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

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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