ECLI:EU:C:1995:463
Case C-444/93 *Megner and Scheffel* ECLI:EU:C:1995:442
Case C-13/94 *P v S & Cornwall County Council* ECLI:EU:C:1996:170
Case C-84/94 *United Kingdom v Council* ECLI:EU:C:1996:431
Case C-104/94 *Asscher* ECLI:EU:C:1996:251
Case C-193/94 *Skanavi and Chryssanthakopoulos* ECLI:EU:C:1996:70
Case C-237/94 *O'Flynn* ECLI:EU:C:1996:206
Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* ECLI:EU:C:1996:379
Case C-18/95 *Terhoeve* ECLI:EU:C:1999:22
Case C-70/95 *Sodemare* ECLI:EU:C:1997:301
Case C-77/95 *Züchner* ECLI:EU:C:1996:425
Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* ECLI:EU:C:2000:72
Case C-67/96 *Albany* ECLI:EU:C:1999:430
Case C-85/96 *Martinez Sala* ECLI:EU:C:1998:217
Case C-187/96 *Commission v Greece* ECLI:EU:C:1998:101
Case C-274/96 *Bickel & Franz* ECLI:EU:C:1998:563.
Case C 275/96 *Kuusijärvi* ECLI:EU:C:1998:279
Case C-1/97 *Birden* ECLI:EU:C:1998:568
Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens* EU:C:1999:434
Case C-219/97 *Drijvende Bokken* EU:C:1999:437
Case C-337/97 *Meussen* ECLI:EU:C:1999:284
Case C-378/97 *Wijnsenbeek* ECLI:EU:C:1999:439

Joined Cases C 180/98 to C 184/98 *Pavlov and Others* EU:C:2000:428
Case C-190/98 *Graf* ECLI:EU:C:2000:49
Case C-222/98 *Hendrik van der Woude* EU:C:2000:475
Case C-281/98 *Angonese* ECLI:EU:C:2000:296
Case C-303/98 *Simap* ECLI:EU:C:2000:528
Case C-407/98 *Abrahamsson* ECLI:EU:C:2000:367
Case C-424/98 *Commission v Italy* ECLI:EU:C:2006:192
Case C-43/99 *Leclere* ECLI:EU:C:2001:303
Case T-112/99 *Metropole* ECLI:EU:T:2001:215
Case C-157/99 *Peerbooms & Geraets-Smits* ECLI:EU:C:2001:404
Case C-173/99 *BECTU* ECLI:EU:C:2001:356
Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458
Case C-268/99 *Jany and Others* ECLI:EU:C:2001:616
Case C-309/99 *Wouters* ECLI:EU:C:2002:98
Case C-381/99 *Susanna Brunnhofer* ECLI:EU:C:2001:358
Case C-413/99 *Baumbast* ECLI:EU:C:2002:493
Case C-459/99 *MRAX* ECLI:EU:C:2002:461
Case C-60/00 *Carpenter* ECLI:EU:C:2002:434
Case C-188/00 *Kurz* ECLI:EU:C:2002:694
Case C-326/00 *Ioannidis* ECLI:EU:C:2003:101
Case C-256/01 *Allonby* ECLI:EU:C:2004:18
Joined Cases C-397/01 to C-403/01 *Pfeiffer and others* ECLI:EU:C:2004:584
Case C-138/02 *Collins* ECLI:EU:C:2004:172
Case C-151/02 *Jaeger* ECLI:EU:C:2003:437
Case C-200/02 *Zhu & Chen* ECLI:EU:C:2004:639
Case C 313/02 *Wippel* ECLI:EU:C:2004:607
Case T-313/02 *Meca-Medina* ECLI:EU:T:2004:282
Case C-456/02 *Trojani* ECLI:EU:C:2004:488,
Case C-209/03 *Bidar* ECLI:EU:C:2005:169
Case C-215/03 *Oulane* ECLI:EU:C:2005:95
Joined Cases T 217/03 and T 245/03 *FNCBV* ECLI:EU:T:2006:391
Case C-227/03 *van Pommeren-Bourgondiën* ECLI:EU:C:2005:431
Case C-408/03 *Commission v Belgium* [2006] ECLI:EU:C:2006:192
Case C-543/03 *Dodl and Oberhollenzer* ECLI:EU:C:2005:364
Case C-551/03 P *General Motors v Commission* ECLI:EU:C:2006:229
Joined Cases C-94/04 and C-202/04 *Cipolla and others* ECLI:EU:C:2006:758
Case C-109/04 *Kranemann* ECLI:EU:C:2005:187, para. 17
Joined Cases C-131/04 & C-257/04 *Robinson-Steele & Michael Clarke* ECLI:EU:C:2006:177
Case C-144/04 *Mangold* ECLI:EU:C:2005:709
Joined Cases C-151/04 and C-152/04 *Durré* ECLI:EU:C:2005:775
See Case C-212/04 *Adeneler and Others* ECLI:EU:C:2006:443
Case C-258/04 *Ioannidis* ECLI:EU:C:2005:559
Case C-519/04 *Meca-Medina* ECLI:EU:C:2006:492
Case C-10/05 *Mattern and Cikotic* ECLI:EU:C:2006:220,
Case C-40/05 *Lyyski* ECLI:EU:C:2007:10
Case C-212/05 *Hartmann* ECLI:EU:C:2007:437
Case C 213/05 *Geven* ECLI:EU:C:2007:438

C 217/05 *Confederación Española de Empresarios de Estaciones de Servicio* EU:C:2006:784
C 287/05 *Hendrix* EU:C:2007:494
Case C 291/05 *Eind* ECLI:EU:C:2007:771
Case C-116/06 *Kiiski* ECLI:EU:C:2007:536
Case C 116/06 *Sari Kiiski* ECLI:EU:C:2007:536
Case C 268/06 *Impact* ECLI:EU:C:2008:223
Case C-350/06 *Schultz-Hoff* ECLI:EU:C:2009:18
Case C-398/06 *Commission v Netherlands* ECLI:EU:C:2008:214
Case C-94/07 *Ranccanelli* ECLI:EU:C:2008:425
Case C 158/07 *Förster* ECLI:EU:C:2008:630
Case C 169/07 *Hartlauer*, EU:C:2009:141
Case C 208/07 *von Chamier Glisczinski* ECLI:EU:C:2009:455
Joined Cases C 378/07 to C 380/07 *Angelidaki and others* ECLI:EU:C:2009:250
Case C 555/07 *Kücükdeveci* ECLI:EU:C:2010:21
Joined Cases C 22/08 and C 23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:344
Case T-111/08 *MasterCard* ECLI:EU:T:2012:260
Case C-147/08 *Römer* ECLI:EU:C:2011:286
Case C-480/08 *Teixeira* ECLI:EU:C:2010:83
Case C 486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* ECLI:EU:C:2010:215
Case C-565/08 *Commission v Italy* ECLI:EU:C:2011:188
Case C 578/08 *Chakroun* ECLI:EU:C:2010:117
Case C-14/09 *Genc* ECLI:EU:C:2010:57
Case C-162/09 *Lassal* ECLI:EU:C:2010:592
Case C 232/09 *Dita Danosa* ECLI:EU:C:2010:674
Case C 236/09 *Test-Achats* ECLI:EU:C:2011:100
Case C-325/09 *Dias* ECLI:EU:C:2011:498
Case C-391/09 *Runevic-Verdyn & Wardyn* ECLI:EU:C:2011:291
Case C 428/09 *Union Syndicale Solidaires Isère* ECLI:EU:C:2010:612
Case C 437/09 *AG2R Prévoyance* EU:C:2011:112
Case C-519/09 *May* ECLI:EU:C:2011:221
Case C-155/10 *Williams & others* ECLI:EU:C:2011:588
Case C-214/10 *KHS AG* ECLI:EU:C:2011:761
Case C 282/10 *Maribel Dominguez* ECLI:EU:C:2012:33
Case C 337/10 *Neidel* EU:C:2012:263
Case C 347/10 *Salemink* ECLI:EU:C:2012:17
Case C 393/10 *O'Brien* ECLI:EU:C:2012:110
Joined Cases C 411/10 and C 493/10 *N.S.* ECLI:EU:C:2011:865
Case C-424/10 and C-425/10 *Ziółkowski & Szeja* ECLI:EU:C:2011:866
Case C 586/10 *Bianca Kücük* ECLI:EU:C:2012:39
Case C-78/11 *ANGED* ECLI:EU:C:2012:372
Case C-83/11 *Rahman* EU:C:2012:519
Case C 106/11 *Bakker* ECLI:EU:C:2012:328
Joined Cases C 229/11 and C 230/11 Heiman & Toltschin ECLI:EU:C:2012:693
Case C 251/11 *Huet* ECLI:EU:C:2012:133
Case C-379/11 *Caves Krier Frères Sàrl* ECLI:EU:C:2012:798
Case C 529/11 *Alarape & Tijani* ECLI:EU:C:2013:290.
Case C 619/11 *Dumont de Chassart* ECLI:EU:C:2013:92

Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* EU:C:2013:127
Case C 20/12 *Giersch and Others* EU:C:2013:411
Case C 46/12 *L.N.* ECLI:EU:C:2013:97
Case C-136/12 *Consiglio nazionale dei geologi* ECLI:EU:C:2013:489
Case C-140/12 *Brey* ECLI:EU:C:2013:565
Case C 176/12 *Association de médiation sociale* ECLI:EU:C:2014:2
Case C-194/12 *Maestre* Garcia ECLI:EU:C:2013:102
Case C 290/12 *Della Rocca* ECLI:EU:C:2013:235
Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13
Case C 415/12 *Bianca Brandes* ECLI:EU:C:2013:398
Case C 456/12 *O & B* ECLI:EU:C:2014:135
Case C 507/12 *Jessy Saint Prix* ECLI:EU:C:2014:2007
Case C 539/12 *Lock* ECLI:EU:C:2014:351
Case C-573/12 *Alands* ECLI:EU:C: 2014:2037
Joined Cases C 22/13, C 61/13 to C 63/13 & C 418/13 *Raffaella Mascolo and others* ECLI:EU:C:2014:2401
Case C-38/13 *Małgorzata Nierodzik* ECLI:EU:C:2014:152
Case C 190/13 *Samohano* ECLI:EU:C:2014:146
Case C-270/13 *Iraklis Haralambidis* ECLI:EU:C:2014:2185
Case C-316/13 *Fenoll* ECLI:EU:C:2015:200.
Case C-333/13 *Dano* ECLI:EU:C:2014:2358
Case C-413/13 *FNV Kunsten Informatie* ECLI:EU:C:2014:2411
Case C 533/13 *AKT* ECLI:EU:C:2015:173
Case C 593/13 *Rina Services and Others* EU:C:2015:399
Case C-47/14 *Holterman & Others* ECLI:EU:C:2020:574
Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597
Case C 168/14 *Grupo Itevelesa and Others* EU:C:2015:685
Case C 219/14 *Kathleen Greenfield* ECLI:EU:C:2015:745
Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114
Case C-308/14 *Commission v. United Kingdom* ECLI:EU:C:2016:436
Case C 432/14 *O v Bio Philippe Auguste* ECLI:EU:C:2015:643
Case C-596/14 *de Diego Porras* EU:C:2016:683
Case C 16/15 *María Elena Pérez López* ECLI:EU:C:2016:679
Case C-178/15 *Sobczyszyn* ECLI:EU:C:2016:502
Case C-216/15 *Betriebsrat der Ruhrlandklinik* ECLI:EU:C:2016:883
Case C-341/15 *Maschek* ECLI:EU:C:2016:576
Joined cases C 360/15 and C 31/16 *X and Visser* EU:C:2018:44
Joined Cases C 401/15 to C 403/15 *Depesme and Others* EU:C:2016:955
Case C-434/15 *Uber Systems Spain* ECLI:EU:C:2017:981
Case C 634/15 *Sokoll-Seebacher and Naderhirn* EU:C:2016:510
Case C 74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe* ECLI:EU:C:2017
Case C 143/16 *Abercrombie & Fitch Italia v Antonino Bordonaro* ECLI:EU:C:2017:566
Case C 320/16 *Uber France SAS* ECLI:EU:C:2018:221
Case C 414/16 *Vera Egenberger* ECLI:EU:C:2018:257
Joined Cases C-427/16 and C-428/16 *CHEZ Elektro Bulgaria* AD ECLI:EU:C:2017:890
Case C-442/16 *Gusa* ECLI:EU:C:2017:1004

Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871
Case C 618/16 *Prefeta* ECLI:EU:C:2018:719
Case C-677/16 *Mantero Mateos* EU:C:2018:393
Case C 684/16 *Tetsuji Shimizu* ECLI:EU:C:2018:874
Case C 68/17 *IR v JQ* ECLI:EU:C:2018:696
Case C 147/17 *Sindicatul Familia Constanţa* ECLI:EU:C:2018:926
Case C 193/17 *Markus Achatzi* ECLI:EU:C:2019:43
Case C-209/17 *Beef Industry* ECLI:EU:C:2008:643
Case C-246/17 *Diallo* ECLI:EU:C:2018:499
Case C 377/17 *Commission v Germany* ECLI:EU:C:2019:562
Case C 385/17 *Hein* EU:C:2018:1018
Joined Cases C 473/17 and C 546/17 *Repsol Butano & DISA Gas* ECLI:EU:C:2019:308
Case C-483/17 *Tarola* ECLI:EU:C:2019:309
Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981
Case C 619/17 *de Diego Porras* EU:C:2018:936
Case C 55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:402
Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:809
Joined Cases C-103/18 & C-429/18 *Sánchez Ruiz and Fernández Álvarez and Others* ECLI:EU:C:2020:219
Case C-177/18 *Baldonedo Martin* ECLI:EU:C:2020:26
Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:794
Case C-228/18 *Budapest Bank* ECLI: ECLI:EU:C:2020:265
Case C-307/18 *Generics* ECLI:EU:C:2020:52,
Case C 447/18 *UB* ECLI:EU:C:2019:1098
Case C-544/18 *Dakneviciute* ECLI:EU:C:2019:761
Case C-610/18 *AMFB & Others* ECLI:EU:C:2020:565
Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 101
Case C-624/19 *K and others v Tesco Stores Ltd* ECLI:EU:C:2021:429
Case C-692/19 *Yodel* ECLI:EU:C:202:288
Case C 710/19 *G.M.A.* ECLI:EU:C:2020:1037
Case C-784/19 *Team Power Europe* ECLI:EU:C:2021:427
Case C-709/20 *CG* ECLI:EU:C:2021

Opinions of the Advocates General of the Court of Justice

Opinion of Advocate General Mayras in Case C-1/72 *Rita Frilli* ECLI:EU:C:1972:40
Opinion of Advocate General Trabucchi in Case C-7/75 *Epoux* F ECLI:EU:C:1975:75.
Opinion of Advocate General Capotorti in Case 149/77 *Defrenne* ECLI:EU:C:1978:115
Opinion of Advocate General Gordon Slynn in Case 53/81 *Levin* ECLI:EU:C:1982:10
Opinion of Advocate General Jacobs in Case C-344/87 *Bettray* ECLI:C:1989:113
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Opinion of Advocate General Fennelly in Case C-222/98 *Hendrik van der Woude* ECLI:EU:C:2000:226
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Opinion of Advocate General Kokott in Case C 313/02 *Wippel* ECLI:EU:C:2004:308

Opinion of Advocate General Ruiz in Case C-408/03 *Commission v Belgium* ECLI:EU:C:2005:638
Opinion of Advocate Geeneral Tizzano in Case C-144/04 *Mangold* ECLI:EU:C:2005:420
Opinion of AG Mengozzi in Case C 291/05 *Rachel Nataly Geradina Eind* ECLI:EU:C:2007:407
Opinion of Advocate General Mazak in Case C 158/07 *Förster* ECLI:EU:C:2008:399
Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C 22/08 and C 23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:150
Opinion of Advocate General Sharpston in Case C-34/09 *Zambrano* ECLI:EU:C:2010:560
Opinion of Advocate General Trstenjak in Case C 325/09 *Dias* ECLI:EU:C:2011:86
Opinion of Advocate General Kokott in Case C 434/09 *McCarthy* ECLI:EU:C:2010:718
Opinion of Advocate General Trstenjak in Case C 282/10 *Maribel Dominguez* ECLI
Opinion of Advocate General Kokott in Case C-393/10 *O'Brien* ECLI:EU:C:2011:746
Opinion of Advocate Genera Bot in Joined Cases C-424/10 and C-425/10 *Ziółkowski & Szeja* ECLI:EU:C:2011:575
Opinion of Advocate General Bot in Case C 529/11 *Alarape & Tijani* ECLI:EU:C:2013:9
Opinion of Advocate General Wahl in Case C-140/12 *Brey* ECLI:EU:C:2013:337
Opinion of Advocate General Wahl in Case C 507/12 *Jessy Saint Prix* ECLI:EU:C:2013:841
Opinion of Advocate General Mengozzi in Case C-316/13 *Fenoll* ECLI:EU:C:2014:1753
Opinion of Advocate General Wathelet in Case C-333/13 *Dano* ECLI:EU:C:2014:341
Opinion of Advocate General Wahl in Case C-413/13 *FNV* ECLI:EU:C:2014:2215
Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210
Opinion of Advocate General Wathelet in Case C-299/14 *García Nieto* ECLI:EU:C:2017:607
Opinion of Advocate General Villalon in Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2015:666
Opinion of Advocate General Saugmandsgaard Oe in Case C-216/15 *Betriebsrat der Ruhrlandklinik* ECLI:EU:C:2016:518
Opinion of Advocate General Tanchev in Case C 414/16 *Vera Egenberger* ECLI:EU:C:2017:851
Opinion of Advocate General Wathelet in Case C-442/16 *Gusa* ECLI:EU:C:2017:607
Opinion of Advocate General Wathelet in Case C 618/16 *Prefeta* ECLI:EU:C:2018:125
Opinion of Advocate General Wathelet in Case C 673/16 *Coman* ECLI:EU:C:2018:2
Opinion of Advocate General Bobek in Case C 89/17 *Banger* ECLI:EU:C:2018:225
Opinion of Advocate General Szpunar in Case C 483/17 *Tarola* ECLI:EU:C:2018:919
Opinion of Advocate General Pitruzella in Case C 55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:87
Opinion of Advocate General Szpunar in Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:512
Opinion of Advocate General Kokott in Joined Cases C-103/18 & C-429/18 *Sánchez Ruiz and Fernández Álvarez and Others* ECLI:EU:C:2019:874
Opinion of Advocate General Pitruzzella in Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:377
Opinion of Advocate General Szpunar in Case C 710/19 *G.M.A.* ECLI:EU:C:2020:739

Case Law from the United Kingdom

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497
Cotswold Development s Construction Ltd v Williams [2006] IRLR 181
Secretary of State for Work and Pensions v JS [2010] UKUT 131 (AAC)
McCormick v Fasken Martineau DuMoulin LLP [2014] SCC 39; [2014] 2 SCR 108

Uber BV and others v Aslam and others (November 2017) UKEAT/0056/17/DA;
Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo (November 2017), TUR1/985(2016).

Pimlico Plumbers Ltd and another v Smith [2017] EWCA Civ 51
Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29

Uber BV and others v Aslam and others [2018] EWCA 2748;
Uber BV and others v Aslam and others [2021] UKSC 5,

The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo[2018] EWHC 3342 (Admin)
The Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo [2021] EWCA Civ 952

Case Law from the Netherlands

Case Number: 200.261.051 / 01; ECLI: NL: GHAMS: 2021: 392; Case 7044576 CV EXPL 18-14762 FNV v Deliveroo (15th January 2019) ECLI:NL:RBAMS:2019:210.

Case Law from Spain

Judgment No. 244/2018 of Labour Court No. 6 in Valencia
STS 2921/2020 *Juan Molins Garcia-Atance* ECLI:ES:TS:2020:2924

Case Law from France

Arret No. 1737 (28/11/2018) Cour de cassation (Chambre sociale) ECLI:FR:CCASS:2018:SO01737

Books

Addison, P., *The Road to 1945: British Politics and the Second World War* (1994), Pimlico: London.
Antonaki, I., *Privatisations and Golden Shares: Bridging the gap between the State and the market in the area of free movement of capital in the EU* (2019) Leiden: E.M. Meijers Institut.
Armingeon, K. and Baccaro, L., 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) OUP: Oxford.
Armstrong, P., Glynn, A., and Harrington, J., Capitalism since World War II: *The making and breaking of the long boom* (1991), Harper Collins: London.
Barnard, C., *EU Employment Law* (4th Ed) (2012) OUP: Oxford.
C. Barnard, *C. 'EU Citizenship and the Principle of Solidarity' (2005)* Oxford: Hart Publishing.
Barnard, C., *The Substantive Law of the EU: The Four Freedoms* (2010), OUP: Oxford.
Barnard, C., *The Substantive Law of the EU* (4th Ed) (2013) OUP: Oxford.
Beck,T., Kotz, H., *Ordoliberalism: A German oddity?* (2017) Centre for Economic Policy Research: London.
Beck, G., *The Legal Reasoning of the Court of Justice of the EU* (2013) Oxford: Hart Publishing.

Bloodworth, J., *Hired: Six months working undercover in low-wage Britain (2019)* London: Atlantic Books.
Blythe, M., *Austerity: The History of a dangerous idea* (2013) Oxford University Press: Oxford.
Blyth, M., *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (2002) Cambridge University Press: Cambridge.
Bourdieu, P., *Distinction: A Social Critique of the Judgment of Taste* (1984) Routledge: Abingdon.
Broughton, A., et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels.
Burke, E., *Thoughts and Details on Scarcity* (1795) Gale ECCO: Online.
Chalmers, D., European *Union Law* (2014) (3rd Ed), CUP: Cambridge.
Collins, H., Ewing, K.D., and McColgan, A., *Labour Law* (2012) CUP: Cambridge.
Countouris, N. and de Stefano, V., *New trade union strategies for new forms of employment* (2019) ETUI: Brussels.
Deakin, S., and Wilkinson, F. *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution* (2005) Oxford University Press: Oxford.
Deakin, S., and Morris, G., *Labour Law* (2005) Butterworths
Durkheim, E., *The Division of Labour in Society* (1984)
Eckes, A., *A Search for Solvency: Bretton Woods and the International Monetary System, 1941 – 1971* (1975) University of Texas Press: Austin.
Esping-Andersen, G., *The Three Worlds of Welfare Capitalism (*1990), Polity Press (Blackwell): Cambridge
Esping-Andersen, G., *'Social Foundations of Post-industrial Economies'* (1999) OUP: Oxford.
Friedman, M., *Capitalism and Freedom* (1962) University of Chigo Press: Chicago.
Gilpin, R., *The Political Economy of International Relations* (1987) Princeton: Princeton University Press.
Giubonni, S., *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (2006) CUP: Cambridge.
Goodfellow, M., Hostile *Environment: How Immigrants became Scapegoats* (2019) London: Verso Books.
Guild, E., The *legal elements of European identity* (2004) The Hague: Kluwer.
Harvey, D., *A Brief History of Neoliberalism* (2005), Oxford University Press: Oxford.
Harvey, D., *Marx, Capital and the Madness of Economic Reason* (2017).
Hayek, F., *The Constitution of Liberty* (1960) University of Chicago Press: Chicago.
Hayek, F., The *Road to Serfdom* (1944) University of Chicago Press: Chicago.
Ingram, J.K., *Work and the Workman. Being an Address to the Trades Union Congress in Dublin September 1880* (1880) Hanse Books: Norderstedt**.**
Internal Labour Organisation*, Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects (*2016) ILO: Geneva,
Kenner, J., *EU Employment Law: From Rome to Amsterdam and Beyond* (2003) Hart Publishing: Oxford.
Johanessen, J., *The Workplace of the Future: The Fourth Industrial Revolution, The Precariat and the Death of Hierarchies* (2019) Routledge: Abingdon
Keynes, J.M., *The General Theory of Employment, Interest and Money* (1936) Palgrave Macmillan: London.
Keynes, J.M.,'Economic Possibilities for our Grandchildren' (1930), in J.M. Keynes, *Essays in Persuasion* (2010) Plagrave Macmillian: London

Kilhoffer, Z. *et al*, 'Study to gather evidence on the working conditions of platform workers' (2020) *Directorate-General for Employment Social Affairs and Inclusion - Report VT/2018/03*, Luxembourg: Publications Office of the European Union
Kindleberger, C., *The World in Depression* 1929-1939 (1973) California University Press:
Kramer, S., *International Regimes* (1983) Cornell Publishing: Ithaca
Lee, S., McCann, D., &. Messenger, J.C., *Working Time around the World: Trends in Working Hours, Laws and Policies in a Global Comparative Perspective* (2007) Routledge: London
Letourneux, V., Precarious Employment and Working Conditions in Europe (1998), Dublin: European Foundation for the Improvement of Living and Working Conditions.
Manza, J., and Sauder, M., *Inequality and Society* (2009) New York: W.W. Norton & Co
Marshall, T. H., *Citizenship and Social Class* (1950), CUP: Cambridge
Marx. K., Economic & Philisophic Manuscripts of 1844 (2017) Dover Publications: Mineola.
Marx, K., *Das Kapital: Volume One* (1867) Pacific Publishing: New York
McKay, S., et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London
van der Mei, A., *Free Movement of Persons within the European Community* (2003), Oxford: Hart
Oastler, R., *Damnation! Eternal Damnation to the fiend-begotten 'coaser-food', new Poor Laws* (1837) Kessinger Publishing: Montana.
O'Brien, C., *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart Publishing
Ohlin, B., et al, *Social Aspects of European Economic Integration* (1956)
O'Leary, *S., The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (1996) Kluwer Law: The Hague
O'Leary, S., *European Union Citizenship: Options for Reform* (1996) IPPR: London
Orwell, G., *The Road to Wigan Pier* (1937) Victor Gollancz: London
Marshall, T.H., Citizenship and Social Class (1950), CUP: Cambridge
Polanyi, K., *The Great Transformation*: *The Political and Economic Origins of our Times* (1944) Beacon Press: Boston.
Ricardo, D., *On The Principles of Political Economy and Taxation* (1817) Dover Publications: New York.
Savage, M., et al., *Social Class in the 21st Century* (2015) Penguin Books: London.
Shaxson, N., *The Global Finance Curse: How Global Finance is making us all poorer* (2018) The Bodley Head: London.
Smith, A., *Wealth of Nations (*1776) Wordsworth Classics: London
Standing, G., *The European Precariat: The New Dangerous Class* (2011). Bloomsbury: London
Standing, G., *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (2016) Biteback Publishing: London
Stiglitz J., et al, *Stability with Growth: Macroeconomics, Liberalization and Development* (2006) Oxford University Press: Oxford.
J. Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (2016) W. W. Norton & Company: New York
Streeck, W., *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014), Verso: London.
Tressel, T., et al, *Adjustment in Euro Area Deficit Countries : Progress, Challenges, and Policies* (2014), International Monetary Fund: New York.
de Witte, F., *Justice in the EU: The Emergence of Transnational Solidarity* (2015) Oxford University Press: Oxford.

Book Chapters

Ashiagbor, D., 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in Fudge, J., & Owens, R., (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart.

Azoulai, L., 'Transfiguring European Citizenship: from Member State territory to Union Territory, in Kochenov, D., (ed.), *EU Citizenship and Federalism* ((2015) Cambridge: CUP

Barnard, C., 'The Traditional Story of the Development of EU Social Policy' in Craig, P., & De Burca, G., (Eds), *The Evolution of EU Law* (2011)

Barnard, C., 'EU Social Policy: From Employment Law to Labour Market Reform' in Craig, P., & De Burca, G., (Eds), *The Evolution of EU Law* (2011)

N. Bodiroga-Vukubrat, N., Poscic, A., and Martinovic, A., 'Making a Living in the Gig Economy: Last Resiort or a Reliable Alternative?', in G. G. Sander, V. Tomljenovic, and N. Bodiroga-Vukubrat (eds.), *Transnational, European, and National Labour Relations: Flexbbility and the New Economy* (2018) Springer: Gham

Bogg, A., 'The regulation of working time in Europe', in Bogg, A., Costello, C., & Davies, A.C.L., *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing),

van den Brink, M., 'The Problem with Market Citizenship and the Beauty of Free Movement', in Amtenbrink, F., Davies, G., Kochenov, D., Lindeboom, J., (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge

Cantillon, B., Verschueren, H., & Ploscar, P., 'Social Protection and Social Inclusion in the EU: Any Interactions between Law and Policy?', in Cantillon, B., Verschueren, H., & Ploscar, P., (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and* Policy (2012) Intersentia: Cambridge, p. 1

Carter, D.W., 'Inclusion and Exclusion of Migrant Workers in the EU', in Jesse, M., (2020) *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020)

Carter, D., 'Inclusion and Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020) Cambridge: CUP.

Cuyvers,. A., 'The EU Common Market', in Ugirashebuja, E., Eudes Ruhangisa, J., Ottervanger T., and Cuyvers A., (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) Brill Nijhoff: Leiden,

Davies, A., 'Regulating Atypical work: beyond equality' (2013), in Countouris, N., & Freedland M., (Eds.), *Resocialising Europe in a Time of Crisis* (2013), CUP: Cambridge, 230-249, p. 233.

Davies, P., 'The Emergence of European Labour Law', in McCarthy,W., (ed.) *Legal Intervention in Industrial Relations: Gains and Losses* (1996)

Davies, P., & Freedland, M., 'The role of EU Employment Law and policy in the de-marginalisation of part-time work: A study in the interaction between EU regulation and Member States Regulation', in Sciarra, S., Davies, P., & Freedland, M., (eds), *Employment Policy and the Regulation of Part-time Work in the European Union* (2004), CUP: Cambridge

Dawson, M., 'The Origins of an Open Method of Coordination' (2011), in *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (2011) CUP: Cambridge,

Dawson, M., & de Witte, B., 'The EU Legal Framework of Social Inclusion and Social Protection', in Cantillon, B., Verschueren, H., & Ploscar,P., (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge,

Dougan, M., 'The Bubble that Bursts: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens', in Adams, M., de Waele, H., Meeusen, J., and Straetmans, G.,

(eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (2013) Oxford: Hart Publishing
Dougan, M., 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of National Welfare States?' in Barnard, C., and Odudu,O., (eds), *The Outer Limits of European Union Law* (London: Hart, 2009)
Dougan, M., and Spaventa, E., 'Wish you weren't here … New Models of Social Solidarity in the European Union', in Dougan, M., and Spaventa, E., (eds), *Social Welfare and EU Law* (London: Hart, 2005)
Everson, M., 'The Legacy of the Market Citizen', in Shaw, J., & More, G., *New Legal Dynamics of European Union* (1995) Clarendon: Oxford
Ferrera, M., 'Modest Beginnings, Timid Progresses: What's next for Social Europe?', in Cantillon,B., Verschueren, H., & Ploscar, P., (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge.
Fredman, S., 'Discrimination Law in the EU', in Collins, H., Davies, P., and Rideout, R., *Legal Regulation of the European Relation* (2000) Kluwer Law: London.
Fudge, J., & Owens, R., 'Precarious Work, Women, and the New Economy: The Challenge to Legal Norms', in Fudge, J., & Owens, R., (eds), *Precarious Work, Women, and the New Economy* (2006) Hart Publishing: London, p
Giubboni, S., 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Intersentia: Cambridge
Groshiede, E., & ter Haar, B., 'Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13 KNV Kunsten Informatie', in Laga, M., Bellomo, S., Gundt, N., and Boto, J.M.M., (eds) *Labour Law and Social Rights in Europe. The Jurisprudence of International Courts* (2018) Wydawnictwo Uniwersytetu Gdańskiego: Gdansk
Handler, F., 'Activation Policies and the European Social Model' in Serrano Pascual, A., and Jepsen, M., (Eds) *Unwrapping the European Social Model* (2006)
Ikenberry, G. J., 'The Political Origins of Bretton Woods', in. Bordo, Michael D., and Eichengreen, B., A *Retrospective on the Bretton Woods System: Lessons for International Monetary Reform* (1991).
Jesse,M., & Carter, D., 'Life after the Dano-Trilogy: Legal Certainty, Choices and Limitations in EU Citizenship Case Law', in Cambien, N., Kochenov, D., & Muir, E., *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (2020) Leiden: Brill Nijhoff,
Jessurun d'Oliveira, H.U., 'Union Citizenship: Pie in the Sky?', in Rosas, A. and Antola, E., (eds.) *A Citizens' Europe* (1995) Sage: London,
Keynes' Memo on War Aims. As contained in P. Addison, *The Road to 1945: British Politics and the Second World War (1994*).
Kochenov, D., 'The Citizenship of Personal Circumstances in Europe', in Thym, D., (ed.), *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing
Kochenov, D., 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in Amtenbrink, F., Davies, G., Kochenov, D., Lindeboom, J., (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge.
Kochenov, D., 'On Tiles and Pillars: EU citizenship as a Federal Denominator', in Kochenov, D., (ed.) *Citizenship and Federalism: The Role of Rights* (2015) CUP: Cambridge
Kountouris, N., 'EU Law and the regulation of 'atypical' work', in Bogg, A., Costello, C., & Davies, A.C.L., Research Handbook on EU Labour Law (2016: Edward Elgard Publishing),

McKay, S., 'Disturbing equilibrium and transferring risk: confronting precarious work', in Countoris, N., & Freedland,M., (eds.) *Resocialising Europe in a Time of Crisis* (2013) CUP: Cambridge
Minderhoud, P., 'Sufficient Resources and Residence Rights under Directive 2004/38', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belon*g (2018) Intersentia: Cambridge
Minderhoud, P., and Mantu, S., 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive', in: Thym, D., (ed.) *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing
Nowak, T., 'The rights of EU Citizens: a legal-historical analysis', in Van der Harst et al, (ed.) *European Citizenship in Perspective* (2018) Cheltenham/Northampton MA: Edward Elgar.
O'Leary, S., 'The Social Dimension of Union Citizenship', in Rosas, A. & Antola, E. (Eds), *A Citizens' Europe: In Search of a New Order* (1995) Sage: London
Peers, S., and Prechal, S., 'Article 52: Scope and Interpretation of Rights and Principles', in Peers, S., Hervey, T., Kenner, J., and Ward, A., (eds), *The EU Charter of Fundamental Rights – A Commentary* (2014) Hart
Pennings, F., 'Principles of EU coordination of social security', in Pennings, F., & Vonk, G., (eds.), *Research Handbook on European Social Security Law* (2015) Camberley: Elgar Publishing
Powell, C., 'Spanish Membership of the European Union Revisited' (2003), in Royo, S., and Manuel P., (Eds), *Spain and Portugal in the European Union: The first fifteen years* , London: Frank Cass and Company
Rodgers, G., 'Precarious Work in Western Europe: The States of the Debate', in Rodgers, G., and Rodgers, J., *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (1989) Brussels: International Institute for Labour Studies,
Sabato, S., and Corti, F., 'the Times they are A-Changin? The European Pillar of Social Rights from Debates to Reality Check' (2018) in Vanhercke, B., Ghailani, D., and Sabat, S., *Social Policy in the European Union: state of play* 2018 (2018);
Šadl, U., and Sankari, S., 'Why did the Citizenship Jurisprudence Change?', in Thym, D., *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing
Schiek, D., 'A Constitution of Social Governance for the European Union', in Kostakopoulou, D., & Ferreira, N., (eds.), *The Human Face of the European Union: Are the EU Law and Policy Humane Enough?* (2016) CUP: Cambridge
Schiek, D., 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' (2017) in Kochenov, D., *EU Citizenship and Federalism: The Role of Rights* (2017) Cambridge: CUP
Schlag, P., 'On Textualist and Purposivist Interpretation (Challenges and Problems)', in Perišin, T., and Rodin, S., (eds.) *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (2018), Oxford: Hart Publishing
Schmidt, S.K., (2017). Extending Citizenship Rights and Losing it All: Brexit and the Perils of 'Over-Constitutionalization', in Thym, D., (ed.) *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU.* Oxford: Hart Publishing
Shaw, J., 'A View of the Citizenship Classics: Martinez Sala and Subsequent Cases on Citizenship of the Union', in Maduro and Azoulai (eds.) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) Oxford: Hart

Shuibhne, N., 'The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice', in Sypris, P., (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012), CUP: Cambridge
Spaventa, E., 'Earned Citizenship – understanding Union Citizenship through its scope', in Kochenov, D., *EU Citizenship and Federalism: The Role of Rights* (2017) Cambridge: CUP
Stone, K., & Authurs, H., 'The Transformation of Employment Regimes: A Worldwide Challenge', in Stone, K., & Authurs, H., *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (2013) Russel Sage: New York
Streeck, W., 'From Market Building to State Building? Reflections on the Political Economy of European Social Policy' in Liebfried, S., and Pierson, P., (Eds) *European Social Policy: Between Fragmentation and Integration* (1995) Brookings Institution: Washington.
Timmermans, C., 'Martinez Sala and Baumbast revisited', in Maduro and Azoulai (eds.) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) Oxford: Hart
Verschueren, H., 'EU Free Movement of Persons and Member State Solidarity Systems: Searching for a Balance', in Guild, E., & Minderhoud, P.E., (Eds) *The First Decade of EU Migration and Asylum Law (2012)* Martinus Nijhoff: Boston.
Wollenschläger, F., 'The Judiciary, the legislature and the evolution of Union Citizenship', in Syrpis, P., (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012) CUP: Cambridge
Weiler, J., 'Citizenship & Human Rights', in Winter, J.A., Curtin, D.M., Kellermann, A.E., and de Witte, B., (eds.) *Reforming the Treaty on European Union* (1996) Kluwer: The Hague
Wright, S., 'Relinquishing Rights? The Impact of Activation on Citizenship for Lone Parents in the UK', in Betzelt, S. Bothfeld, S., (eds), *Activation and Labour Market Reforms in Europe. Work and Welfare in Europe* (2011), Palgrave Macmillan: London,

Journal Articles

Adams, A., Freedland, M.R., & Prassl, J., 'The Zero-Hours Contract: Regulating Casual Work, or Legitimising Precarity' (2015) *Oxford Legal Studies Research Paper* No. 11/2015
Aimo, M., 'In Search of a European Model for fixed-term work in the name of the principle of effectiveness' 7(2) *European Labour Law Journal* 232
Alberti, G., 'The Government of Migration through Workfare in the UK: Towards a shrinking Space of Mobility and Social Rights?' 3(1) *Journal fur Kritische Migrations und Grenzregimeforschung* 1.
Arestis, P., and Sawyer, M., 'Keynesian Economics for the New Millennium' (1998), 108(446) *The Economic Journal* 181
Armingeon, K., and Baccaro, L., 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) 41(3) *Industrial Law Society* 254.
Ashiagbor, D., 'Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration' (2013), 19(3) *European Law Journal* 303
Barnard, C., 'Free Movement vs. Fair Movement: Brexit and Managed Migration' (2018) 55(special) *Common Market Law Review* 203.
Barnard, C., 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82(2) *Modern Law Review* 350.
Behling, F., and Harvey, M., 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970

Berger, H., and Danninger, S., 'Labor and Product Market Deregulation: Partial, Sequential, or Simultaneous Reform?' (2005) IMF Working Papers No. 05/227
Bell, M., 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37 *European Law Review* 31
Bell, M., 'Disability, rehabilitation and the status of worker in EU Law: *Fenoll*' (2016) 53(1) *CMLRev* 197
Bosch, G., 'Towards a New Standard Employment Relationship in Western Europe' (2004) *42 British Journal of Industrial Relations 617*
Block, F., 'Karl Polanyi and the Writing of the Great Transformation' (2003) 32 *Theory and Society* 275-306.
Blyth, M., 'The Great Transformation in understanding Polanyi: Reply to Hejeebu and McCloskey' (2004) 16(1) *Critical Review* 117-133
Blyth, M., 'The Austerity Battle: Why a Bad Idea won over the West' (2013) 92(3) *Foreign Affairs* 41-56.
Bottini, F., 'The Roots of the French Welfare State' (2013) 20(2) *Jurisprudencija: Mokslo darbu žurnalas* 643-662.
Van den Brink, M., 'The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?' (2019)
Burri, S., and Prechal, S., 'EU Gender Equality Law' (2008) *Luxembourg: Office for Official Publications of the European Communities*
Caporaso, J., & Tarrow, S., 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63(4) *International Organization (CUP)* 593-620
Cardoso, P.M., et al, 'Precarious Employment in Europe' (2014).
Carter, D., and Jesse, M., 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208
Christensen, A.K., and Malstedt, M., 'Lex Loci Laboris versus Lex loci domiclii – an inquiry into the normative foundations of European social security law' (2000) 2 *European Journal of Social Security* 111
Closa, C., 'The Concept of Citizenship in the Treaty of the European Union' (1992) 29(6) *Common Market Law Review* 1137–1169
Copeland, P., 'A Toothless bite? The effectiveness of the European Employment Strategy as a governance tool' (2013) 23(1) *Journal of European Social Policy* 21, p. 21.
Cournede, B., 'Enhancing Economic Flexibility: What is in it for workers?' (2016) OECD Working Paper No. 19
Cremers, J., 'Non-standard employment relations or the erosion of workers' rights' (2010) Solidar Briefing Paper No. 23
Daly, M., 'Whither EU Social Policy? An Account and Assessment of Developments in the Lisbon Social Inclusion Process' (2007) 37(1) *Journal of Social Policy* 1-19
Davies, G., 'Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency' (2016) College of Europe Research Paper 02 / 2016
Davies, G., 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) 25(10) *Journal of European Public Policy* 1442 – 1460
Deakin, S., 'Regulatory Competition in European after Laval' (2008) *Centre for Business Research Working Paper* No 364, University of Cambridge
Editorial Comments, 'Is the "indivisibility" of the four freedoms a principle of EU law?' (2019) 56(1) *Common Market Law Review* 1

Ellis, E. 'Social Advantages: A New Lease of Life' (2003) 40(3) *CMLRev* 639
Evju, S., 'Labour is not a Commodity: Reappraising the Origins of the Maxim' (2013) 4 *European Labour Law Journal* 222
EPSC Strategic Notes, The Future of Work: Skills and Resilience for a World of Change. Issue 13, 10th June 2016.
Fanti, L., and Manfredi, P., 'Is Labour Market Flexibility Desirable or Harmful? A Further Dynamic Perspective' (2010) 61(2) *Metroeconomia* 257-266
Ferrera, M., 'The European Union and National Welfare States, Friends, not Foes: But What Kind of Friendship? URGE Working Paper 4/2005
Freedman, S., 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 *Industrial Law Journal* 299
Friedman, M., 'Inflation and Unemployment: Nobel Lecture' (1977) 85(3) *Journal of Political Economy* 451-472
Garben, S., 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance' (2019) 21 CYELS 101-127
Garben, S., 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review* 210.
Garben, S., 'The Constitutional (Im)balance between "the Market" and "the Social"' (2017) 13 *European Constitutional Law Review* 23-61
Giubboni, S., 'Social Rights and Market Freedom in the European Constitution: A Re-Appraisal' (2010) 1(2) *European Labour Law Journal* 161-184.
Giubboni, S., 'Being a Worker in EU Law' (2018) 9(3) *European Labour Law Journal*. 2018 223-235.
Goetschy, J., 'The European Employment Strategy: Genesis and Development' (1999) 5(2) *European Journal of Industrial Relations* 117
Goldmann, M., 'The Great Recurrence: Karl Polanyi and the Crises of the European Union' (2017) 23 *European Law Journal* 272
Golynker, O., 'Case C-158/07, Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep, Judgment of the Court (Grand Chamber) of 18 November 2008' (2009) 46(6) *Common Market Law Review*, pp. 2021–2039
Golynker, O., 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity' (2005) 30 *European Law Review* 120
Greer, I., 'Welfare reform, precarity and the re-commodification of labour' (2016) 30(1) *Work, Employment and Society* 1
Groshiede, E., & ter Haar, B., 'Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13 KNV Kunsten Informatie'
Hailbronner, K., 'Union Citizenship and Access to Social Benefits' (2005) 42(5) *Common Market Law Review* 1245
Hayek, F., 'Inflation Resulting from the Downward Inflexibility of Wages' (1958) *Problems of United States Economic Development* 147-152
Hayek, F., 'Unions, Inflation and Profits', in Bradley, P.D. (ed.) *The Public Stake in Union Power* (1959) University of Virginia Press: Charlottesville
Hejeebu,S., and McCloskey,D., 'The Reproving of Karl Polanyi' (1999) 13(3-4) *Critical Review* 285-314
Hendrickx, F., 'Regulating New Ways of Working: From the new 'wow' to the new 'how'' (2018) 9(2) *European Labour Law Journal* 195-205

International Labour Office, Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects (2016) International Labour Office: Geneva.
Iglesias Sánchez, S., 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law* 137
Jacobs, F. G., 'Citizenship of the European Union – A Legal Analysis' (2007) 13(5) *European Law Journal* 591-610
Jesse, M., 'The Legal Value of 'Integration' in European Law' 17(1) *European Law Journal*, pp. 172–189
Jesse, M., 'Joined Cases C-424/10, Tomasz Ziółkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin' (2012) 49(6) *CMLRev* 2003.
Joerges, C., 'What is left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *European Law Review* 461-489
Kalecki, M., 'Political Aspects of Full Employment' (1943) 14(3) *Political Quarterly* 322.
Kamanabrou, S., 'Successful Rules on Successive Fixed-term Contracts?' 33(2) *International Journal of Comparative Labour Law and Industrial Relations* 221-240
Kountouris, N., 'The Legal Determinants of precariousness in personal work relations: A European Perspective' (2012) *Comparative Labour Law & Policy Journal* 21.
Kountouris,N., 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018), 47(2) *Industrial Law Journal* 192-225
Koukiadaki, A., & Katsaroumpas, I., 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017), *PETI Committee, DG for Internal Policies: Citizens' Rights and Constitutional Affairs (European Parliament)* PE 596.823.
Kostakopoulou, D., 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4(4) *Journal Political Philosophy* 337–358
Kostakopoulou, D., European Union Citizenship: Writing the Future (2007) 13(5) European Law Journal 623–646
Kostakopoulou, D., 'Nested "Old" and "New" Citizenships in the European Union' (1999) 5(3) *Columbia Journal of European Law*, 389–414
Kramer, D., 'From worker to self-entrepreneur: The transformation of the *homo economicus* and the freedom of movement in the European Union' (2017) 23 *European Law Journal* 172
Kramer, D., 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 *Cambridge Yearbook of European Legal Studies* 270-301
Kruis, T., 'Primacy of European Union Law - from Theory to Practice' (2011)
Lang, C., Clauwaert, S., & Schomann, I., Working Time Reforms in Time of Crisis' ETUI Working Paper 2013.04
Lazzerini, N., '(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS' (2014) 51 *CMLRev* 907
Leisering, Lutz 'The Welfare State in Postwar Germany – Institutions, Politics and Social Change' (2001) Unpublished (available with author).
Lenaerts, K., and Gutiérrez-Fons, J.A., 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2013) *AEL* 2013/9
Lenaerts, K., 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012)8(3) *European Constitutional Law Review* 375
Lock, T., 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 *CMLRev* 1201

Lourenço, L., 'Religion, discrimination and the EU general principles' gospel: Egenberger' (2019) 56(1) *CMLRev* 193
Mantu, S., 'Concepts of Time and European Citizenship' (2013) 15 *European Journal of Migration and Law* 447–464.
Messenger, J.C., 'Working Time Trends and Developments in Europe' (2011) 35 *Cambridge Journal of Economics* 295
Manfredi, M., 'From the austerity measures to the European Pillar of Social Rights: what kind of protection for economic and social rights in the European Union?', in Baruffi, M.C., *Trending Topics In International And Eu Law: Legal And Economic Perspectives* (2019) Editoriale scientifica: Italy.
Meehan, E., 'Citizenship and the new European Community' (1993) 64(2) *Political Quarterly* 172–186
Milotay, N., 'Social protection in the EU: State of play, challenges, and options" (2018) European Parliament Research Service PE 628.258
Nelson, 'Social assistance and EU poverty thresholds 1990–2008. Are European welfare systems providing just and fair protection' (2013), 29 *European Sociological Review* 387.
Nogler, L., 'Rethinking the Lawrie-Blum Doctrine of Subordination: A Critical Analysis Promoted by Recent Developments in Italian Employment Law' (2010) 26(1) *The International Journa; of Comparative Labour Law and Industrial Relations* 83-101.
Nowak, T., 'The turbulent Life of the working Time Directive' (2018) 25(1) *Maastricht Journal of European and Comparative Law* 118-129
Oberg, U., 'Precarious Work and European Union Law' (2016) EFBWW - EFFAT - EPSU - ETF - ETUC - industriAll - UNI Europa: Brussels
O'Brien, C., 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50(6) *CMLRev* 1643
O'Brien, C., 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights' (2016) 53(4) *CMLRev* 937.
O'Brien, C., 'The ECJ sacrifices EU Citizenship in vain: Commission v United Kingdom' (2017) 54(1) *CMLRev* 209
O'Brien, C., Spaventa, E., & De Coninck, J., 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016) *DG for Employment, Social Affairs and Inclusion* FreSsco Contract: VC/2014/1011: Brussels
O'Brien, C., 'I trade, There(fore) I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643.
O'Brien, C., 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46(4) *CMLRev* 1107
OECD, *OECD Employment Outlook 2020: Worker Security and the COVID-19 Crisis* (2020) OECD publishing: Paris
O'Connor, J. S., 'Policy Coordination, social indicators and the social policy agenda in the European Union' 15(4) *Journal of European Social Policy* 345-361.
O'Leary, S., 'Equal Treatment and EU Citizens: A new chapter on cross-border educational mobility and access to student financial assistance' (2009) 34(4) *European Law Review*, pp. 612–627
Ostry, J., Loungani, P., and Furceri, D., 'Neoliberalism Oversold?' (2016), 53(2) *Finance & Development* 38.
Ovotrup,S., and Prieur, A., 'The commodification of the personal: labour market demands in the era of neoliberal post-industrialization' (2016), 17(1) *Distinktion: Journal of Social Theory* 94

Peers, S., 'Equal Treatment for Atypical Workers: A New Frontier for EU Law?' (2013) 32(1) *Yearbook of European Law* 30-56
Pech, L., 'Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in Römer and Dominguez' (2012) 49 *CMLRev* 1841
Peers, S., 'Equal Treatment of Atypical Workers: A New Frontier for EU law?' (2013) 32(1) *Yearbook of European Law* 30-56
van Peijpe, T., 'EU Limits for the Personal Scope of Employment Law' (2012) 3(1) *European Labour Law Journal* 35-59
Pennings, F., 'Coordination of Social Security on the Basis of the State-of –Employment Principle: Time for an Alternative?' (2005) 42(1) *CMLRev* 67
Pennings, F., 'EU Citizenship: Access to Social Benefits in other Member States' (2012) 28(3) *International Journal of Comparative Labour Law and Industrial Relations* 307
Pesole, A., et al, 'Platform Workers in Europe: Evidence from the COLLEEM Survey' (2018), Joint Research Centre: Brussels.
Poptcheva, E. M., 'Freedom of movement and residence of EU citizens: Access to social benefits' (2014) European Parliamentary Research Service: Brussels.
Porthe, V., et al, 'Extending a Model of Precarious Employment: The case of Spain' (2010) 53 *American Journal of Industrial Medicine* 417-424
Risak, M., and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change' *ETUI* Report 140, ETUI AISBL, Brussels
Rosewarne, S., 'Globalisation and the Commodification of Labour: Temporary Labour Migration, The Economic and Labour Relations Review' (2010) 20(2) *The Economic and Labour Relations Review* 99-110
Rosin, A., 'Platform Work and fixed-term employment regulation' 12(2) *European Labour Law Journal* 156-176
Ruggie, J., 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36(2) *International Organization* 379
Sabato, S., et al, 'Implementing the European Pillar of Social Rights: What is needed to guarantee a social impact' (2018) The European Social Observatory (OSE): Brussels
Sauter, W., 'The Economic Constitution of the European Union' (1998) 4 *Journal of European Law* 27.
Scharpf, F., 'The European Social Model: Coping with Challenges of Diversity' (2002) MPIfG Working Paper 02/8.
Scharpf, F., 'The asymmetry of European integration, or why the EU cannot be a social market economy' (2010) 8(2) *Socio-Economic Review* 211-250
Schiek, D., 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611
Schiek, D., and Gideon, A., 'Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities' (2018) 32(2-3) *International Review of Law, Computers & Technology* 275-294
Schiek, D., 'EU Social Rights and Labour Rights and EU Internal Market Law' (2015) *European Parliament DG for Internal Policies* IP/A/EMPL/ST/2014-02 PE 563.457
Schoukens, P., and Barrio, A., 'The changing concept of work: when does typical work become atypical' (2017) 8(4) *ELLJ* 306
Shaw, J., 'The Interpretation of European Union Citizenship' (1998) 61(3) *Modern Law Review* 293

Shaw J., 'The Many Pasts and Futures of Citizenship in the EU' (1997) 22(6) *European Law Review* 22 (6),
Shuibhne, N. 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) *CMLRev* 889
Shuibhne, N., 'The Resilience of EU Market Citizenship' (2010) 47(4) *CMLRev* 1597,
Shuibhne, N., 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016) 23(6) *Maastricht Journal of European and Comparative Law* 908-936
Somek, A., 'Solidarity decomposed: being and time in European citizenship' (2007) 32 *European Law Review* 787
Stigler, G., 'Information in the Labor Market' (1962) I*nvestment in Human Beings* 94-105
Stiller, S., & van Gerven, M., 'The European Employment Strategy and National Corte Executives: Impacts on activation reforms in the Netherlands and Germany' (2012) 22(2) *Journal of European Social Policy 118*, p. 119.
Therborn, G., 'The Tide and Turn of the Marxian Dialectic of European Capitalism' (2011) 9(1) *Journal of Modern History* 9-12
Thornquist,A., 'False Self-employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market' (2015) 31(4) *International Journal of Comparative Labour Law and Industrial Relations* 411-429
Thornquist, C., 'Welfare States and the Need for Social Protection of Self-Employed Migrant Workers in the European Union' (2015) 34(4*) International Journal of Comparative Labour Law and Industrial Relations* 391
Thym, D., 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40(2) *European Law Review* 249-262
Thym, D., 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) *Common Market Law Review* 17–50
Troilo, M., 'The Welfare State After the Second World War: A comparison between Italy and Canada (1945 – 2013),
Tucker, D., 'Precarious Non-standard employment: A review of the literature' (2002)
Varoufakis, Y., & Groutsis, D., 'The Trouble with Labour' (2010) 20(2) *The Economic and Labour Relations Review* 1-6.
Verschueren, V., 'The European Internal Market and Competition between Workers' (2015) 6(2) *European Labour Law Journal* 137
Verschueren, H., 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?' (2015) 52(2) *Common Market Law Review* 363
Verschueren, H., 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' (2013) 16 *European Journal of Migration* 147
Vincenzi, C., 'European citizenship and free movement rights in the United Kingdom' (1995) *Public Law* 259–275
de Vries, S. A., 'The Bauer et al and Max Planck judgments and EU citizens' fundamental rights: an outlook for harmony' (2019) *1 European Equality Law Review* 16.
Watson, P., 'The Community Social Charter' (1991) 28 *CMLRev* 37.
Weiler, J., 'European Neo-Constitutionalism: In search of Foundations for the European Constitutional Order' (1996) 44(3) *Political studies* 517-533.
Wright, S., 'Welfare-to-work, Agency and Personal Responsibility' (2012) 41(2) *Journal Social Policy* 309
Van den Bogaert, S., Jesse, M., et al, 'Kroniek van het Europees materieel recht' (2019) Nederlands Juristen Blad 10

Blogs

Bednarowicz, B., 'Workers' rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?' (24th April 2019).
Bergqvist, C., 'Collective Bargaining and Platforms' (11th December 2020) Kluwer Competition Law Blog.
Chaibi, L., 'Proposal for a Directive of the European Parliament and of the Council on Digital Platform Workers' (2019)
Cousins, M., 'Establishing and Retaining a Right of Residence as A Worker under EU law: Tarola v Minister for Social Protection' (2016) Bepress,
Fielder, B., Devernay, N., Ivey, C., 'Delivery Riders are Employees, not Self-employed workers, according to a French Supreme Court ruling' (November 2018). Bird & Bird
Frantziou, E., 'Joined cases C-569/16 and C-570/16 Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable' (19 November 2018) European Law Blog
Hoogenboom, A., 'CJEU case law on EU Citizenship: normatively consistent? Unlikely! A response to Davies "Has the Court changed, or have the cases?"' (2018) Maastricht University Blog
Kramer, D., A Right to Reside for the Unemployed Self-employed: The case Gusa (C-442/16)' European Law Blog.
Peers, S., 'Pregnant workers and EU citizens' free movement rights' (19th June 2014) EU Law Analysis
Rossi, L. S. 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' (25th February 2019), *EU Law Analysis*.
O'Brien, C., 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' (2016)
Strumia, F., 'Unemployment, Residence Rights, Social Benefits at Three Crossroads in the Tarola Ruling' (13th April 2019), EU Law Analysis.
Vandendaele, V., 'Commission v Germany (c-377/17): Do exceptions in tariff regulation matter?' (29th July 2019), European Law Blog

Newspaper Articles

Metcalf, S., 'Neoliberalism: The Idea of (that)?? Swallowed the World' (18th August 2017) The Guardian Online.
M. Sanianto, M., '"I'm not a robot": Amazon workers condemn unsafe, gruelling conditions at warehouse' (5th April 2020), *The Guardian*

Internet Materials

Eurofound, 'Flexible Forms of Work: very atypical contractual arrangements' (2010)
Eurostat, 'precarious employment by sex, age and activity', at: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_qoe_4ax1r2&lang=en.
ILO, Policies and Regulations to Combat Precarious Employment (2011), ILO Catalogue.
OECD, General report of the Committee of European Economic Co-operation (Volume II) (1947), Chapter III on recommendations,
OECD, *In It Together: why Less Inequality Benefits All* (2015)

OECD, General report of the Committee of European Economic Co-operation (Volume II) (1947), Chapter III on recommendations
UK Home Office, European Economic Area nationals: qualified persons (Version 6.0) (December 2018)
'Facing the Challenge: The Lisbon Strategy for Growth and Employment', Report form the High Level Group chaired by Wim Kok (November 2004)

Curriculum Vitae

Daniel William Carter was born in 1985 in Southampton, England. He studied Sociology and Criminology at the University of Brighton, graduating with honours in 2008. In 2010, he was admitted to the Graduate Diploma in Law (GDL) at the University of Bournemouth, graduating in 2011 *with Distinction*, receiving the highest overall grade in his cohort. In 2014, Daniel studied for an LLM in European Law at Leiden University, graduating *cum laude* in 2015. During his studies, Daniel participated in the European Law Moot Court (ELMC) competition. He and his team, *One Directive*, won the prize for Best Written Memorials and won the Prague Regional Final, eventually finishing Runners Up in the All-European Final at the Court of Justice of the European Union in Luxembourg.

In August 2015, Daniel started reading for a PhD in European Law at Leiden Law School, under the supervision of Prof. Christa Tobler and Dr. Moritz Jesse. Alongside his PhD, Daniel acted as Academic Coordinator for the Advanced LLM in European and International Business Law. He was also a coach for the Leiden European Law Moot Court teams.

Daniel's PhD research focuses on the area of the free movement of persons in the European Union, in particular the protection of those engaged in modern forms of employment. Is research more widely looks at social integration in the EU and the value and enforcement of social rights within the EU legal order. Daniel has numerous publications in academic journals and books.

Alongside his academic career, Daniel currently works as an Employment Consultant and Labour Market Analyst in the area of civil litigation, providing independent expert evidence on employment and labour market matters before the English, Scottish, and Irish civil courts.