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

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Chapter 9: Final Conclusions

Following the analysis that has taken place in this thesis, it is now possible to answer the basic research question posed at the start of the thesis: i.e., *"what space is there in EU law for the legal protection of the 'European Precariat' (i.e., EU Migrant Workers engaged in precarious forms of non-standard employment)?"*

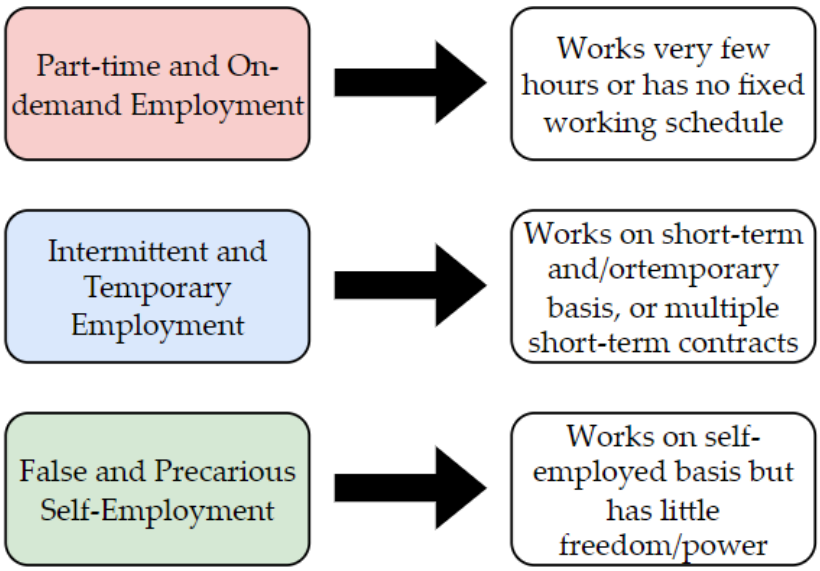
The European Precariat highlights a fundamental tension at the heart of European integration. The shift towards flexible forms of employment and competitive labour markets has resulted in increasing levels of precarious employment. However, whilst the Treaties refers to a high level of protection for workers, there are many on the margins of economic activity who, due to the distinctions in the law between worker, self-employed, non-worker, jobseeker, and others, may lose legal status and protection simply by engaging in precarious forms of work. Their legal protection is constrained by the structural limitations of the EU legal order, which has manifested itself into incomplete forms of citizenship that create gaps in the law leaving certain precarious workers with less/no legal protection. The thesis highlights three clear examples of where this protection is lacking: (i) part-time and limited work, (ii) short-term and intermittent work, and (iii) precarious forms of self-employment, and asks what the consequences of this lack of protection are, and how can precarious workers be better protected within the current confines of the EU legal order. The main conclusions of the thesis will now be explained.

1 Europe Sways with the Winds of Change

The first conclusion that can be made is that the "space" available to the legal protection of precarious workers is dictated both by the constitutional limitations of the EU and the political direction of developed nations generally, which in turn has affected the political priorities of the Union. The regulation of labour markets and protection of workers has, throughout its development, been based on a fundamental tension between, on the one hand, facilitating the expansion of markets by treating workers as a commodity that can be bought and sold, and, on the other hand, ensuring the protection of workers as individuals whose prosperity can be in conflict with market forces. This tension has resulted in an ebbing and flowing of the level of protection available to workers, from the 'free-for-all' of *laissez-faire* liberalism in the late 19th and early 20th centuries; to the more secure and protective system established through embedded liberalism, the SER, and the welfare state during the post-war era; and finally, the market-dominated approach of neoliberalism, with its focus on competitive labour market and ever-increasing employment flexibility. This shift towards neoliberal labour markets, with their focus on competitiveness and flexibility, especially when combined with events such as the Global Financial Crisis and the rise of the platform economy, has resulted in a situation whereby employment is becoming increasingly insecure and exploitative. Whilst flexible employment is not precarious *per se*, this thesis has outlined certain extreme forms of flexible employment, usually involving a high level of insecurity and power imbalance between worker and employee, that can be considered as precarious for the purposes of this thesis. These include (i) part-time work where the individual has a limited working schedule (for example, they are contracted to carry out very few hours or are employed on an on-demand or zero-hour basis); (ii) fixed-term, short-term, temporary, and other forms of intermittent

employment where the worker may face periods of economic inactivity due to their employment situation; and (iii) workers classified as being self-employed, despite have many of the risks and costs associated with work and have having little control over their rates of pay or working schedule. These have been summarised below:

Figure 6: The Main Forms of Precarious Employment



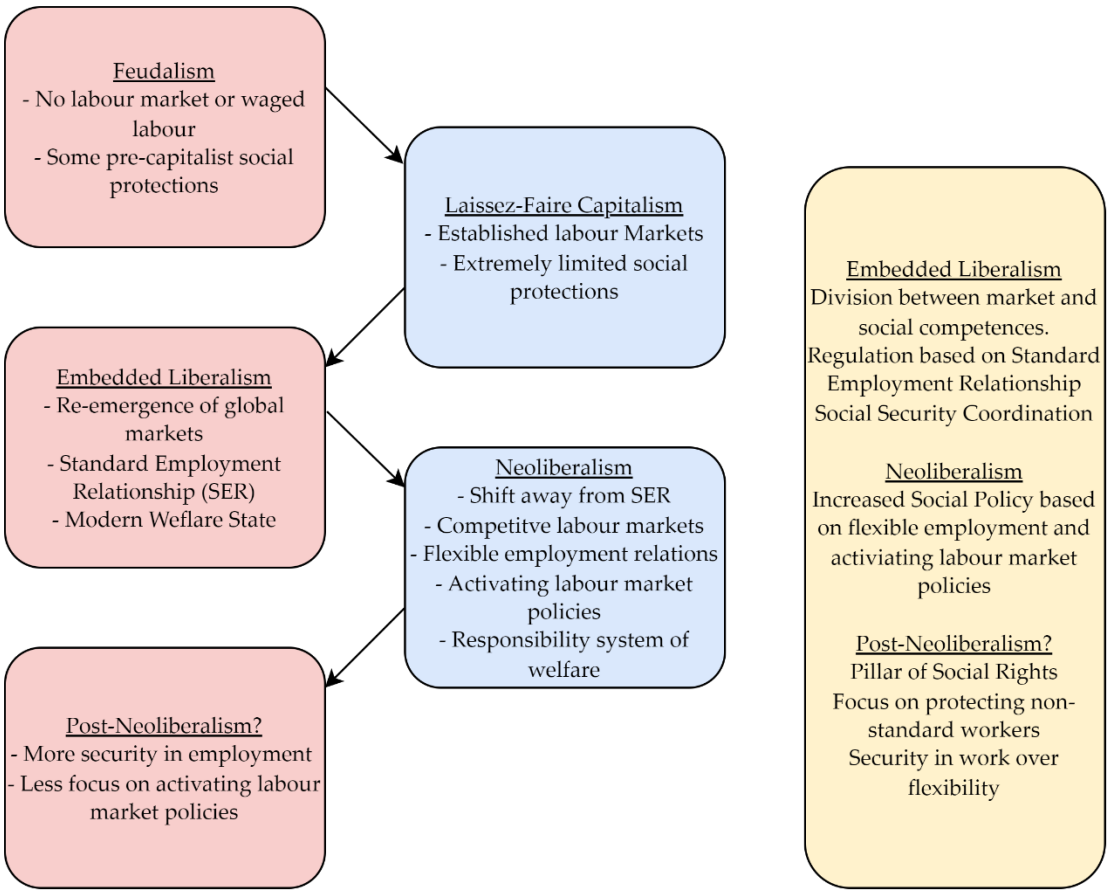
The protection of workers under the EEC, and later the EC and EU, have been heavily influenced by development of labour markets and the shift towards neoliberalism. This is unsurprising: the EU does not exist in a vacuum, and as such will inevitably be influenced by broader geopolitical and economic trends. The European Union is a representation of the wider economic and political environment of the time, and as such will inevitably reflect the priorities and interests of (or at least most of) its constituent Member States.

The EEC had strong links with embedded liberalism, particularly its clear division between market and social competences. Similarly, the influences of neoliberalism on the European Union since the 1990s are inescapable, notably with regard to social policy as the Union shifted towards individualism through its focus on competitiveness and flexibility, activating labour market policies, and the responsibility model of welfare. The ascendency of neoliberalism seemed to be unaffected by the Global Financial Crisis, with recovery measures still focused on employment flexibility and labour market competitiveness, which have resulted in an ongoing increase in non-standard and precarious forms of employment.

That said, in recent years there has, at least at the European level, been a modest but noticeable change in the direction of the wind. The insecurity resulting from the market-centred approach of neoliberalism has been noticed, and there has been more focus on secure jobs. Important new developments, such as the Social Pillar, the Revision to the Posted Workers Directive, the Directive on Transparent and Predictable Working Conditions, and the recently proposed Directives on Adequate Minimum Wages and on Improving Working Conditions for Platform Workers are clear examples of this shift in attitude. However, just how far such developments

will go in elevating the concrete legal protection of workers remains to be seen, especially as Europe faces challenges such as the COVID-19 pandemic and the cost-of-living crisis, which like the Global Financial Crisis may encourage the use of flexible working arrangements and competitive labour markets.

Figure 7: The Development of Labour Markets and European Regulation



The European Union is also limited in terms of the protection that can be provided to precarious workers by its historic and ongoing lack of competences in the area of social law, most notably in terms of social security entitlement and policies of redistribution that protect individuals' employment security, as well as its limited powers in setting minimum social standards. While the division between market and social competences was relatively unproblematic during the period of embedded liberalism, the shift towards neoliberalism, the inclusion of more market competences in the Union's legal order, as well as the accession of lower-wage Member States with a greater variety of economic and social systems, have created a more pressing need for European social integration.

The relative lack of social competences has meant that the social protection of workers has largely been pursued through policy coordination rather than hard law, which further limits the level of protection available. Policy coordination is less effective at raising social standards than hard law, and European social policy has been heavily influenced by neoliberal

principles. In particular, the EES and Flexicurity agenda focus strongly on the promotion of non-standard and flexible employment as a means of improving the efficiency of labour markets and activating labour market policies as a means of incentivising people into work and reducing public expenditure. That said, more recent policy instruments, for example the Social Pillar, suggests that the Union may be shifting its focus towards secure employment and stronger protections, rather than flexibility and competitiveness. Furthermore, the Social Pillar has resulted in the adoption of certain hard law, indicating that there is currently more space available for the adoption of legislation aimed at protecting workers.

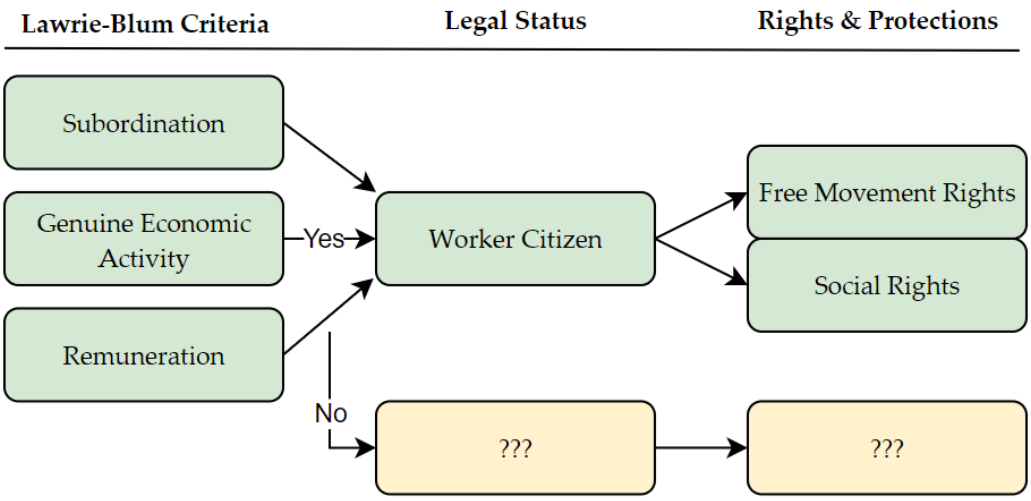
Therefore, the space available for the protection of EU Migrant Workers engaged in precarious employment is difficult to quantify. It is affected by both the political and economic conditions of the time, as well as the powers that have been conferred to the Union and which affect its ability to provide such protection. Whilst one can approve or disapprove of the political direction of the EU and its level of social competences, it is merely a reflection of its constituent parts (the Member States), which limits the level of protection that can realistically be provided within this framework.

2 PROTECTING PRECARIOUS WORKERS: PLEASE MIND THE (LEGAL) GAP

The protection of EU migrant workers is provided primarily through a series of legal classifications based on the individual's employment situation, which dictates the level of protection available to them. The definition of worker, based on the three-stage *Lawrie-Blum* criteria of (i) remuneration, (ii) subordination, and (iii) genuine economic activity, is the most important legal classification in determining who is, and who is not, entitled to protection under EU law. The division of competences also plays a role in determining whether an individual can claim worker status. The Court of Justice has long asserted that a uniform, EU-definition of worker, based on the *Lawrie-Blum* criteria, is necessary for the functioning of the internal market, however, the actual classification of who is a worker in a Member State for the purposes of immigration and labour law is undertaken by national administrations, meaning that there can be inconsistencies between European and national law in terms of the individual's status.

The Court has traditionally interpreted the *Lawrie-Blum* criteria in a broad and generous manner which would cover many flexible workers within in scope. It has also extended the criteria beyond the freedom of movement for workers, where it was first developed, into EU social law. It has applied the *Lawrie-Blum* criteria in situations where EU social legislation is silent on the definition of worker, suggesting that these instruments use the uniform, EU-based definition. However, it has also applied it in situations where the legislation refers to national definitions of work (the subsidiary approach) by using an effectiveness argument to find that the *Lawrie-Blum* criteria acts as a *de facto* lower limit that Member States must adhere to even when defining workers for the purposes of this legislation. Such an approach is logical: to do otherwise would allow Member States to undermine EU legislation and undercut other Member States through the (mis-)classification of worker under national law.

Figure 8: Worker Citizen Status under EU Law



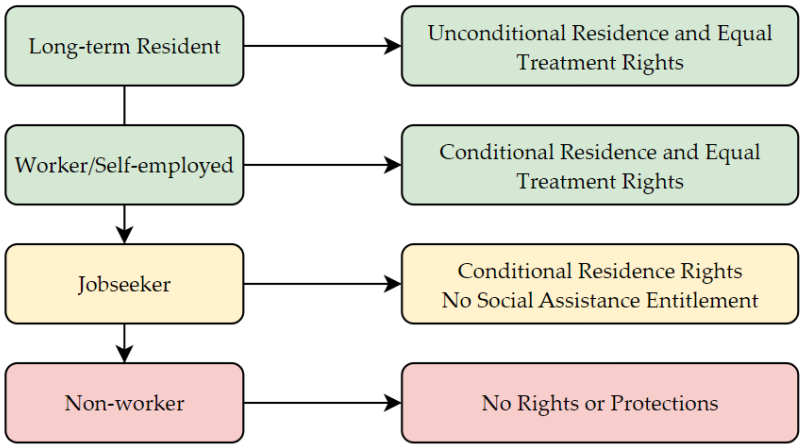
This means that for EU migrant workers engaged in precarious forms of employment, who are already on the intersection between free movement and social law, their legal classification as worker becomes doubly important, as not meeting the *Lawrie-Blum* criteria means losing access to protections under both areas of law. This all-or-nothing approach towards the classification of worker under EU law means that the *Lawrie-Blum* criteria serves a gateway function, providing the migrant worker access to the full range of free movement and social rights available under EU law. This creates a federalised form of 'market' or 'worker' citizenship, with horizontal free movement rights and vertical social rights being linked intrinsically to the *Lawrie-Blum* criteria. Whilst this provides a high level of protection for 'market insiders' who gain citizenship status, the flip side it that those not meeting the criteria are largely excluded from the law and the protections it provides.

There have traditionally been limited rights and protections available for those not meeting the *Lawrie-Blum* criteria. However, since the 1980s the Union has gradually extended free movement protections beyond workers to include economically inactive migrants, primarily through Union Citizenship and subsequently Directive 2004/38. This process has been controversial, given the sensitivity among many Member States over granting non-workers access to welfare systems, which due to the division between market and social power is still a competence largely retained by the Member States. This sensitivity has resulted in a shift in the level of protection available to non-workers, from the Court's initially generous case-law based on primary law, to a strict adherence to the text of Directive 2004/38 following its adoption.

The Court's approach towards interpreting Directive 2004/38 can be justified by the aims and increased legal value of the Directive, as well as the Court's theoretical method of judicial interpretation. However, this strict approach also means that there is still little residual protection available for those not meeting the *Lawrie-Blum* criteria. Despite notable additions to the level of protection on offer, such as the right to permanent residence, there is not a form of social citizenship that functions as a real safety net for individuals not qualifying as workers. Instead, the system is based on an idea of 'earned' citizenship, whereby the individual must adhere to the logic of the Directive, which is nominally based on time but in practice requires

sufficiently engaging with the market, in order to guarantee legal protection. This creates a stratified and conditional system that not only results in gaps in the law where precarious workers may fall into, but also reduces the situations where individual assessment may provide additional protection, as well as reducing their level of welfare entitlement.

Figure 9: The Hierarchical System of Rights under Directive 2004/38



As such, Directive 2004/38 has done little to de-commodify the system of protection for EU citizens. It continues the sharp division between the status and rights of workers, non-workers, self-employed persons, and jobseekers, with few rights or protections being made available to those not meeting the *Lawrie-Blum* criteria. In doing so, it has created a highly conditional system that may actually exclude more persons than was the case previously. It has the potential to encroach upon the rights available under Article 45 TFEU by creating new categories of persons with fewer protections that workers can fall into. As such, rather than fixing the gaps in the law, this seems to have created more and provided Member States with further possibilities to exclude certain workers from protection. The Directive also has strong links with neoliberal principles such as activation labour market policies and responsibility discourse, which suggest that participating in the market is seen as the only real way of integrating into society, thereby further limiting the protection available to precarious workers.

3 Part-time and On-demand Workers: Europe's Lumpenprecariat?

The final part of the thesis examined the situation of three types of precarious worker: (i) limited part-time and on-demand workers (including zero-hour contract) workers, (ii) short-term/temporary workers, and all those who face an intermittent working pattern, and (iii) workers engaged in false/bogus employment, or in a situation of precarious self-employment. Each study aimed to outline where and how such workers are excluded from legal protection, explain the consequences of this lack of protection for the worker and society more broadly, and finally make suggestions as to how the law could be interpreted to provide a higher level of protection whilst adhering to the Union's constitutional and political limitations.

The first case study examined the situation of workers engaged in part-time work with few hours and on-demand work without a fixed working schedule, such as platform and zero-hour contract workers. These workers can be excluded from legal protection due to failing to meet the genuine economic activity requirement within the *Lawrie-Blum* criteria. The Court has traditionally applied a broad approach to determining who is a worker under this condition, which is based on quantitative factors such as the number of hours worked. However, more recently the Court has also emphasised the importance of qualitative factors, such as the existence of an employment contract and employment-based rights. Despite the Court's increasingly holistic approach to defining genuine employment, some Member States use strict thresholds relating to working time and remuneration when making this assessment, that arguably undermines the Court's *acquis* which restricts the use of such thresholds and tends to ignore the more recent qualitative aspects emphasised by the Court.

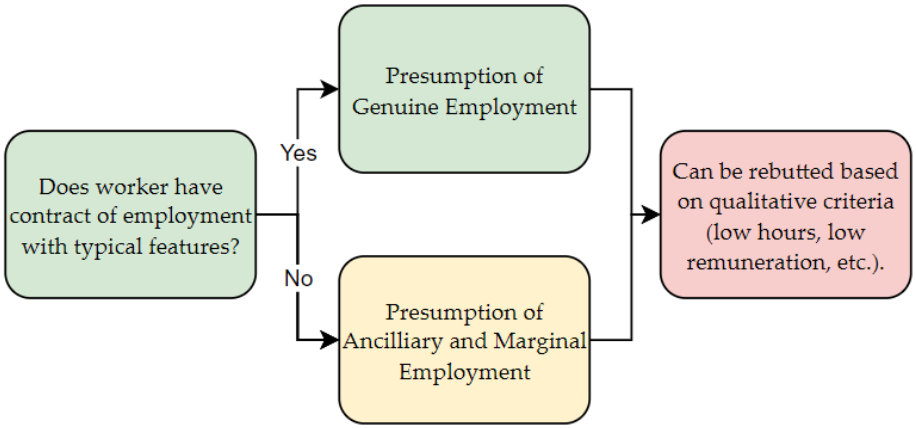
Not meeting the genuine economic activity requirement results in the worker being excluded from even the most basic free movement rights under Article 45 TFEU, such as conditions of employment and basic social security rights. Furthermore, the limited space for legal protection under Directive 2004/38 means that they are treated as jobseekers under the Directive and national implementations of it. This means that, despite being engaged in employment, the worker has limited residence and equal treatment rights. It also creates the strange situation where an individual must register with a jobcentre and comply with various requirements to maintain their lawful status in the host-Member State, despite already being engaged in economic activity. In addition, the link between the *Lawrie-Blum* criteria and EU social legislation means that those not meeting this condition are also excluded from EU social rights. In the case of on-demand workers, under the Part-time Work Directive even those that do meet the *Lawrie-Blum* criteria can be excluded from its protection due to an exception for casual workers, as well as the fact that on-demand workers without a full-time comparator cannot rely on it. This is problematic for precarious workers, as it potentially excludes all those working on an on-demand basis, most notably including platform and zero-hour contract workers, from important legal protections.

This creates a dichotomy in the law, whereby *Lawrie-Blum* workers obtain the full range of rights and benefits available under the law, whilst those not meeting the genuine economic activity requirement are excluded from virtually every protection available to workers. This legal dichotomy risks creating a class of *Lumpenprecariat* workers (the 21st century equivalent of the traditional *Lumpenproletariat*), who are who are engaged in economic activity but who have no legal protection under EU law. As well as creating problems for precarious workers themselves, this situation also undermines the concept of market solidarity (i.e., that those sharing in the productivity of the society should be included within its social institutions) upon which the internal market is based. It is furthermore likely to create downward pressures on wages and social standards that will affect the level of protection available to both Member State national and EU Migrant workers.

In light of this, it can be argued that precarious part-time workers require an inclusive system of legal protection that classifies as many people as possible engaged in economic activity as workers. Against this, however, is the constitutional limitation to European integration that the highest level of status and rights is only granted to those engaged in economic activity. As such, there must be some threshold as to when the individual can no longer be considered as

genuinely working in the host-state. Where this threshold is placed is still an open question, and furthermore is a political one that is difficult to answer in this legal study. That said, this thesis proposes a revised assessment of the genuine economic activity requirement that would provide a high level of protection to precarious part-time, adhere to the *acquis* of the Court of Justice, whilst maintaining the traditional limitations of the law. This would be to use a 'presumption of genuine activity', based primarily on qualitative factors (i.e., looking for the existence of an employment contract or employment-based rights). Assuming these elements exist, this would create a presumption of genuine economic activity, which could be rebutted using quantitative factors which prove that the extent the activity is performed renders it marginal. In order to safeguard against individuals being excluded from legal status due to not having formal aspects of employment, the test could be reversed: a marginal worker whose employment has failed the test due to insufficient qualitative factors could always prove that their employment is genuine through an assessment based on quantitative factors. This presumption of genuine activity can be linked to the system included within the Commission's recent Proposal for a Directive on Improving Working Conditions in Platform Work. That said, such a system would only work if adequately enforced, which seems unlikely given that the Commission has been reluctant to challenge Member State measures arguably undermining its current *acquis* on worker definition. It may be that new institutions, such as the European Labour Authority (ELA), could take the lead in preparing such challenges, however, this would require additional supervisory and enforcement powers to be granted to the ELA.

Figure 10: A Legal Presumption of Genuine Employment



4 *Intermittent Workers: Falling between the Gaps*

The second case study examined the situation of intermittent workers. A broad definition of intermittent work was used, which included part-time, on-demand, platform, agency workers, and even bogus self-employed persons, all of whom are likely to face periods of intermittent employment due to the insecurity associated with their employment. Due mainly to the division in competences at the European level, intermittent workers have few rights and protections during periods of economic inactivity, what is known as 'employment insecurity' (i.e., a lack of security whilst between jobs).

In particular, intermittent workers risk falling through the gaps created by the strict system under Directive 2004/38. Once their employment has ceased, the individual must comply with the criteria laid down in Article 7(3) in order to retain the status of worker, or failing that must meet the conditions required to obtain the status of jobseeker. The Court's strict interpretation of the Directive means that there are few opportunities to retain legal status outside of this system. Intermittent workers face an added problem as, even if they are able to obtain the status of jobseeker, they have a much-diminished status and fewer rights compared to workers. Notably, they can be excluded from social assistance benefits, including those intended to facilitate access to the labour market, thereby arguably undermining the Court's previous *acquis*. Periods of inactivity can also affect an individual's claim for permanent residence status, as even a short period of inactivity can result in their five-year residence timer being re-set, despite them potentially being engaged in employment and contributing to public funds through taxation, and therefore not representing any burden on the host-state, reasonable or otherwise. If this happens, the individual must reside legally for another five full years before being able to obtain this secure form of residence.

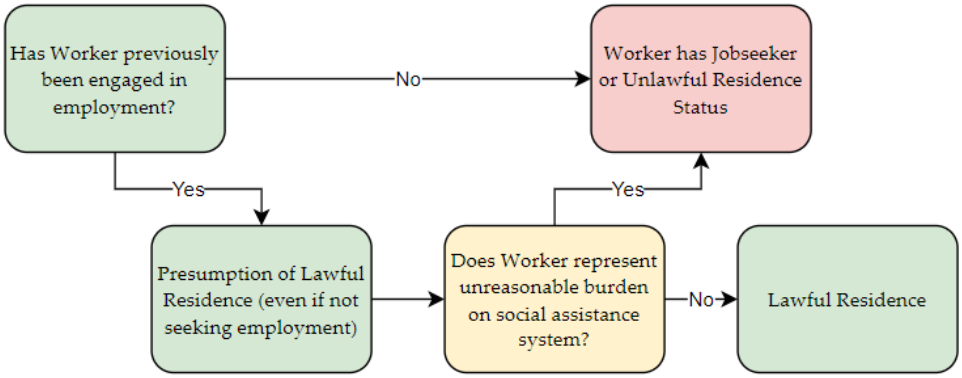
Given the sharp division between market and social competences, EU social law provides little protection to EU migrant workers during periods of economic inactivity. The Fixed-term Work Directive focuses on job security, i.e., protecting an individual whilst engaged on a temporary contract, rather than employment security. However, even this is done in an arguably ineffective and inconsistent manner. Furthermore, the Employment Agency Directive, given its limited scope and effect, does little to alleviate the problems faced by intermittent workers. While the Directive on Transparent and Predictable Working Conditions seems to provide significant additional protection to precarious workers, as it regulates the situation of temporary workers during probationary periods, it remains to be seen how this will be interpreted by the Court.

The lack of protection provided to intermittent workers means that, as well as contributing to downward pressures on social standards (like with precarious part-time workers), they are also at high risk of social exclusion. They risk being forgotten about by the law, as they lack residual bases of residence if not engaged in meaningful employment or actively looking for work. Moreover, the neoliberal influences permeating the Directive mean that its notion of social protection is linked to the idea of active labour market policies and the responsibility model of welfare, which provides the exclusionary system with a normative basis that defines social justice in terms of an individual's ability to participate in the labour market, rather than providing protection against the negative effects resulting from the labour market.

As such, there is arguably a need for greater employment security under EU law, in particular under Directive 2004/38. However, increased employment security needs to be balanced with the sensitivity around extending protections to economically inactive EU migrants, which is not feasible in view of the current constitutional limitations and political priorities of the Union and its Member States. This thesis suggests re-thinking the level of protection available to intermittent workers following a period of employment, that would ensure a level of security during periods of inactivity without undermining the Member States' power to ensure that intermittent workers do not place an unreasonable burden on their welfare systems. In this respect, the Court could re-consider the approach of Advocate General Wathelet in *Alimanovic*, who suggested that those previously engaged in employment should have a more protected

status than recently arrived jobseekers that have no connection with the host-state. Furthermore, for those who do not retain the status of worker or obtain the status of jobseeker following a period of employment, the Court could apply its decision in *Bajratari* by analogy, which would suggest that, assuming such individuals do not represent an unreasonable burden on the state, they can rely on a residual basis of residence under Article 7(2) Directive 2004/38. This presumption of sufficient resources could then be rebutted on the basis that the individual poses an unreasonable burden on the host-Member State.

Figure 11: Intermittent Workers' Presumption of Legal Residence



5 *Precarious Self-Employment: New Employment, Old Distinctions*

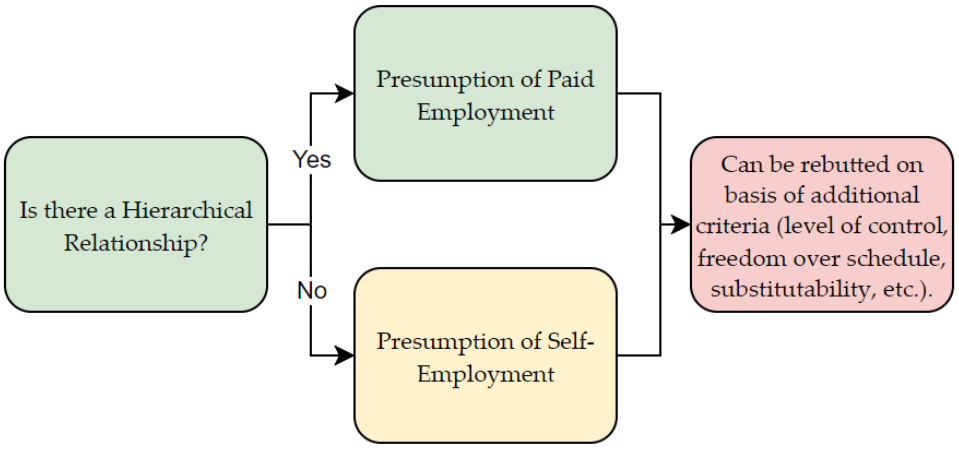
The third and final case study in this thesis is the situation of precarious self-employed persons. This was defined as false (also known as bogus) self-employment, i.e., the situation whereby the individual is classified as self-employed and as such faces the risks associated with employment (start-up/infrastructure costs, funding holiday leave, sick pay, etc.), despite them not accruing the benefits and freedoms associated with self-employment, such as setting one's own working schedule, sub-contracting out work, etc. The use of false self-employment has been propelled by technological developments such as the platform economy. Given the increasingly grey area between paid and self-employment, precarious self-employment was also defined as including those who, despite being genuinely classified as self-employed may face the same risks and challenges as those falsely engaged in self-employment. Whilst there are separate protections available to paid and self-employed workers due to their different working situations, it is argued that denying them certain social rights, for example the right to collectively agreed rates of pay, is increasingly difficult to justify in light of modern labour markets and employment norms.

EU law seeks to protect falsely self-employed workers by distinguishing between genuine and false self-employment on the basis of the subordination element of the *Lawrie-Blum* criteria. The Court will find that individuals who are classified as self-employed under national law must be considered as workers if their classification is merely "notional". The Court has a broad notion of subordination, based purely on the existence of a 'hierarchical relationship', which seems to go further than what is considered by national authorities, suggesting that there is a risk of divergent definitions at the national and European levels. That said, so far this has not posed a significant challenge for the Union, as most national systems have recognised

falsely self-employed persons (particularly in the case of platform workers) as paid workers. However, there is still a risk that such workers will be classified differently depending on what national or European court is determining the individual's status. This situation risks creating a non-uniform application of the law as individuals working for the same employer can be treated as workers or self-employed persons depending on the jurisdiction in question (as is the case with Deliveroo riders in the UK and Netherlands).

A solution could be to adopt a presumption of paid employment, whereby the existence of a 'hierarchical relationship' between the two parties creates a presumption that the individual is subordinate to the undertaking or platform. However, seeing as a 'hierarchical relationship' could encompass certain genuinely self-employed persons (for example, those working on a sub-contractor basis), this presumption could be rebutted if, following a case-by-case assessment, it could be shown that the individual has a certain level of freedom in terms of setting their own rates of pay, work schedule, etc. Interestingly, the Commission has recently included a system of legal presumption of paid employment in its Proposal for a Directive on Improving Working Conditions in Platform Work. This system ensures that those meeting certain technical requirements relating to the relationship between the platform and the worker (supervising the worker's performance, setting limits on remuneration, restricting the ability to build a client base, etc.) will be presumed to be paid workers, although this presumption can be rebutted by the worker or platform. Whilst the Directive must be welcomed as it will likely ensure greater uniformity across the internal market in terms of which platform workers are classified as paid workers, it remains to be seen whether this system will be included in its current form. Furthermore, there is a problem insofar as the Directive only applies to platform workers. However, as can be seen from the Court's case-law, many employment relationships on the borderline between paid- and self-employment are outside of platform work (for example neither of the two seminal cases, *Allonby* and *FNV*, concerned platform workers). Therefore, non-platform workers engaged on a false self-employed basis will likely not be able to rely on it.

Figure 12: Falsely Self-employed Presumption of Employment



So far, the discussion on self-employed persons is focused on the dichotomy between genuine and false self-employment. However, as the Court has stated, the grey area between paid and self-employment means that it is increasingly difficult to apply this simple binary distinction.

Genuinely self-employed persons face many of the same risks and challenges as falsely self-employed persons, and as such it is difficulty to continue denying them certain protections. In terms of their free movement rights, the Court has a long-standing tradition of ensuring a degree of equivalence between paid and self-employed workers, meaning that both have similar rights under both Articles 45 and 49 TFEU. Importantly, this includes the ability to retain the status of self-employed worker under Directive 2004/38, even where they have had to cease operations due to economic conditions. However, paid and self-employed workers do not have the same equivalence under EU social law. Whilst in most situations this can be justified on the basis that self-employed persons take on more responsibilities and accrue certain advantages that are not available to workers, and as such should not be entitled to the same employment-related benefits, in some situations even genuinely self-employed persons face a stark power imbalance between them and the employer/platform, meaning that it is increasingly difficult to deny them certain social rights. An example that was explored in this thesis was the right to collectively agreed rates of pay. In principle, self-employed persons are not entitled to collectively agreed rates of pay, as this violates both Articles 101(1) TFEU as an agreement between undertakings, as well as Article 15(2)(g) of the Services Directive which prohibits the setting of minimum fees. It has been suggested that the Court may be able to provide such workers with this right within the current legal framework, insofar as EU competition law could be interpreted in such a way that would ow space for certain self-employed workers to rely on this specific right through an effects-based assessment of the restriction caused by the collective agreement under Article 101(1) TFEU. This would allow precarious self-employed persons to be exempt from falling foul of EU competition law by setting minimum fees and enforcing collectively agreed rates of pay, whilst maintaining the prohibition on collusive behaviour that negatively affects competition in the internal market. This is similar to the approach used by the Court in cases concerning Article 56 TFEU, where it has held that the setting of minimum fees can actually be beneficial for consumers as it stops undertakings from reducing the quality of service provided through intense competition. This also suggests that such agreements could be justified under Article 15(3) of the Services Directive on the basis that removing the agreement would risk a deterioration in the quality of the service provision, assuming it meets the other requirements of being non-discriminatory and proportionate.

6 *Final Comments: Time to protect Europe's Most Vulnerable Workers?*

"A really good pair of leather boots cost $50. But an affordable pair of boots, which were sort of OK for a season or two and then leaked like hell cost about $10. But good boots lasted for years and years. A man who could afford $50 had a pair of boots that'd still be keeping his feet dry in 10 years' time, while the poor man who could only afford cheap boots would have spent a hundred dollars on boots in the same time and would still have wet feet" [151]

- Sam Vines' Boots Theory of Economic Unfairness

Sam Vines, Commander of the Ankh-Morpork City Watch in Terry Pratchett's Discworld series, questioned why the rich always seem to get richer, while the poor stay poor. The short answer is that those with the most resources and security have best opportunities in life, whilst

[151] T. Pratchett, *Men at Arms* (2014), Orion Publishing: London.

those living hand-to-mouth are easily exploited due to their economic situation. Those who have the ability to pay upfront will ultimately pay less those who will have to extend payments or borrow to purchase at all. The theory can equally be applied to the legal protection provided under EU law. Those in traditional, secure forms of employment are able to make use of the rights and protections granted under EU law, however, they are unlikely to ever need to rely on such support given their secure economic situation. Even if they do require state support, this is likely to be provided in a comprehensive and timely manner. Opposed to this, those with the most insecure and exploited working situations are likely to face additional problems relating to their employment situation. They may not be entitled to state support at all, given the limited nature of their employment, or may find that the support they receive is limited, due to them not being entitled to jobseeker benefits during periods of inactivity, or their support is limited due them being recognised as self-employed, rather than a paid worker. They are forced to circumvent a complex, arbitrary, and at times cruel system of legal status and rights, where their level of protection is affected by the precariousness of their working situation. In short, their legal status and rights are precarious, and can be lost simply because they are in a precarious working situation.

The problem is that the Union's constitutional limitations, concretely the still ongoing division between market and social rights, means that providing a high level of protection for all precarious workers, even during periods of economic inactivity, is unfeasible. Furthermore, the political priorities of the Union, which is currently fixated on 'flexibility' and 'competitiveness' means that same level of unfairness is seen as a by-product of ensuring that there is competition between workers. *The European Precariat* has made concrete suggestions as to how precarious workers can be better protected under EU law, within the constitutional and political confines of European integration. These include using legal tests that provide basic assumptions that (i) workers with employment contracts are treated as workers, (ii) those not engaged in employment maintain their residence status if not becoming a burden on the host-state, and (iii) ensuring that those on the borderline between paid- and self-employment have adequate social rights where appropriate. The common thread between these suggestions is that those in more marginal and insecure forms of employment should be given a bit more leeway when trying to prove their legal status and rights: instead of presuming that such persons are a drain to society, we should recognise their contribution and offer them a basic level of protection. In essence, there could, and should, be a little bit more heart in the system. That said, whilst the suggestions made in this thesis would significantly improve the situation of precarious workers, the constitutional and political limitations of the legal system mean that certain precarious workers are inevitably going to lose out on protection, particularly during periods of economic inactivity. However, given the barriers to improve social integration at the European level, such questions are political, rather than legal, and significantly expanding social protection would seem to be unlikely in the foreseeable future. That said, as labour markets are likely to continue the shift towards competitiveness and flexible working arrangements, the problem of precarious employment is likely to become more prominent in the future, particularly for EU migrant workers who are already overrepresented in such employment. As such, the level of protection provided to workers is likely to become an increasingly important legal and political issue in the future.