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

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Chapter 7: Intermittent Workers

1 INTRODUCTION

The second case study will assess the situation of intermittent workers. These are persons who, due to being engaged in casual, agency, or other short-term work, face periods of economic inactivity during their working career which can undermine their employment security and place them in a precarious situation. This chapter will use a broad notion of intermittent work that includes not just those engaged on fixed-term contracts or through employment agencies, any employment that is not permanent, and which can result in periods of economic inactivity and employment insecurity. Therefore, it can also include on-demand and platform, given that workers engaged in such employment will likely also face periods of economic inactivity during their working carer.

The following sections will first explain what forms of intermittent employment are precarious, looking at fixed-term, employment agency, and other forms of temporary and short-term employment. Following this, it will examine the situation of intermittent workers under free movement law, specifically Directive 2004/38.[1] It will examine their ability to retain the status of worker and to obtain permanent residence status, as well as the relationship between the different statuses under the Directive. Next, it will look at the supplementary protection intermittent workers receive through EU social law, in particular the Fixed-term Work Directive, the Employment Agency Directive, and the Charter of Fundamental Rights and the Directive on Transparent and Predictable Working Conditions.[2] Finally, it will look at the wider consequences for intermittent workers and what this means for their overall level of social protection, before suggesting a system of residual protection that would provide employment security to such workers whilst adhering to the limitations of the Union.

2 PRECARIOUS FORMS OF INTERMITTENT EMPLOYMENT

Intermittent employment can be defined as work which, by reason of its short-term or casual nature, means that the worker is liable to spend periods of time in economic inactivity during their working career. This includes temporary employment such as fixed-term and agency-placed work, as well as other forms of work that can be considered temporary under a broader, holistic understanding of intermittent employment.

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
[2] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP *OJ L 175, 10.7.1999*; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work *OJ L 327, 5.12.2008*; The Charter of Fundamental Rights of the European Union (2012 consolidated version) *OJ C 202 7.6.2016*; Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union PE/43/2019/REV/1 *OJ L 186, 11.7.2019.*

2.1 Fixed-term Work

Fixed-term work is defined as an employment relationship where the end of the employment contract is related to reaching "a specific date, completing a specific task, or the occurrence of a specific event".[3] This is different from the SER model, under which most contracts were permanent or open-ended. Fixed-term work existed before the 2008 Financial Crisis and was in decline prior it, however, since the crisis it has increased.[4] In fact, for those entering the labour market now, fixed-term employment is increasingly the norm rather than the exception, with their use increasing following the COVID-19 pandemic: OECD data suggests that current employees engaged on fixed-term contracts are not having them renewed, and permanent contracts are being replaced with temporary ones.[5] Fixed-term employment allows entry into employment and opportunities for valuable experience for workers who might otherwise not be able to attain such, for example younger persons with less working experience. As such, fixed-term work is a trade-off between, one the one hand, reduced job security as the worker does not have a permanent contract, while on the other hand providing valuable work experience that may ultimately result in a permanent employment position.

In general, fixed-term workers report a high degree of financial and job insecurity, which can have significant negative effects on their mental health.[6] On average they receive lower pay and have fewer employment rights than permanent workers.[7] Unlike part-time work, there is little distinction between precarious and non-precarious forms of fixed-term work: a solid majority of fixed-term workers in Europe are in their position involuntarily would prefer a permanent contract.[8] This is particularly the case for fixed-term workers that are engaged on consecutive fixed-term contracts, often without the opportunity of making this employment permanent, even after several years of service. This creates a significant power imbalance between the worker and employer which pushes the intermittent work towards social exclusion, undermines solidarity between workers, and distorts competition.[9] The perceived precariousness associated with fixed-term work varies across Member States. Those with strong traditions of employment protections and more permanent, open-ended contracts see fixed-term work as highly precarious, however, in Southern Member States fixed-term contracts have become more normalised.[10]

2.2 Employment Agency Work

Employment agency work is defined as employment where a worker is engaged on a contract with a work agency "to work temporarily under its supervision and direction".[11] Agency work

[3] Clause 3, Framework Agreement on fixed-term work, in Directive 99/70/EC; see also S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, p. 18.
[4] Ibid.
[5] OECD, *OECD Employment Outlook 2020: Worker Security and the COVID-19 Crisis* (2020) OECD publishing: Paris.
[6] A. Broughton et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels, p. 96.
[7] Ibid, p. 95; S. McKay et al (n 3), p. 18.
[8] A. Broughton (n 6), p. 103.
[9] S. McKay et al (n 3), pp. 18 – 19.
[10] Ibid, p. 18.
[11] Directive 2008/104/EC on temporary agency work, Art. 3; See also S. McKay et al (n 3), p. 28.

is inherently temporary by nature, as can be seen through its regulation under EU law.[12] Like most forms of precarious employment, its use has increased significantly since the Global Financial Crisis.[13] Agency work disproportionately affects younger workers, women, and migrants: 57% of agency workers in Europe are under 30,[14] a significant majority are women,[15] and many are migrants.[16] Like fixed-term work, employment agency work is suggested to assist younger workers and long-term unemployed to get (back) into meaningful employment. However, in practice it tends to create precarious working conditions, and the 'transition rate' from agency work to permanent work is very low, particularly for migrant workers.[17] Furthermore, it creates a complex system of legal rights and entitlements than is applicable to those directly employed, which is likely to negatively affect agency workers and opens up the system for abuse.[18] On average, agency workers are paid less than comparable permanent workers.[19] Agency work also has societal implications as it can de-incentivise companies from up-skilling their own staff. Furthermore, during times of crisis, companies tend to lay off flexible agency workers before their core workforce,[20] or even replace their core workforce with agency workers.[21] Agency staff can be used to circumvent requirements on employment protections and social security contributions, thereby undermining social rights across the Union. As such, agency work is one of the most precarious forms of non-standard employment.

2.3 Other forms of Intermittent Employment

Intermittent work must be seen as encompassing more than just fixed-term and employment agency work. Individuals engaged in casual or zero-hour work, short-term employment, or platform work, may also find themselves moving between jobs regularly and therefore having to spend periods of time in economic inactivity. As such, all precarious workers discussed in this thesis are likely to face some of the issues relating to intermittent workers. Platform work does not easily fit inside the definition of legislation such as the Fixed-term or Employment Agency Directives, at least without some inventive readings of the law.[22] However, the nature of platform work means that those engaging with an app are likely to do it intermittently. As such, the issues affecting intermittent workers will also affect platform workers. This broad understanding of intermittent workers can be seen from the Court's case-law: *Alimanovic* concerned individuals "in temporary jobs lasting less than a year",[23] whilst in *Tarola* the worker

[12] Directive 2008/104/EC refers explicitly *temporary* agency work.
[13] S. McKay et al (n 3), p. 28.
[14] Eurociett, 2012.
[15] S. McKay et al (n 3), p. 29.
[16] Ibid.
[17] A. Broughton (n 6), p. 110.
[18] Ibid.
[19] Ibid.
[20] S. McKay et al (n 3), p. 29.
[21] G. Standing, *The European Precariat: The New Dangerous Class* (2011) Bloomsbury, London.
[22] See A. Rosin, 'Platform Work and fixed-term employment regulation' 12(2) *European Labour Law Journal* 156-176, p.166-167.
[23] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para. 27.

was engaged on a basis short-term in both paid- and self-employment.[24] These cases demonstrate how regularly moving between jobs is increasingly the norm for many workers.

3 PROTECTION OF INTERMITTENT WORKERS UNDER DIRECTIVE 2004/38

Intermittent workers do not face problems meeting the *Lawrie-Blum* criteria, which they are deemed to have met during short-term periods of employment. Instead, difficulties can arise in terms of retaining this status during periods of economic inactivity, or when trying to secure permanent residence status under Directive 2004/38, both of which would provide employment security during periods of economic inactivity. The following section will examine the system of worker retention and the system of permanent residence under Directive 2004/38, in view of the Court's strict and literal approach towards its interpretation.

3.1 Retaining Workers Status: The Court's Case-law

The Court has long held that the "mere fact" that a contract of employment is fixed term in nature "cannot necessarily lead to the conclusion" that once it is completed the worker "is automatically to be regarded as voluntarily unemployed".[25] However, those seeking to retain the status of worker, or obtain the status of jobseeker, following a period of economic activity must comply with certain requirements such as registering with a job centre and genuinely seeking employment (as was explained in Section 5.4.1). The following section will outline the Court's case-law on the interpretation of Article 7(3) Directive 2004/38.

Saint Prix

Saint-Prix concerned the ability of women to retain the status of worker under Directive 2004/38 if they temporarily give up work due to pregnancy. There was no specific provision in the Directive that covered this situation, which the UK lower courts had considered to be a conscious decision by the EU legislator,[26] which could be inferred from a literal reading of the text. However, as Advocate General Wahl concluded, it would create a strange situation where women were protected in the case of illness, but not in the case of pregnancy.[27] It would furthermore represent "blatant disregard for the principle of non-discrimination on grounds of sex", as is protected under Article 23 Charter.[28] The Court agreed, finding that there was nothing in Article 7(3) to suggest that it "lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status".[29] That said, the Court did not read the new situation into Article

[24] Case C-483/17 *Tarola* ECLI:EU:C:2019:309, para. 9.
[25] Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:600, para. 42.
[26] C. O'Brien 'I trade, There I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643, p. 1666; *Secretary of State for Work and Pensions v JS* [2010] UKUT 131 (AAC), para. 22.
[27] Opinion of Advocate General Wahl in Case C-507/12 *Jessy Saint Prix* ECLI:EU:C:2013:841, para. 33.
[28] Ibid, para. 40.
[29] Case C-507/12 *Jessy Saint Prix* ECLI:EU:C:2014:2007, para. 38.

7(3) directly.[30] Instead, it decided the case under Article 45 TFEU, finding that the constraints requiring a woman to give up work during pregnancy and "the period needed for recovery" does not necessarily deprive her of worker status.[31] The fact that she was "not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement".[32] However, given that the situation could not be read into the Directive directly (with the Court rejecting the idea that could be equated with temporarily illness),[33] the case was ultimately decided under Article 45 TFEU.

Alimanovic

The Court's generous approach in *Saint Prix*, based on Article 45 TFEU, can be compared to cases like *Alimanovic*, where it has been much stricter in its approach when interpretating the system of worker retention. *Alimanovic* concerned intermittent workers in the truest sense: mother and daughter Alimanovic were engaged in 'temporary jobs' lasting less than a year before becoming unemployed.[34] Following this, the Alimanovic family received the *Arbeitslosengeld II* (subsistence allowance for the long-term unemployed) social benefit, however, this was rescinded by the local authorities after eight months due to a change in the national regulations.[35] The Court held that intermittent workers in the situation of the Alimanovic family could only maintain a right to reside if they either retained the status of worker under Article 7(3)(c), or as a jobseeker under Article 14(4)(b) which protects them for "as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged".[36] However, as Germany had already conferred worker status upon the Alimanovic family for eight months (two months more than is required under the Directive for those in employment for less than 12 months), it was under no obligation to confer this status any longer. The applicant could still retain a right of residence as jobseekers under Article 14(4)(b), which meant that in principle they could rely on the right to equal treatment under Article 24(1), however, the derogation in Article 24(2) meant that Germany could deny them social assistance.[37]

The Court's decision went against the Opinion of Advocate General Wathelet, who considered that a distinction should be made between jobseekers that have just moved to another Member State to seek employment, and those (like the Alimanovic family) who are looking for work after a period of employment in the host-state.[38] He considered that denying them social assistance would represent an "appropriate, albeit restrictive, transposition of Directive 2004/38", and that "its automatic consequences for entitlement to subsistence benefits seem to

[30] Ibid, para. 30. The Court rejected the suggestion that a pregnant woman's situation could be equated with temporarily illness.
[31] *Saint Prix*, para. 40.
[32] Ibid, para. 41.
[33] Ibid, para. 30
[34] *Alimanovic*, para. 27.
[35] Ibid, para. 30.
[36] Ibid, para. 56.
[37] Ibid, para. 57-58.
[38] Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, para. 87 et seq.

go beyond the general system established" under it.[39] In his view, Member States must make an individual assessment that takes into account, *inter alia,* "the amount and regularity of the income received by the citizen of the Union, (and) also the period during which the benefit applied for is likely to be granted to them".[40] He then made a link with the Court's 'real-links' case-law,[41] stating that this link should prevent the automatic exclusion of these social benefits on the basis of a single condition of entitlement (i.e., time spent in receipt of the benefit).[42] He considered that the national rule "prevents other factors which are potentially representative of the real degree of connection of the claimant with the relevant geographic labour market being taken into account … goes beyond what is necessary to achieve its aim".[43] Interestingly, whilst the Court rejected the Advocate General's approach, Italy does make this distinction between first-time jobseekers and those already in the country, with the latter group having an extended period of a year rather than six months before they lose worker status.[44]

The Court adopted a much stricter approach, finding that an individual assessment was unnecessary as the Directive establishes "a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant".[45] According to the Court, this allows individuals to know their rights and obligations, and guarantees a significant level of legal certainty and transparency while complying with the principle of proportionality.[46] Finally, the Court asserted that whilst an individual claim for social assistance could not represent an unreasonable burden on the host-state, the cumulative claims of such benefits was "bound to" result in one being placed on it.[47]

Alimanovic represents a strict interpretation of Article 7(3) when compared to *Saint Prix*, as well as the Advocate General's Opinion, which would allow for more protection for ex-workers than first-time jobseekers. The difference in the Court's reasoning is that pregnant women can rely upon Article 45 TFEU directly, however, jobseekers must rely on Article 14(4)(b) of the Directive. This approach is based on the idea that jobseekers obtain residence rights under Article 14(4)(b) Directive 2004/38, whilst as pregnant women are not covered under the Directive, they rely directly on Article 45 TFEU. Advocate General Wathelet has criticised this approach for misunderstanding the Directive. In his Opinion in *Gusa*, he argued that the structure and wording of Article 14(4)(b) "do not support a view of that provision as providing the basis for a right of residence".[48] The fact the provision applies 'by way of *derogation'* means that it only applies when a right of residence has been lost. It does not grant rights, but rather protects jobseekers from expulsion "as long as they can provide evidence that they are

[39] Ibid, para. 103.
[40] Ibid, para. 106.
[41] See, for example, Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458 and Case C-209/03 *Bidar* ECLI:EU:C:2005:169.
[42] Opinion of Advocate General Wathelet in *Alimanovic*, paras. 107 – 108
[43] Ibid, para. 109.
[44] C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016) *DG for Employment, Social Affairs and Inclusion* FreSsco Contract: VC/2014/1011, p. 32.
[45] *Alimanovic*, paras. 59 – 61.
[46] Ibid, paras. 59 – 61.
[47] Ibid, paras. 62.
[48] Opinion of Advocate General Wathelet in Case C-442/16 *Gusa* ECLI:EU:C:2017:607, para. 69.

continuing to seek employment and they have a genuine chance of being engaged".[49] He also considered that the purpose of the Directive would be undermined as this approach would treat a first-time jobseeker "who has never paid any contributions, even though he has contributed to the tax and social security system of the host Member State, in the same way as an employed person".[50] Whilst such as approach would provide more protection to ex-working jobseekers, the Court has confirmed in more recent that jobseekers' sole right of residence is based on Article 14(4)(b).[51] Notwithstanding the views of AG Wathelet, the Court's approach adheres to the literal/purposive approach it purports to adhere to. Where the situation is covered under Directive, the Court will apply these rules strictly. However, where the situation is not covered by the secondary legislation, the Court will use Treaty provisions and loose formulae in order to come to an outcome in line with the purpose of the law.

Prefeta

Subsequent case-law has been more in line with the stricter approach of *Alimanovic* when deciding cases under Article 7(3). *Prefeta* concerned the rights of Polish workers during the country's accession to the EU.[52] The applicant worked in the UK from 2009 to 2011 before ceasing employment due to a non-work-related injury. He therefore qualified as an 'accession worker requiring registration', however, the registration was only belatedly completed in January 2011, two months before he was forced to stop working. He registered as a jobseeker but was denied income-related Employment Support Allowance on the basis that he had not been working for an uninterrupted period of 12 months following the granting of his residence certificate and before becoming unemployed. The Court held that as he obtained a certificate registering his employment only in January 2011, he had not been working as a registered accession worker for 12 months and therefore could not retain the status of worker.[53] It was considered that if the UK were not able to restrict the application of Article 7(3) Directive 2004/38 to individuals "without having first completed 12 uninterrupted months of registered work", this would undermine the effectiveness of the derogations within the Act of Accession, nearly to "restrict the right of economically inactive accession state nationals to reside in the United Kingdom for the purpose of seeking work".[54] As it was put by Advocate General Wathelet: "it is not sufficient for him to work. He must have been allowed to do so".[55]

The is a very narrow interpretation of the worker retention rules laid down in the Act of Accession and Directive 2004/38. The Advocate General claimed that the applicant needed to be allowed to work in the host-state, however, he was factually engaged in employment for 20 months, even if technically only two of these were as a 'registered worker'. This logic is not at all convincing: if a worker is granted a job in a host-state and pays social security contributions and income tax whilst there, but is not granted formal residence status by the national authorities due to administrative errors, how does this restrict the right of "economically inactive accession state nationals to reside in the United Kingdom for the purpose of seeking

[49] Ibid, para. 70.
[50] Ibid, para. 76
[51] Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037.
[52] Case C-618/16 *Prefeta* ECLI:EU:C:2018:719.
[53] Ibid, para. 52.
[54] Ibid, para. 47.
[55] Opinion of Advocate General Wathelet in Case C-618/16 *Prefeta* ECLI:EU:C:2018:125, para. 70.

work", as the rule was suggested to do by the UK. To borrow the words of Advocate General Wathelet, this seems to be an "appropriate, albeit restrictive" interpretation of the Accession Act.[56] Furthermore, it creates a situation whereby workers from accession countries can be working and paying taxes, and yet are not recognised as being lawfully resident and therefore excluded from social protection. This is liable to commodify the labour of such workers, resulting in their social exclusion as well as distorting the labour market and creating downward pressures of wage rates and labour standards.

Tarola

A final example can be seen from the case of *Tarola*, which concerned a Romanian national working in Ireland during August and September 2013, and from 8th July to 22nd July 2014.[57] His application for jobseeker's allowance was denied because he had "not worked for more than a year and the evidence produced was insufficient to establish Ireland as his habitual residence", as was required under national law.[58] However, the Court held that the Irish lower court had "misread" the Directive when it concluded that Article 7(3)(c) only applied to fixed-term workers.[59] It was considered that the wording of the provision, in particular the use of the word *or*, meant that individuals retained the status of worker for no less than six months in two situations: (i) when they finish a fixed-term contract and become involuntarily unemployed as result (e.g. *Alimanovic*), and also (ii) when an individual becomes involuntarily unemployed *during the first 12 months of employment*.[60] The Court held that Article 7(3)(c) applies "in all situations in which a worker has been obliged, for reasons beyond his/her control, to stop working in the host state before one year has elapsed, regardless of the nature of the activity or the type of contract".[61] As such, assuming the individual is involuntarily unemployed (i.e. for any reason beyond their control), they will retain the status of worker, regardless of the form or type of their employment contract. This meant that, even though the applicant worked for just two weeks before becoming involuntarily unemployed, he could still retain the status of worker for at least six months, assuming he complied with the conditions of Article 7(3).[62]

The *Tarola* decision represents a broader interpretation of the Directive, albeit one that adheres to the approach of applying a literal approach to the Directive wherever possible. Through this literal interpretation, the Court considered that the word 'or' created two scenarios in which worker status could be retained, which covered all situations where a worker is forced to cease work. However, in a "gentle nudge" to Member States, the Court emphasised that they could still exclude certain persons working for short periods from social security entitlement, assuming this is also the case for Member State nationals.[63]

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[56] Using the terminology in *Alimanovic*, para. 103.
[57] *Tarola*.
[58] Ibid, para. 12.
[59] M. Cousins, 'Establishing and Retaining a Right of Residence as A Worker under EU law: Tarola v Minister for Social Protection' (2016) *Bepress*, available at: https://works.bepress.com/mel_cousins/98/; see also [2016] IEHC 206, para. 28.
[60] *Tarola*, paras. 30-31.
[61] Ibid, para. 48.
[62] Ibid, para. 54.
[63] Ibid, para. 56; see also Opinion of Advocate General Szpunar in Case C-483/17 *Tarola* ECLI:EU:C:2018:919, para. 55; F. Strumia, 'Unemployment, Residence Rights, Social Benefits at Three Crossroads in the Tarola Ruling' (13th

3.2 No Social Assistance for Jobseekers? Intermittent Workers and the 'Alimanovic Trap'

The Court's stricter approach towards Directive 2004/38 has made it more difficult for those on the fringes of economic activity to claim social benefits. A clear example of this is in the context of intermittent workers claiming social assistance benefits during periods of economic inactivity where they do not retain the status of worker. Specifically, the Court's recent approach suggests that jobseekers may struggle to claim social assistance benefits that assist with access to the labour market.

Following the establishment of Union Citizenship, the Court held that it was no longer possible to exclude jobseekers the entitlement of social benefits "of a financial nature intended to facilitate access to employment in the labour market".[64] Even before the adoption of Directive 2004/38, the distinction between these job seeking benefits, and social assistance benefits more broadly, was unclear and arbitrary.[65] However, since the adoption of Directive 2004/38, the Court's approach seems to have created a situation whereby non-contributory jobseekers' allowance, and other social assistance benefits meeting the *Vatsouras* / *Collins* description, have become inaccessible to jobseekers. If a social benefit has a social assistance-like function, then it can be derogated from under Directive 2004/38, regardless of whether it facilitates access to employment or not.[66] This paradox can be understood as the 'Alimanovic trap', which can be most clearly explained by comparing the decisions of *Dano* and *Alimanovic*. In *Dano*, the applicant was denied a SGB II (Jobseeker) benefit as, according to the Court, she was not in employment or actively looking for work, and only entered Germany in order to claim social assistance benefits. However, *Alimanovic* also concerned SGB II (Jobseeker) benefits, and yet the applicants this time were actively seeking employment but were also denied these benefits due to the derogation on social assistance contained in Article 24(2), suggesting that, at least in the context of the of SGB II (Jobseekers) benefits, these are inaccessible to jobseekers insofar as it is difficult to imagine a situation where a jobseeker would be entitled to them.[67] Furthermore, the Court's interpretation of Directive 2004/38 may mean that any means-tested benefit as covering minimum subsistence costs necessary to lead a life in keeping with human dignity would be excluded from jobseekers.[68] As such, it is suggested that in cases such as *Tarola* (and potentially *Alimanovic*) applicants should be entitled to the social benefit in question under the *Vatsouras*/*Collins* doctrine, thereby negating any need to assess their potentially retained worker status under Article 7(3).[69] To exclude them from

April 2019), *EU Law Analysis*. Available at: http://eulawanalysis.blogspot.com/2019/04/unemployment-residence-rights-social.html.

[64] Joined Cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:344, para. 37; Case C-138/02 *Collins* ECLI:EU:C:2004:172, para. 63; Case C-326/00 *Ioannidis* ECLI:EU:C:2003:101, para. 22;

[65] F. Wollenschläger, 'The Judiciary, the legislature and the evolution of Union Citizenship', in P. Syrpis (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012) CUP: Cambridge, p. 324.

[66] C. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *CMLRev* 937, p. 947.

[67] C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart, pp. 53–56; M. Jesse & D. Carter, 'Life after the *Dano*-Trilogy: Legal Certainty, Choices and Limitations in EU Citizenship Case Law', in N. Cambien, D. Kochenov, & E. Muir, *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (2020) Leiden: Brill Nijhoff, p. 164.

[68] D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208, p. 1204; see also C. O'Brien (n 64), pp. 948 - 949; O'Brien (n 67), pp. 53-56.

[69] M. Cousins (n 59).

such benefits risks creating distortions on the labour market and pushing those excluded from protection into social exclusion.

3.3 Retaining Worker Status: A Proportionate System?

Intermittent workers are also affected by the Court's strict interpretation of Directive 2004/38 that leaves little room for individual assessments. This is because, in the context of Article 7(3), the Court has held that considers that this constitutes a "gradual system" which "seeks to safeguard the right of residence and access to social assistance" and "takes into consideration various factors characterising the individual situation of each application for social assistance and, in particular, the duration of the exercise of any economic activity".[70] According to the Court, national measures that apply this system guarantee a "significant level of legal certainty … while complying with the principle of proportionality".[71] This effectively means that any measure complying with this provision, even strictly, will automatically be considered to be proportionate and will forgo the need for an individual assessment.[72]

The actual proportionality of this system can be questioned. In *Saint Prix*, the Court held that Article 7(3) is not an exhaustive list of situations where individuals can retain the status of worker and had to read into the law an additional situation (the latter stages of childbirth) in which EU Citizens could retain the status of worker for a "reasonable period".[73] The Court felt it necessary to decide the case on the basis of Article 45 TFEU, which in itself suggests that Article 7(3) is not as comprehensive a system as the Court has made out in recent cases. Furthermore, rather than considering "various factors characterising the individual situation of each application", Article 7(3) appears to consider only one factor: namely, time spent engaged in genuine employment. Advocate General Wathelet was critical of this 'one-size-fits-all' approach, finding that such rules do not allow the Member State to undertake an "overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned".[74] He considered that the "requirement of an individual examination actually concerns the application for social assistance and not the lawfulness of the residence", which would suggest that whilst individual residence status could be determined through a strict application of Article 7(3), any benefit claim requires an individualised assessment of factors such as the income of the citizens and the period they planned to claim the benefits.[75]

The Court has repeatedly asserted that the objective of Article 7 is to prevent "Union citizens who are nationals of other Member States from becoming an unreasonable burden" on the

[70] *Alimanovic*, para. 60; see also Case C-299/14 *Garcia-Nieto* ECLI:EU:C:2016:114, para. 49 in the context of Article 6 Directive 2004/38.
[71] *Alimanovic*, para. 61; see also *Garcia-Nieto*, para. 49 in the context of Article 6 Directive 2004/38.
[72] D. Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 *CYELS* 270-301, pp. 294 – 295.
[73] *Saint Prix*, paras. 38 - 41.
[74] Opinion of Advocate General Wathelet in *Alimanovic*, para. 104.
[75] Ibid, para. 105; see also *Brey*, paras. 78 – 79.

host-state.[76] However, is Article 7(3) really proportionate to this aim if it restricts the entitlement of social assistance to an entire class of persons, regardless of whether they factually represent an unreasonable burden on the state? The Court has dismissed this as the accumulation of such claims is "bound to" result in an unreasonable burden, however, this claim can apparently be made by Member States without any evidence, empirical or otherwise, to support it.

3.4 Intermittent Workers & Permanent Residence

Intermittent workers can gain indirect protection once they obtain the status of permanent residence under Article 16(1) Directive 2004/38. Permanent residence status provides individuals with full equal treatment comparable to genuine workers for as long as they remain physically present in the country. As such, obtaining this status would provide intermittent workers with a high level of legal protection, as they obtain the same level of employment security as is available to Member State nationals. However, the Court's strict approach towards interpreting the Directive means that any period of time that the worker is legally considered to be economically inactive may undermine their claim to permanent residence under 16(1).

The Court has held that permanent residence status under Article 16(1) requires the individual to reside in conformity with Article 7 of the Directive for the entire five-year period. This means that any period of residence that does not satisfy the Directive will not be regarded as lawful residence required for permanent residence under Article 16(1).[77] Any periods spent unlawfully resident, residence based on national law, and periods of voluntarily inactivity, can therefore eliminate the individual's claim to permanent residence status. The confusion over permanent residence can be seen from the Court's case-law, where applicants that seemingly have a right to permanent residence need to invoke their rights through separate provisions, such as Article 7(3). For example, in *Tarola* it suggested to be difficult to see how "any reasonable deciding officer" could conclude that Mr. Tarola did not have permanent residence.[78] Furthermore, in *Gusa*, the Court stated that the applicant did not claim to have permanent residence status in when making his claim,[79] however, it was not clear from the facts of the case why he could not claim his permanent residence,[80] a point which was alluded to by Advocate General Wathelet.[81]

Another challenge intermittent workers face in obtaining permanent residence status is that, in order to retain the status of worker under Article 7(3) following a period of economic

[76] Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para. 74; *Alimanovic* 7, para. 50; Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114, para. 39; *Tarola*, para. 50; Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:809, paras. 36 – 37; Case C-709/20 *CG* ECLI:EU:C:2021:602, paras. 76 – 77; Case C-535/19 *A* ECLI:EU:C:2021:595, paras. 58 – 59.
[77] Case C-424/10 and C-425/10, *Ziółkowski & Szeja* ECLI:EU:C:2011:866, paras. 45 – 46; see also See also D. Kramer, 'A Right to Reside for the Unemployed Self-employed: The case *Gusa* (C-442/16)' *European Law Blog*. Available at: https://europeanlawblog.eu/2018/01/10/a-right-to-reside-for-the-unemployed-self-employed-the-case-gusa-c-444216/.
[78] M. Cousins (n 59).
[79] Case C-442/16 *Gusa* ECLI:EU:C:2017:1004, paras. 21.
[80] D. Kramer (n 77).
[81] Opinion of Advocate General Wathelet in Case C-442/16 *Gusa* ECLI:EU:C:2017:607, paras. 35 – 36.

activity, the worker must register with a job centre. This means that they must often comply with national activation policies in order to maintain their status. At a basic level this is logical: if the individual wants to retain a right of residence whilst looking for a new job, then they should comply with national requirements for jobseekers. On the other hand, it seems that this is the only option for intermittent workers to retain a right of residence during periods of economic inactivity. What then, is the situation for 'voluntary' workers, i.e., intermittent workers that are not currently engaged in economic activity, however, for whatever reason do not wish to register with a jobcentre and meet the conditions necessary for that? O'Brien notes that some EU citizens conduct their own job searches outside of the structures of national job centres in order to avoid creating a burden on the state, but later find that this period has left them with a status gap when they are unable to prove that they were lawfully resident under the Directive.[82] If an individual has worked for a period of time in the host-state, has contributed to its public finances, and has not claimed social benefits during their stay, should they really lose their residence status under the Directive due to not working for a period of time? It is impossible to say that they would place any kind of a burden on the host-state, unreasonable or otherwise.[83] This arguably undermines the Directive's main objective of facilitating the exercise of the primary and individual right to move and reside,[84] and is inappropriate in realising the objective of Article 7 to ensure that Member States can protect themselves against an unreasonable burden being placed on their welfare system.[85] To punish EU citizens by removing their legal status and rights under the Directive because they have taken a short break from employment, or have not complied with the necessary activating labour market policies associated with maintaining the status of jobseeker, seems disproportionate and unfair.[86]

3.5 Application at National Level

Most Member States adhere to Article 7(3) of the Directive insofar as they place a six-month limit on worker status retention in the case where the worker was engaged for less than 12 months, and do not place a limitation on worker status retention where the individual is engaged in employment for over 12 months.[87] Furthermore, the majority allow intermittent workers that do not retain the status of worker to access social benefits applicable to jobseekers. However, some Member States, such as Italy, Portugal, Netherlands (and the United Kingdom when it was a Member), in principle do not allow jobseekers to claim social assistance benefits entirely, and more Member States do not adhere to the *Collins* principle that jobseekers should be entitled to social benefits that "facilitate access to the labour market".[88] Even where such benefits are not excluded from jobseekers, Member States often impose requirements such as that jobseekers must have either sufficient resources not to become a burden on the state or

[82] C. O'Brien (n 67), p. 52.
[83] C. O'Brien, E. Spaventa, & J. De Coninck (n 42), p. 18.
[84] Recital (3) Directive 2004/38; *Brey*, para. 53; *Tarola*, para. 23; *Bajratari*, para. 47.
[85] Recital (10) Directive 2004/38; *Brey*, para. 54; *Dano*, para. 70; *Alimanovic*, para. 50; *Tarola*, para. 17; *Bajratari*, para. 37.
[86] C. O'Brien, E. Spaventa, & J. De Coninck (n 44), p. 68; see also S. Wright, 'Welfare-to-work, Agency and Personal Responsibility'.
[87] C. O'Brien, E. Spaventa, & J. De Coninck (n 44), p. 70.
[88] Ibid, p. 68.

must have a 'real-link' with the Member State or labour market in question.[89] Similar to the situation of marginal part-time and on-demand workers, the decision to recognise an individual's residence is undertaken by national decision-makers on a case-by-case basis. In the UK, 'intermittent' or 'erratic' work is explicitly noted as less likely to be considered as constituting 'genuine' work.[90] Furthermore, involuntarily unemployed workers are treated the same, regardless of whether the employment was terminated during the first 12 months or after this date.[91]

Another problem faced by intermittent workers at the national level is that in a number of Member States, a brief period of economic inactivity can 'reset' their residence clock, meaning that the citizen must be lawfully resident for another full five years in order to obtain permanent residence status.[92] This practice punishes individuals for taking time out of the labour market and for not becoming a jobseeker. Ironically, this punishes people for not claiming support from the host-state even though they are less likely to place a burden on it. It also creates an administrative barrier to claiming permanent residence status, as some migrant workers, especially those in the most marginal and precarious of jobs, may find it difficult to prove that they have been in continuous employment for five years, constantly meeting any necessary pay and hourly-working thresholds. Consequently, they may find that some periods of residence are discounted and that their 'residence clock' restarts several times before they can obtain permanent residence status.[93]

This practice of resetting the clock on lawful residence arguably underlines the Court's case-law on permanent residence. It has held that absences of two years do not affect the acquisition of permanent residence status, even if this was realised prior to the coming into force of the Citizenship Directive.[94] Furthermore, in *Dias* the Court stated that the aim of Article 16(1) was to integrate EU citizens, "not only on territorial and time factors but also on qualitative elements",[95] and that absences from the host Member State can be compared to periods of time spent residing in a host Member State without having a right of residence.[96] This meant that Article 16(4) should be applied by analogy to periods completed without the condition governing entitlement to a right of residence of any kind having been satisfied.[97] The Court considers that, where an individual has performed a period of lawful residence for 5 years, subsequent periods of absence for less than two years should not affect (but not count towards) the acquisition of permanent residence, i.e. the residence clock should not be automatically turned back.[98] A suggestion here would be to create an analogy with unlawful residence, insofar as residence outside of that provide for in Article 7 should not count towards obtaining permanent residence status, however, this should also not result in discounting any previous period of residence that was in compliance with Article 7.

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[89] Ibid, p. 33.
[90] Ibid, p. 26. C. O'Brien (n 66), p. 975.
[91] Ibid, p. 70.
[92] C. O'Brien (n 66), p. 959; C. O'Brien, 'The ECJ Sacrifices EU citizenship in vain: Commission v United Kingdom' (2017) 54(1) *CMLRev* 209, p. 237.
[93] C. O'Brien (n 66), p. 976.
[94] Case C-162/09 *Lassal* ECLI:EU:C:2010:592, para. 58.
[95] Opinion of Advocate General Trstenjak in Case C-325/09 *Dias* ECLI:EU:C:2011:86, para. 106.
[96] Case C-325/09 *Dias* ECLI:EU:C:2011:498, para. 63.
[97] Ibid, para. 63.
[98] C. O'Brien (n 26), p. 1664.

4 INTERMITTENT & FIXED-TERM WORKERS AND EU SOCIAL LAW

In line with the division between market and social competences in the European Union, there are extremely limited powers for the Union to legislate in the area of employment security (i.e., providing protection to workers during periods of economic inactivity). That said, there is some social law that applies to intermittent workers, such as the Fixed-term Work and the Employment Agency Directives, as well as the Charter and the recently adopted Directive on Transparent and Predictable Working Conditions. The protection afforded under these instruments shall be explained below.

4.1 The Fixed-term Work Directive

Directive 1999/70 concerning the framework agreement on fixed-term work regulates fixed-term work in the EU.[99] It establishes a principle of equal treatment to ensure that fixed-term workers are not treated less favourably than 'comparable permanent workers', unless this can be justified on objective grounds.[100] The *pro rata temporis* principle applies where appropriate, to ensure that fixed term workers have the same *pro rata* rights as their permanent peers, with the Directive also aimed at preventing "abuse arising from the use of successive fixed-term contracts or relationships",[101] which seek to protect permanent workers from the use of fixed-term work as a means of undercutting their rights and standards.[102] This can reduce labour market segmentation,[103] and restrict the abuse of such contractual relations.[104]

Like the Part-time Work Directive, the Fixed-term Work Directive was adopted through the 'social method', which allows social partners to effectively draft the content of EU legislation through Framework Agreements.[105] Its focus on *pro rata* rights and prohibiting abuse of fixed term work contracts suggests that the Directive has a predominantly social aim. That said, it was adopted as part of the European Employment Strategy, which includes the aim of promoting flexible working arrangements as a tool to foster job creation and economic

[99] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP *OJ L 175*.
[100] Clause 4 Annex, Directive 1999/70; Case C-658/18 *UX* ECLI:EU:C:2020:572, para. 138; Case C-677/16 *Mantero Mateos* EU:C:2018:393, para. 41; Case C-596/14 *de Diego Porras* EU:C:2016:683, para. 37; Clause 3(2) Annex to Directive 1999/70. See C. Barnard, *EU Employment Law* (4th Ed) (2012) OUP: Oxford, pp. 439-440.
[101] Case C-268/06 *Impact* ECLI:EU:C:2008:223, para. 89; see also N. Kountouris, 'EU Law and the regulation of 'atypical' work', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 261.
[102] A. Koukiadaki & I. Katsaroumpas, 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017) *PETI Committee, DG for Internal Policies: Citizens' Rights and Constitutional Affairs*, p.69; S. Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU law?' (2013) 32(1) *Yearbook of European Law* 30-56, p. 31.
[103] N. Kountouris (n 101), pp. 255 - 256.
[104] D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart, p. 92-93.
[105] This uses the procedure as explained in Article 155(2) TFEU. See S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social"' (2017) 13 *European Constitutional Law Review* 23-61, p. 28.

growth.[106] It is furthermore linked to the Union's flexicurity agenda: despite not mentioning the term specifically, the Directive makes many references to both the concepts of flexibility and security and should therefore be seen in this context.[107] That said, the Fixed-term Work Directive does not actively promote the use of fixed-term contracts like the Part-time Work Directive promotes part-time work.[108]

An important protection for intermittent workers under the Directive is the restriction on the repeated use of fixed-term contracts. The successive use of fixed-term contracts is one of the most precarious forms of employment that exists, as it can lock the individual into a never-ending cycle of temporary employment, pushing them towards poverty and social exclusion. It furthermore creates dualisations on the labour market that can affect the rights of permanent workers. Under Clause 5 of the Framework Agreement Member States are required to introduce one or more of the following measures: (a) objective reasons for justifying the renewal of such contracts, (b) limits on the maximum total duration of successive contracts, or (c) limits on the number of contract renewals.[109] Clause 8(3) states that Member States cannot use the Framework Agreement to reduce the general level of protection appliable to workers engaged in their first or successive fixed-term contract.[110]

The Court has held that, under Clause 5, it is not possible to "determine sufficiently" the level of protection that should be implemented through it, and as such is not "unconditional and sufficiently precise" to be relied upon by individuals.[111] However, the Court has also held that this provision contains an obligation on Member States to "adopt appropriate measures to deal with such a situation", which must be proportionate, sufficiently effective, and act as a sufficient deterrent to ensure that the Framework Agreement is fully effective.[112] This obligation requires them to adopt at least one of the measures contained in Clause 5(1),[113] although the Court will also consider whether other effective measures exist that prevent the abuse of successive fixed-term contracts,[114] as long as this does not reduce the protection applicable to fixed-term workers to a level below the minimum set by the Framework Agreement.[115]

Measures violating Clause 5 can be justified on the basis of "the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out".[116] Measures cannot be justified if fixed-term contracts are used when the employer's needs are in fact "fixed and permanent".[117] There is not an obligation to create new permanent

[106] See Rectials (5), (6), and (7) in Directive 1999/70. See also Ibid; M. Aimo, 'In Search of a European Model for fixed-term work in the name of the principle of effectiveness' 7(2) *European Labour Law Journal* 232, p. 234.
[107] N. Kountouris (n 101), pp. 249 – 250; M. Bell, 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37(1) *European Law Review* 31, pp. 36; M. Aimo (n 104), p. 234.
[108] M. Aimo (n 106), p. 235; D. Ashiagbor (n 104), p. 93.
[109] Clause 5, Directive 1999/70.
[110] Joined Cases C-378/07 to C-380/07 *Angelidaki and others* ECLI:EU:C:2009:250, para. 208.
[111] Case C-268/06 *Impact* ECLI:EU:C:2008:223, paras. 78-79; see also N. Kountouris (n 99), p. 261.
[112] Case C-212/04 *Adeneler and Others* ECLI:EU:C:2006:443 paras. 94; *Angelidaki and others*, para. 158.
[113] Ibid, para. 91; Case C-251/11 *Huet* ECLI:EU:C:2012:133, para. 38; N. Kountouris (n 99), p. 262.
[114] *Angelidaki and others*, paras. 184 – 187.
[115] Ibid, para. 149.
[116] *Adeneler and Others*, para. 75.
[117] Case C-16/15 *María Elena Pérez López* ECLI:EU:C:2016:679, para. 52; See also *Angelidaki and others*, para. 88; Joined Cases C-103/18 & C-429/18 *Sánchez Ruiz and Fernández Álvarez and Others* ECLI:EU:C:2020:219, para. 77.

jobs, however, an employer cannot fill permanent posts by hiring temporary staff "so that the precarious situation of workers is perpetuated".[118] This provision has been used to preclude national rules that prohibit absolutely the conversion of fixed-term contracts into permanent ones.[119] It has also been used to find that a national practice of only recognising contracts concluded within 20 days of the previous one expiring as 'successive' was held to be "so inflexible and restrictive" that it would "allow insecure employment of a worker for years".[120]

That said, the concrete legal value of the obligation under Clause 5 is limited. The Framework Agreement only applies to successive fixed-term employment contracts (i.e., not the first or single use of a fixed-term contract),[121] however, Clause 5(2) confers discretion to Member States to determine under what conditions fixed-term employment contracts shall be regarded as either "successive" or "of indefinite duration".[122] Furthermore, the Court has accepted that the "temporary need for replacement staff" may constitute an objective reason to justify the successive use of fixed-term contracts.[123] This can apply even if the employer's needs for temporary staff are recurring or even permanent.[124] In fact, the Court had accepted that the use of 13 fixed-term contracts within 11 years was justified it served the employer's temporary staffing requirements.[125] Furthermore, successive fixed-term contracts can be objectively justified where there is an absence of workers in the labour market to fill the required needs.[126] The Court has held that this can occur in sectors that require flexibility, for example, in higher education where there is a risk of granting tenure to a greater number of teachers than is necessary,[127] and a need to "enrich" university teaching in certain areas.[128] Given that this was a permanent need of the university, there was "no limitation as to the maximum duration and the number of renewals of those contracts".[129] Overall, it is suggested that the Court is willing, or perhaps over-eager, to accept justifications put forward by Member States to defend the use of successive fixed-term contracts.[130]

An recent example of the weak obligation under Clause 5 can be seen from the recent case of *Baldonedo Martin*, where an interim civil servant worked as a groundsperson in a temporary position that was open until "such time as the post was filled by an established civil servant".[131] After eight years working in the same position, her employment was terminated without notice, which she claimed undermined her rights as she was engaged in *de facto* permanent employment. The Court held that there was differential treatment as other workers in similar

[118] *María Elena Pérez López*, para. 55.
[119] *Adeneler and Others*, para. 105.
[120] Ibid, para. 85.
[121] *Angelidaki and others*, para. 90; Case C-177/18 *Baldonedo Martin* ECLI:EU:C:2020:26, para. 70; Case C-144/04 *Mangold* EU:C:2005:709, paras. 41 – 42; Case C-586/10 *Bianca Kücük* EU:C:2012:39, para. 45.
[122] See *Adeneler and Others* paras. 81; *Huet*, para. 39; Case C-619/17 *de Diego Porras* EU:C:2018:936, para. 79; *Baldonedo Martin*, para. 71.
[123] *Bianca Kücük*, para. 46.
[124] Ibid, para. 38.
[125] Ibid, para. 30.
[126] *Angelidaki and others*, paras. 101-102.
[127] Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13 *Raffaella Mascolo and others* ECLI:EU:C:2014:2401, para. 95.
[128] Case C-190/13 *Samohano* ECLI:EU:C:2014:146, para. 50.
[129] Ibid, para. 59 - 60.
[130] N. Kountouris (n 99), p. 261.
[131] *Baldonedo Martin*.

roles to the applicant were entitled to compensation on termination of their contract.[132] However, this could be justified on the basis that this compensation was based on compensating for the "unforeseen nature" of the termination and undermining the stability of their employment.[133] In the applicant's case, her employment was terminated due to a foreseeable event: namely, filling her position with an established civil servant.[134] As such, it was not relevant that "the person concerned held the same position of employment continuously and constantly".[135] The decision seems to effectively permit fixed-term contracts of indefinite duration that can be terminated immediately and with zero compensation.

The decision is also hard to reconcile with past judgments of the Court, for example that selection procedures must have "objective and transparent criteria" to assess whether a fixed-term contract renewal responds to a genuine need and is proportionate.[136] Moreover, the Court has held that situations whereby a worker is engaged in fixed-term contracts until the vacant position has been filled permanently when the individual has occupied "within the framework of several appointments, the same uninterrupted position for several years and has exercised, constantly and continuously, the same functions" will be covered by Clause 5.[137] The Court stated that this practice undermines the legal obligation on employers to organise "… a selection procedure aimed at filling said vacant position definitively and his employment relationship having therefore been implicitly extended from year to year".[138] The mere fact that the worker has agreed to this situation does not remove or alleviate the abusive behaviour of the employer in relation to the abuse of successive fixed-term contracts.[139] It is particularly difficult to reconcile the Court's assertions in *Sanchez Ruiz* with *Baldonedo Martin*. The only difference between the two cases is that Ms Baldonedo Martín's contract was never formally renewed. The decision risks allowing Member States to avoid their obligations under Clause 5 by implementing fixed-term contracts of indefinite duration, that can easily be terminated once a more appropriate worker has been found.

The overall level of protection against the abuse of successive fixed-term contracts is arguably low.[140] It leaves too much room for Member States to define successive contracts and determine the conditions of their use.[141] Furthermore, inconsistent decisions by the Court, such as *Sanchez Ruiz* and *Baldonedo Martin*, potentially create an inconsistent and arbitrary system where a measure's validity is entirely dependent on the whims of the Court. By granting too much discretion to Member States, the Court is suggested to contribute to the "false perception" that non-standard work is beneficial for workers,[142] which can normalise precarious employment

[132] Ibid, para. 39.
[133] Ibid, para. 46; see also Case C-619/17 *de Diego Porras* EU:C:2018:936, para. 72.
[134] Ibid, para. 47.
[135] Ibid, para. 72 – 73.
[136] Joined Cases C-22/13, C-61/13 to C-63/13 & C-418/13 *Raffaella Mascolo and others* ECLI:EU:C:2014:2401, paras. 99 – 104.
[137] *Sánchez Ruiz*, para. 61; See also Opinion of Advocate General Kokott in Joined Cases C-103/18 & C-429/18 *Sánchez Ruiz and Fernández Álvarez and Others* ECLI:EU:C:2019:874, para. 44.
[138] *Sánchez Ruiz*, 61.
[139] Ibid, para. 114.
[140] S. Kamanabrou, 'Successful Rules on Successive Fixed-term Contracts?' 33(2) *International Journal of Comparative Labour Law and Industrial Relations* 221-240, p. 225.
[141] Ibid.
[142] A. Davies, 'Regulating Atypical work: beyond equality' (2013), in N. Countouris & M. Freedland (Eds.), *Resocialising Europe in a Time of Crisis* (2013), CUP: Cambridge, 230-249, p. 233.

relationships.[143] This is particularly troubling in the case of fixed-term work given that, which unlike part-time work, are disadvantaged on the job market simply by being engaged on such a contract.[144] Furthermore, unlike part-time work, fixed-term work actually makes it harder to perform personal responsibilities such as childcare alongside work.[145]

4.2 The Employment Agency Directive

Some intermittent workers are engaged on short-term contracts through employment agencies, which is regulated under Directive 2008/104 on temporary employment agency work.[146] The Employment Agency Directive is often included within the Non-standard Work Directive cluster; however, it is different from the Part-time or Fixed-term Work Directives both in terms of form and substance which has resulted in it providing less protection. First, despite attempts to adopt it under the 'social method', the Union's social partners failed to produce any concrete Framework Agreement to form the basis of a Directive.[147] As such, it was ultimately adopted through the ordinary legislative channels, limiting its scope and effect.[148] It also has stronger links with the concepts of flexicurity and competitiveness. It focuses on providing greater flexibility to companies as well as improving protection for agency workers,[149] and also makes an explicit link with the concept of 'flexicurity', stating that it strikes "a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation".[150] As such, it has clear market-based aims and seeks to actively promote employment agency work.[151] The original proposal even contained a provision obliging Member States to remove restrictions on agency work.[152] Whilst this did not make it into the final text of the Directive, the Commission has stated that the Directive does not oblige Member States to lift unjustified restrictions and prohibitions on the use of employment agencies.[153] This has been confirmed by the Court, which has held that Article 4(1) of the Directive only places an obligation on Member States to "review" their national legal framework and inform the Commission of the results.[154] It does not oblige national courts to set aside national rules prohibiting or restricting the use temporary employment agencies.[155]

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[143] N. Kountouris (n 101), p. 264.
[144] Ibid; A. Davies (n 142), pp. 243-244.
[145] A. Davies (n 140), pp. 233-234; see also S. Freedman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 *Industrial Law Journal* 299.
[146] Directive 2008/104/EC on temporary agency work *OJ L 327*.
[147] Directive 2008/104/EC of 19 November 2008 on temporary agency work (L 327/9). See Recital (7).
[148] S. Garben (n 105), p. 28.
[149] Taken from Commission website: https://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=207
[150] Recital (8), Directive 2008/104/EC. See also Communication from the European Commission on the Social Agenda (2005), COM/2005/0033 final.
[151] N. Kountouris (n 101), pp. 249 – 250; M. Bell (n 107), p. 36.
[152] European Commission, 'Explanatory memorandum of proposal' COM (2002) 149 final, p. 11 – 13; See N. Kountouris (n 101), pp. 262-263.
[153] European Commission, 'Report on the Application of Directive 2008/104/EC on Temporary Agency Work' COM (2014) 176 final.
[154] Case C-533/13 *AKT* ECLI:EU:C:2015:173, paras. 28.
[155] Ibid, paras. 32.

The Directive does contain an obligation on Member States to take appropriate measures against national rules and practices designed to circumvent the protection it provides.[156] However, it also contains the broadest range and most vaguely phrased exceptions of the three Directives,[157] and permits opt-outs for workers engaged permanently with employment agencies and collective agreements.[158] It is limited to "basic working and employment conditions" under Article 3(1)(f), meaning that the Court cannot apply it in the far-reaching manner that it did to Directives 97/81/EC and 99/70/EC.[159] Finally, those engaged through employment agencies cannot rely on the Fixed-term Work Directive, even if their employment is time limited.[160]

4.3 The Charter of Fundamental Rights

The Charter of Fundamental Rights provides little protection to intermittent workers. As the previous chapter demonstrated, individuals can only rely on provisions of the Charter that have "mandatory effect", such as Articles 21 and 31(2), in situations where they cannot rely on secondary legislation. This would indicate that fixed-term workers can rely on these provisions to enforce their equal treatment and employment rights. The Court considered the application of Articles 20 and 12 Charter to fixed-term workers in the case of *Baldonedo Martin*. It held that the national measure was not one which was "sufficiently effective and a sufficient deterrent to ensure that the measures taken pursuant to the framework agreement are fully effective", as required under Clause 5.[161] This meant that it pursued a "different objective" from Clause 5 of the Framework Agreement, and as such could not therefore be regarded as "implementing EU law" as is required for the Charter to be relied upon.[162] This creates a circular argument: if the measure were an effective and sufficient deterrent then it would not permitted under the Framework Agreement. However, if it is not an effective and sufficient deterrent then it cannot be precluded under the Charter as it is not implementing EU law. However, it does open the possibility of Article 21 Charter being relied upon by fixed-term workers, even if it only provides protects again discrimination for vulnerable groups overrepresented in fixed-term and short-term work, such as young persons.

4.4 Transparent and Predictable Working Conditions

Directive 2019/1152 on transparent and predictable working conditions in the European Union lays down certain rights and protections that can be beneficial for fixed term and intermittent workers.[163] As well as the provisions on informing workers about their rights and protections, which is likely to benefits intermittent workers, under Article 8 of the Directive, 'trial periods' are limited to a maximum of six months. Furthermore, Member States are obliged to ensure

[156] See Article 5(5) Directive 2008/104 of 19 November 2008 on temporary agency work.
[157] N. Kountouris (n 101), pp. 254 – 255.
[158] Article 5(2) Directive 2008/104; see also N. Kountouris (n 101), pp. 254 – 255.
[159] N. Kountouris (n 101), pp. 256-257.
[160] Case C-290/12 *Della Rocca* ECLI:EU:C:2013:235, paras. 39-40.
[161] *Baldonedo Martin*, para. 59 - 61; See also *de Diego Porras*, para. 92 - 94.
[162] *Baldonedo Martin*, para. 63.
[163] Directive 2019/1152 on transparent and predictable working conditions in the European Union *OJ L 186*

that the length of any probationary period is proportionate to the expected duration of the contract and the nature of the work. The application of multiple trial periods is also prohibited; however, longer periods can be justified if necessary due to the nature of the employment or in the interest of the worker. Finally, under Article 12 of the Directive, workers have the right to request an employment contract with more predictable and secure working conditions after six months' employment, and the Member State must provide a "reasoned written reply" within one month of request, or three months for smaller companies. It remains to be seen how strictly the Court will interpret the rights and obligations contained in the Directive, and whether this will be in an inconsistent manner that confers more rights to employers than employees, as it has done with the Fixed-term Work Directive.

5 The Wider Consequences for Intermittent Workers

This chapter has shown that the legal protection for intermittent workers is limited. The system of worker retention and permanent residence under Directive 2004/38, and its strict application by the Court, means that intermittent workers can lose legal status entirely. Furthermore, as jobseekers they are excluded from social assistance benefits intended to assist them in finding employment. Moreover, EU social law provides little additional protection to support individuals' employment security. The following section will assess some of the consequences for intermittent workers of this weak system of protection.

5.1 Intermittent Workers: Neoliberal Market Citizens?

The principles of neoliberalism underlying the law have far-reaching consequences for intermittent workers. They are expected to engage with the labour market in order to obtain social protection, and any failure to adequately engage with it is seen as their own responsibility.[164] As such, it is claimed that EU law does not seek to protect individuals from market forces, but views participation in the labour market and the only real means of achieving social justice, with the role of the law as simply to lay down the conditions that allow them to realise the goal of market self-sufficiency.[165] This ignores class antagonisms and commodification processes that often are key in determining an individual's prosperity.[166]

The responsibility model of welfare means that EU law accepts the practice of activation labour market policies that seek to encourage individuals into employment through punitive measures for those that are unable to do so.[167] As such, they are viewed not as individuals to be protected but inactive economic targets that need to be 'activated'.[168] Furthermore, this responsibility model is based on the idea that social benefits system should be aimed at decreasing the burden of the welfare system.[169] The Court has endorsed labour market

[164] D. Kramer, 'From worker to self-entrepreneur: The transformation of *homo economicus* and the freedom of movement in the European Union' (2017) 23 *EurLawJ* 172, p. 176.
[165] Ibid.
[166] Ibid, p. 186.
[167] C. O'Brien (n 26), p. 1647.
[168] Ibid, p. 1644.
[169] Ibid, p. 1672 - 1673.

activation policies, finding that Member States may demand that jobseekers perform certain tasks such as registering with the national body responsible for jobseekers, approaching employers with letters of application, attending job interviews, etc., in order to maintain their legal status.[170] That said, it has also rejected some of the most punitive measures, finding that Member States must take into account "the situation of the national labour market in the sector corresponding to the occupational qualifications of the jobseeker", which means that just because a jobseeker declines an offer of employment that does not correspond to their qualification level, this cannot be used to find that the individual has lost the status of jobseeker under Article 14(4)(b) Directive 2004/38.[171] Overall, the system of social protection for intermittent workers is highly individualistic and places almost all of the responsibility for their protection on the workers themselves.[172] This is also true for EU social law that applies to intermittent workers, such as the Fixed-term Work and Employment Agency Directives, which are suggested to contain much of the 'flexi', but little of the 'curity', in the flexicurity model of welfare.[173]

5.2 Dualisations in the Labour Market

The precarious system of protection for intermittent workers is liable to create dualisations in the labour market, which can undermine the social standards available to intermittent workers. Like the situation of marginal part-time and on-demand workers, creating differences in the level of support available to migrant and native workers, or between different types of intermittent workers, is liable to create differences in protection that can place pressures on the level of social protection overall. This is the idea of labour commodification: i.e., that excluding intermittent workers from social protection results in them becoming reliant on the market for their survival rather than through social institutions.[174] This means that a chunk of the labour market is treated unequally and has significantly reduced social protections, which creates a higher risk of downward pressures on working and living conditions.[175] This functions in a similar manner to the downward pressure explain in the previous chapter on part-time work. However, it should be noted that the extent to which differential treatment in the context of intermittent work will affect overall employment and social standards is reduced when compared to part-time and on-demand work, given that the starting level of protection available to intermittent workers is less than for part-time workers.

EU law does not create explicit dualisations in the labour market for intermittent workers due to differentiating between different types in the legislation itself, as, for example, the Part-time Work Directive does. That said, the seemingly inconsistent and arbitrary decisions of the Court

[170] Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037, paras. 46 - 47.
[171] Ibid, paras. 26 - 27, para. 47; see also Opinion of Advocate General Szpunar in Case C-710/19 *G.M.A.* ECLI:EU:C:2020:739, paras. 75 – 76.
[172] C. O'Brien (n 26), p. 1646.
[173] C. O'Brien (n 66), p. 953; M. Aimo (n 106), p. 234.
[174] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990), p. 35; F. Behling, and M. Harvey, 'The evolution of false self-employment in the British construction industry: a neo-Polanyian account of labour market formation' (2015) 29(6) *Work, employment and society* 970.
[175] D. Schiek, 'EU Social Rights and Labour Rights and EU Internal Market Law' (2015) *European Parliament DG for Internal Policies* IP/A/EMPL/ST/2014-02 PE 563.457, p. 23-24.

as to when successive contracts are permitted or not, as well as the lack of social protection available under the Employment Agency Directive, may have a similar effect insofar as it creates a sub-class of worker that is not entitled to the same rights and protections as others.

5.3 Social Exclusion

As well as creating dualisations in the labour market that undermine social standards, the lack of safety net for intermittent workers, particularly EU migrants working in a host-state, means that there is little by way of employment security, i.e., protection or cushioning for intermittent workers when they are moving between jobs, under EU law.[176] This lack of protection is damaging for the intermittent workers, as it may push them into poverty and social exclusion, undermining a key objective of the Union.[177] The Union's treatment of intermittent workers is another example of the law not protecting those that need it most: individuals engaged in low-paid work that require state support during periods of inactivity. It is argued that such a system is hardly likely to win firm support among those it excludes and commodifies.[178]

6 SOLUTION: ELEVATED EMPLOYMENT SECURITY FOR INTERMITTENT WORKERS?

A suggestion that may mitigate at least some of these problems could be to re-think the level of protection that is afforded to intermittent workers during periods of inactivity, although this should be tempered against the division between market and social competences in the European Union and the lack of powers (or legitimacy) in the areas of welfare and redistribution. An option could be to reconsider Advocate General Wathelet's suggestion in *Alimanovic* that jobseekers first arriving in the host-state and those who are seeking employment after a period in work should not be treated in the same manner, as a more generous approach for those who are economically inactive following a period of employment would provide them with a higher level of protection. This could be combined with the idea alluded to by the Court in *Bajratari*, that as long as the individual is not a burden on the host-state's welfare system, a right of residence should be provided. The Court could presume that an individual will be residing lawfully following a period of economic activity, either (i) as a worker if meeting the conditions under Article 7(3), (ii) as a jobseeker if meeting the conditions under Article 14(4)(b), or (iii) as having sufficient resources under Article 7(1) if not meeting either of these conditions. However, this presumption could be rebutted on the basis that the individual poses an unreasonable burden on the host-Member State. This approach would ensure a higher level of security for EU migrant workers during periods of inactivity, thereby mitigating some of the negative consequences explained above, without undermining Member States' prerogative to construct their welfare systems and determine its overall generosity.

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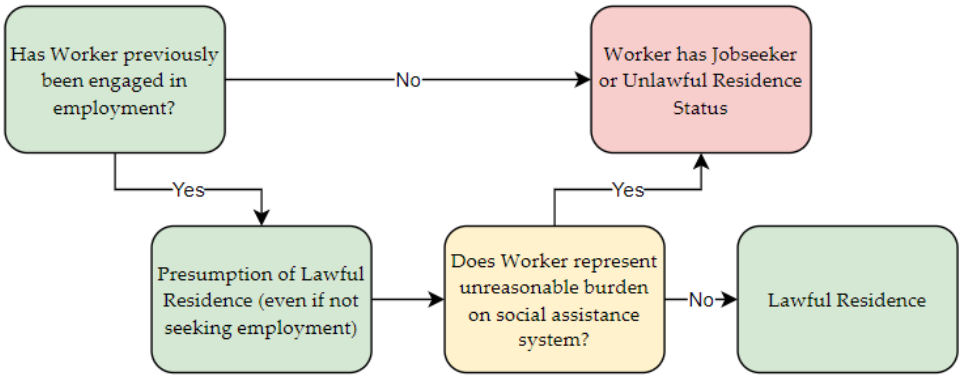
[176] C. O'Brien (n 66), p. 953; S. Mantu, 'Concepts of Time and European Citizenship' (2013) 15 *European Journal of Migration and Law* 447, p. 459.

[177] Article 3 TEU; see also M. Dawson & B. de Witte, 'The EU Legal Framework of Social Inclusion and Social Protection', in B. Cantillon, H. Verschueren, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge.

[178] D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, p. 219.

Figure 4: Intermittent Workers' Presumption of Legal Residence



7 CONCLUSION

This chapter has assessed the level of protection that is available to intermittent workers under EU law and made suggestions as to how this protection can be improved within the legal space available. Intermittent employment should be understood broadly, including not just fixed-term work (which is increasingly common in modern labour markets), but any worker, including fixed-term or part-time work, platform work, agency work, bogus self-employment, casual employment, or any other form of non-standard work that may result in them facing an intermittent working pattern.

Intermittent workers face a loss of protection due to a lack of employment security being available at the European level to protect them during periods of inactivity, with Directive 2004/38 providing very limited protection during these periods. The Court's strict interpretation of Article 7(3), while in general a coherent representation of the Court's stated methods of interpretation, creates a restrictive system that can exclude intermittent workers from certain social benefits or even legal status during periods of inactivity. This can lead to a strange situation, whereby an individual has engaged in a host-state's labour market and contributed to its public finances, thereby representing no unreasonable burden, but can still be excluded from legal status merely by leaving their employment and not meeting the conditions required under EU or national law to retain the status or worker or obtain the status of jobseeker. It furthermore means that those losing worker status may not be able to access job-seeking benefits, such as those falling under the *Collins/Vasouros* definition. The strict interpretation of Directive 2004/38 also has consequences for claiming permanent residence, insofar as even a brief period of economic inactivity can result in the Member States denying the worker the ability to obtain permanent residence after five years of residing in the host-state as they must be lawfully resident for a full five-year period. As such, even a short period of unlawful residence (which can include simply not working but also not registering with a job centre) can 're-set' the residence clock, meaning that the individual must reside for another five years before being able to obtain the most secure form of residence under the Directive.

Intermittent workers gain limited protection under EU social law during periods of inactivity. Whilst the Fixed-Term Work Directive provides some protection to workers on short-term

contracts, this is focused on job security, i.e., ensuring that temporary workers are not exploited by the successive use of such contracts, rather than employment security, i.e., providing protection during periods between jobs. Moreover, the Court's decisions are arguably inconsistent and arbitrary, resulting in outcomes which are difficult to reconcile with other decisions of the Court. The weak nature of the Employment Agency Directive, which was not adopted using the social method and has limited effect for individual workers, means that it provides very limited additional protection to intermittent workers. The Directive on Predictable and Transparent Working Conditions is likely to be beneficial to workers on short-term contracts, particularly the provisions related to initial probationary periods, however, the concrete benefit of this Directive will depend on its interpretation by the Court.

The limited protection available to intermittent workers during periods of inactivity means that such workers are placed in a precarious situation due to their employment insecurity. They are caught between the division of market and social competences, and their rights are further limited by the sensitivities surrounding the extension of social benefits and welfare entitlement to those not activity engaged in economic activity. Under this system, there is very limited solidarity between citizen and host-state. Instead, fairness is characterised in terms of labour market participation and competition between workers, with the individual's existence commodified, at least until they can claim permanent residence status (which can prove to be difficult). Intermittent workers are therefore at serious risk of social exclusion and poverty, arguably undermining the principles of the Union and resulting in the same downward pressures on wages and social standards that are applicable to precarious part-time workers, albeit to a lesser degree. Such problems may be mitigated against using a presumption of lawful residence based on a three-step determination of whether the intermittent worker is classified as (i) retaining worker status, (ii) a jobseeker, or (iii) having sufficient resources. While this would provide residual protection to intermittent workers, it would resolve all the problems faced by intermittent workers, as they face structural problems due to a lack redistributive powers at the European level and the limited effect of social law in this area.