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

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Part III: Case Studies

Chapter 6: Part-time & On-Demand Workers

1 INTRODUCTION

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

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

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

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

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

2 Precarious forms of Limited Employment

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

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

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

[5] Ibid, p. 70.

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

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

2.1 Marginal Part-time Work

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

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

[7] Ibid, pp. 272 - 273.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Marginal Work & Genuine Economic Activity

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

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

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

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

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

3.1 CJEU Approach: Quantity over Quality?

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

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

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

[31] Case C-188/00 *Kurz* ECLI:EU:C:2002:694, para. 32; see also, amongst others, Case 53/81 *Levin* ECLI:EU:C:1982:105, para. 16; *Kempf*, para. 14.

finding that the irregular nature and limited duration of the employment, as well as the limited number of hours, could render it marginal and ancillary.[32] That said, the Court has "only in exceptional circumstances" actually concluded that employment is marginal and ancillary through a quantitative approach.[33] It has held that working just 10 or even five hours a week will not necessarily render the employment 'marginal'.[34]

3.2 A Shift towards Qualitative Considerations?

In recent years, the Court has included more *qualitative* elements when assessing whether employment is genuine or not, placing more focus on the individual's employment and contractual situation. For example, in *Genc*, the Court stated that the fact that a person works for "only a very limited number of hours" may be an indication that the activities performed are marginal and ancillary, however, it went on to state that "independently" of the limited amount of remuneration and hours, an "overall assessment of the employment relationship" could mean that the activity is real and genuine, thereby granting the individual worker status under [Article 45 TFEU].[35] The Court expanded on this "overall assessment", stating that the national court should take into account factors relating to "not only the number of working hours and level of remuneration but also the right to 28 days of paid leave, to the continued payment of wages in the event of sickness and to a contract of employment which is subject to the relative collective agreement in conjunction with the fact that her contractual relationship with the same undertaking has lasted for almost four years", as these are also "capable of constituting an indication that the professional activity in question is real and genuine".[36]

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[32] Case C-357/89 *Raulin* ECLI:EU:C:1992:87, para. 14.

[33] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:150 para. 24.

[34] Case 171/88 *Rinner-Kühn* ECLI:EU:C:1989:328, para. 11; See also *Genc*.

[35] *Genc*, para. 26.

[36] Ibid, para. 27.

Genc is one of the few examples of the Court using this qualitative approach to distinguish genuine from marginal activity in the context of free movement law. However, the Court has also applied a more quality-based and holistic approach in case-law concerning age discrimination. For example, in *O v Bio Phillippe Auguste*, the Court again stated that "independently of the limited amount of the remuneration for and the number of hours" it could not be ruled out that following "an overall assessment of the employment relationship" that the activity should be considered as real and genuine".[37] In *Abercrombie & Fitch*, the Court again held that it was necessary "to take into account factors relating not only to the number of working hours and level of remuneration but also to the right to paid leave, to the continued payment of wages in the event of sickness, to a contract of employment which is subject to the relevant collective agreement, to the payment of contributions and, as appropriate, the type of those contributions".[38] The above cases demonstrate that the Court has been more willing to consider more qualitative aspects relating to the employment in question, such as the existence and form of an employment contract, the fact that the worker receives collectively agreed pay and working conditions or employment-based rights such as the right to paid annual leave, the right to sick pay, rather than simply looking at quantitative factors like the number of hours worked or remuneration received. In this regard, a link can be made with cases such as *Ninni-Orasche*, where the Court had held that the permanent or long-term nature of employment is irrelevant when determining whether the individual is a worker for the purposes of Article 45 TFEU.[39]

3.3 National Application: A problem of enforcement?

The balance of competences within the European Union, and in particular the absence of a well-defined, universal definition of worker under EU law, means that significant discretion is left to Member States

[37] Case C-432/14 *O v Bio Philippe Auguste* ECLI:EU:C:2015:643, para. 24.
[38] Case C-143/16 *Abercrombie & Fitch Italia v Antonio Bordonaro* ECLI:EU:C:2017:566, para. 20.
[39] Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:600.

when determining who is a worker under national regulations. As such, regardless of the Court's approach towards the genuine economic activity aspects of the *Lawrie-Blum* criteria, an individual's status is largely dependent on regulations and practices applied within Member States. While historically there have been few tensions in this area, in recent years some Member States have adopted increasingly restrictive rules that potentially do not comply with the more recent approach of the Court, and risk excluding many marginal and on-demand workers from the status of worker and the rights accompanying that classification.

Often Member States impose strict conditions relating to working hours and income before migrant workers can obtain the legal status of worker, which seems to undermine the Court's *acquis* in this area.[40] For example, Romania imposes a *de facto* threshold of full-time work before the individual obtains worker status. Other states impose working-time requirements that range from around 10% to 50% of full-time work, and even in states that do not impose formal working time requirements, often administrators use *de facto* thresholds in their case-by-case assessments of individuals' situations.[41] Some Member States impose earning requirements. For example, Italy imposes a formal earning requirement of €7.000 per year, whilst others have de facto thresholds in their case-law. Often these thresholds work in combination: in order to earn a certain level of income the individual needs to work a specific number of hours, and *vice versa*.[42] These thresholds seemingly undermine the Court's assertion in its earlier case-law that Member States should not be able to fix and modify the definition of worker unilaterally through national laws, without any control by the EU, as this would make it possible for Member States to "exclude at will certain categories of persons".[43]

[40] See C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016).
[41] Ibid, p. 24.
[42] Ibid, p. 24 – 25.
[43] Case 53/81 *Levin* ECLI:EU:C:1982:105, para. 11.

Some Member States comply with the requirement for case-by-case assessments by using formal thresholds relating to remuneration or working hours to automatically recognise worker status. This means that case-by-case assessments still apply, at least in theory, for those not meeting the threshold. An example can be seen from the United Kingdom, which whilst no longer a member of the European Union, provides good insight as it as it demonstrates how far Member States can when limiting these rights, as well as more flexible systems that may arguably comply with the Court's *acquis*. The UK's 'Primary Earnings Threshold' (PET) automatically classifies individuals as workers if they earn £166 gross per week.[44] Despite setting an earnings requirement, the UK maintained that it was in line with the Court's *acquis* as it claimed there is "no minimum amount of hours which an EEA national must be employed for in order to qualify as a worker".[45] However, O'Brien et al assert that the earnings requirement functions as a *de facto* working time requirement for those in the lowest income brackets.[46] It means that (as of 2022), a minimum wage worker earning £9,50 per hour would have to work 17 hours per week to be automatically recognized as a worker.[47] Other Member States, such as the Netherlands, impose similar, albeit slightly more sophisticated systems, with the actual calculation dependent on a number of legislative instruments, and based on whether the individual's income exceeds 50% of the social assistance standard or they work at least 40% of normal full-time employment hours.[48] For students specifically, they must work 12 hours per week to automatically obtain worker status, which is more-or-less the same as 40% of full-time requirement. Like the United Kingdom, if these criteria are not met, a case-by-case assessment will take place that considers various factors.

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[44] Based on 2019/20 rates. See https://www.gov.uk/government/publications/rates-and-allowances-national-insurance-contributions/rates-and-allowances-national-insurance-contributions

[45] See Home Office, European Economic Area nationals: qualified persons (Version 6.0) (December 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759064/eea-qualified-persons-v6.0ext.pdf, p. 12

[46] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 64.

[47] Current national minimum wage is taken from https://www.gov.uk/national-minimum-wage-rates.

[48] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 27.

These systems provide a level of flexibility that, at least in principle, may comply with the Court's *acquis*. However, they leave a lot of discretion to Member States. In particular, they leave much power to national decision makers that are often poorly equipped to apply *acquis* from the Court of Justice and are susceptible to political direction coming from superiors or central Government.[49] Second, some Member States can be highly selective in terms of the indicators from the Court's *acquis* that they actually use. The UK, for example, whilst referring to the court's *acquis*, completely omits the more-recent, qualitative criteria laid down in *Genc* and other cases, such as the existence of an employment contract, the applicability of a collective agreement, the right to annual paid leave, etc.[50]

This flexible approach can be used as a smokescreen for systems that undermine the Court's *acquis* by imposing *de facto* earnings and working requirements, whilst having the façade of requiring case-by-case assessments. This is often the case with Member States that adopt a 'reject now, justify later' approach, that generally assumes migrants do not meet the requirements necessary to obtain legal status under national law.[51] Many of those rejected will not have the knowledge or resources to challenge the decision against them, thereby acting as a *de facto* barrier to many. However, if an individual challenges such a measure, the Member State will often back-down in order not to run the risk of the Court of Justice finding that their national rules are contrary to EU law. This reduces the possibilities of challenges arriving at the Court through the preliminary ruling procedure. Furthermore, the Commission would seem to have little interest in challenging these practices, at least when compared to other matters considered to be more important, such as the rule of law and ensuring fair competition. It seems that these practices apparently do not fall into the "most important breaches of EU law

[49] T. Kruis, 'Primacy of European Union Law - from Theory to Practice' (2011), p. 278
[50] *Genc*, para. 27.
[51] C. O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017); C. O'Brien, 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' (2016).

affecting the interests of its citizens and businesses",[52] as prioritised by the Commission.

4 Precarious Part-time Workers under Directive 2004/38

The distinction between genuine and marginal economic activity also has implications for an individual's free movement rights under Directive 2004/38, as this instrument regulates the residence and equal treatment rights of both persons on the genuine economic activity divide. However, it is unclear from the text of the Directive what the status is (if any) of marginal workers that do not meet the genuine economic activity requirement. The following section will explain the distinction between marginal and genuine work under Directive 2004/38, looking at their treatment under the Directive and national applications of it. Following this, it will assess whether treating marginal workers as having sufficient resources may be more appropriate than their treatment as jobseekers, as is the most common practice.

4.1 The Binary Distinction between Economic Activity and Inactivity

The position of 'marginal' workers under Directive 2004/38 is unclear, however, there seems to be little by way legal effects or individual/proportionality assessments for marginal workers that do not meet the genuine economic activity criterion. Whilst there is limited case law on marginal workers, there are some examples in cases concerning students of migrants engaging in employment but not sufficiently enough to confer worker status. In these decisions the Court will classify the individual as either a worker or student, with no intermediary statuses or rights for those falling in between these categories. That said, the Court has at times used the individual's (albeit limited) employment within its reasoning, even if this is not decisive for the outcome of the

[52] European Commission Communication, 'EU Law: Better results through better application' (2017/C 18/02), p. 14.

case. This can be seen in *Grzelczyk*, where the Court explicitly mentions the fact that Mr Grzelczyk "defrayed his own costs", in part through performing "various minor jobs".[53] Advocate General Alber suggested that "the holding of occasional student jobs", or in other words marginal work activity, would "scarcely satisfy" the *Lawrie-Blum* criteria.[54] However, the fact that Mr Grzelczyk was able to support himself financially and only sought social benefits during the final stage of his degree, seemed to influence the Court's decision as it held that the Member State should demonstrate financial solidarity with Mr Grzelczyk.[55]

Grzekczyk can be compared to *Förster*.[56] In this case the applicant worked during her studies in "various kinds of paid employment", and later in a "paid work placement in a Dutch special school".[57] Unlike Mr Grzekczyk, however, Ms Förster was actually recognised as a worker during this period, until her employment activity become so small as to render it marginal and ancillary. However, this time the Court gave no weight to her previous worker status or current marginal work activity, holding simply that she was no longer entitled to study financing as her employment status meant that she could no longer be considered as a 'genuine' worker. In conformity with the stricter and more literal approach to interpreting the Directive explained in Chapter 5, the Court applied a binary approach that did not leave space for any kind of individual or proportionality assessment to her situation.

The flip side of this is that, assuming the individual is engaged in genuine activity, then the binary approach means they will fully realise that status. In *L.N.*,[58] a 'European citizen' (nationality unknown) worked at an international wholesale firm for three months before starting a full-time course at Copenhagen Business School and claiming Danish educational

[53] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 10.
[54] Opinion of Advocate General Alber in Case C-184/99 *Grzelczyk* ECLI:EU:C:2000:518, para. 94.
[55] *Grzelczyk*, para. 44
[56] Case C-158/07 *Förster* ECLI:EU:C:2008:630.
[57] Ibid, p. 16 – 17.
[58] Case C-46/12 *L.N.*

assistance, which was denied as "his principal objective in coming to Denmark was to pursue a course of study", meaning he was a student rather than a worker.[59] The Court held that "the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration".[60] As soon as the genuine economic activity criterion is satisfied, they must be entitled to the study grant on the basis of Article 7 Regulation 492/2011, and therefore would not need to rely on Article 24(2) Directive 2004/38.[61] Overall, however, it can concluded that the Court's binary approach to Directive 2004/38 means that once an individual's employment status becomes 'marginal and ancillary', rather than 'genuine and effective' they will lose the protection available to workers under the Directive. That said, without specific case law in this area, it is difficult to know how the Court would react to such a situation.

4.2 Marginal Workers as Jobseekers

The status of marginal workers can be compared to those who, having lost the status of worker under Article 7 Directive 2004/38, retain a residual status as a jobseeker under Article 14(4)(b).[62] Whilst jobseekers obtain a right of residence under the Directive, Member States are only required to provide them with a "reasonable period of time" in which to apprise themselves of employment offers corresponding to their occupational qualifications and to take necessary steps to become engaged.[63] In *G.M.A.* the Court was asked whether a Member State could require a jobseeker to have a genuine chance of being employed before they granted a residence permit for more than three months. [64] It found that the Directive is silent on the minimum time period that Member States must provide for a right to reside on the basis of Article 14(4)(b)

[59] Ibid, para. 19.
[60] Ibid, para. 47.
[61] Ibid, para. 48 - 49.
[62] See Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para. 56; Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037, para. 34.
[63] *G.M.A.*, paras. 26 - 27.
[64] Ibid, para. 9.

Directive 2004/38.[65] The only indication is the pre-Directive case of *Antonissen* which suggests that a six-month period would be acceptable.[66] The Court held that jobseekers should have a "reasonable period of time" to acquaint themselves with the job market, during which the Member State cannot require the individual to demonstrate that they have a "genuine chance of being engaged".[67] After this "reasonable period" has ended, the Member State can demand that the jobseeker is able to "provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged" in order to maintain their residence status.[68]

Despite their diminished status and rights, jobseekers do have more protection under the Directive that other types of non-workers. The wording of Article 14(4)(b) actually refers to expulsion decisions (for example, on the basis of being an unreasonable burden) when they concern workers or *jobseekers genuinely seeking employment* (emphasis added). Jobseekers derive their rights through Article 45 TFEU, rather than Article 21, and as such cannot be subject to the unreasonable burden limitation so long as they are genuinely seeking employment. As Advocate General Szpunar has stated, the unreasonable burden limitation is a specific objective of Article 7 only, and therefore does not apply to Article 14(4)(b), which comes under the Directive's general object of facilitating the right to move and reside freely throughout the Union.[69]

However, treating marginal workers as jobseekers is also suggested to be inappropriate insofar as it can impose requirements that are inappropriate or impossible to comply with if they are already engaged in marginal or on-demand work. Jobseekers have very few social rights,

[65] Ibid, para. 34.
[66] Ibid, para. 38 – 39; Case C-292/89 *Antonissen* ECLI:EU:C:1991:80, para. 10.
[67] Ibid, para. 43 - 45.
[68] Ibid., para. 46.
[69] Opinion of Advocate General Szpunar in Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:512, para. 57.

in particular the right to welfare entitlement.[70] They cannot rely on Regulation 492/2011 and therefore do not have the right to the same social advantages as Member State nationals.[71] Recent case-law suggests that they are excluded from all social assistance entitlement under Article 24(2) Directive 2004/38, which in recent decisions also seemingly encompasses *Collins*-type benefits "intended to facilitate access to employment in the labour market".[72] It is unclear whether the Court's reasoning means that *all* jobseeker allowance benefits that are non-contributory will fall under Article 24(2) of the Directive, or whether benefits have do not have a dual-nature (i.e. they solely focus on an individual's entry into the labour market) still do not fall under this derogation. That said, it is difficult to see a situation where a non-contributory jobseeker benefit would *not* have the dual objective of facilitating entry onto the labour market whilst contributing to the individual's subsistence. Moreover, the Court's rejection of Advocate General Wathelet's argument in *Alimanovic* that different rules should apply to different types of jobseekers, with an individual assessment based on proportionality being applied to those that have previously been in employment in the host-state,[73] means that it is highly unlikely that the Court would treat marginal workers differently from classic jobseekers, despite the concretely different factual position between marginal worker and jobseeker proper.[74]

This arguably undermines the main objective of Directive 2004/38, which is to facilitate the right to move and reside freely throughout the Union,

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[70] O. Golynker, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity' (2005).

[71] Case C-316/85 *Lebon* ECLI:EU:C:1987:302, para. 27

[72] D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208, p. 1204; see also C. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53(4) *CMLRev* 937, pp. 948 - 949; O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart, pp. 53-56.

[73] Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, paras. 104 - 105.

[74] D. Carter, 'Inclusion and Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020) Cambridge: CUP.

as it does not protect the Member State against unreasonable burdens, but simply denies protection to those engaged in employment. Furthermore, it is questionable how appropriate it is to apply labour market activation policies, which can require the worker to apply for jobs or prove that they have sufficient resources, to those already in employment, as some Member States do.[75] That said, whilst the Court has endorsed activation policies in principle, it has also stated that the individual must be given time to seek a job at their skill level, and cannot be denied jobseeker status simply because they do not accept a job below their skill level or outside their field of expertise.[76] The application of activating labour market policies to those already in employment, even marginally, means that the worker effectively has two jobs: their marginal/on-demand employment, and complying with the conditions national authorities require to maintain the status of jobseeker.

4.3 Sufficient Resources as Residual Residence for Marginal Workers?

In the absence of individual assessments or special protection for marginal workers, it may be more appropriate to treat marginal or on-demand workers as having sufficient resources under Article 7 than as jobseekers under Article 14(4)(b). A benefit for such workers would be that the social assistance derogation under Article 24(2) would not apply to them, and it would allow them to maintain a right to reside in a host-state without having to register with a job centre and adhere to the connected conditions. However, it would also mean that Member States could require them to have sufficient resources and thus they could in principle lose their residence status under Article 7 for becoming an unreasonable burden.

Whilst this would seem to be a big shift in the approach to dealing with marginal workers, the Court recently alluded to such an approach in the

[75] C. O'Brien, E. Spaventa, & J. De Coninck (n 38), p. 31. See also Section 6.4.3.

[76] *G.M.A.*, paras. 26 – 27 and paras. 47-48; see also Opinion of Advocate General Szpunar in Case C-710/19 *G.M.A.* ECLI:EU:C:2020:739, paras. 75 – 76.

case of *Bajratari*.[77] The case concerned the right of residence of minor EU citizens, who were supported by their Albanian father, who had been working irregularly in non-standard employment following the expiration of his residence card and work permit. The national court had determined that the children did not satisfy the requirement of self-sufficiency provided for in Article 7(1)(b) of the Directive and did not consider the income of their father.[78] However, the Court held that a minor EU citizen has sufficient resources under Article 7(1)(b) even if these resources were obtained through their father's income, which was earned "without a residence card and work permit".[79] The Court also considered that although technically "illegal" resources, the father had lived "for the past 10 years without needing to rely on the social assistance system of that Member State".[80]

The decision can be applied by analogy to the situation of marginal workers to suggest that they would have sufficient resources even if not satisfying the *Lawrie-Blum* criteria. In *Bajratari*, the Court did not consider the "unlawful" nature of the employment and only focused on the self-sufficiency of the citizen, as well as the fact that they did not seek recourse to public funds. As such, if a citizen is engaged in marginal work activity and does not require recourse to public funds, there seems little reason why they could not establish a right to reside under Article 7(1)(b) Directive 2004/38 as in *Bajratari*. If fact, such an approach would make more sense, given that the marginal worker's activity is not unlawful. The Court's reasoning would actually suggest that even those engaged in casual and irregular employment (i.e., other forms of "unlawful" employment) could obtain a right to residence under the Directive.

[77] *Bajratari*.
[78] Ibid, para. 14.
[79] Ibid; See also Opinion of Advocate General Szpunar in Case C-93/18 *Bajratari* ECLI:EU:C:2019:512, para. 70.
[80] Ibid, para. 46.

4.4 The Treatment of Marginal Workers under National Law

The situation "on the ground" for marginal workers is, like under Directive 2004/38, unclear. Some Member States are generous in granting worker status to individuals engaged in marginal forms of employment. For example, in *Tarola* Advocate General Szpunar noted that whilst the applicant was "a part-time worker who works for a period of less than 13 (hours per) week and whose work is not regular", it did not result in them losing the status of worker under Irish law.[81] However, other Member States impose conditions and limitations on marginal workers that potentially undermine their social protection. As O'Brien et al note, these can exclude individuals from worker status because they perform multiple jobs on different employment contracts, each of which may be limited to a few hours or a short period of time.[82] Whilst some that fail this test are deemed to be economically inactive, in the vast majority of Member States cases these persons are classified as jobseekers.[83] However, marginal working jobseekers often also face additional limitations on their rights and protections. For example, in some Member States, for example Bulgaria, Cyprus, Finland, Greece, and Italy, they face temporal limitations on their status, and in others (for example Belgium, Malta, Portugal, Slovakia, and Sweden), they have to prove that they have a genuine chance of finding employment to maintain their status.[84] Some Member States, such as Denmark, France, Germany, Poland, and the United Kingdom, go as far as to combine these temporal limitations with a test of genuinely seeking employment.[85] As well as their status on the labour market, this assessment can also include looking at the individual's integration into the host-state, their language proficiency,

[81] See footnote 8 in the Opinion of Advocate General Szpunar in Case C-483/17 *Tarola* ECLI:EU:C:2018:919.
[82] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 26; C. O'Brien (n 72), p. 975.
[83] Ibid, pp. 31, 68-69; C. O'Brien (n 72), p. 975. These states include: Belgium, Bulgaria, Cyprus, Czechia, Denmark, Finland, France, Germany, Greece, Italy, Malta, Netherlands, Portugal, Romania, Slovakia, and the United Kingdom.
[84] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 31 - 32.
[85] Ibid.

previous claims for social benefits, the personal circumstances of the individual, as well as previous evidence of searching for employment.[86]

In a number of Member States, employment in marginal work will not suffice in demonstrating that they have a genuine chance of employment. O'Brien et al highlight Belgium, where an individual can be working around 11 hours a week in employment which is classified as 'marginal and ancillary', and furthermore could not even demonstrate their genuine chance of being employed or obtain a right to reside as a jobseeker.[87] Another individual was found to not be a jobseeker, despite being engaged in 'genuine and effective employment' for three months, which subsequently became marginal work once their hours were reduced.[88] Furthermore, the strict UK rules that require the individual to have either (i) an offer of employment, or (ii) be waiting on the result of recent interviews,[89] would exclude individuals that are engaged in marginal employment.

Perhaps most problematic of all is the tendency for some Member States to conflate the legal distinction between jobseekers and economically inactive citizens by combining the tests of 'genuinely seeking employment' with that of 'sufficient resources' when assessing whether "the jobseeker is or has become an unreasonable burden".[90] This means that the individual must both genuinely seek employment whilst simultaneously not becoming an unreasonable burden on the host-Member State.[91] This conflated test undermines the wording, historical background, and underlying purpose of both Directive 2004/38 and the constitutional settlement between workers and citizens under EU law.[92] It effectively swaps jobseekers status from having limited rights under

[86] Ibid, p. 31.
[87] Ibid, p. 68.
[88] Ibid.
[89] Ibid.
[90] C. O'Brien, E. Spaventa, & J. De Coninck (n 40), p. 34.
[91] D.W. Carter, 'Inclusion and Exclusion of Migrant Workers in the EU', in M. Jesse (2020) *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020) CUP: Cambridge, p. 316.
[92] Ibid

Article 45 TFEU, to being an economically inactive citizens under Article 21.[93] However, EU law dictates those residing on the basis of Article 45 TFEU can *never* become an unreasonable burden, meaning that this requirement cannot legally be imposed upon a jobseeker.[94] Jobseekers have their own specific restrictions and limitations (for example relating to social assistance), and therefore to impose the unreasonable burden limitations upon them conflates two separate bases of residence under EU law.

5 The Free Movement Rights of Precarious Part-time Workers

So far, this chapter has explained the distinction between genuine and marginal economic activity, and what this means for the legal status of precarious part-time workers. The following section will look at the concrete rights of workers that are available under the *Lawrie-Blum* criteria, and the extent to which these can be lost due to the individual's marginal worker status. The following section will look at free movement rights, however, it will not cover residence rights as these have been discussed in the context of Directive 2004/38 (see Chapter 5).

5.1 Employment-based Rights

Under Article 45(3) TFEU, Member State nationals are entitled to leave their home state and reside in a host state for the purposes of pursuing an employment activity.[95] Under the market-making rationale of the internal market, any national rules which "preclude or deter" nationals leaving their home state in order to exercise their rights under Article 45

[93] C. O'Brien (n 72), p. 950.

[94] See, for example, Case C-46/12 *L.N.* ECLI:EU:C:2013:97, para. 47; see also C. O'Brien 'I trade, There I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643, p. 1663.

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

TFEU will constitute a violation of the freedom of movement for workers.[96] Further specific protections relating to accessing and the conditions of employment were conferred through Regulation 1612/68, now Regulation 492/2011.[97] This Regulation prohibits directly discriminatory criteria in relation to taking up certain jobs, as well as indirectly discriminatory measures that cannot be justified under either Article 45(3) TFEU or any objective reasons in the public interest.[98] Article 45 TFEU also applies to certain non-discriminatory measures that restrict access to employment.[99] However, the Court will not preclude non-discriminatory national measures that restrict access to employment if the restrictive effect is "too uncertain and indirect".[100] Whilst the Court has applied a restriction-based approach in some cases concerning the freedom of movement for workers,[101] the discrimination approach is the "most firmly entrenched", at least compared to the other freedoms.[102] Finally, the Court has found that Article 45 TFEU can be applied in horizontal situations,[103] however, it is unclear whether the same applies for Article 3 of Regulation 492/2011.[104] By failing to meet the genuine economic activity criterion, it is possible that precious part-time workers are denied even these basic rights relating to accessing and conditions of employment.

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[96] Case C-10/90 *Masgio* ECLI:EU:C:1991:107, para. 18-19; *Terhoeve*, para. 39; *Bosman*, para. 96

[97] Regulation 492/2011 of 5th April 2011 on freedom of movement for workers within the Union *L 141/1*.

[98] Case C-237/94 *O'Flynn* ECLI:EU:C:1996:206, para. 20; Case C-57/96 *Meints* ECLI:EU:C:1997:564, para. 45; Case C-187/96 *Commission v Greece*, para. 19.

[99] *Bosman*, para 96.

[100] Case C-190/98 *Graf* ECLI:EU:C:2000:49.

[101] For example, Case C-40/05 *Lyyski* ECLI:EU:C:2007:10. In this case the Court considered a Swedish rule requiring a teachers in state schools to undertake a period of training a special Swedish school could be justified on the basis of improving the education system. See also *Bosman*.

[102] C. Barnard, *The Substantive Law of the EU* (4th Ed) (2013) OUP: Oxford, p. 281.

[103] Case C-281/98 *Angonese* ECLI:EU:C:2000:296.

[104] Ibid, para 22.

5.2 Social Security

The objective of facilitating the cross-border movement of workers requires that they are entitled to equal treatment in terms of social security entitlement. Traditionally, the inclusion of migrant workers into national social security systems has been relatively uncontroversial, with Member States establishing normative ideas on how equal treatment between foreign workers and Member State nationals could be used as a means of facilitating free movement even before the Treaty of Rome, predominantly through international agreements confirming the right of migrant workers to social security.[105]

Social security entitlement is governed by the Social Security Coordination Regulation, which coordinates social security rules across the internal market.[106] The Union's lack of competence to harmonise social security entitlement means that coordination is necessary as it preserves national social security systems, which do not just reflect variations in national wealth, but "also reflect deep-seated differences in cultural attitudes and traditions in social values".[107] The Regulation therefore seeks to find a balance between providing an adequate level of protection to migrants residing in a host-state, whilst respecting the diversity of national social security systems.[108] The Social Security Coordination Regulation is primarily based on seeking guarantee equality of treatment for workers under the different national legislation for the persons concerned.[109] It is also aimed ensuring the aggregation of

[105] C. Barnard, 'Free Movement vs. Fair Movement: Brexit and Managed Migration' (2018), pp. 208 – 209.
[106] Regulation 883/2004. The coordination of social security in the EU is also governed by Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems; see F. Pennings, 'Coordination of Social Security on the Basis of the State-of –Employment Principle: Time for an Alternative?' (2005) 42(1) *CMLRev* 67, p. 68.
[107] M. Shanks, 'The Social Policy of the European Communities' (1977), p. 376.
[108] H. Verschueren, 'EU Free Movement of Persons and Member State Solidarity Systems: Searching for a Balance', in E. Guild & P.E. Minderhoud (Eds) *The First Decade of EU Migration and Asylum Law* (2012), p. 51.
[109] See Recital 5, Regulation 883/2004.

time periods for the conferral of benefits,[110] and guarantees the possibility of exporting benefits, with any derogations from this being interpreted strictly.[111] These principles effectively mean that benefits accrued in one Member State can be transferred to another, even if the worker moves from one Member State to another (or has family there).[112]

Regulation 883/2004 functions on a conflict-of-laws basis that aims to ensure that the individual is subject to one national system only, meaning that it can have stark consequences for workers whose employment is (or previously has been) connected to a host Member State.[113] Once the national system has been determined, under the *lex loci laboris* (the state-of-employment) principle the host-state legislation is applicable to the worker immediately from the starting date of employment.[114] They will be covered under this the state of employment even if residing in a different state.[115] The only exception are the infamous 'special non-contributory benefits', which are non-exportable. Whilst they must be granted to nationals from other Member States, they can be limited to persons residing in the territory of the host-state.[116] Given that national social security systems are often linked to employment, it would the make the exercise of free movement rules less attractive if their inclusion within such systems were not guaranteed and they were to fall between the gaps in the law.[117] This would risk placing downward pressures on social security standards, thereby potentially undermining the objective

[110] Recitals 10 and 14, Regulation 883/2004.
[111] Recitals 33 and 37, Regulation 883/2004.
[112] F. Pennings, 'Principles of EU coordination of social security', in F. Pennings & G. Vonk (eds.), *Research Handbook on European Social Security Law* (2015) Camberley: Elgar Publishing.
[113] Ibid, p. 321; Case 302/84 *Ten Holder* ECLI:EU:C:1986:242, para. 20.
[114] For some recent examples of how this works in practice, see Case C-784/19 *Team Power Europe* ECLI:EU:C:2021:427, para. 34; Case C-610/18 *AMFB & Others* ECLI:EU:C:2020:565, para. 42.
[115] F. Pennings (n 106), p. 68.
[116] Ibid, p. 75.
[117] Ibid, p. 69; F. Pennings (n 112), p. 324; see also Case 24/75 *Teresa & Silvana Petroni* ECLI:EU:C:1975:129, para. 13.

of ensuring a continued improvement of living standards throughout the Union.[118]

This is arguably the situation for precarious part-time workers. If they do not possess the status of worker under EU law, then they can potentially be excluded from social security benefits under Regulation 883/2004. As was discussed in Chapter 5, there has been much discussion over whether Regulation 883/2004 should be based on *factual*, rather than *legal* residence, meaning that mere residence in a host-state would entitle them to social security benefits under the Regulation, regardless of their employment status.[119] If this were the case, it would it would provide precarious part-time workers with a residual level of protection as they would be entitled to social security benefits regardless of whether their employment is genuine or marginal. However, the Court's case law suggests that the Regulation does not stretch that far. Despite accusations that the Court uses the Regulation to justify decisions that create "harmonising effects" despite it being a coordination Regulation,[120] the Court has held that Member States fully retain the competence to determine the precise conditions for obtaining social security benefits under their legislation, although this must be done in conformity with EU law.[121] It has gone so far as to permit the imposition of right-to-reside tests even for social security benefits that are classified as family benefits under Regulation 883/2004.[122] This suggests that marginal workers could be excluded from social security benefits by way of the application of a right to reside test. That said, their classification as jobseekers should, at least in theory, mean that they are entitled to social security benefits under the Regulation, even if such persons can be excluded from social assistance benefits under Article 24(2) Directive 2004/38, which includes social security benefits that some elements of social assistance.

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[118] F. Pennings (n 106), p. 69.

[119] H. Verschueren, Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' (2013) 16(2) *European Journal of Migration and Law* 147-179; see also the Opinion of Advocate General Wahl in Case C-140/12 *Brey* ECLI:EU:C:2013:337.

[120] F. Pennings (n 112), p. 322.

[121] Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para. 90; see also Opinion of Advocate General Wathelet in Case C-333/13 *Dano* ECLI:EU:C:2014:341, para. 146.

[122] Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, paras. 67- 68.

5.3 Social Assistance and Social Advantages

The market-building logic behind Article 45 TFEU requires more than just social security entitlement. There are many benefits and advantages that are not classified as social security under Regulation 883/2004, but exclusion from which would undermine the level playing field between migrant and native workers, placing the former at a disadvantage on the labour market. As such, the *lex laboris* principle extends beyond social security. The Court has expanded the rights of workers through Article 7(2) Regulation 492/2011, which states that EU migrant workers "shall enjoy the same social and tax advantages as national workers". The Court has held this to be a specific expression of the principle of equal treatment enshrined in Article 45(2) TFEU and must be accorded the same interpretation as that provision.[123]

The Court has held that the term 'social advantages' includes any social benefit conferred by the state, regardless of its status as social security or social assistance.[124] It extends beyond advantages conferred to individuals due to their status as workers. In *Even*,[125] the Court held that the term covers any benefit or advantage "generally granted to national workers primarily because of their objective status as workers or *by virtue of the mere fact of their residence on the national territory*" (emphasis added).[126] This means that workers are not just entitled to benefits available to native workers, but to any social benefit or other advantage available to Member State nationals by reason of them being a Member State national and/or resident within the host-state. This means that it covers "all advantages by means of which the migrant worker is able to improve his living and working conditions and promote his social advancement".[127] The Court has extended the concept so far as to include

[123] C-287/05 *Hendrix* EU:C:2007:494, para. 53; C-20/12 *Giersch and Others* EU:C:2013:411, para. 35; Joined Cases C-401/15 to C-403/15 *Depesme and Others* EU:C:2016:955, para. 35; Case C-447/18 *UB* ECLI:EU:C:2019:1098, para. 39.

[124] Case 1/72 *Frilli v Belgium* ECLI:EU:C:1972:56, para. 13, 14.

[125] Case 207/78 *Criminal proceedings against Gilbert Even* ECLI:EU:C:1979:144.

[126] Ibid, para. 22.

[127] E. Ellis, 'Social Advantages: A New Lease of Life' (2003) 40 *CMLRev* 639, p. 644

a right to have court proceedings undertaken in German,[128] or a discount card for public transport discount following the death of a spouse,[129] if these rights are available to nationals of host-state. The main limitation to Article 7(2) is that an ex-worker cannot obtain rights for children born after his or her employment relationship has ended,[130] and that individuals must actually be working in order to obtain these rights, even if the social advantages in question are available to residents.[131]

Precarious part-time workers failing the *Lawrie-Blum* criteria due to their marginal employment status are not entitled to more generous social assistance benefits or wider social advantages. Furthermore, their classification as jobseeker will not provide them with protection due to the derogation from granting social assistance benefits to jobseekers under Article 24(2) Directive 2004/38. Moreover, if they are classified as self-sufficient person but do not have a right of residence under the Directive, then they will not be entitled to social assistance benefits.[132] This suggests that, regardless of their status under the Directive, marginal workers are not entitled to obtain more generous social assistance benefits and social advantages.

5.4 Derived Family Rights

The Court has stressed that the principle of equal treatment includes all areas of life which could constitute obstacles which impede the mobility of workers, even those "conditions of integration of such family in the environment of the host country".[133] As such, to fully exercise the rights under Article 45 TFEU, the social entitlements available to migrant

[128] Case C-137/84 *Ministère Public v Mutsch* ECLI:EU:C:1985:335, para. 17.
[129] Case 32/75 *Cristini* ECLI:EU:C:1975:120.
[130] Case C-43/99 *Leclere* ECLI:EU:C:2001:303, para. 59.
[131] E. Ellis (n 125), p. 648; see Opinion of Advocate General Jacobs in Case C-43/99 *Leclere* ECLI:EU:C:2001:97, para. 96.
[132] *Dano*, paras. 68 – 69; for a recent example, see Case C-709/20 *CG* ECLI:EU:C:2021:602, para. 75.
[133] Case 76/72 *Michel S* ECLI:EU:C:1973:46, para. 13.

workers must also be available for their family members.[134] This commitment to remove obstacles for the integration of the worker's family into the host country is now contained in Recital 6 to Regulation 492/2011. The Court has further stated that this requires Member States to ensure that there are the "best possible conditions" for such integration to take place.[135]

The reasoning for this can be seen from *Reed*, where the Court held that granting permission for an "unmarried companion" to reside with the applicant, "can assist his integration in the host State and thus contribute to the achievement of freedom of movement for workers".[136] For the migrant worker to fully integrate into a host-society, it was considered necessary for the worker's spouse, or in this case unmarried partner, to accompany them, and therefore fell within the concept of social advantages under Article 7(2).[137] The Court has also applied this reasoning in *Carpenter*, albeit in the context of service provision under Article 56 TFEU,[138] where it held that free movement law "could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse".[139] Simply put, the migrant worker needs their family (particularly a spouse/partner) to have equal rights in order for the worker to fully exercise their free movement rights. Furthermore, these derived rights facilitate free movement by reimbursing expenses incurred by the worker or compensating for costs that they may incur in relation to their family members.[140] The Court has emphasised the de-commodifying nature of derived family rights, holding that the granting of such benefits "enables one of the parents to devote himself or herself to the raising of a young child" and "is capable of reducing that worker's

[134] Ibid, para. 14-16.
[135] See Case C-308/89 *Di Leo* ECLI:EU:C:1990:400, para. 13; Case C-413/99 *Baumbast*, para. 50; see Opinion of Advocate General Mengozzi in Case Opinion of AG Mengozzi in Case C-291/05 *Rachel Nataly Geradina Eind* ECLI:EU:C:2007:407, para. 56
[136] Case 59/85 *Reed* ECLI:EU:C:1986:157.
[137] Ibid, para. 28; see also E. Ellis, 'Social Advantages: A New Lease of Life' (2003), p. 648.
[138] Case C-60/00 *Carpenter* ECLI:EU:C:2002:434
[139] Ibid, para. 39.
[140] F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015), p. 90.

obligation to contribute to family expenses".[141] If they are not entitled to such derived family rights they may have to take time off work or incur financial losses as a result. This will place them at a disadvantage compared to Member State nationals and other migrant workers that are entitled to such derived benefits.

EU migrant workers also derive rights for their children, who under Regulation 492/2011 are entitled to state education under the same conditions as Member State nationals. The Court has held that this includes basic social security benefits for the child and guardian.[142] Once the child is independent, which is established on a case-by-case basis, they must obtain social advantages by themselves.[143] In recent years the Court has considered the fundamental rights of the child to a greater extent, for example finding that national authorities must check whether a denial of social assistant benefits to a parent would risk violating the child's fundamental rights which require them to stay in dignified conditions with their parents/guardians.[144]

6 THE SOCIAL RIGHTS OF PRECARIOUS PART-TIME WORKERS

The loss of worker status under the *Lawrie-Blum* criteria affects not just an individual's position under free movement law, but also under EU social law. The following section will examine the rights that are available to workers under EU social law, and the extent that precarious part-time workers may lose protection from these. It will also examine additional problems that marginal; on-demand; and platform workers may face from specific social legislation due to their limited employment.

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[141] Case C-212/05 *Hartmann* ECLI:EU:C:2007:437, para. 26; see also Joined Cases C-245/94 and C-312/94 *Hoever and Zachow*, paras. 23 - 25; *Bernini* , paragraph 25.

[142] *Lebon*, paras. 12-13 *Bernini*, paras. 26; *Giersch*, para. 40; Case C-401/15 *Depesme* ECLI:EU:C:2016:955, para. 40; Opinion of Advocate General Pitruzzella in *Jobcenter Krefeld v JD*, para. 74-75.

[143] *Lebon*, para. 12; Article 10 (1) and (2), Regulation 1612/68. See *Bernini*, paras. 25, 29; Case C-337/97 *Meussen* ECLI:EU:C:1999:284, para. 19; *Giersch*, para. 39; *Depesme*, para. 39.

[144] Case C-709/20 *CG* ECLI:EU:C:2021:602, paras. 90-91. See Articles 1,7, and 24 of the Charter.

6.1 The Part-time Work Directive

Directive 97/81/EC concerning the Framework Agreement on Part-time Work is an important piece of social legislation for those engaged in limited forms of employment.[145] It was adopted by way of the 'social' legislative method, which allows the social partners of the Union representing management and labour to effectively draft much of the content of EU legislation through Framework Agreements.[146] The Framework Agreement is annexed to the Directive, and can be relied upon by individuals against the state in the same manner Directives, i.e., assuming that the provisions are sufficiently clear and precise.[147]

The Directive seeks to ensure that there is equal treatment between full-time and part-time workers in respect to employment conditions,[148] and that the rights contained in the Agreement should apply on a *pro rata temporis* basis "where appropriate".[149] This means that part-time workers should receive a proportional share of all the rights and protections that are available to full-time workers.[150] The definition of part-time work is left to national authorities and the Directive does not contain a definition, however, the Court has accepted that full-time work constitutes "a basic normal working time of 40 hours per week and 8 hours per day", and that anyone working less than this can be considered as a part-time worker.[151] The Part-time Work Directive is also linked to equal treatment

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[145] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work.

[146] This uses the procedure as explained in Article 155(2) TFEU. See S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social"' (2017) 13 *European Constitutional Law Review* 23-61, p. 28.

[147] Case C-268/06 *Impact* ECLI:EU:C:2008:223, paras. 57 – 58; see also Advocate General Kokott in Case C-268/06 *Impact* ECLI:EU:C:2008:2 , para. 87; Case 152/84 *Marshall* [1986] ECLI:EU:C:1986:84, paras. 46 - 49, and Case C-187/00 *Kutz-Bauer* ECLI:EU:C:2003:168, paras. 69 and 71.

[148] Clause 4, Annex, Directive 97/81.

[149] Clause 4(2)

[150] N. Kountouris, 'EU Law and the regulation of 'atypical' work', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 259.

[151] Case C-313/02 *Wippel* ECLI:EU:C:2004:607, paras. 45 – 46.

and opportunities between men and women in employment, insofar as women can face indirect discrimination by being disproportionately engaged in part-time work when compared to full-time male comparators.[152] That being said, the Directive does not prohibit differential treatment that can be justified on objective grounds, or where the application of the *pro-rata* principle is inappropriate.[153]

Despite the protections it affords, the Part-time Work Directive has been described as "essentially cautious",[154] which is suggested to have resulted in its uncontroversial adoption.[155] That said, its adoption through the "democratic, transparent, inclusive, and accountable" 'social method' method is suggested to ensure a good balance between market and social rights.[156] It is also suggested that the Court has given the Directive more "backbone" through its interpretation of it.[157] Despite this, for precarious part-time and on-demand workers its protection is limited, in some cases significantly.

Despite the Part-time Work Directive formally being based on a subsidiary approach that defers to national laws and practice when determines who falls under its scope, the Court has stated that Member States must not undermine the objectives sought by the Directive through their classification of who is a worker, thereby depriving it of its

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[152] Case C-38/13 *Małgorzata Nierodzik* ECLI:EU:C:2014:152 , para. 28.

[153] A. Koukiadaki & I. Katsaroumpas, 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017) *PETI Committee, DG for Internal Policies: Citizens' Rights and Constitutional Affairs*, p.69; S. Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU law?' (2013) 32(1) *Yearbook of European Law* 30-56, p. 31.

[154] P. Davies & M. Freedland, 'The role of EU Employment Law and policy in the de-marginalisation of part-time work: A study in the interaction between EU regulation and Member States Regulation', in S. Sciarra, P. Davies & M. Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union* (2004), CUP: Cambridge, p.77.

[155] A. Davies, 'Regulating Atypical Work: Beyond Equality?', in N. Countouris & M. Freedland (eds), *Resocialising Europe in a Time of Crisis* (2013), CUP, p. 243.

[156] This uses the procedure as explained in Article 155(2) TFEU. See S. Garben (n 146), p. 28.

[157] N. Kountouris (n 148), p. 256.

effectiveness.[158] However, unlike other EU social legislation using the subsidiary approach which refers to the *Lawrie-Blum* terminology, the Court has not explained what the threshold to Member State discretion is. The Court has only stated that it should be assessed whether the employment relationship in question is "substantially different from an employment relationship between an employer and a worker", for example whether they are entitled to sick pay, maternity/paternity pay, and other benefits.[159]

The deference granted to Member States in defining who falls under the Directive's scope means that precarious part-time workers risk being excluded. Moreover, the lack of *Lawrie-Blum* terminology used by the Court in cases concerning Directive 97/81/EC suggests that even those meeting it may not be protected. The consequence of this is that precarious part-time workers may not be protected from discrimination *vis-à-vis* full-time workers or entitled to *pro rata temporis* rights.[160] This differential treatment is likely to produce labour market segmentation and dualizations that result in downward pressures on wages and social standards.[161] In fact, employers could be encouraged to use marginal and on-demand employment as a means of undercutting the rights and standards of workers generally.[162]

The Exclusion of Casual and On-demand Workers

On-demand workers face an added risk insofar as Member States can make use of a derogation contained in Clause 2 of the Framework Agreement that permits them to exclude "part-time workers that work on a casual basis" from its scope.[163] There is a safeguard to this, however,

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[158] See, for example in the case of the Part-time Work Directive, Case C-393/10 *O'Brien* EU:C:2012:110, paras. 34 – 35; see also Opinion of Advocate General Kokott in Case C-393/10 *O'Brien* ECLI:EU:C:2011:746, paras. 36 – 37.

[159] Case C-393/10 *O'Brien* EU:C:2012:110, paras. 45.

[160] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart, p. 93.

[161] N. Kountouris (n 150), pp. 255 - 256.

[162] On this point, see S. Peers (n 151).

[163] Clause 2(1) & 2(2) Directive 97/81.

as this exclusion must be explicit and must be "reviewed periodically" to ascertain whether the objective reasons underlying them remain valid.[164]

Even outside the explicit derogation for casual workers, on-demand workers can be excluded from the scope of the Directive if their situation cannot be compared to a full-time comparator. *Wippel* concerned a worker whose working schedule was determined "on a case-by-case basis by agreement between the parties", meaning that she worked irregularly and did not have a fixed income.[165] Ms Wippel claimed that during her employment she had "virtually no liability for holiday pay, sick pay and termination payments", which undermined, in part, the principle of equal treatment under the Part-time Work Directive.[166] In its decision, the Court held that the Directive applied to workers assuming they (i) have a contract of employment; and (ii) work fewer hours than a comparable full-time worker.[167] However, the national legislation in *Wippel* made no distinction between full-time and part-time work, meaning that there could be no discrimination between the two.[168] The crucial point is that the Part-time Work Directive can only provide protection in situations where there is a difference in treatment between a part-time and comparable full-time worker, either from the same establishment or by reference to applicable collective agreement, or national laws or practices.[169] However, the Court distinguished Ms Wippel's employment from full-time work, finding that the latter has fixed working schedules and salaries, and generally do not allow for the possibility of refusing work. It found that "there is therefore no full-time worker comparable to Ms Wippel within the meaning of the Framework Agreement", and as such there could not be no "less favourable treatment" required under it.[170]

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[164] S. Peers (n 151), p. 31.

[165] *Wippel*, para. 19

[166] Ibid, para. 22.

[167] And assuming the Member State has not made use of the casual workers derogation under Clause 2(2). See *Wippel*, para. 40.

[168] *Wippel*, para. 50.

[169] Ibid, para. 58.

[170] Ibid, paras. 59-60, 62; see also A. Bogg (n 6), p. 286.

The logical conclusion of the *Wippel* decision is that, due to a lack of suitable comparator, all on-demand, zero-hour, platform, or other casual workers can potentially be excluded from the scope of the Directive, regardless of whether the Member State has made use of the explicit exclusion under Clause 2(2). As on-demand workers by definition do not have fixed working schedules, which are often arranged on a case-by-case basis and provide workers with the ability to turn down work, there can apparently be no discrimination with full-time workers.[171] This is suggested to constitute "obtuse judicial reasoning" that uses a circular argument to exclude on-demand and casual workers from social protection purely because of their status as on-demand and casual workers.[172] This situation is highly problematic as it may result in many kinds of on-demand workers, including those working for platform-based services who can be in the most precarious working situations, being excluded from vital social protections.[173] Given the nature of platform work, with its on-demand nature, limited amount of hours, uncertainty of work schedules, and the focus on 'tasks' rather than working time, many platforms workers are likely to be excluded from the protections provided under Directive 97/81/EC.

Promoting Part-time and precarious employment?

Directive 97/81/EC is also criticised for promoting part-time work, which has encouraged flexible and precarious forms of employment, thereby undermining its effectiveness. It has its roots in the European Employment Strategy as it seeks to regulate some flexible employment relations, however, it also promotes certain flexible practices, in this case part-time work, as a tool to foster job creation and economic growth.[174] Its preamble stresses the need to "to promote the employment and equal opportunities for women and men … by a more flexible organisation of

[171] A. Koukiadaki & I. Katsaroumpas (n 153), pp. 70-71, 72-73.
[172] A. Bogg (n 6), p. 287; A. Davies (n 155), p. 244.
[173] N. Kountouris (n 150), p. 260; Z. Kilhoffer (n 24), p. 140.
[174] D. Ashiagbor (n 160), p. 78; N. Kountouris (n 150), pp. 249 – 250; M. Bell, 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37(1) *European Law Review* 31, pp. 36.

work".[175] Moreover, Clause 5 of the Framework Agreement obliges Member States and social partners to "identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them".[176] These provisions that promote part-time work are suggested to have contributed to a "false perception" that part-time work is *per se* beneficial for workers.[177] However, as this chapter has shown, whilst this is true for some workers, for other part-time work results in a less secure and more exploitable position.

Directive 97/81/EC does not create a comprehensive system of protection for part-time workers.[178] Its promotion of part-time work has arguably resulted in more precarious working situations, and its exclusion of on-demand and casual work from its scope means that it does not provide protection to a quickly growing group of precarious workers. This situation risks normalising precarious part-time employment relationships.[179] In order to provide more protection to part-time workers, the Court should first use the *Lawrie-Blum* criteria as an absolute floor below which the Member States cannot go when classifying workers for the purposes of the Directive. Moreover, it should recognise the shifting nature of labour markets and the rise of on-demand and platform work and use this to provide adequate protection to such workers on the basis of the Directive.

6.2 The Working Time Directive

Marginal and on-demand workers also obtain protection through the Working Time Directive.[180] This Directive derives from the Union

[175] Recital (5), Directive 97/81/EC.
[176] Clause 5(1), Framework Agreement on Part-time Work, Annex to Directive 97/81/EC.
[177] A. Davies (n 155), p. 233.
[178] N. Kountouris (n 150), p. 256.
[179] Ibid, p. 264.
[180] Originally Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, subsequently Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

competence to legislate in the field of health and safety of workers, conferred through the Single European Act. It is a health and safety measure that establishes a floor of rights and does not aim to regulate the functioning of the internal market.[181] In fact, the Court removed a provision dictating that minimum rest periods include Sundays, as it was unclear why this would improve the health and safety of workers.[182] The sole focus is to improve the "physiological and psychological capabilities of the individual", although establishing a floor of health and safety rights will also likely mitigate against employment practices that create downward pressures on social standards by seeking competitiveness through increased flexibility.[183]

The Directive sets lower limited for, *inter alia*, daily and weekly rest periods, maximum working time, the right to paid annual leave, working during unsociable hours, and on-call work.[184] It does not prohibit Member States from adopting rules more favourable to workers.[185] Whilst the Directive is more focused on excessive, rather than limited, employment,[186] it does offer some important protections to marginal part-time and on-demand workers in precarious working situations. Most notably, this is through a broad definition of working time that gives rise to rights such as *pro rata* annual paid leave, and compensation *in lieu*.

The concept of working time under the Directive is important for calculating the individual's *pro rata* paid annual leave or the compensation *in lieu*. This is important for precarious workers, particularly those working casually or on-demand, who may be excluded from such benefits and who are often required to perform tasks ancillary

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[181] Case C-84/94 *United Kingdom v Council* ECLI:EU:C:1996:431, para. 15.
[182] Ibid, para. 37; see also S. Garben (n 146), p. 30.
[183] J. Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (2003) Hart Publishing, p. 96.
[184] See A. Bogg (n 6), p. 267.
[185] Article 15 Directive 2003/88. See also Case C-282/10 *Dominguez* EU:C:2012:33, para. 48; Case C-337/10 *Neidel* EU:C:2012:263, para. 35; Case C-219/14 *Kathleen Greenfield* ECLI:EU:C:2015:745, para. 39; Case C-385/17 *Hein* EU:C:2018:1018, para. 30; Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981, para. 34.
[186] A. Bogg (n 4), p. 272.

to their main employment that may not be included as 'working time'. The Court has stated that time spent on site constitutes working time, even if on-call, however, time spent away from work may not count, even if the worker is on-call (although there are some exceptions to this).[187] The Court has asserted that to find time spend on-call at the place of work was not working time would undermine the worker's fundamental rights.[188] However, the Court has been accused of not respecting national subsidiarity and the role of collective agreements under the Directive.[189]

Time not spent working will not be covered by the Directive, even if the worker is "on the books" of the employer and receives compensation. *Heimann* concerned the German *Kurzarbeit Null* plan, whereby employers could extend an employment contract for a dismissed worker for one year, however, during this period the worker had no obligation to work, and the employer no obligation to pay a salary.[190] The individual's annual paid leave was calculated on a *pro rata temporis* basis, which as the applicant did not work during this period meant that he was not entitled to anything. The Court considered that since their situation is *de facto* comparable to that of part-time workers the *pro rata* principle should apply.[191] However, as no hours were worked, this calculation resulted in zero. Moreover, the Court felt that any obligation on the employer to pay for annual leave on top of the basic salary would make it less likely that they would make use of the social plan.[192] The decision has been criticised for negating the entitlement to compensation *in lieu* on termination of employment through principle of *pro rata*, which is difficult to reconcile with case-law addressing interaction between sick leave and paid annual leave.[193] It also suggests that on-demand workers that have a formal contract of employment, but do not actually perform any economic activity, will not be entitled to annual paid leave.

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[187] Case C-303/98 *Simap* ECLI:EU:C:2000:528, para. 50.
[188] Case C-151/02 *Jaeger* ECLI:EU:C:2003:437, para. 47.
[189] A. Bogg (n 6), p. 284.
[190] Joined Cases C-229/11 and C-230/11 *Heiman & Toltschin* ECLI:EU:C:2012:693.
[191] Ibid, paras. 32 – 34.
[192] Ibid, paras. 26 – 30.
[193] A. Bogg (n 6), p. 289.

Under the Directive, Member States must also ensure that undertakings record working time through adequate systems of time-registration.[194] In *CCOO*, the Court held that the absence of a time-registration system meant that it was "not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done".[195] As such, Member States are obliged to ensure that employers set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.[196] This is helpful for on-demand and platform workers, who may often have to perform additional tasks alongside their employment which is not recognised by the platform or employer.

Under Article 7, every worker is entitled to at least four weeks annual paid leave, which may not be replaced by compensation *in lieu*, except where the employment relationship is terminated.[197] This means that a national measure depriving the individual of entitlement to paid annual leave or compensation *in lieu* will be contrary to the Directive,[198] and cannot be subject to any preconditions.[199] If a worker moves onto a contract with different hours, then a new period of annual paid leave calculation must be made from this date using the *pro rata* principle,[200] and any reduction in working hours cannot affect annual leave already accumulated.[201] It covers 'normal' remuneration, which includes basic salary and supplementary payments.[202] The Court has held that the right

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[194] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:402.
[195] Ibid, para. 47; see also Opinion of Advocate General Pitruzella in Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:87, paras. 57 – 58.
[196] *CCOO*, para. 60.
[197] Joined Cases C-131/04 & C-257/04 *Robinson-Steele & Michael Clarke* ECLI:EU:C:2006:177, para. 58; Case C-350/06 *Schultz-Hoff* ECLI:EU:C:2009:18, para. 60; Case C-155/10 *Williams & others* ECLI:EU:C:2011:588, para. 26.
[198] Case C-173/99 *BECTU* ECLI:EU:C:2001:356, para. 49;
[199] Ibid, para. 53; Case C-350/06 *Schultz-Hoff* ECLI:EU:C:2009:18, para. 28.
[200] Case C-219/14 *Kathleen Greenfield* ECLI:EU:C:2015:745, para. 37-38.
[201] Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* ECLI:EU:C:2010:215, paras. 32-34; Joined Cases C-229/11 and C-230/11 *Heimann & Toltschin* ECLI:EU:C:2012:693, paras. 34-35; Case C-415/12 *Bianca Brandes* ECLI:EU:C:2013:398, para. 33; *Kathleen Greenfield*, para. 34.
[202] *Williams & others*, para. 31.

to annual paid leave is protected under Article 31(2) of the Charter and can in some instances be relied upon by individuals in situations where they cannot rely on the Working Time Directive.[203] This right provides protection to precarious part-time workers by reducing the pressure of having to forego paid annual leave during periods of low income, whilst compensation *in lieu* enhances the worker's employment security by ensuring that they have can receive some financial security during periods of inactivity.[204]

Such benefits are particularly useful for platform workers, who may risk being excluded from such protections.[205] Specifically, they often do not have adequate systems for recording working time, and do not have a site of work and time spent 'on-call' is done from their home or in a public place, which can make this very difficult to assess.[206] That said, the Court has held that for Firefighters, time spent 'on-call' at their home constituted working time as they were required to be available within eight minutes, which significantly reduced the opportunities for the workers to perform non-work activities.[207] Moreover, if the worker does not have a fixed place of work, then time spent travelling each day between their homes and the premises of the first and the last customers constitutes working time.[208] Such principles could be applied to platform workers, as any time spent with the app turned on, regardless of the worker's physical location, should be classified as working time, including travelling periods. The app itself could then be used as a means of time recording. This would protect platform workers during periods of time that they are waiting and/or monitoring new incoming jobs or offers by classifying this as working time.

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[203] Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871; Case C-684/16 *Tetsuji Shimizu* ECLI:EU:C:2018:874. This point is discussed in more detail in the context of the Charter of Fundamental Rights.
[204] A. Bogg (n 6), pp. 281 – 282.
[205] Z. Kilhoffer et al (n 24), p. 152.
[206] *Ibid*, p. 151.
[207] Case C-518/15 *Matzak,* ECLI:EU:C:2018:82, para. 63; see also Case C-580/19 *RJ* ECLIËU:C:2021:183, para. 47; compare with Case C-344/19 *DJ* ECLI:EU:C:2021:182, paras. 54 – 56.
[208] *CCOO*, para. 45.

Despite some important protections, the Working Time Directive is suggested to do little to protect from the "immense control" the employer has over precarious workers.[209] Furthermore, it is argued to be old-fashioned in the context of modern labour markets as it does little for those with limited hours.[210] As such, it is suggested that future legislation should be more aimed at setting minimum hours rather than maximum hours.[211] However, it should be emphasised that the Working Time Directive is a health and safety instrument that cannot set a minimum number of hours, as this does not affect the health of the worker except in the wider sense of it potentially pushing them into poverty.

6.3 Equal treatment between Men and Women

Precarious part-time workers can also gain indirect protection through EU rules on equal treatment at work. These ensure that there is equal treatment between marginalised groups that face discrimination in the workplace and the dominant group. Whilst not affecting precarious workers directly, such rules can protect vulnerable and marginalised groups that are often overrepresented in precarious work.[212] This is most common between men and women, with the latter overrepresented in part-time, marginal, and on-demand employment, and who can face discrimination when compared to full-time, male comparators.

Equal pay between men and women was laid down in Article 119 EEC (now 157 TFEU) and recognised as a general principle of EU law in *Defrenne*, when the Court famously held that European integration had a "double aim" that was "at once economic and social", and that it required the elimination of all discrimination.[213] However, this right also had a social aim insofar as the Union's strategic economic and employment policy goal was to further the inclusion of women in the workforce to

[209] A. Bogg (n 6), p. 285.
[210] U. Oberg (n 21), p. 34. This is in reference to a number of MEP questions posed to the European Commission regarding zero-hour contract work.
[211] H. Collins, K.D. Ewing, and A. McColgan, *Labour Law* (2012) CUP: Cambridge, p. 310.
[212] D. Ashiagbor (n 160), p. 81-82.
[213] Case 43/75 *Defrenne v Sabenna (No 2)* ECLI:EU:C:1976:56, paras. 12, 19.

improve competitiveness.[214] Originally, these equal treatment rules only related to remuneration, with working conditions not covered under the Treaty.[215] This led to a number of Directives concerning equal treatment of men and women at work.[216] This patchwork of Directives has now been subsumed into the overarching Directive 2006/54, on equal opportunities and equal treatment of men and women.[217] The fundamental right to equal treatment between men and women in "all areas, including employment, work, and pay" is now enshrined in Article 23 of the Charter. EU rules now cover transgender persons, at least in the context of gender reassignment,[218] and permit positive action as a means to counter "*de facto* inequalities which may arise in society".[219]

Importantly, these rules cover indirect discrimination between men and women, for example on the basis of full-time and part-time work, if the differential treatment cannot be explained by other factors.[220] The Court will thus find national measures constitute indirect discrimination between men and women if the latter are put at a particular disadvantage when compared to the former, due to the overrepresentation of women

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[214] S. Fredman 'Discrimination Law in the EU' (2000) *Legal Regulation of the Employment Relation*, p. 188; M. Bell (n 172), p. 32.

[215] Case 149/77 *Defrenne v Sabenna (No 3)* ECLI:EU:C:1978:130, paras. 23-24; see also Opinion of Advocate General Capotorti in Case 149/77 *Defrenne* ECLI:EU:C:1978:115, pp. 1383-1384.

[216] See, for example, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

[217] Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[218] Case C-13/94 *P v S & Cornwall County Council* ECLI:EU:C:1996:170.

[219] Case C-407/98 *Abrahamsson* ECLI:EU:C:2000:367, para. 48.

[220] Case 96/80 *Jenkins* ECLI:EU:C:1981:80, para. 13; Case C-170/84 *Bilka* ECLI:EU:C:1986:204, para. 29.

in part-time work.[221] In this respect, the Court has held that if a "much lower proportion of women than of men" work full time, then the exclusion of part-time workers from occupational pension schemes can be contrary to the rules on equal pay, if the measure could not be explained by other factors.[222]

Such rules cover not just equal pay for equal work, but also situations where women do not receive the same pay for work "of equal value".[223] The Court has been praised for adopting an effects-based approach that considers the everyday social realities of women, which requires more than simple negative non-discrimination to realise genuine equality.[224] That said, women can face problems proving discrimination given the number of variables that are often involved, and the national court must take many factors into account such as whether a significant amount of evidence collaborates the claim that the measure has a more unfavourable impact upon women.[225] Furthermore, differential treatment can be justified if they "correspond to a real need on the part of the undertaking" and are appropriate and necessary in achieving the objectives pursued.[226] Arguments justifying such measures need to be specific and supported by evidence.[227] Like the Working Time Directive, the rules on equal treatment are linked explicitly with the *Lawrie-Blum* definition of worker, which is used to determine who falls under its scope. This means that women engaged in marginal part-time or on-demand employment who do not meet the criteria are unlikely to be protected.

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[221] Case C-167/97 *Seymour-Smith and Perez* ECLI:EU:C:1999:60, para. 58; see also Case C-109/88 *Danfoss* ECLI:EU:C:1989:383, para. 20 – 21; Case C-381/99 *Susanna Brunnhofer* ECLI:EU:C:2001:358, para. 51.

[222] *Bilka*, para. 29.

[223] Case C-624/19 *K and others v Tesco Stores Ltd* ECLI:EU:C:2021:429, para. 33.

[224] S. Burri and S. Prechal, 'EU Gender Equality Law' (2008) Luxembourg: Office for Official Publications of the European Communities, p. 16.

[225] *Seymour*, para. 62; Case C-127/92 *Enderby* ECLI REF, para. 17.

[226] *Bilka*, para. 36.

[227] S. Burri and S. Prechal (n 224), p. 16.

6.4 The Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union (The Charter) can, in some instances, provide residual protection to individuals when they are unable to rely on secondary legislation, for example due to the horizontal nature of the situation. The Charter of Fundamental Rights built on the 1961 and 1989 Charters, and originally had a similar legal value as it was not binding on Member States. The Charter was conferred primary law status in Article 6(1) TEU of the Treaty of Lisbon. Ostensibly, it contains a number of rights and principles that provide protection to marginal and on-demand workers, such as the right to collective bargaining and action; fair and just working conditions; an annual period of paid leave; the protection of young persons; and social security and social assistance benefits; and assistance to "combat social exclusion and poverty". That said, there are a number of factors which limit the ability of individuals to rely upon the its provisions.

First, the Charter's provisions can only be invoked where a right is provided under EU secondary law. The Court applied this approach prior to the Charter having primary law status, using the principle of non-discrimination to provide protection to individuals when they could not rely on the rights available under secondary legislation.[228] The Court found that the secondary legislation in question did not establish the right to equal treatment, which was found in "various international instruments and constitutional traditions common to the Member States".[229] Therefore, in order to ensure the full effectiveness of that fundamental right, the national court had to set aside any provision of national law conflicting with it.[230] That said, the Court rarely mentioned the Charter in its decisions, instead focusing on general principles.[231]

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[228] Case C-144/04 *Mangold* ECLI:EU:C:2005:709; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21.

[229] *Mangold*, para. 74; *Kücükdeveci*, para. 20.

[230] *Mangold*, para. 76 – 77; *Kücükdeveci*, paras. 50 – 51.

[231] N. Lazzerini, '(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: *AMS'* (2014) 51 *CMLRev* 907, pp. 909-910; Opinion of Advocate Geeneral Tizzano in Case C-144/04 *Mangold* ECLI:EU:C:2005:420, para. 54.

Since the Treaty of Lisbon, the Court has increasingly referred to the Charter, albeit in a haphazard manner.[232] In *Egenberger*, the Court set out a clear formula for when the Charter's provisions (in this case the right to non-discrimination under Article 21) could be relied upon.[233] Advocate General Tanchev that Article 21 Charter was not a subjective right that had horizontal application between private parties, meaning that it could not apply where the applicant could not rely on secondary legislation.[234] However, the Court held that non-discrimination of the grounds of religion or belief, protected under Article 21 Charter, was a "mandatory" general principle of EU law that is "sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them",[235] and did not need to be made more specific by provisions of EU or national law.[236] *Egenberger* can be understood as a continuation of the non-discrimination general principles case-law,[237] with the only difference being that the Court uses the "mandatory" nature of Article 21, rather than solely the 'general principle' of non-discrimination. The Court has applied the same formula in more recent cases,[238] finding that "Article 21(1) … is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds".[239] Granting certain provisions of the Charter "mandatory effect" is suggested to demonstrate that the Court takes the Charter's elevated primary law seriously.[240]

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[232] For example, see Case C-147/08 *Römer* ECLI:EU:C:2011:286 in the context of discrimination on the basis of sexual orientation, and Case C-391/09 *Runevic-Verdyn & Wardyn* ECLI:EU:C:2011:291 in the context of discrimination on the basis of ethnic origin. See L. Lourenço, 'Religion, discrimination and the EU general principles' gospel: *Egenberger*' (2019) 56(1) *CMLRev* 193, p. 201-202.

[233] Case C-414/16 *Vera Egenberger* ECLI:EU:C:2018:257.

[234] Opinion of Advocate General Tanchev in Case C-414/16 *Vera Egenberger* ECLI:EU:C:2017:851, para. 119.

[235] *Egenberger*, para. 76.

[236] *Egenberger*, para. 78.

[237] L. Lourenço, 'Religion, discrimination and the EU general principles' gospel: *Egenberger*' (2019) 56(1) *CMLRev* 193, p. 200.

[238] Case C-68/17 *IR v JQ* ECLI:EU:C:2018:696, paras. 69-70.

[239] Case C-193/17 *Markus Achatzi* ECLI:EU:C:2019:43, paras. 76-77.

[240] L. Lourenço (n 235), pp. 202-204.

Precarious workers also face the difficulty that only a very limited number of provisions are likely to have "mandatory effect" and therefore can be relied upon. From the text of the Charter, it is not clear which provisions are rights that can be invoked by individuals, and which are 'principles' that require implementation beforehand, given that the Charter uses both terms without ever providing a concrete definition for either.[241] This meant that there was initially confusion over the precise nature and effect of many of its provisions.[242] In particular, there was disagreement over the legal value of the Charter's social rights. Whilst some argued that they should be of lesser value than other provisions within the Charter, others argued that social rights could be denied to individuals *per se*.[243]

Traditionally, social rights have not been given the freestanding status that rights such as non-discrimination have. Even in cases concerning Article 31(2) of the Charter on the right to annual paid leave, the Court has tended to decide these cases solely through Article 7 Directive 2003/88. For example, Advocate General Trstenjak considered that, whilst the wording of Article 31(2) suggested a higher legal value than other provisions in the Solidarity Chapter, he did not think that this could be relied upon in situations where secondary legislation did not apply.[244] However, in its decision the Court omitted the Charter entirely, deciding the case on the basis of a harmonious interpretation of Article 7 Directive 2003/88.[245] This was despite the referring court explicitly stating that this

[241] On this, see T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 *CMLRev* 1201, pp. 1202-1203.
[242] S. A. de Vries, 'The *Bauer* et al and *Max Planck* judgments and EU citizens' fundamental rights: an outlook for harmony' (2019) 1 *European Equality Law Review* 16, p. 24; S. Peers and S. Prechal, 'Article 52: Scope and Interpretation of Rights and Principles', in S. Peers, T. Hervey, J. Kenner, and A. Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2014) Hart: London, p. 1506.
[243] T. Lock (n 239), p. 1210; D. Schiek, 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611, p. 627-628.
[244] Opinion of Advocate General Trstenjak in Case C-282/10 *Maribel Dominguez* ECLI, para. 75.
[245] Case C-282/10 *Maribel Dominguez* ECLI:EU:C:2012:33, paras. 28-31.

was not possible due to a *contra legem* interpretation.[246] The Court was criticised for hiding away from the most difficult issue in the case,[247] and for muddying the waters by confusing the already unclear terms of rights and principles throughout the judgment.[248]

The case of *AMS* suggested that the Charter's Solidarity Chapter provisions may not be relied upon.[249] *AMS* concerned Article 27, which refers to the obligation for workers and their representatives to be "guaranteed information and consultation in good time". The Court held that a French rule circumventing the requirement to place a union representative on company boards was not in conformity with Article 3(1) of Directive 2002/14.[250] However, Article 27 could not be applied directly, as it was clear from the wording of the provision that for the article to be fully effective, it needed to be given more specific expression in Union or national law.[251] The Court distinguished Article 27 from 21, finding that the latter was sufficient in itself to confer a directly effective right on individuals.[252]

Following *AMS*, it was suggested that the Solidarity provisions should be considered as principles, rather than rights that could be relied upon.[253] However, in recent cases the Court has confirmed that at least one of the Solidarity Chapter provisions has mandatory effect. In *Bauer & Broßonn* and *Shimizu (Max Plank)*,[254] both of which concerned the right to annual leave that could not be converted into compensation *in lieu*

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[246] L. Pech, 'Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*' (2012) 49 *CMLRev* 1841, p. 1856.
[247] Ibid, p. 1850; see also N. Lazzerini (n 229), p. 914.
[248] Ibid, p. 1858.
[249] Case C-176/12 *Association de médiation sociale (AMS)* ECLI:EU:C:2014:2.
[250] *AMS*, para. 29. Directive 2002/14 gives further effect to Article 27 Charter by establishing a general framework for informing and consulting employees.
[251] Ibid, para. 45.
[252] Ibid, para. 47.
[253] C. Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82(2) *Modern Law Review* 350, p. 354; S. A. de Vries (n 238), p. 24.
[254] Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871; Case C-684/16 *Tetsuji Shimizu* ECLI:EU:C:2018:874.

following either the termination of the contract (*Shimizu*), or the death of the worker (*Broßonn*), and which is protected under Article 31(2) Charter. Article 7 Directive 2003/88 could not be relied upon in these cases,[255] however, the Court held that the right to annual leave is a "particularly important principle", or alternatively an "essential principle",[256] of EU social law from which there may be no derogations.[257] Unlike Article 27, the Court held that Article 31(2) is "both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law".[258] Given that the legislation in question implemented Directive 2003/88, it was held to be within the scope of EU law. [259] That said, there are limits to the mandatory effect of Article 31(2). In Joined cases *TSN & AKT*,[260] the Court held that the Working Time Directive does not govern situations where Member States go beyond the minimum protection required under it, whilst also not limiting the possibility of going beyond this minimum.[261] As the national rule in question did not affect the minimum right to four weeks' annual paid leave, any restrictions on their leave could not adversely affect its coherence or the objectives pursued through the Directive or Article 31(2).[262]

The Court's *acquis* on the Charter shows that some of the rights contained within it have 'mandatory' effect, meaning that they are free-standing rights that can be applied in situations where secondary legislation does not apply.[263] The Court has used this approach in the context of Article 21 and Article 31(2), both of which can provide marginal and on-demand workers protection in situations where secondary legislation does not

[255] It should be noted that in the context of *Bauer and Broßonn,* the Directive could be relied upon in *Bauer*, but not in *Broßonn* due to the horizontal nature of the situation.
[256] *Bauer and Broßonn*, para. 58; *Tetsuji Shimizu*, para. 69.
[257] *Bauer and Broßonn*, para. 38; *Tetsuji Shimizu*, para. 19.
[258] *Bauer and Broßonn*, para. 84-85; *Tetsuji Shimizu*, para. 73-74.
[259] *Bauer and Broßonn*, para. 53; *Tetsuji Shimizu*, para. 50; see S. A. de Vries (n 238), p. 22.
[260] Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981.
[261] *Ibid*, para. 34-35.
[262] *Ibid*, para. 51.
[263] S. A. de Vries (n 240), pp. 27-28; see also E. Frantziou, 'Joined cases C-569/16 and C-570/16 Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable' (19 November 2018) *European Law Blog*.

apply. For a Charter provision to be relied upon, the right must be (i) unconditional, and (ii) "mandatory".[264] This suggests that provisions which refer to "national laws and practices" (which includes most social provisions) are unlikely to be capable of being applied directly.[265] That said, provisions like Article 31(1) that places a limitation on maximum working hours are likely to have mandatory effect. This suggests that in a situation like *CCOO*, a national practice of inadequate recording of working time would violate Article 31(1) Charter, even if the Directive could not be relied upon (as was the view of the Advocate General).[266] Other provisions that may have mandatory effect are the right of workers to conclude collective agreements and 'defend their interests' through strike action under Article 28; the right to unjustified dismissal under Article 30; and the right to maternity and paternity leave under Article 33(2).

A problem for marginal and on-demand workers is that the Charter only applies when the situation is "within the scope" of EU law.[267] However, if the individual cannot rely on secondary legislation due to them not meeting the genuine economic activity requirement, then they are unlikely to be able to rely on the Charter. This would be troubling, as it would mean that the Union's fundamental social rights are in fact linked to economic activity. That said, the Court has stated that where Member States exercise discretion (for example determining whether employment is genuine or not), this must comply with the Charter.[268]

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[264] S. A. de Vries (n 240), p. 25; see also L. S. Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' (25th February 2019), *EU Law Analysis*.

[265] C. Barnard (n 253), p. 355; S. A. de Vries (n 242), p. 25.

[266] *CCOO*. On the horizontal applicability of Article 31(2), see Opinion of Advocate General Pitruzzella in Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:87, paras. 96-98.

[267] Case C-617/10 *Akerburg Frannson* ECLI:EU:C:2013:105, para. 21.

[268] Joined Cases C-411/10 and C-493/10 *N.S.* ECLI:EU:C:2011:865, paras.65–68; see also K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European Constitutional Law Review* 375, p. 380.

6.5 The Directive on Transparent & Predictable Working Conditions: (Finally) Protecting Marginal Workers?

Precarious part-time and on-demand workers gain protection through Directive 2019/1152 on transparent and predictable working conditions in the European Union. The Directive was adopted through the Social Pillar, which despite being a non-binding policy instrument, has become the catalyst for the adoption of legislation and non-binding recommendations and communications becoming something of catch-all basis for social legislation.[269] The Directive lays down certain rights and protections that are beneficial to part-time workers, in particular those engaged in marginal, on-demand, and casual forms of employment.[270] It provides the worker a right to be informed about their rights and protections, which is welcome given such workers insecure and vulnerable position. Furthermore, Article 9 provides workers with the right to start another job outside the work schedule established with the first employer. This provides more flexibility to the employee and reduces the power of the employer over them, as an undertaking cannot prohibit a marginal worker from supplementing their income thorough additional employment.

Under Article 10, workers have the right to a minimum predictability of work. It states that "where a worker's work pattern is entirely or mostly unpredictable" then the worker shall not be required to work unless the work "takes place within predetermined reference hours and days" and "the worker is informed by his or her employer of a work assignment within a reasonable notice period".[271] If this is not done, then the worker can refuse such requests "without adverse consequences", and are entitled to compensation if the employer unexpectedly cancels their work assignment. This right is likely to be highly beneficial for marginal

[269] Proposal for a Council Recommendation on access to Social Protection for Workers and the self-employed COM (2018) 132 final; Decision 2016/334 on establishing a European Platform to enhance cooperation in tackling undeclared work; European Platform Undeclared Work, Work Programme 2017-18 (Update 19-20 October 2017)
[270] Directive 2019/1152 on transparent and predictable working conditions in the European Union *OJ L 186*.
[271] Article 10(1), Directive 2019/1152

workers, who often have little choice but to accept unreasonable demands and changes from the employer to maintain their employment and income stability. Under Article 11, Member States shall undertake measures that will prevent abusive practices within on-demand work, such as limitations of the use of duration of such contracts, a rebuttable presumption of the existence of an employment contract with a minimum number of paid hours, or "equivalent measures that ensure effective prevention of abusive practices".[272] The Directive explicitly refers to casual workers such as zero-hour contract workers, domestic or voucher-based workers, platform workers, and short-term workers who can be excluded under EU social law. Whilst it does not prohibit zero-hour contracts, the recital indicates that workers who have no guaranteed working time, including those on zero-hour and some on-demand contracts are in "a particularly vulnerable situation", and thus the Directive should apply to them "regardless of the number of hours they actually work".[273]

The Directive is suggested to be a good start for the expansion of social and employment rights through the Social Pillar and has the potential to "significantly improve" the overall balance between social and economic values in the EU and respond to numerous social challenges that have arisen since the financial crisis.[274] That said, despite positive developments, the legislation fails to fully address the structural imbalance between the EU's competences in the internal market and social fields.[275] It also contains neoliberal influences, insofar as it seeks to

[272] See Article 11, Directive 2019/1152

[273] Recital (11) & (12), Directive 2019/1152 on transparent and predictable working conditions in the European Union.

[274] S. Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review* 210, p. 212, 224; B. Bednarowicz, 'Workers' rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?' (24th April 2019).

[275] D. Schiek, 'A Constitution of Social Governance for the European Union', in D. Kostakopoulou & N. Ferreira (eds.), *The Human Face of the European Union: Are the EU Law and Policy Humane Enough?* (2016) CUP: Cambridge, p. 37.

it seeks to improve working conditions while "ensuring labour market adaptability",[276] and "the necessary flexibility for employers".[277]
How the Directive will affect the protection of on-demand and marginal workers remains to be seen. Whilst it does provide concrete rights and protections, it is unclear how effective these will be or what protection it will provide to workers than do not meet the *Lawrie-Blum* criteria. The final version of the Directive removed the inclusion of the *Lawrie-Blum* criteria, which was moved to the recital, and was ultimately based on the subsidiary approach linking it to national definitions. This could mean that Member States will be able to exclude some precarious workers from its scope, however, it is likely that the Court will, like other social legislation, use the *Lawrie-Blum* as a floor which ensures the effectiveness of the Directive. Precarious workers may gain further protection from the fact that the Directive does not apply to individuals that work less than 12 hours per month, which is an improvement on the 32 hours contained in Directive 91/533/EEC, which in some respects was the predecessor to the Directive 2019/1152, albeit with more limited scope.[278] 12 hours a month (or approximately three a week) would cover all but the most marginal of part-time workers. It will be interesting to see how the Court interprets this instrument once the transposition date has passed.

7 The Wider Consequences of excluding Precarious Part-time Workers

The final part of this chapter will explore some of the wider social implications for the exclusion of precarious part-time workers from the protections explained so far in this chapter. By failing to meet the genuine economic activity aspect of the *Lawrie-Blum* criteria, precarious part-time workers are excluded from almost all social protections available to them under EU law, including both free movement and social law. This means that it is no longer enough just to engage with the market, instead one

[276] Article 1(1) Directive (EU) 2019/1152.
[277] Recital (1), Directive (EU) 2019/1152.
[278] Article 1(2)(a) Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

must engage sufficiently in the 'right type' of work. The most flexible, insecure, and precarious positions are likely not to be the 'right type' of work that gains protection under EU law.

Therefore, EU law creates a form of dualism in the labour market, whereby there is a group of workers engaged in more standard forms of employment that enjoy all the rights and protections available under EU law due to their status as workers. There is another group, however, that is excluded from protection. This commodifies their labour and undermines their social protection. The following section will explain how this dualism is liable to (i) undermine the bonds of market solidarity that the system of legal protection rests upon, and (ii) exclude precarious part-time workers from legal protection, thereby commodifying their labour and creating downward pressures on social standards.

7.1 Breaking the bonds of Market Solidarity

Conferring such social protections, in particular social benefits, to 'outsiders' that have only recently entered the host-state requires some form of legitimacy and normative reasoning. In the European Union, this is often discussed in term of the level of solidarity that exists between the worker and the host-society, which demands the outsider's inclusion and protection.[279] A system based on protecting individuals due to their economic participation is based on the idea of *market solidarity*, which suggests that there is solidarity between different members of society as this is necessary for the functional division of labour on a market.[280] This is linked to Durkheim's concept of organic solidarity, which suggests that solidarity in modern societies derives from individuals performing distinct but interconnected roles, and the mutually advantageous reciprocity of their actions,[281] rather than 'mechanical' solidarity associated with conforming to a dominant culture.[282] The

[279] A. Somek, 'Solidarity decomposed: being and time in European Citizenship' (2007) 32 *European Law Review* 787, p. 801; F. de Witte (n 140).
[280] F. de Witte (n 138), p. 81.
[281] Ibid, pp. 81 - 82; D. Schiek (n 243), p. 617.
[282] Ibid, p. 81; E. Durkheim, *The Division of Labour in Society* (1984), pp. 68 – 86.

"interdependency between actors and the mutually advantageous nature of their transactions" means that all "are engaged in the effective division of labour … and (all) should derive the same social entitlements from that economic engagement".[283] Market solidarity ensures that individuals are compensated through their participation in the market though access to these social entitlements. This suggests that anyone engaging in the division of labour on the market should obtain certain rights and obligations under market solidarity to ensure they are able to prosper within that society,[284] regardless of their background or nationality.

Migrants are already disadvantaged on the labour market when compared to Member State nationals. They often have more limited social and cultural capital, meaning that they have fewer social connections and less cultural knowledge necessary to build relationships.[285] They are more likely to be engaged in precarious employment, and are less likely to be involved in collective action or join a trade union, making them a source of cheap, malleable labour than can be easily exploited.[286] Market solidarity mitigates these negative effects, by seeking to ensure that there is a "space of freedom" from the market where the migrant's hopes, needs, and aspirations can be realised without having to worry about market pressures.[287]

Given the dichotomy between market and social integration, Member States remain largely free to define the generosity of the social rights and protections available to their own citizens, however, market solidarity dictates that they must include non-national EU migrants when determining the level of protection available.[288] Simply put, no-one in modern society is independent. We all share in the active participation and proper functioning of the economy and therefore should all share in

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[283] F. de Witte (n 140), p. 84
[284] Ibid, p. 82.
[285] M. Savage, et al., *Social Class in the 21st Century* (2015); see also P. Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (1984).
[286] D. Schiek (n 275), p. 20; G. Standing, *The European Precariat: The New Dangerous Class* (2011), p. 65.
[287] F. de Witte (n 138), p. 82
[288] Ibid, p. 86.

the benefits accrued from this. It is difficult to argue that one should be entitled to more or less protection simply because they come from another Member State, or because their employment is not 'valued' as much as other positions.[289] The COVID-19 pandemic has shown that just because an individual's employment is 'lower' skilled or paid, it does not make it less valuable to society.

7.2 The European Lumpenprecariat

The idea of market solidarity and the equality of treatment between migrant workers and native populations is what distinguishes European integration from other free-trade areas, as workers are able to counter the negative effects of free trade by themselves, and the improvement of their working and living conditions is placed at the heart of the system.[290] However, this legal dichotomy creates a dualism in the labour market, whereby genuine workers are entitled to market solidarity (and all the rights and protections that this provides), whilst marginal workers are excluded from solidarity and entitled to very little, if any, social protection.

This places citizens into 'deserving' or 'non-deserving' categories, or more bluntly labels them as 'good' or 'bad' citizens, depending on whether they fulfil the conditions required of them.[291] This is suggested to represent a 'totalitarian' mind-set where only 'good' European citizens need protection.[292] On the other hand, it also creates a second-class of citizens who have an inferior form of citizenship which is "devoid of any

[289] Ibid, p. 84.
[290] D. Schiek, 'EU Social Rights and Labour Rights and EU Internal Market Law' (2015) *European Parliament DG for Internal Policies* IP/A/EMPL/ST/2014-02 PE 563.457, p. 21 - 22.
[291] L. Azoulai, 'Transfiguring European Citizenship: from Member State territory to Union Territory, in D. Kochenov (ed.), *EU Citizenship and Federalism* ((2015) Cambridge: CUP, p. 178.
[292] D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, p. 226.

transnational protective status".[293] In particular, the "less affluent or disabled" are relegated to irrelevance and their rights unprotected.[294] These second-class migrants then become part of a group of 'tolerated' citizens within the EU legal order.[295] Despite not facing any formal expulsion order, their legal status is technically irregular and they have very limited if any social protections. This creates a disenfranchised, indentured, and exploited class of workers that carries greater risks for society, such as homelessness, greater healthcare needs, and increased crime.[296]

This group can be described as a 'Lumpenprecariat',[297] made up of "illegal migrants, living unlawfully in other Member States without equal treatment guarantees",[298] rights of residence and equal treatment, or even protection under the Charter as they fall outside the scope of EU Law.[299] They are more likely to be in lower-paid or less formal work, and include groups such as women engaged in care or reproductive work, young persons, disabled persons, ethnic minorities, etc. [300] This dichotomy creates a danger that free movement, and potentially all social protection under EU law, becomes the preserve of capitalist-class workers, leaving the 'working proletariat' at greater risk of poverty.[301] It risks creating an elitist model of free movement that alienates the working poor and effectively awards rights on the basis of socio-economic class.[302] While traditional proletarian workers are likely to gain

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[293] S. Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Intersentia: Cambridge, pp. 75 – 88, p. 85.

[294] D. Kochenov (n 290), pp. 225 - 227.

[295] N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015), pp. 926–927.

[296] C. O'Brien (n 72), p. 965

[297] D. Schiek, 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' (2017), p. 360. This can be seen as an update of the traditional Marixt term of 'proletariat'.

[298] D. Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40(2) *European Law Review* 249-262.

[299] As the Court made explicit in *Dano*, paras. 89–91; See N. Nic Shuibhne (n 293), pp. 914–915.

[300] C. O'Brien (n 92), pp. 1661 – 1672; C. O'Brien (n 72), p. 940.

[301] C. O'Brien (n 72), p. 940.

[302] Ibid, p. 939.

protection under EU law (due to their SER-based employment), those on the most flexible, casual, and precarious employment that is most likely to lose out. As such, this is worse than simply reinforcing the "dogmatic ideal of a good market citizen".[303] It means that simply engaging with the market is no longer enough, the workers must engage with right type of work, which is one of consistency, security, and stability, which is out-of-step with increased flexibility and insecurity in modern labour markets.[304] This contributes to long-standing criticisms that the EU is a 'rich person's club' that benefits affluent cosmopolitans over working class migrants. Most troubling, it creates a system whereby "the weak and the needy" are provided the least protection.[305] In some circumstances, for example in the context of discrimination in work or ensuring the basic conditions relating to health and safety at work, EU provides significant protection that should not be trivialised. However, for the subject matter of this chapter, i.e., the European *Lumpenprecariat* on the margins of economic activity, it is suggested that the law provides rights to those "who do not need them and only when they do not need them".[306]

7.3 Labour Commodification & Downward Pressures on Social Standards

Lastly, creating this dualism in the labour market by excluding precarious part-time and on-demand workers from legal protection is liable to result in downward pressures being placed on wages and social standards. This is because their exclusion from social protection results in them becoming more reliant on the market for their survival, known

[303] D. Kochenov, 'The Citizenship of Personal Circumstances in Europe', in D. Thym (ed.), *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing, p. 51.
[304] C. O'Brien (n 72), p. 938; C. O'Brien (n 92), p. 1650.
[305] D. Kochenov (n 303), p. 51.
[306] P. Minderhoud and S. Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive' (2017), p. 207.

as labour commodification.[307] Social institutions, whether it be the parishes and workhouses of the industrial era, the employment security of the SER, or the benefits and protections provided under the modern welfare state, ensure that individuals are protected to varying degrees from the pressures of the market and the commodification of their employment.[308] However, the principle always remains the same: labour will be commodified if the individual is forced to rely on the market rather than social institutions.[309] Moreover, this dualism is liable to create more inequality in terms of bargaining power between labour and capital.[310] Labour is better able to protect and promote its own interests if acting in a unified and coherent fashion, rather than the workforces splitting between migrant and native, or marginal and genuine, worker. If the former is split off and easily exploited, this can undercut the standards of the organised, less exploited workforce as it intensifies competition between them and lowers their price.[311] In essence, if a sizeable degree of the labour market is treated unequally and has significantly reduced social protection, then there is a higher risk of downward pressures on working and living conditions generally.[312] This suggests that a more inclusive approach seeking to ensure equality of treatment between migrant and native workers, and permanent and temporary workers, will protect all workers from the deregulatory pressures arising from the use of internal market rules to undermine social standards, and even contribute towards an *upward* spiralling of wages and social conditions.[313] Not only does it secure a fairer, more

[307] F. Behling, and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970.

[308] D. Ashiagbor, 'Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration' (2013), p. 305; see also G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990); G. Standing, *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (2017) London: Biteback; S. Rosewarne, 'Globalisation and the Commodification of Labour: Temporary Labour Migration: The Economic and Labour Relations Review' (2010), pp. 99–110.

[309] G. Esping-Andersen (n 306), p. 35.

[310] F. de Witte (n 140), p. 82

[311] C. O'Brien (n 72), p. 964; D. Schiek (n 297).

[312] D. Schiek (n 290), pp. 23-24.

[313] Ibid; D. Schiek (n 275).

equitable distribution of life chances for EU citizens, but it will also generate more growth and jobs, and improve the overall functioning of the internal market.[314]

Ironically, the exclusion of precarious workers from protection may result in increased negative sentiment towards migrants, as their exploited position is perceived by some as undermining the wages and social standards of the general population. This can result in a vicious spiral, whereby increasingly strict migration and employment policies are adopted to quell this sentiment, which in turn results in the migrant worker becoming more commodified, resulting in further downward pressures on wages and social standards.[315]

8 Solution: A Rebuttable Presumption of Genuine Activity?

By failing to meet the *Lawrie-Blum* criteria, EU migrant workers engaged in precarious forms of part-time employment can lose their legal status and rights under Article 45 TFEU, Directive 2004/38, and much of EU social law. Their differential treatment has a number of negative consequences: it undermines the idea of market solidarity upon which the internal market is based, and is liable to create an under-class of *lumpenprecariat*, i.e., precarious workers who have very limited or no legal protection under EU law. Not only does this place the worker at risk of poverty and destitution, arguably undermining the Union's claims of a commitment to social protection, but also creates downward pressures on social standards which may undercut the wages and social standards of workers in general.

This exclusion of precarious part-time workers indicates the need for a broad definition of worker and the effective enforcement of this. However, it must also be recognised that the constitutional and political limits of European integration mean that extending the scope of worker

[314] M. Ferrera, 'Modest Beginnings, Timid Progresses: What's next for Social Europe?', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge, pp. 18 - 19.
[315] D. Schiek (n 297).

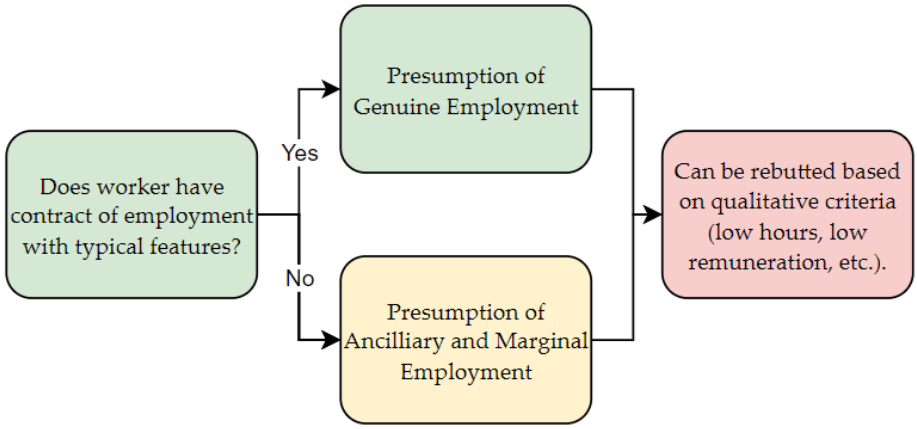
protection too far is also likely to undermine the idea of market solidarity and the legitimacy of the Union, which is still largely based on a sharp division between market and social competences. The Court may be able to protect against, or at least mitigate, the negative effects of this lack of protection for marginal workers, whilst preserving the constitutional foundations of the EU, by adopting a 'presumption of genuine activity' test that can be used when assessing whether an individual's economic activity is 'genuine', and consequently whether they gain worker status under the *Lawrie-Blum* criteria.

When determining the factors to be assessed, the Court has traditionally used a quantitative approach that examines the amount of work, or the number of hours performed, when assessing whether economic activity is genuine. More recently, it has taken a more qualitative approach looking at the nature of the employment, including the existence of employment-based rights. Both of these approaches may be problematic. The quantitative approach can mean that precarious part-time workers without a fixed work schedule, such as on-demand, zero-hour, or platform workers, are unable to demonstrate that they work enough for their employment to be considered genuine, and the demand that they 'prove' that they have performed a sufficient number of hours per week is likely to place them in an even more insecure and exploitable position. Under the qualitative approach, the requirement of a formal contract of employment with basic employment rights and protections may mean that the most casual or irregular working situations are not covered. This could mean that the most exploited and insecure workers are further denied legal protection.

A more balanced approach may be to apply a 'presumption of genuine activity', based on elements of both approaches, which would offer a higher level of social protection by including more workers within its scope, whilst still adhering to the core legal distinction between economic activity and inactivity. To do this, the Court should effectively switch its reasoning. Instead of finding that an individual can be classified as a worker, despite working very few hours, following an overall assessment of the employment relationship, the Court should say that, assuming the worker has an employment contract that contains the main elements of

employer-employee relationship under national law, then there should be a rebuttable presumption that the economic activity performed is genuine. This presumption could then be rebutted if, notwithstanding the existence of an employment relationship, the activity in question is performed to such a small extent that it renders the activity marginal. This may risk excluding individuals that are engaged in genuine employment but do not have the formal features of an employment relationship. To safeguard against this, a reversal of the presumption could apply: the individual's employment could be presumed to be marginal, however, this could be rebutted through a quantitative evaluation of the individual's economic activity.

Figure 3: A Legal Presumption of Genuine Employment



Interestingly, the European Commission has proposed a similar system in its recent Proposal for a Directive on improving working conditions in platform work.[316] In Article 4, the Proposal lays down the rules for when platform workers should be considered as paid- or self-employed. Assuming the relationship meets the criteria laid down in paragraph 2, "the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship". Under Article 5, Member States must establish a system for

[316] Proposal for a Directive on improving working conditions in platform work COM (2021) 762 final.

"any of the parties to rebut the legal presumption referred to in Article 4". If the digital platform (i.e., the employer) challenges this presumption, then the "burden of proof shall be on the digital labour platform" to demonstrate this. It remains to be seen whether this presumption of paid employment will be adopted in the final text of the Directive. However, it could act as a precedent for the use of a presumption of genuine activity test under the genuine economic activity requirement.

9 Conclusion

This chapter has assessed the level of protection that is available to precarious part-time workers under EU law and has made suggestions as to how this protection can be improved within the legal space that is available. Such workers have been defined as workers engaged on contracts with an extremely limited working schedule, or those engaged on an on-demand or zero-hour basis without a fixed working schedule or income. Whether they obtain legal protection or not is primarily based on whether they meet the genuine economic activity requirement within the *Lawrie-Blum* criteria. Traditionally, this has been based on quantitative factors relating to the amount of work undertaken, however, recently the Court has applied a more comprehensive approach that also assesses qualitative elements relating to the nature of the employment relationship. That said, the division in competences between Union and Member State means that this classification is mainly undertaken by national authorities that predominantly use quantitative elements and do not consider the mor recent *acquis* of the Court.

If unable to meet the genuine economic activity requirement, or national implementations of it, the worker is liable to lose many rights and protections. Under Directive 2004/38, the strict approach of the Court means that there is limited space for granting legal status and rights outside of worker status. Instead, marginal workers are treated as jobseekers, reducing their protection and subjecting them to various conditions and limitations. This can be highly problematic as it means that they have to comply with strict conditions to maintain this status (i.e., national activating labour market policies), which may be not reasonable or even feasible for those already engaged in employment.

The Court's approach in *Bajratari* may offer residual protection to precarious part-time workers, as it would suggest that they can be treated as having "sufficient resources" under the Directive, rather than being jobseekers.

Precarious part-time workers are liable to lose their free movement rights under Article 45 TFEU, such as the right to access employment, residence rights, and important social security rights such as family benefits that are necessary for the worker's integration into the host-society. They may also lose protection under EU social law that is linked to the *Lawrie-Blum* criteria, such as the Working Time Directive, the Directive on Predictable and Transparent Working Conditions, and Equal Treatment legislation. This is also likely to be the case under the Part-time Work Directive, despite this instrument in principle being based on the subsidiary approach to determining who falls under its scope. Furthermore, casual and on-demand workers can lose protection under this Directive if a Member State excludes them from its scope or if there is no full-time comparator, regardless of the application of the *Lawrie-Blum* criteria. Again, this suggests that those on the most insecure and exploitable contracts are likely to receive the least protection.

The exclusion of such workers from protection has wider societal consequences. It undermines the concept of market solidarity that is crucial to the freedom of movement for workers in the EU, and moreover risks creating an under-class of *Lumpenprecariat*, i.e., precarious workers that have limited or no legal protection under EU law due to not meeting the *Lawrie-Blum* criteria. This is not only likely to put the worker at risk of poverty and destitution, thereby undermining the Union's claims of a commitment to social protection and social justice but may also create dualisations in the labour market that are likely to place downward pressures on social standards and undercut the wages of both native and migrant workers. This chapter has proposed shifting the Court's focus to looking primarily at the nature of the employment, i.e., the existence of an employment contract and employment-based rights, which would lead to a presumption of genuine activity, which could then be rebutted if, regardless of the existence of an employment contract, the work is performed to such a small extent that it should be considered as marginal

and ancillary. This would mitigate at least some of the problems resulting from the genuine economic activity requirement whilst adhering to the Union's constitutional and political limitations in terms of how far the rights of workers can be extended to those on the margins of economic activity.