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Law and the production of precarious work in Europe: an introduction

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Abstract

The introductory article sets out the background and the content of the Symposium on ‘Law and the Production of Precarious Work in Europe’. The analysis builds on the premise that European (EU) law, together with international and national law, is constitutive of precarious forms of work and work relations in different national and local contexts. The Symposium takes issue with the specific legal frameworks and regimes that are related to structuring various forms of precarious and exploitable labour, by exploring how (EU) law orders the world of work through legal regimes and regulatory frameworks governing specific forms of labour mobility across borders, as well as by looking at the other components of the structures and institutional interactions underlying the broader political economy where precarious forms of work materialise.

Keywords: labour exploitation; labour mobility; posting of workers; seasonal workers; in-work poverty; migration

1. Introduction

The topic of labour and work has hardly ever been as prominently publicly discussed as during the time following the outbreak of the Covid pandemic. Concerns about working conditions and overall wellbeing of particular categories of workers have become part of the daily agendas of mainstream news outlets and social media debates. The public exposure of the contradiction between the ‘essential’ character of the work that particular workers are doing and the working conditions and overall treatment they experience,¹ aside from raising important questions about how we value labour in our societies, has raised fundamental questions about the law and regulatory frameworks that yield and govern these forms of work.

Alongside the discussions on flawed infrastructures and working conditions in the health care sectors across States in Europe and beyond, being the obvious starting point of discussing labour amidst a pandemic, a significant part of the debate has focused on other worker categories. In addition to delivery workers from a variety of digital platforms, seasonal workers in agriculture and migrant (mobile) workers in the meat industry or logistics have become textbook examples of precariousness, exploitation and inequality.² It has quickly become clear that, in the European

¹See, for example, V Bogoeski, ‘Harvesting Injustice’ (2021) *Verfassungsblog* <<https://verfassungsblog.de/harvesting-injustice/>> accessed 21 September 2022.

²See MS Lodovici, E Ferrari, E Paladino, F Pesce, NA Torchio and A Crippa, ‘Revaluation of Working Conditions and Wages for Essential Workers’, Document requested by the European Parliament’s Committee on Employment and Social Affairs (EMPL) (European Parliament 2022).

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context, food security and critical infrastructures in societies during a global crisis depended heavily on (seasonal) migrant and mobile workers.³ At the same time, the numerous infection outbreaks that have kept occurring on farms, slaughterhouses, and meat processing plants have drawn attention to the exploitative working and degrading living conditions of the workers.⁴ Aside from the more ‘extreme’ cases involving outright wage theft, violence, or human trafficking, the regular conditions documented by journalists, researchers, trade unions and activists span from constant overtime work, unpaid working hours, cramped accommodations and transport in times of strict social distancing, lack of health insurance and social security coverage, and overall high level of existential dependence on employers.⁵ While the increased public attention towards these groups of workers during the pandemic was new, the exploitative working conditions were not. They have been long in place, as a product of old structures yielded through migration regimes, racialisation processes,⁶ and the existing legal frameworks, business, and institutional practices shaping the overall political economy of particular economic sectors.

Against this background, our symposium asks in what ways law is entangled in the broader structures maintaining precarious forms of work and exploitative working conditions. By exploring different sectoral and legal contexts in the EU and the United Kingdom (UK), each article contributes towards the understanding of what makes law, and EU law in particular, part of the root causes behind precariousness and labour exploitation.

Not only where it is relatively obvious – as in the above examples concerning seasonal and mobile (migrant) workers in agriculture, the meat sector, transport and logistics – the migration and mobility dimension plays generally a central role in determining the working and living conditions of working people across economic sectors. Decades of research on migration and labour has in various ways demonstrated how specific features inherent to the migrant workers’ experience render them exploitable even in the case of documented (‘regular’) migrant workers or mobile EU citizens in the case of the EU.⁷ In this context, although the EU has limited competences in directly regulating core aspects of labour and social welfare matters,⁸ it significantly shapes labour and social landscapes of Member States through the EU-level regulatory frameworks governing the Internal Market, particularly in the domain of free movement of workers and overall labour mobility. Moreover, despite the limited character of EU’s competences in labour and social welfare matters, EU’s hard and soft laws influence the governance of work

³F Fasani and J Mazza, ‘A Vulnerable Workforce: Migrant Workers in the COVID-19 Pandemic’ (Publications Office of the European Union 2020). See also V Bogoeski, ‘The German Asparagus Saga’ (2020) *Journal for International Politics and Society* (IPS) <<https://www.ips-journal.eu/regions/europe/the-german-asparagus-saga-4321/>> accessed 21 September 2022.

⁴See F Bartolini et al, ‘Migrant Key Workers and Social Cohesion in Europe’ (FEPS Policy Study 2022); M-L Augère-Granier, ‘Migrant Seasonal Workers in the European Agricultural Sector’ (2021) European Parliament Briefing.

⁵See A Corrado and L Palumbo, ‘Essential Farmworkers and the Pandemic Crisis: Migrant Labour Conditions, and Legal and Political Responses in Italy and Spain’ in A Triandafyllidou (ed), *Migration and Pandemics: Spaces of Solidarity and Spaces of Exception* (Springer International Publishing 2022) <https://doi.org/10.1007/978-3-030-81210-2_8> accessed 21 September 2022; V Landry et al, ‘The Systemized Exploitation of Temporary Migrant Agricultural Workers in Canada: Exacerbation of Health Vulnerabilities during the COVID-19 Pandemic and Recommendations for the Future’ 3 (2021) *Journal of Migration and Health* 100035; ‘Initiative Faire Landarbeit: Bericht 2021 – Saisonarbeit in Der Landwirtschaft’ (Industriegewerkschaft Bauen-Agrar-Umwelt Bundesvorstand and Institut für nachhaltige Regionalentwicklung in Europa (PECO-Institut eV) 2021) <<https://igbau.de/Binaries/Binary16991/2021-InitiativeFaireLandarbeit-Saisonarbeitsbericht.pdf>> accessed 21 September 2022.

⁶See V Piro and D Sacchetto, ‘Subcontracted Racial Capitalism: The Interrelationship of Race and Production in Meat Processing Plants’ 1 (2021) *Work in the Global Economy* 33; D Ashiagbor, ‘Race and Colonialism in the Construction of Labour Markets and Precarity’ 50 (2021) *Industrial Law Journal* 506.

⁷See, for example, B Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’ 24 (2010) *Work, Employment and Society* 300; I Wagner, *Workers without Borders: Posted Work and Precarity in the EU* (Cornell University Press 2018).

⁸F Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ 40 (2002) *Journal of Common Market Studies* 645, 645–8.

through different means beyond regulating free movement, as it is the case with EMU-related measures.⁹ EU law also significantly shapes the structures governing local and transnational supply chains currently underlying most workplaces globally.¹⁰ Hence, in addition to national and international law, EU law substantively determines and regulates different aspects of the lives of working people who are moving for work across borders but also of those who are staying put in their countries of ‘origin’.

Building on the premise that EU law, together with international and national law, is constitutive of precarious forms of work and work relations in different national and local contexts, the contributions to this symposium take issue with the specific legal frameworks and regimes that are related to structuring various forms of precarious and exploitable labour. While most contributions explore how (EU) law orders the world of work through legal regimes and regulatory frameworks governing specific forms of labour mobility across borders, we stress the importance to look beyond mobility regimes in order to grasp the other components of the structures and institutional interactions underlying the broader political economy where precarious forms of work materialise. Several contributions underline that precariousness and exploitation are often driven by cost-saving and profit-maximisation rationalities that are at the core of our social order, particularly in sectors such as agriculture or food production overall. Elena Corcione’s contribution to this symposium most clearly emphasises the limits of migration and labour mobility policies in successfully challenging other structures behind precariousness and exploitation, such as, for instance, price-setting practices in food supply chains. In addition to the articles exploring short-term labour mobility regimes in the EU, the symposium complements the inquiry into law’s role in constituting precariousness and exploitation through exploring developments in regard to labour mobility in post-Brexit UK as well as the effects of EU law on precarious realities of non-mobile workers.

In the European context, two particular short-term mobility modes have been consistently notorious for precarious and exploitative working conditions, namely posting of workers and seasonal work (particularly in agriculture and food production). Several law and policy initiatives at EU level have been undertaken in order to address the negative effects of these regimes on workers and society at large. We have recently had the Revision of the Posted Workers Directive (PWD),¹¹ the establishment of the European Labour Law (ELA) authority,¹² the European Pillar of Social Rights,¹³ or Social Conditionality in Common Agricultural Policy (CAP)¹⁴ and a Proposal for a new Corporate Sustainability Due Diligence Directive.¹⁵ In the UK, allegedly new short-term mobility schemes and migration plans have been introduced to deal with labour shortages after Brexit. In order to reflect on the capacity of such instruments to successfully address some of the

⁹F Costamagna, ‘National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal’ 24 (2018) *European Law Journal* 163.

¹⁰See J Salminen and M Rajavuori, ‘Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis’ 26 (2019) *Maastricht Journal of European and Comparative Law* 602; The IGLP Law and Global Production Working Group, ‘The Role of Law in Global Value Chains: A Research Manifesto’ 4 (2016) *London Review of International Law* 57.

¹¹Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 Amending Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services, OJ L 173/16.

¹²Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 Establishing a European Labour Authority, Amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and Repealing Decision (EU) 2016/344, OJ L 186/21.

¹³The Pillar has been solemnly proclaimed by the European Parliament, the Commission and the Council in November 2017 in Gothenburg.

¹⁴Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the Financing, Management and Monitoring of the Common Agricultural Policy and Repealing Regulation (EU) No 1306/2013, OJ L 435/187.

¹⁵Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM(2022)71 final.

problems they identify, we first take a look at the broader (legal) structures enabling precarious forms of work to emerge and thrive.

2. Structuring precariousness and exploitation in the context of labour mobility and beyond

While historically and now there have been different scholarly accounts of the function of law in constituting and constructing social relations and different subjectivities,¹⁶ including those of working people, the role of EU law in this has often been treated as marginal. Being a legal order that applies to individuals alongside – or only after being incorporated in – a territorially bounded national legal order, EU law has often been discussed as something of secondary nature, particularly when it comes to the social and labour law domain.¹⁷ This is partly to be explained through the early history of the European integration process, where, in the words of Joerges and Rödl, Europe was intentionally conceived of as a ‘dual polity’.¹⁸ The building of a common market and economic integration were to be pursued at European or supranational level, while labour and social welfare politics was to be predominantly pursued at national level.¹⁹ The politics behind this arrangement, which has been explored extensively, has set the foundations of the ‘European liberal bargain’.²⁰ The ‘bargain’ meant that the consequences of the supranational market building project were to be feathered by Member States’ national labour and social welfare institutional structures. While EU law has increasingly become crucial in shaping the conditions of production directly affecting work and labour conditions, the protective responses have remained at national or local level. This European variety of ‘embedded liberalism’, not too different in its essence from transnational markets that were emerging at global scale from the 70s,²¹ was quick in showing the early problems of the arrangement. While uniformity achieved through law, regulation, and the jurisprudence of the Court of Justice of the European Union (CJEU) was a necessary component of the market building project, the very pursuit of uniformity often occurred at the expense of institutional arrangements and practices providing for social embeddedness at national level.²²

The embedded liberal compromise at the core of the European integration process and EU’s limited direct competences in regulating labour and social affairs were also justified through the idea of preserving and strengthening national legal and institutional diversity in the labour and social domain.²³ However, supranational economic integration has affected these domains in

¹⁶See S Deakin et al, ‘Legal Institutionalism: Capitalism and the Constitutive Role of Law’ 45 (2017) *Journal of Comparative Economics* 188; L McHugh-Russell, ‘Getting the Constitutive Power of Law Wrong’ *Legal Form* (2018) <<https://legalform.blog/2018/03/31/getting-the-constitutive-power-of-law-wrong-liam-mchugh-russell/>> accessed 21 September 2022.

¹⁷S Giubboni, *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective* (Cambridge University Press 2006).

¹⁸C Joerges and F Rödl, ‘Informal Politics, Formalised Law and the “Social Deficit” of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval’ 15 (2009) *European Law Journal* 1, 5.

¹⁹See M Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (Oxford University Press 2005).

²⁰D Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration’ 19 (2013) *European Law Journal* 303. See also F De Witte, ‘The Architecture of EU’s Social Market Economy’ in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU’s Internal Market* (Edward Elgar 2016) 121.

²¹See JG Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ 36 (1982) *International Organization* 379.

²²M Goldmann, ‘The Great Recurrence. Karl Polanyi and the Crises of the European Union’ 23 (2017) *European Law Journal* 272, 277; See AJ Menéndez, ‘Which Free Movement? Whose Free Movement?’ in S Borelli and A Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene editore 2019).

²³See the discussions in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017), particularly C Joerges, ‘Social Justice in an Ever More Diverse Union’ in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017).

various ways nevertheless. Wage-setting represents a good case in point in this regard. While EU primary sources preclude a direct supranational regulatory intervention, since the Eurozone crisis such interventions have occurred through other means, such as, for instance, recommendations for decentralising collective bargaining with the effect of weakening the overall capacity of organised labour to set, regulate and defend social objectives.²⁴ The most obvious and most discussed measures of EU law in shaping precarious worker subjectivities and structures of exploitation have occurred in the domain of cross-border labour mobility. As part of the process of building a supranational market, one of the main goals of European law and regulation were to facilitate free movement of capital, products, services, and – ultimately – workers. The most interesting, and challenging, has turned out to be the overlap between the latter two fundamental freedoms (services and workers).

The idea of building a free market for services across borders in Europe has introduced a particular mode of free movement of labour within the scope of cross-border contracts for services. The so-called posting of workers allows companies to move their workforce between Member States in order to conduct projects for which they have been contracted for a limited period of time.²⁵ The original idea was that for the time spent abroad providing the commissioned service on behalf of the employer, the employment relationship of the posted workers will continue being regulated by the employment contract as well as labour law and welfare arrangements from the ‘country of origin’.²⁶ The problems of this arrangement for the overall development of the European integration process have become obvious at the latest when it has been confronted with its early core-periphery dynamics.²⁷ Namely, the first CJEU cases that brought the concept of posting of workers in relation with ‘social dumping’ appeared right after the so-called Southern enlargement, meaning after Portugal and Spain have joined the Communities.²⁸ Following the first Eastern enlargement and the increased material inequality within and between Member States, the question has become prominent especially after that the infamous *Laval*²⁹ and related cases³⁰ have turned posting of workers,³¹ and overall labour mobility, into a serious matter of contestation.³²

Posting turned out to be crucial politically for the overall development of the EU as a polity, creating an East–West chasm most evidently during the recent Revision of the Posted Workers Directive (PWD).³³ At least at first sight, the Commission’s Proposal for the Revision was very much responsive to the concerns expressed by high-wage countries, seeking to reduce the possibility to use labour costs’ differentials as competitive factors in the context of posting. The Proposal caused much controversy, revealing the depth of the fault between high-wage and low-wage countries. This is very much evident if one considers the reaction of national parliaments participating to the legislative process. Whereas the French Parliament lamented the fact

²⁴See G Kennedy, ‘Embedding Neoliberalism in Greece: The Transformation of Collective Bargaining and Labour Market Policy in Greece during the Eurozone Crisis’ 97 (2016) *Studies in Political Economy* 253; E Nanopoulos and F Vergis, *The Crisis behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019).

²⁵Art 56 TFEU.

²⁶Also known as ‘home state’ or ‘sending state’ in the broader discourse on posting of workers.

²⁷On Europe’s core-periphery constellation see D Kukovec, ‘Law and the Periphery’ 21 (2015) *European Law Journal* 406.

²⁸M Bernaciak, ‘Social Dumping and the EU Integration Process’ ETUI Working Paper (2014).

²⁹Case C-341/05 *Laval* ECLI:EU:C:2007:809.

³⁰Case C-113/14 *RegioPost* ECLI:EU:C:2015:760; Case C-346/06 *Rüffert* ECLI:EU:C:2008:189; Case C-319/06 *Commission v Luxembourg* ECLI:EU:C:2008:350.

³¹These cases prompted an intense debate that has been reviewed by C Barnard, ‘The Calm After the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in Viking and Laval’ in A Bogg, C Costello and A Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar 2016) 337–62.

³²See F Costamagna, ‘Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive’ in S Borelli and A Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene editore 2019).

³³V Bogoeski, ‘The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe’ 2 (2021) *Global Perspectives* 1.

that the Proposal was not bold enough in promoting the principle of equal pay for posted workers, ten national parliaments³⁴ of Central and Eastern European States³⁵ issued reasoned opinions in the context of subsidiarity control mechanism under Protocol No. 2, triggering a yellow card against the Commission.³⁶ These opinions were quite comprehensive, touching upon issues that go beyond just the violation of the principle of subsidiarity. In particular, almost all these parliaments expressed concerns as to the negative effects that the Revised PWD could have on the competitiveness of lower-wage countries and, thus, on their undertakings' ability to have access to lucrative markets.

However, since the co-existence of legal regimes deriving from materially unequal polities offering different levels of pay and labour protection at the same workplace already creates conditions for labour exploitation, it is important to explain where do we see the role of the posting regulatory framework in constructing some posted workers as precarious and exploitable workers.³⁷ The posting legal framework entrenched through its interpretation by the CJEU drives a dual process of precarisation and exploitation. First, by excluding posted workers from the equal treatment principle,³⁸ the legal framework deprives them from enjoying legal protections and entitlements that they would otherwise enjoy at the workplace where the temporary work is being conducted.³⁹ Second, dividing the workforce into domestic and posted workers, the latter being entitled to a lower level of rights, protections, and pay, means that the legal framework directly affects the overall position of collectively organised labour and its capacity to set, regulate and defend social objectives.⁴⁰ Although similar to the issues handled by the court in the first, pre-PWD era, the reasoning in the *Laval* rulings together with the outcome have entrenched this differentiated treatment, preventing domestic collective actors from integrating posted workers into their protective structures. This understanding of mobile labour under the free movement of services framework, loose from effective embeddedness within a labour constitution of the *loci laboris*,⁴¹ has been a move towards market expansion through subjugation of Member States' labour constitutions to the economic logic of markets.

Similar developments have been happening in the domain of seasonal work, particularly in areas such as agriculture. Migrant workers from outside EU working on farms in Italy or Spain,⁴² as well as mobile workers from Europe's Eastern periphery on farms and fields in Western and Northern Europe, have been often deprived from basic rights to labour protection and social security on the basis of various legal frameworks and established institutional

³⁴More precisely, also the Danish Parliament issued a reasoned opinion, but it raised arguments not in line with those of the other parliaments. In particular, it focused on the perceived intrusion of the Proposed Directive into domains traditionally considered as Member States' exclusive preserve.

³⁵Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia. Specifically on the Latvian position, see Z Rasnača, 'Identifying the (Dis)Placement of "New" Member State Social Interests in the Posting of Workers: The Case of Latvia' 14 (2018) European Constitutional Law Review 131.

³⁶D Jancic, 'EU Law's Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward' in D Jancic (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (Oxford University Press 2017).

³⁷One needs to bear in mind that one third of all postings takes place in high-value chains and concerns a highly skilled workforce. See E Voss, M Faioli, J-P Lhernould, and F Iudicone, 'Posting of Workers Directive – Current Situation and Challenges' (2016) Study for the EMPL Committee, 14–20.

³⁸Art 45 TFEU.

³⁹H Verschueren, 'The European Internal Market and the Competition Between Workers' 6 (2015) European Labour Law Journal 128, 136.

⁴⁰Generally, on fissuring the workplace see D Weil, *The Fissured Workplace* (Harvard University Press 2014). See R Dukes, 'Insiders, Outsiders and Conflicts of Interest' in D Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Bloomsbury Publishing 2018) 147–66.

⁴¹On the concept of the 'labour constitution' see R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014).

⁴²A Corrado, *Is Italian Agriculture a 'Pull Factor' for Irregular Migration – and, If so, Why* (Open Society Foundations 2018).

practices.⁴³ Not only the European South has been place of countless forms of abuse of undocumented migrant workers, from unjust payment withdrawals to established gang-mastering practices,⁴⁴ but also in the North, for instance Germany, exploitative working conditions and exclusion from social security systems have been long a common place in regard to seasonal work in agriculture.⁴⁵ Alongside the food supply chain at the core of the political economy of food production globally,⁴⁶ labour mobility laws and regulation in combination with different business and institutional practices in place have been at the heart of the problem, to which various legal and political responses have followed. Starting from the above-mentioned Seasonal Workers Directive⁴⁷ to the recent social conditionality to CAP and the Proposal for the Corporate Sustainability Due Diligence Directive, one could rightly ask whether these responses have the capacity to address the problems they have identified. Moreover, whether problems rooted in the political economy of food production or the dual polity character of the EU, deeply ingrained in its Economic Constitution,⁴⁸ could be addressed by responses of partly incremental and technocratic nature. Moreover, as the two contributions dealing with labour migration and seasonal work in the UK point out, the legal instruments regulating labour mobility are often driven by postulates of market efficiency and economic rationality rather than securing worker protection and wellbeing.

3. Troubled legal responses to structural problems

While different types of structural critique of the law as a driver of any kind of social change are to be taken seriously,⁴⁹ our symposium has set out to inquire into how some of the CJEU jurisprudence or the legal and policy interventions that seek to address precariousness and exploitation fail or succeed in that mission. As previously argued, some of the issues seasonal agricultural workers or mobile workers in the meat industry have been facing, are strongly embedded in the border regimes that govern conditions of entry and work.⁵⁰ Therefore, it might be *a priori* clear that piecemeal legal and policy interventions will hardly be able to offset the legal edifice of border controls, food supply chains or the structural dominance of the economic over the social dimension of the European integration process. However, some of the initiatives that the symposium explores have been politically salient and raised questions detrimental for the political development of the EU as a polity, or of the UK after leaving the EU. Hence, we consider those initiatives worthy of scholarly attention because they, first, help us identify further problem and link them to their origins in legal frameworks and their judicial interpretation, and second, help us identify the limits of such attempts even when they are being partly considered successful (the case of the Revision of the PWD). In the case of the UK initiatives, the seasonal workers visa and the ‘new’ point-based

⁴³J Schneider et al, *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, The Netherlands and Sweden* (Open Society Foundations 2020).

⁴⁴See T Ferrando, ‘Gangmastering Passata: Multi-Territoriality of the Food System and the Legal Construction of Cheap Labor Behind the Globalized Italian Tomato’ 14 (2021) *FIU Law Review* 521.

⁴⁵See V Bogoeski, ‘Continuities of Exploitation: Seasonal Migrant Farmworkers in German Agriculture during Covid-19’, forthcoming in 49 (2022) *Journal of Law and Society*.

⁴⁶Ferrando (n 44).

⁴⁷Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ 2014 L 94:375).

⁴⁸C Joerges, V Bogoeski and L Nüse, ‘Economic Constitutionalism and the “European Social Model”: Can European Law Cope with the Deepening Tensions between Economic and Social Integration after the Financial Crisis’ in HCH Hofmann, K Pantazatou and G Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar Publishing 2019).

⁴⁹See, for example, Z Adams, ‘A Structural Approach to Labour Law’ 46 (2022) *Cambridge Journal of Economics* 447; M Dimick, ‘Pashukanis’ Commodity-Form Theory of Law’ in P O’Connell and U Özsü (eds), *Research Handbook on Law and Marxism* (Edward Elgar Publishing 2021).

⁵⁰Anderson (n 7).

migration system, it is evident from the start that both these initiatives are forging structures of exploitation rather than successfully tackling existing problems.⁵¹

The symposium consists of seven articles which address different aspects of labour precariousness and exploitation. All but one of the articles explore the role of labour mobility in fostering precarious and exploitative working conditions. Four of the articles focus on labour mobility in the EU context, while two of them examine the effects of recent developments of migration policy regarding (seasonal) migrant workers in post-Brexit UK. Finally, as the most of the EU discourse on labour ‘naturally’ focuses on working people on move, we found it important to balance the symposium by including an exploration of the role of (EU) law in shaping precariousness and exploitative conditions for non-mobile workers, or those who work in their countries of ‘origin’ or citizenship.

The symposium approaches three main areas of exploitation and precariousness arising from short-term labour mobility. The first one is the posting of workers model which has been associated with worker exploitation and precariousness for decades (particularly after EU’s East Enlargements in 2004, 2007, and 2013). Two of the contributions look into the issue of posting, from two different perspectives. Both these articles are, in different ways, asking whether we see any recent shifts in legal reasoning at the level of the CJEU and if so, are these to be traced to larger structural changes occurring at the level of the CJEU or the EU as a polity more broadly? Could such changes in the legal reasoning be traced back to a shift in the EU law overall rationale – from EU law as a vehicle for establishing fair competition or level playing field to worker protection and countering labour exploitation? The recent Revision of the PWD has partly been interpreted as a shift from such reasoning symbolic for *Laval* and similar subsequent cases,⁵² which Sophie Robin Olivier expands upon in her intervention. While, traditionally, protecting posted workers was just functional to reaching the objective of fair competition among service providers, would this then mean that countering workers’ exploitation is becoming (or has become) part of the way in which the EU might be from now approaching these issues? The article by Andrea Iossa cautions against such optimism. Using analytical tools provided by legal geography, and in particular the concept of ‘chronotope of law’ developed by Mariana Valverde, Iossa looks into the reasoning and implications of CJEU rulings in order to distil structural and contingent elements that favour exploitation of posted work in the transnational logistics industry. Based on his findings, he argues that the CJEU in recent case law on posted workers in transport and logistics struggles with deriving legal meaning by applying the usual lens to analyse the intricate spatial and temporal elements central to the phenomenon of posting. Given the political economy of the logistics sector, having an inherent cross-border dimension and being prone to profit-maximising driven outsourcing, the recent court decisions demonstrate an inability of the court to accommodate this reality in its reasoning, mostly to the detriment of the (posted) workers themselves.

The second area with which the symposium engages is the law and political economy of agricultural work, particularly the centrality of seasonal work. In the EU context, much political energy was invested into the adoption of the Seasonal Workers Directive, expecting it would improve the working and living conditions of seasonal workers coming from outside the EU. As the analysis in the contribution by Virginia Passalacqua shows, in the Italian context, much of the Directive’s assumptions and overall framework do not correspond with the reality on the ground. Seasonal workers are often not in fact ‘seasonal’, many are undocumented migrants changing agricultural jobs across regions within Italy over longer periods of time or often even

⁵¹On ‘structures of exploitation’ see V Mantouvalou, ‘Legal Construction of Structures of Exploitation’ in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2019).

⁵²M Rocca, ‘Stepping Stones over Troubled Waters. Recent Legal Evolutions and the Reform of the Posting of Workers Directive’ in J Arnholtz and N Lillie (eds), *Posted Work in the European Union: The Political Economy of Free Movement* (Routledge 2019); A van Hoek, ‘Re-Embedding the Transnational Employment Relationship: A Tale about the Limitations of (EU) Law?’ 55 (2018) *Common Market Law Review* 449.

permanently. While accounting for the workers' actual reality when drafting legislative proposals might lead to better protection of seasonal migrant workers in agriculture, Elena Corcione's article challenges the idea that by merely addressing the frameworks that govern questions of labour migration and mobility could change the broader structures of the political economy of the field that ultimately shapes workers' reality, including non-mobile, local labour. While critique and reform of migration and mobility frameworks could sometimes be meaningful, Corcione's article argues for a shift towards reflecting how strengthening accountability of agri-food supply chains in the EU could improve the reality of working people in the sector.

The third pair of articles addressing the intersection of labour mobility and precariousness are the two articles focusing on the UK after Brexit. The Brexit and the ceased free movement of workers it imposed was a disruption in the British labour market of significant proportions. Labour shortages in particular industries were predicted even before Brexit was actually executed.⁵³ Virginia Mantouvalou investigates how one of the recent attempts to mitigate said labour shortages, the introduction of the UK seasonal worker visa, is an example of structures of worker exploitation fostered through law, creating different kinds of vulnerabilities for the workers subjected to this particular visa regime. Providing a complex picture of the web of rules, state and non-state institutions as well as factual circumstances at the core of exploitation of seasonal migrant workers in agriculture, the article sheds particular light on the central role that the state and its migration policies have to play in maintaining those structures of exploitation. The 'state-mediated structures of exploitation' emerging from the particular seasonal worker visa programme are a case in point. This new visa programme operating under a well-known logic is also a good example of path-dependence and continuity in British migration policy, which is the focus of the second article concerning the UK by Manoj Dias-Abey. However new some migration policy proposals might be said to be, for instance the 'new' points-based migration plan, the rationale behind them seems to be a continuation of economic rationalities of the 'value creating migrant worker' that have shaped migration politics in the UK for a long time.

The final piece on 'stayers', by Luca Ratti and Manuel Antonio García-Muñoz Alhambra, expands the narrative of migration and short-termism as sources of exploitation, by drawing the attention to the complicity of EU law and regulation in fostering exploitation and precarity of different groups of workers among non-mobile workers. Starting from the original structural focus of EU law on regulating moving labour, premised on the foundational choice of the EU as a dual polity, the paper analysis how EU legal instruments driven by rationales such as market integration, flexibility and enhanced competitiveness, have continuously driven precariousness and in-work poverty within particular groups of vulnerable workers. Against this background they examine recent initiatives and their potential to enhance the protection of the currently most vulnerable workers.

Competing interests. The authors have no conflicts of interest to declare.

⁵³M Sumption, C Forde, G Alberti and PW Walsh, 'How Is the End of Free Movement Affecting the Low-wage Labour Force in the UK?' (2022) ReWAGE and Migration Observatory Report.

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