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

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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.”<sup>1</sup>

- 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 20<sup>th</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> It also saw the establishment of the modern welfare state, with universal public services and stronger state support through social benefits.<sup>6</sup> 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.<sup>7</sup> As such, since the 1970s

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<sup>1</sup> G. Orwell, *The Road to Wigan Pier* (1937) Victor Gollancz: London, p. 153.

<sup>2</sup> J.M. Keynes, ‘Economic Possibilities for our Grandchildren’ (1930), in J.M. Keynes, *Essays in Persuasion* (2010) Plagave Macmillian: London, p. 330.

<sup>3</sup> K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Times* (1944) Beacon Press: Boston.

<sup>4</sup> 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.

<sup>5</sup> G. Standing, *Corruption of Capitalism* (2016) Biteback Publishing: London.; G. Esping-Andersen (n 4);

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup>

The Global Financial Crisis, instead of instigating a change in the approach towards labour market 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).<sup>9</sup> 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.<sup>10</sup> 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,<sup>11</sup> which can leave workers in an insecure, exploited and potentially unprotected situation due to its limited

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<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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. Bodiřoga-Vukubrat, A. Posćic, and A. Martinovic, 'Making a Living in the Gig Economy: Last Resort or a Reliable Alternative?', in G. G. Sander, V. Tomljenovic, and N. Bodiřoga-Vukubrat (eds.), *Transnational, European, and National Labour Relations: Flexibility and the New Economy* (2018) Springer: Gham.

<sup>11</sup> 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,<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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

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

<sup>13</sup> 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.

<sup>14</sup> 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.<sup>15</sup> 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”.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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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<sup>15</sup> 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.

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

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

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

<sup>19</sup> 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.

<sup>20</sup> 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.<sup>21</sup> 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,<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> However, such exclusion can be damaging for society as it creates dualisms within the labour market and commodifies the

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<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> 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;

<sup>24</sup> 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.

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

<sup>26</sup> 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.<sup>27</sup>

### 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

*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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<sup>27</sup> 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.

<sup>28</sup> L. Fanti, and P. Manfredi, 'Is Labour Market Flexibility Desirable or Harmful? A Further Dynamic Perspective' (2010) 61(2) *Metroeconomica* 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?'

<sup>29</sup> 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.

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

<sup>31</sup> 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.<sup>32</sup> 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 are 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 disproportionately 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, most of the social protection provided to precarious workers is pursued through policy coordination.<sup>33</sup> 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

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<sup>32</sup> 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.

<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> It will also combine these ideas with those on 'market citizenship',<sup>38</sup> to comprehensively explain the system of protection provided under the worker definition in EU law, as well as

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<sup>34</sup> 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).

<sup>35</sup> 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.

<sup>36</sup> 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).

<sup>37</sup> 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).

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> The thesis further develops ideas put forward by the author in previous publications relating to EU Citizenship and the inclusion/exclusion of EU migrants.<sup>41</sup> That said, those interested in this element of the thesis are invited to read these publications, which combined with *The European Precariat* hopefully

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<sup>39</sup> 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. Verschuere (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. Syrpis (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.

<sup>40</sup> 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.

<sup>41</sup> 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,<sup>42</sup> as well as the regulation of non-standard and precarious forms of employment from a national perspective.<sup>43</sup> *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

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<sup>42</sup> 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. Aimò, '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 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).

<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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),<sup>49</sup> falsely self-employed persons, in particular that working through platforms,<sup>50</sup> 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

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<sup>44</sup> 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).

<sup>45</sup> U. Oberg (n 30); S. McKay (n 11).

<sup>46</sup> A. Broughton (n 31); A. Koukiadaki & I. Katsaroumpas (n 11); C. O'Brien, E. Spaventa, & J. De Coninck (n 21).

<sup>47</sup> C. O'Brien (n 22); D. Schiek (n 19).

<sup>48</sup> G. Esping-Andersen (n 4); D. Schiek (n 40); D. Schiek (n 19);

<sup>49</sup> A. Adams, M.R. Freedland, & J. Prassl (n 44).

<sup>50</sup> A. Thornquist (n 29); Z. Z. Kilhoffer et al (n 10); N. Bodiroga-Vukubrat, A. Posic, 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 Union 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 of 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 Lumpenproletariat*' (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 the 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.