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

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Part II: The General Protection of EU Migrant Workers

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

1 INTRODUCTION

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

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

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

2 THE DEFINITION OF WORKER UNDER EU LAW

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

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

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

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

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

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

2.1 The Lawrie-Blum Criteria

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

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

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

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

2.2 Genuine Economic Activity

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

2.2.1 Qualitative Genuine Economic Activity

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

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

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

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

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

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

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

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

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

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

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

2.2.2 *Quantitative Genuine Economic Activity*

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

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

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

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

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

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

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

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

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

Despite its traditional focus on quantitative factors, in recent years the Court has begun to place more emphasis on the contractual relationship between worker and employer and the existence of certain employment-based rights and obligations, rather than simply the number of hours performed, or the remuneration received. In a number of recent decisions, it has been stated that "independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine".[56] Concretely, this includes factors such as the right to paid leave, sick pay, and collectively agreed rates of pay.[57] The shift towards more qualitative considerations is explained more in Chapter 6.

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

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

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

2.3 Subordination

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

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

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

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

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

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

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

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

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

2.4 Remuneration

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

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

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

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

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

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

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

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

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

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

3.1 EU Definition: The Direct Application of Lawrie-Blum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[129] Ibid, para. 27.

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

[131] Ibid, para. 32.

[132] Ibid, para. 35.

[133] Ibid, para. 36 - 37.

[134] Ibid, para. 29 - 30.

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

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

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

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

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

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

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

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

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

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

[141] Ibid.

[142] See Recital 8,

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

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

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

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

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

3.3 A Uniform Definition of Worker Across EU Law?

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

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

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

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

4 LAWRIE-BLUM AS THE GATEWAY TO MARKET CITIZENSHIP

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

4.1 Protection through Lawrie-Blum

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

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

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

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

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

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

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

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

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

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

[157] Ibid, p. 644

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 Market Citizenship with a Federalised Character

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

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

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

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

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

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

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

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

5 CONCLUSION

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

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

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

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