CHAPTER 11

Social Policy

Between Legal Integration and Politicization

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Summary

Social policy in the European Union (EU) is characterized by a fundamental puzzle: integration has happened despite member-state opposition to the delegation of welfare competences. Consequently, the policy has developed in small and modest steps. Nonetheless, over time, it has expanded considerably. Negative integration pushed by judicial decision-making is often regarded as a main driver for social integration. Positive integration through EU legislation is, however, also defining for EU social policy, and politics is very evident when EU member states negotiate social regulation. More recently, the policy has been marked by deep politicization.

Introduction

EU social policy dates back to the Rome Treaty, where the founders inserted, but soon forgot, a few social considerations to their envisioned common market. Over time, EU social policy has developed in small and modest steps that have increasingly constrained both national welfare states and markets. These constraints have taken the form of social regulation, rather than redistributive policies or financial transfers. The reason for this is that member states have always jealously guarded their power to tax and spend and therefore hindered the EU from determining member states' welfare spending or taxing and redistributing welfare among income groups or risk categories (Daly 2008).

European Union social policy development relates in particular to three of the policy modes, presented in Chapter 4 of this volume. Initially, the policy process in social policy conformed to the *Community method*. The Commission proposed social initiatives, and the Council of Ministers decided alone, adopting rules by unanimity. The Single European Act adopted in 1986 marked a new beginning for EU social policy, which increasingly came to develop by means of the *regulatory mode*. Under this mode, the European Parliament (EP) has joined the scene as co-decision-maker. In addition, qualified majority voting (QMV) has increasingly replaced unanimity in the Council. The Court of Justice of the European Union (CJEU) is often called upon to resolve disputes and clarify more open concepts or ambiguous formulations in legislation. In addition, the policy *coordination mode* has grown in EU social policy by means of the open method of coordination and by means of governance through agencies, committees, and networks (Smismans 2008). On balance, most EU social policies are regulatory. The coordination mode has in particular been applied to redistributive policies, where member states continue to oppose hard law, counting the core welfare policies of social inclusion, poverty, pension, long-term care, and healthcare.

When presenting the processes of EU social policy-making, a distinction is often made between positive and negative integration (Scharpf 1996). Negative integration means the removal of discrimination and national restrictions. Positive integration means the adoption of common policies to fulfil economic and welfare objectives (Scharpf 1996: 15). Negative integration takes place when member states are obliged to remove or change national policies or practices that hinder the free movement principles of the internal market (see Chapter 5). On the other hand, positive integration, in which EU social policy legislation is adopted by the Council and the EP, shapes market conditions and seeks to protect those displaced by market competition.

Positive integration, however, faces many obstacles. First, the thresholds for agreement—QMV in the Council plus an absolute majority in the EP—are higher than in most other political systems (Pollack 2003). The jurisprudence of the CJEU also advances negative integration by imposing market compatibility requirements on national welfare states (Leibfried 2005). Thus, negative integration is often re-

than market correction. However, as we shall see, both negative and positive integration are at play in EU social regulation, and EU common policies have accumulated over time.

Political disagreements on the scope and limits of EU social policy have always been considerable. However, as will be demonstrated in this chapter, the form of political contestation changed in the mid-2000s. Contestation started to be articulated beyond the Council of Ministers and co-decision-makers populating the Brussels bubble. Since then, more political actors have articulated their opinions and attempted to influence EU social policy. We see politicization with increasing public resonance on the rise.

This chapter first presents the overall puzzle and legislative development of social policy. It then turns to its institutionalization, distinguishing between four phases relating to different policy modes. In the first phase, from the Treaty of Rome to the Single European Act, the Community method is mainly at play. The second phase, from the Single European Act to the Maastricht Treaty, marks new beginnings under the regulatory mode. The third phase, from Maastricht up to the Lisbon Treaty, is characterized by an emerging political backlash and the rise of the coordination mode by means of the open method of coordination (OMC). Finally, in the post-Lisbon setting, we currently witness a fourth phase of policy-making, in which EU social policy has to find its way in a highly politicized environment. The final section of this chapter examines the politicization of EU social policy through the case study of cross-border welfare.

The puzzle of EU social policy: integration despite contestation

This chapter takes a broad definition of social policy, including labour market policies, healthcare, gender equality, and welfare redistributive policies, but not education. As Figure 11.1 demonstrates, EU social legislation has increased considerably since a few social policy articles were included in the Treaty of Rome.

Over six decades, 444 regulations and directives have been adopted in EU social policy, including healthcare. Positive integration has taken place throughout that period, despite political contestation and clear decision-making obstacles. This pretty steady accumulation of legislation has occurred despite changes to decision rules (from unanimity to QMV), periodic enlargements, a greater role for the EP, and the changing preferences of EU commissioners. Figure 11.2 presents the number of regulations and directives adopted per year in social policy, and it disaggregates the individual acts into whether they are new acts, amending acts, or implementing acts.

As will be seen in what follows, adopting an act which revises an existing piece of legislation may be just as cumbersome and conflicting as adopting new ones. Moreover, implementing acts may be highly important to improving the national application

FIGURE 11.1 Total EU social policy legislation, including healthcare 1958–2019

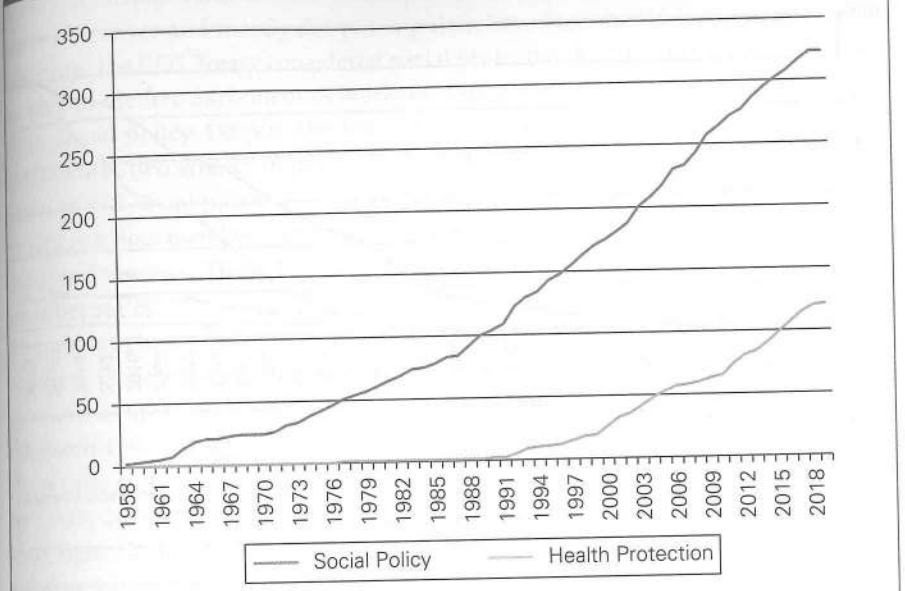


FIGURE 11.2 EU regulations and directives 1958–2019: new, amending, and implementing acts per year

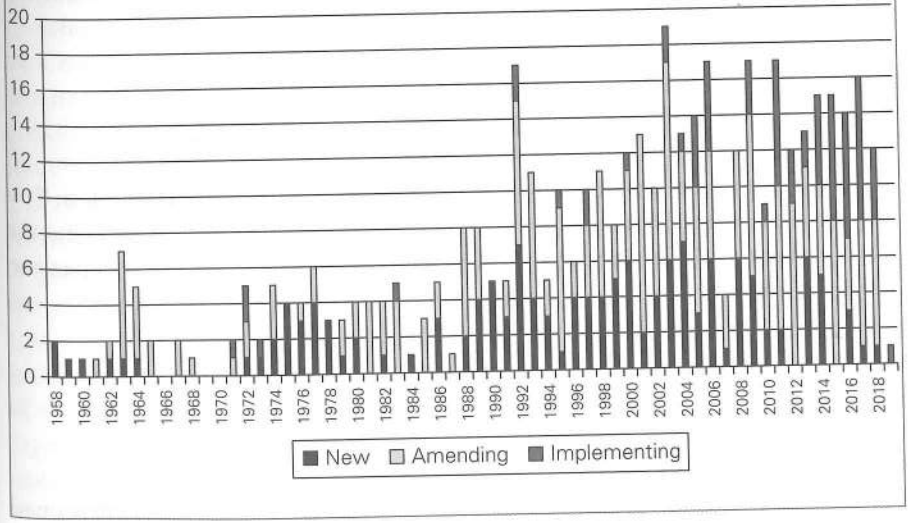
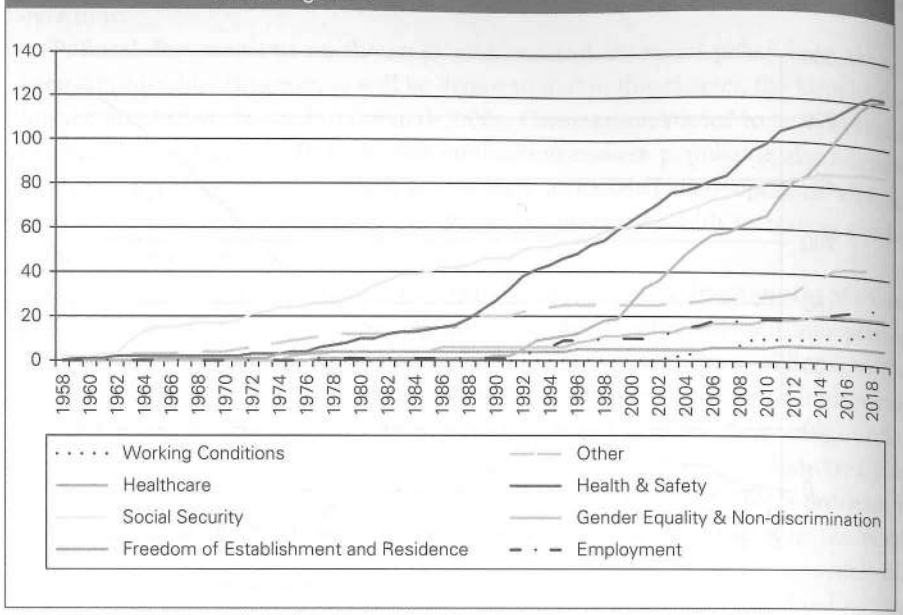


FIGURE 11.3 Development of EU social policy 1958–2019, divided into subcategories



of EU law. Therefore, the increasing number of amending and implementing acts hardly denotes a decline in EU social policy (Graziano and Hartlapp 2018).

The focus of EU social policy, however, has changed over time (Figure 11.3). Until the mid-1990s, the emphasis was on the regulation of social security. It then shifted to health and safety regulation, and subsequently, the regulation of healthcare has come to the fore.

The institutionalization of EU social policy

European Union social policy represents a fascinating process of integration. Few and very limited provisions were inserted into the original treaty framework, but the social endeavour of the European Union has gradually expanded. This expansion occurred in four phases.

The first phase: progress and constraints under the Community method

The founding fathers of the European Economic Community (EEC) had envisioned a clear division of policy competences where member states would cooperate on

national level (Vandenbroucke 2016). In total, 12 of the 248 articles in the Treaty of Rome (the EEC Treaty) dealt directly with social issues (Arts. 117–128) (Hantrais 2007). A characteristic of these social provisions was that they were rather vague in their objectives and mostly did not stipulate how they should be implemented. In addition, the EEC Treaty considered social protection for migrant workers (Art. 51) as part of the free movement of workers, which was laid down in Article 48, rather than social policy. Despite the low priority of social affairs in the original treaty framework, two articles in particular became cornerstones in the gradual development of EU social policy: Article 51 granting migrant workers access to social security in a host member state, and Article 119 on equal pay for equal work between men and women. These key provisions were pushed into the text by individual member states.

Italy fought for free movement of workers and cross-border welfare for migrant workers to be incorporated into the Treaty of Rome. For several years, Italy had worked to open up European labour markets for its many unemployed citizens (Romero 1993). It secured some bilateral agreements, but the hosting states primarily set the conditions. When the negotiations on creating a common market began in 1955, Italy's ambition for the multilateral liberalization of labour markets saw new light (Dahlberg 1967). Given opposition from other countries, Italy did not achieve immediate open access to the labour markets of the other member states as it had envisioned (Romero 1993: 53). Rather, Article 48 granted free movement of workers while simultaneously obliging member states to remove barriers on entry and residence for Community workers over a 12-year transition period (Romero 1993: 52–4). In addition, the parties agreed on Article 51, which stated that a worker moving from one member state to another had the right to access the social security schemes of that member state while retaining his or her previously earned social security benefits. The aim was to ensure that migrant workers did not lose their social benefits when moving to another member state.

Article 51 lay the foundations for the principle of cross-border welfare. In 1958, the Council adopted Regulation 3/58, which further detailed migrant workers' social security rights. Thus, one of the very first Community regulations dealt with social policy. The regulation has been amended many times since and has become the subject of intense political controversy, notably during the Brexit referendum.

France sparked the other important social initiative in the Treaty of Rome negotiations. France was concerned that its higher level of social contributions paid by employers, its relatively pro-labour laws on paid holidays and overtime, as well as the principle of equal pay between men and women written into the French constitution would put its companies at a competitive disadvantage in the common market (Anderson 2015; Hantrais 2007). France thus argued for a harmonization of social provisions in these areas. Germany, however, was firmly against European regulation in social policy, arguing that economic integration itself would bring social progress. The French government nevertheless insisted on the inclusion of equal pay in particular. Article 119 of the EEC Treaty (now Art. 157 TFEU), requiring equal pay between men and women, and a provision on paid vacation (Art. 120

The member states were supposed to implement the equal pay principle before 31 December 1962. However, none of the member states did so (Warner 1984). Throughout the 1960s, the article remained a mere treaty declaration with no true national implications. The two *Defrenne* cases of 1971 and 1976 challenged this (see Box 11.1). The CJEU's ruling in the second *Defrenne* case that Article 119 was directly applicable was a game changer for the integration of gender equality policies.

In 1974, while the second Defrenne case was pending before the CJEU, the Commission presented the first EC Social Action Programme of 1974, which included a section on women. By the mid-1970s, the member states were ready to commit to binding rules on gender equality. This development reflected the broader societal context of that time with second-wave feminism and a greater demand for women in the labour market (Hantrais 2007: 123). Between 1975 and 1986, the Council adopted a first round of secondary social policy legislation, consisting of five new directives. The 1975 Equal Pay Directive (75/117/EEC) detailed and extended the scope and meaning of Article 119 by stating that men and women are entitled to equal pay for equal work and for work of equal value. The subsequent four directives went beyond equal pay to address the broader principle of equal treatment in: vocational training, access to employment and working conditions (Directive 76/207/EEC), social security (Directive 79/7/EEC), occupational social security (Directive 86/378/EEC), and on the application of the principle of equal treatment for the self-employed (Directive 86/613/EEC).

The first phase of Community social policy was thus characterized by rather modest social objectives in the original treaty and the constraints of unanimous decision-making under the Community method. Nevertheless, as summed up in Table 11.1, the treaty provisions were important milestones for future developments. In addition, by the mid-1970s, further steps were taken under the impetus of an activist court.

BOX 11.1 The *Defrenne* cases

The *Defrenne* cases (Case C-80/70, *Defrenne* [1971] and Case C-43/75, *Defrenne* [1976]) concerned discriminatory practices in Sabena, the Belgian national airline. Male and female stewards had exactly the same job responsibilities, but the male stewards earned more. Furthermore, female stewards were obliged to retire when they turned 40, while their male colleagues could continue working another 15 years and then become entitled to Sabena's special pension scheme.

The CJEU ruled that Article 119 did not extend to pension schemes or retirement. However, in the second *Defrenne* case, it concluded that Article 119 was directly applicable to equal pay. That is, women could rely on the equal pay principle in national courts irrespective of whether or not secondary EU or national legislation existed (Mazey 1998).

TABLE 11.1 Milestones—The first phase of social policy

Treaty developments	Important legislation	Important CJEU decisions
• Free movement of labour. Unanimity Arts. 48–50 • Coordination of social security. Unanimity Art. 51 • Gender equal pay. Unanimity. Art. 119	• 1971: Regulation 1408/71 on coordination of social security • 1975: Equal Pay Directive (75/117)	• 1971: C-80/70 *Defrenne* • 1976: C-43/75 *Defrenne*

The second phase: new beginnings under the regulatory mode

The 1986 Single European Act (SEA) introduced Article 118A (Art. 153(1)(a) TFEU), which granted the Union the ability to adopt measures to regulate health and safety. Union competence in social matters was thus extended, albeit only slightly and only because member states could agree that the health and safety of workers was closely linked to the single market (Rhodes 2015). Article 118A obliged the Commission to consult the Economic and Social Committee and enhanced the involvement of the EP through the new cooperation procedure (see Chapter 4). Furthermore, decisions in the Council had to be taken by QMV. For the first time, social policy initiatives could be advanced without consensus among the member states. It thus provided 'an escape route out of the unanimity requirement' (Falkner 2010: 270).

The member states regarded health and safety as a relatively safe area in which to transfer regulatory competence. Unlike most welfare policies, health and safety measures can be adopted at low cost to public authorities. Furthermore, being technical in procedure and content, health and safety did not seem to pose any major obvious threat to national sovereignty (Smismans 2004: 98–9). The member states did not foresee that the treaty base for a rather technical area could be used creatively and extensively to adopt measures beyond a narrow definition of health and safety—what Rhodes (2015) has termed the 'treaty base game'. However, the Commission soon used Article 118A not only to improve the working environment (such as developing standards for exposure to dangerous chemicals, requiring safety signs, and taking measures to prevent occupational diseases), but also to improve working conditions generally. Using QMV as a voting procedure made it possible to isolate member states, especially the UK, opposed to social policy initiatives.

The EU's Working Time Directive (93/104/EC) is an illustration of the treaty base game and its complex aftermaths. In 1990, the Commission advanced its proposal for a working time directive based on Article 118A. The UK, however, firmly opposed the choice of legal basis. It argued that working time was an employment issue, not a health and safety matter, and thus should be based on Article 100 or Article 235, both of which required unanimity (Lewis 2003: 116). The Commission disregarded the UK's stance, and negotiations continued in the Council. During the

negotiations, the other member states made many attempts to bring the UK on board by offering important concessions. The UK pushed for exemptions from working time regulation for a variety of sectors: air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea, and the activities of doctors in training. More importantly, the UK was granted an opt-out from the main rule in the directive of a 48-hour work week, which allowed that workers could, on an individual basis, agree with their employer that the 48-hour ceiling did not apply to them.

Although there was sufficient support to adopt the directive in 1991, the Council continued negotiations for another two years, attempting to establish consensus and bring 'everyone on board' (Lewis 2003: 118). The UK, however, never came around, and the directive was finally adopted in 1993 by QMV, after three years of negotiations.

The opt-out and exemptions, inserted in an effort to bring the UK on board, meant that from the beginning, the working time rules were rather patchy and left leeway for differentiation. Thus on the one hand, the Working Time Directive extended European integration in social policy. On the other hand, the opt-outs and a lack of implementation have prevented the creation of the level playing field that the Commission, the EP, and various stakeholders had aimed for.

Nonetheless, the UK remained dissatisfied. Soon after the adoption of the directive, it brought an annulment procedure before the CJEU, arguing that Article 118A was not an appropriate legal basis for the directive. In 1996, the CJEU ruled against the UK, concluding that Article 118A was an appropriate treaty base for the EU regulation of working time (Case C-84/94 *United Kingdom* [1996]).

This ruling did not end the political controversies about or judicial proceedings regarding the Working Time Directive. In 2000 and 2003, in its *SiMAP* (Case C-308/98) and *Jaeger* (Case C-151/02) rulings, the CJEU extended the regulatory scope of the directive. In the *SiMAP* case, the CJEU held that doctors were not excluded from the directive, even though Article 2(2) explicitly allowed the exemption of public service activities that maintain public order and security. The Court also concluded that on-call time spent in a healthcare institution constituted working time and had to be counted towards the 48-hour limit, a determination that the Court confirmed in *Jaeger*.

Member states were very upset by these rulings, arguing that they would have severe budgetary implications, especially in the healthcare sector. In autumn 2004, the Commission presented a proposal that, in essence, broke from the case law by drawing a distinction between 'on-call time' and 'inactive on-call time', with 'inactive on-call time' not counting towards the number of working hours. A long process of negotiations between the Council and the EP followed. A very united EP opposed the Commission proposal because it would 'not lightly alter the *acquis communautaire* and legislate against the case law of the Court of Justice' (Martinsen 2015: 117–18). For the first time, the conciliation committee between the Council and the EP did not produce agreement. Political negotiations had failed.

Subsequently, the Commission asked the social partners to negotiate to try to resolve the issue. Workers were represented by the European Trade Union Con-

TABLE 11.2 Milestones—The second phase of social policy

Treaty developments	Important legislation	Important CJEU decisions
• Occupational health and safety. QMV Art. 118A	• 1993: Working Time Directive 93/104	• 2000: C-308/98 *SiMAP* • 2001: C-151/02 *Jaeger*

Europe, which represented European peak associations; CEEP, which represented public-sector employers; and UEAPME, which represented small and medium-sized enterprises. Those talks broke down in December 2012.

Member states have subsequently adopted opt-outs from the 48-hours work rule, some across sectors and some for individual sectors. Over time, the opt-out developed as a concession to one member state has morphed into a derogation for the majority of the member states (Martinsen and Wessel 2014). Consequently, the directive has been criticized for resembling 'an Emmentaler with more holes in [it] than [cheese]' (Martinsen 2015: 127–8). In addition, the CJEU's jurisprudence created 'rules nobody follows'. Such a critique may be too harsh, but the Working Time Directive demonstrates a characteristic of social Europe, where legal integration often faces political constraints and there is a great distance between 'law in the books' and 'law in action' (Conant 2002).

The second phase thus marked a new beginning for EU social policy under the regulatory mode. Table 11.2 presents important milestones of this new beginning. The treaty provision on occupational health and safety offered a broader escape route out of the policy area's consensus constraints, which was not foreseen by the member states. However, as the case of the Working Time Directive demonstrates, political opposition sometimes carried on beyond legislative agreement, resulting in differentiated implementation.

Third phase: regulatory progress, the coordination mode, and political backlash

The period from the late 1980s to the early 1990s has often been associated with the establishment of the EU's social dimension (Daly 2008; Graziano and Hartlapp 2018). During that period, Jacques Delors, then President of the European Commission, argued that for the common market to be effective, it had to be socially regulated. A main achievement during this period was the adoption of the non-binding Community Charter of the Fundamental Social Rights of Workers in 1989, which all of the member states, except the UK, signed. At the 1991 intergovernmental conference that prepared the Maastricht Treaty, Delors and his allies again pushed for expanding the EU's social dimension. The UK stood firmly against this, threatening to veto the treaty over the social issue (Adler-Nissen 2008; Lange 1993: 8). As a result, the UK was allowed another opt-out, and the other member states adopted a social

treaty. A major advancement of the social protocol was that it changed the decision-making rule to qualified majority voting for gender equality, working conditions, and worker information and consultation, among other issues.

The UK opt-out came to an end in 1997, when the new Labour government decided to accept the social chapter as part of the Treaty of Amsterdam. 1997 was also an important year in relation to enhancing EU social policy by means of the co-ordination mode. This enhancement was made possible through new initiatives in EU employment policy, such as the European Employment Strategy (EES) launched during the extraordinary Luxembourg job summit, and the Treaty of Amsterdam's new employment title (Arts. 125–130, now Arts. 145–150 TFEU). The main aim of the strategy was to achieve a high level of employment. Instead of binding legislation, however, the strategy introduced an annual coordinating and monitoring cycle for national employment policies as a new mode of governance. The EES governance mode was the precursor of the open method of coordination (OMC) (De la Porte *et al.* 2001), which was formalized with the Lisbon European Council in 2000 and then applied to EU social policy (see Box 11.2). With the OMC, the member states obtained a new 'soft', non-binding policy instrument to use in the social policy sphere.

In addition, new progress was made during this period in terms of gender equality. In 1992, the Maternity Leave Directive (Directive 92/85/EEC) was adopted, followed by the Parental Leave Directive (Directive 96/34/EC), and the Directive on burden of proof in sex discrimination cases (Directive 97/80/EC). It was also during

BOX 11.2 The Coordination Mode—Open method of coordination in EU social policy

The open method of coordination (OMC) involves the exchange of best practices between the member states: benchmarking, target-setting, peer-pressure, and multilateral surveillance (De la Porte 2002; and see Chapter 4). There are different OMC procedures, but in general, the process involves three main stages. First, the Council agrees on policy aims. Secondly, these aims are translated into national action plans. Thirdly, national actions taken are monitored and evaluated by the Council and the Commission. Over time, the OMC has extended to a wider range of policies, including modernization of social protection, social inclusion, pensions and healthcare, education, and migration. The OMC has been regarded as a solution to the sovereignty dilemma that haunts the social policy area. Through the OMC, the EU can take a role in coordinating national social policies while accepting the member states' prerogative to design, organize, and finance their own welfare states (Armstrong 2010; Zeitlin 2011). The OMC has thus been presented as the new means to promote social cohesion while simultaneously ensuring a competitive market and preserving national autonomy. However, the OMC's effectiveness has been questioned. Some scholars have found the OMC to be an important problem-solving tool based on deliberation and learning (Borrás and Jacobsson 2004; Daly 2006; Heidenreich and Zeitlin 2009; Vanhercke 2009), but others argue that it is ineffective in generating actual change

this period that the Posted Workers Directive was finally adopted after six years of negotiations (Directive 96/71/EC).[1] The negotiations on the Posted Workers Directive were a protracted battle over how to strike the right balance between the free movement of workers and domestic social and labour market regulation; that is, how to avoid social dumping (see Box 5.2). The Commission's proposal had favoured the free movement of workers. During the negotiations, however, the member states amended the Commission's proposal many times so that in the end it significantly extended the ability of the hosting member state to apply its domestic labour laws to posted workers. As a result, the balance tilted towards social regulation, and the directive became a tool primarily to protect national labour markets (Davies 2002; Kolehmainen 1998).

In 2004, the Commission proposed the Services Directive—known as the 'Bolkestein' Directive after the lead commissioner, and by its opponents in public debates as the 'Frankenstein' Directive (Jensen and Nedergaard 2011: 851)—which sought to liberalize trade in services. In addition to seeking to revisit the Posted Workers Directive to make it more liberal (see Box 5.2), the proposal made the daring move to include healthcare in the de-regulation agenda (Szyszczak 2011: 116). Here, the Commission was building on the CJEU's jurisprudence that treated healthcare like any other service. National politicians from most member states strongly opposed the Commission initiative (De Ruijter 2015: 234–5). As a result, the Council opposed having healthcare regulated as part of a single market directive. Furthermore, members of the EP (MEPs) disapproved of healthcare being regulated as part of the Services Directive, and in February 2006, the EP vetoed the inclusion of healthcare in the Services Directive.

In sum, the third phase was arguably a period of progress in EU social policy. As summed up in Table 11.3, the social protocol marked a new social commitment and new pieces of social legislation were adopted by means of the regulatory mode. In addition, the coordination mode was applied by means of the open method of coordination. However, the last part of this phase marked the limits of EU regulation, with a political backlash against applying internal market provisions to the social domain.

Fourth phase: social policy-making in a politicized environment

The EU financial and economic crisis hit EU social policy hard. As a response to the crisis, the EU introduced new economic governance tools that disciplined government spending and imposed fiscal austerity measures on several member states

TABLE 11.3 Milestones—The third phase of social policy

Treaty developments	Important legislation/initiatives
• Social protocol attached to the Maastricht Treaty • Public health, QMV Art. 129	• 1992: Maternity Leave Directive 92/85 • 1996: Posting of Workers Directive 96/71 • 1997: Burden of Proof Directive 97/80 • 1997: European employment strategy

(see Chapter 7). These developments put indirect pressure on national welfare states. These pressures contributed to reform programmes and cuts in welfare spending in many member states. Pavolini *et al.* (2015) demonstrate how emerging social investment policies in Italy and Spain changed dramatically into policies of 'permanent strains', consisting of a negative welfare blend of salary reductions, budget cuts, and restrictive social policy reforms. Other scholars have shown that conditions imposed on the member states that received financial assistance from the EU, as well as from the European Central Bank (ECB) and the International Monetary Fund (IMF)—Portugal, Greece, Ireland, and Cyprus—affected their social policies hard (Baeten and Vanhercke 2016; Theodoropoulou 2015).

The euro area crisis and its accompanying austerity measures and welfare cuts were met by a wave of public and political protest. In southern Europe, this led to the rise of the new left, including Syriza in Greece, Podemos in Spain, the Five Star movement in Italy, and Bloco de Esquerda in Portugal (Kriesi 2016). Politicization expressed opposition to austerity policies and requests for a more social Europe and more EU solidarity (Kriesi 2016; Statham and Trenz 2015).

The Juncker Commission, which took office in 2014, claimed that it was time to revitalize the EU social agenda. In his 2015 State of the Union speech, Juncker presented his intentions to develop a 'European pillar of social rights'. The pillar was officially launched in 2016 and signed by the member states at the social summit held in Göteborg in November 2017. The pillar consists of 20 principles, ranging from gender equality to social protection. The pillar is organized into three main categories: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. Four instruments are identifiable: social regulation, soft coordination, social benchmarking, and EU co-funding (De la Porte 2019). While the member states have expressed their political support for the 20 principles, the main parts of the pillar are not legally binding. It is still too early to evaluate whether the pillar will lead to substantial progress or whether it is foremost a declaration of good intentions.

The principles of gender equality and work–life balance, which comprise the legally binding part of the European Pillar of Social Rights, however, made a remarkable legislative step forward. The Commission presented its proposal for a directive on a work–life balance for parents and carers in April 2017, before the Göteborg social summit (COM(2017) 253, 26 April 2017) (Commission 2017*g*). The proposal for a directive was negotiated simultaneously with the social pillar and was provisionally adopted one year after the Göteborg social summit. Both the speed of the decision-making process and the content of the directive are remarkable, and they indicate that the stated commitment to social Europe is more than the 'cheap talk' of which the EU social dimension is often accused.

The Commission's proposal followed up on the failed attempt to revise the Maternity Leave Directive back in 2008. At that time, the Commission proposed a revision of this directive to extend paid maternity leave from 14 to 18 weeks (COM(2008) 600/4) (Commission 2008*c*). The EP, however, wanted to extend paid maternity leave to 20 weeks, which the Council was not willing to accept. The proposal was stalled

BOX 11.3 The main content of the Work–Life Balance Directive

- Fathers or second parents will be able to take at least ten working days of paid paternity leave when the child is born.
- All parents shall have an individual right to four months of parental leave, from which two months are non-transferable between the parents. In essence, this means that the directive introduces two months of leave earmarked for fathers or second parents. The level of payment during leave is to be set by member states.
- A new concept of carers' leave is introduced, according to which workers have a right to five working days of leave per year to care for relatives in need of care.

The new directive on work–life balance is remarkable in the light of this experience. The proposal was justified on the need to reduce the gender gaps in employment, pay, and pensions. In January 2019, the Council and the EP reached a provisional agreement on the proposal. The directive was finally adopted on 20 June 2019 (2017/0085 (COD)). The new directive represents an advance on the previous EU maternity directive and goes beyond domestic policies on work–life balance in various member states (see Box 11.3).

Although the qualified majority in the Council supported the agreement, not all member states were happy with it. For example, the Danish government stated that it would vote against the directive, opposing further supranational regulation on the matter. In particular, the earmarked leave for fathers was criticized for the EU imposing itself on what should be a national competence and decision, not least because Denmark and most other EU member states reserved no proportion of parental leave for fathers. Thus, the directive will extend domestic social rights.

In this period, the thorny issue of EU of the balance between social protection and market liberalization was revisited by means of negative integration. During 2007–08, the CJEU issued its famous *Laval*-quartet rulings. In these four cases—Case C-438/05 *Viking* [2007], C-341/05 *Laval* [2007], C-346/06 *Rüffert* [2008], C-319/06 *Commission v. Luxembourg* [2008]—the Court ruled against national restrictions on the free movement of services and establishment, challenging, among other aspects, the right to collective action. The four cases disrupted the balance established in the original Posted Workers Directive, giving greater weight to the single market. This shift was to the great dismay of social democratic politicians and trade unions.

The Socialists and Democrats (S&D) and other left-wing groups in the EP used the EP's powers to force remedial action onto the EU's political agenda. In the autumn of 2009, they stated that they would support the re-election of Manuel Barroso as president for the Commission only if he would commit to revising the Posted Workers Directive and re-establish the balance that the Court had disrupted. Barroso duly promised to present a solution to the 'case law problem' in his new term (Martinsen 2015: 199).

In 2012, the Commission came forward with two proposals: (1) the so-called Monti II Regulation (COM(2012) 130, 21 March 2012) (Commission 2012*b*),

21 March 2012) (Commission 2012*d*). In particular, the Monti II proposal evoked considerable politicization. European trade unions, national politicians, as well as members of the European Parliament expressed strong opposition to the proposal, which they found would codify the case law of the Court and place internal market principles above the right to collective action. Only eight weeks after the presentation of the proposal, two-thirds of all the national parliaments had issued reasoned opinions against the proposal and for the first time used the 'yellow card' procedure, which was introduced by the Lisbon Treaty.[3] In this politicized environment, the proposal for the Monti II regulation proved short-lived and was withdrawn by the Commission only six months after its presentation as a reaction to the national parliaments having given the proposal the 'yellow card'. The enforcement directive was, however, adopted, which to some extent compensated for the internal market push by the Court (Directive 2014/67).

As part of its aim to revitalize the social agenda, the Juncker Commission followed up by proposing in March 2016 a further revision to the directive (COM(2016) 128, 8 March 2016) (Commission 2016*a*). The amended directive (Directive 2018/957) was adopted by the Council and the EP in June 2018. One of the main changes introduced by the revised directive is that all mandatory elements of remuneration, instead of just the 'minimum rates of pay', have to be applied to posted workers. This change obliges firms posting workers to also pay local salary supplements in order to ensure social protection and avoid social dumping. That the Council and the EP managed to revise the directive stands out as another important achievement for EU social policy—again by means of binding legislation.

Another major social policy development during this period was legislation governing the cross-border supply of healthcare services. The public opposition to the 2006 Services Directive, along with Council and EP opposition to treating healthcare like any other service, forced the Commission to rethink how it would proceed on cross-border healthcare regulation. It began by shifting responsibility from the Directorate-General responsible for the single market (DG MARKT) to the DG for public health and consumer protection (DG SANCO). Following a public consultation, the Commission planned to present its proposal in December 2007. However, on the day the initiative was to be launched, the Commission withdrew its proposal. It emerged that the Commission was split over the proposal (Greer and De Almagro Iniesta 2014: 369). Some commissioners opposed the directive because they were concerned about the implications for national health systems. Others were worried about how the public would receive the proposal, given the extent of opposition to the Services Directive. With the ratification of the Lisbon Treaty looming, the timing of this proposal seemed risky (Martinsen 2009).

As a result of this opposition, the Commission delayed the proposal until July 2008. Almost three years of negotiations followed. The EP rapporteur from the Committee on the Environment, Public Health and Food Safety (ENVI) and a majority of MEPs supported greater patient mobility and less national control than the proposal advanced. Most member states, however, were concerned about the cost

TABLE 11.4 Milestones—The fourth phase of social policy

Treaty developments	Important legislation/ initiatives	Important CJEU decisions
• Lisbon Treaty. Most social initiatives now under QMV.	• 2011: Patient Rights Directive 2011/24 • 2014: Enforcement Directive, Posted Workers Directive 2014/67 • 2018: Posted Workers Directive 2018/957 • 2019: Directive on work–life balance	• 2007: C-438/05 *Viking* & C-341/05 *Laval* • 2008: C-346/06 *Rüffert* & C-319/06 *Commission v. Luxembourg*

could receive hospital care as well as cost-intensive and specialized non-hospital care in another member state. During the negotiations, therefore, the Commission's proposal was watered down and considerably more domestic control was inserted into the directive. As a result, the feared implications of the CJEU case law on patient mobility were thus considerably modified (Martinsen 2015). In February 2011, the Patient Rights Directive (2011/24) was adopted by the EP and the Council, with Austria, Poland, Portugal, and Romania voting against it, and the Slovak delegation abstaining.

Much of the fourth phase of European social policy, therefore, was marked by austerity, which made social initiatives unlikely while at the same time increasing political demands for them. After years of social reluctance, the Juncker Commission eventually sought to revitalize the EU social agenda, and EU legislators displayed a renewed commitment to social Europe. Thus, the milestones of the fourth phase (see Table 11.4) show that social policy-making can happen by means of the regulatory mode, also in a politicized environment.

Cross-border welfare as a lightning rod for politicization

The four phases of EU social policy-making demonstrate that EU social regulation and internal market pressures on domestic welfare policies have always generated political responses and disputes. However, around the mid-2000s, the scope and location of political contestation changed, increasingly involving non-governmental actors and taking place beyond the legislative institutions (for the definition and theoretical discussion of politicization, see De Wilde 2011; Grande and Hutter 2016; De Wilde *et al.* 2016). As a result of the enlargements of 2004 and 2007 and the euro area crisis, politicization of EU social policies grew (Hemerijck 2013: 291; Martinsen

debates about the Constitutional Treaty, which resulted in their rejecting the treaty in referendums in 2005 (Hemerijck 2013). European Union freedom of movement and cross-border welfare were key themes of the UK's referendum campaign on leaving the EU (on the former, see Chapter 5). Cross-border welfare has been a lightning rod for politicization in other member states as well.

The right to cross-border welfare is closely connected to the single-market principle on free movement of persons. Over the years, both the personal—who is entitled—and the material scope—to which benefits—in other member states have developed as a result of both legislative amendments of the regulations and judicial interpretations thereof (see Box 11.4).

In wake of the eastern enlargements and the economic crisis, politicization of cross-border welfare has intensified. The fundamental idea of cross-border welfare as a means to facilitate the free movement of persons has been disputed, and claims about 'welfare migration' and 'benefit tourism' have infused political and public debates. A notable 'freedom of movement–welfare closure' cleavage between new and old members is evident in political negotiations and debates.

Although EU citizens' access to welfare across borders has been an issue since at least 2003, politicization peaked between 2013 and 2015, with cross-border welfare being increasingly framed in negative terms as 'welfare migration' or 'benefit tourism' (Blauberger *et al.* 2018).

Reflecting this greater politicization, in April 2013, the Austrian, British, Dutch, and German ministers of the interior sent a joint letter to the Council of the European Union expressing their concerns about fraud in relation to social benefits and stating, that the free movement of persons and access to welfare should not be unconditional (Blauberger *et al.* 2018). In November 2013, the UK Prime Minister, David Cameron, declared that EU free movement 'needs to be less free' and that access to cross-border welfare should be limited.[6] A year later, Cameron added a fresh attack on the EU social security regulations, demanding further cutbacks of EU migrants' access to British welfare. This time, the British prime minister even stated that he was prepared to force the UK to leave the Union if he did not achieve his goal in Brussels.[7] The issue became a key part of the deal between the UK and the EU, stating what would be re-negotiated if the UK referendum were to result in Remain (see Box 11.5). The UK was thereby given concessions, which had previously been held as unlikely breaches of the principles of free movement and non-discrimination. This episode shows that in times of high politicization, even EU core principles are bendable.

Despite its extraordinary nature, the cross-border deal that Cameron secured figured little in the UK's referendum campaign. Rather, the access of other EU citizens to the UK's welfare system was framed as a main reason why the UK needed to 'take back control' in order to save the British welfare system.

After the UK voted to leave the EU, the concessions made to the UK on cross-border access to welfare were no longer on the table. They were not, however, forgotten by other member states. In response, in December 2016, the Commission presented a reform proposal of Regulation 883/2004 on the right to cross-border welfare (COM(2016) 815, 14 December 2016) (Commission 2016*b*). In particular, the proposal called for extension of the period during which a person could claim unemployment benefits from his or her home government from three to six months to make jobseekers more mobile. For frontier workers—those living in one country but working in another—the proposal was that the member state in which the person had worked for the past 12 months would be responsible for paying unemployment benefits. In addition, when and how periods of unemployment insurance could be aggregated between member states was on the negotiating table. The Commission did not, however, propose the indexation of child benefits.

BOX 11.4 The rules and legal integration of cross-border welfare

All workers, self-employed people, and EU citizens who can provide for themselves and their family members have a right to move and reside across the Union. In addition, they become eligible for welfare benefits in a host state under certain conditions. Thus, member states can no longer limit social benefits to their own citizens but must treat citizens from other member states equally (Leibfried 2015). Regulation 883/2004 details the rules on cross-border welfare, including which benefits can be exported to other member states. This means that member states can no longer insist that some of their benefits can only be provided in their own territory (Leibfried 2015). Regulation 492/2011 establishes that migrant workers have the same rights to the social advantages of the member state in which they work as their national citizens. This gives individuals with worker status more extensive social rights than migrating EU citizens in general.

Over the years, the CJEU has played an important role in defining the personal and material scope of and limits to these two regulations, interpreting who should have rights to which types of social benefit (Blauberger and Schmidt 2014). The earlier expansive European citizenship jurisprudence[4] has, however, experienced a turnaround with more recent restrictive case law,[5] in which the legislative conditions for access to welfare benefits in other member states feature more prominently (Blauberger *et al.* 2018). Moreover, by means of legislative amendments, member states have managed to modify the implications of Court-initiated integration by inserting special rules and clarifying individual articles in the complex legislative texts (Martinsen 2015).

BOX 11.5 Cameron's deal on cross-border welfare

In a letter to the President of the European Council, Donald Tusk, Cameron insisted that EU citizens residing in the UK must have lived there and contributed to the British welfare system for four years before they could qualify for in-work benefits or social housing. Furthermore, Cameron required that child benefits should no longer be exportable.[8] In the subsequent decision taken by the European Council on a new settlement for the UK, the UK–EU deal, both issues were addressed.[9] Among other items, the deal stated that if the UK decided on Remain, (1) it could insert a residence clause of in-work benefits for a total period of up to four years, and (2) the Commission would present a proposal to index exportable child benefits, that is, modifying family benefits paid for children residing in another member state to reflect the cost of living of that state.

The proposal provoked deep political disagreements in the Council.[10] Some member states, particularly the Central and Eastern European member states, pushed to further facilitate free movement. Another group of welfare-concerned member states—which included Austria, Germany, Denmark, and the Netherlands—raised concerns about the unemployment chapter and presented an amendment to the family benefit chapter of the regulation to allow the indexation of family benefits.

The issue came to a head at the June 2018 meeting of the Employment, Social Policy, Health and Consumer Affairs Council. Eight member states still had reservations on the unemployment chapter of the proposal. At the meeting, Luxembourg expressed its deep concerns in relation to frontier workers' access to unemployment benefits and threatened to use the emergency brake of TFEU's Article 48, which enables a member state to appeal to the European Council if it considers that its social security system will be fundamentally endangered by proposed legislation. Denmark also argued that its welfare system would be considerably challenged by the reduction of the waiting period for the aggregation of unemployment contributions. Negotiations continued. On 19 March 2019, a provisional agreement was reached between the Council and the EP. The provisional agreement, among other things, ensured that jobseekers would be able to take unemployment benefits with them for six months to another member state and that national authorities would be given better tools to address abuse or fraud (Commission press release, 19 March 2019). However, behind the formal declaration of a forthcoming agreement, the welfare-concerned alliance of member states still worked to hinder a final agreement. Ten days later, Austria, Belgium, the Czech Republic, Denmark, Germany, Luxembourg, the Netherlands, and Sweden formed a blocking minority against the agreement. While the Czech Republic objected because the agreement did not enhance mobility enough, the others objected to liberalized access to and greater exportability of unemployment benefits.[11]

The troublesome negotiations on cross-border welfare demonstrate that politicization in some member states—here termed the welfare-concerned states—is likely to affect Council negotiations. In this case, the politicized environment hindered social policy-making, making it impossible to bridge the 'free movement–welfare closure' cleavage, which emerged between member states during Council negotiations.

Conclusion

This chapter has shown how EU social policy has developed incrementally, but substantially, over the decades. Reflecting the push of individual member states, which aimed to solve important issues of domestic politics, the Treaty of Rome contained a few social provisions, the long-term consequences of which no one had foreseen. From these beginnings grew quite extensive supranational regulation on gender equality. Freedom of movement and cross-border welfare likewise had their origins in the Treaty of Rome. Today, we witness considerable politicization relating to these

cross-border rules, and a notable 'free movement–welfare closure' cleavage between new and old members stands out in political negotiations and debates. The politicization of cross-border access to welfare contributed to Brexit. Thus, EU legislation and judicial rulings extended from initial provisions around social security for migrant workers and gender equality to occupational health and safety, working conditions, and healthcare.

The EU's role in social policy, however, has always been contested and many initiatives have stalled, failed, or been watered down. Politicization has made the EU's role in social policy even more controversial, as the Brexit referendum and the failure to reform access to welfare vividly illustrate. Nonetheless, there have been important new social initiatives since the 2016 referendum in favour of Brexit. European Union social policy thus continues to be ambiguous, having to balance demands for social regulation and EU-wide solidarity with the core liberalizing objectives of the internal market. Thus, future EU social policy will probably continue to be marked by its own stop-and-go logic.

NOTES

1 A posted worker is an employee who is sent by his or her employer to carry out a service in another EU member state for a temporary period.

2 EU Observer, 'Controversial maternity leave bill scrapped', 16 July 2014

3 Article 12 of the Lisbon Treaty together with the relevant protocols grant the national parliaments an early warning mechanism according to which they can request the Commission to reconsider a proposal with reference to the principle of subsidiarity. The mechanism is often termed the 'yellow card'.

4 See, among other cases, C-85/96 *Sala* [1998] and C-184/99 *Grzelczyk* [2001].

5 See, among other cases, C-333/13 *Dano* [2014], C-67/14 *Alimanoviz* [2015], and C-308/14 *Commission v. United Kingdom* [2016].

6 'Free movement within Europe needs to be less free', *Financial Times*, 26 November 2013.

7 'Cameron to tell EU: cut all tax credits to migrants', *The Guardian*, 28 November 2014.

8 See Cameron's letter to Donald Tusk, 'A new settlement for the United Kingdom in a reformed European Union', 10 November 2015, (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf).

9 European Council meeting, 18 and 19 February 2016. Conclusions. EUCO 1/16, (www.consilium.europa.eu/media/21787/0216-euco-conclusions.pdf).

10 'EU countries reject proposal on social security coordination', Politico, 29 March 2019, (www.politico.eu/article/eu-countries-reject-proposal-on-social-security-coordination).

11 See endnote 10.

FURTHER READING

For insights into the development of this policy arena, see Leibfried (2015) and Rhodes (2015). For an overall presentation of EU social policy, see Anderson (2015), and for a discussion of more recent legal and political developments as well as interplay between law and politics, see Höpner and Schäfer (2012), Martinsen (2015), Hervey and McHale (2015), and Vandenbroucke, Barnard, and De Baere (2017). For a discussion on how national welfare states are challenged by, respond to, and adapt to EU regulation, see Scharpf (2002), Ferrera (2005), Falkner *et al.* (2005), and Hemerijck (2013). For further insights into the OMC, see de la Porte and Pochet (2002) and Zeitlin (2011).

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CHAPTER 12

Digital Policy-Making in the European Union

Building the New Economy of an Information Society

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Summary

Digital technologies are transforming European societies, politics, and markets. Since the 1970s, the European Union has attempted to navigate these pressures through a package of digital policy-making. These efforts have targeted the dual missions of pan-European market-making, as well as market correction. Relying on a host of governance modes including the regulatory method, policy coordination, incorporated transgovernmental networks, and private governance, the European Union has tried to steer the new information society so as to both spur market growth and protect citizens against abuse. The ultimate success of these efforts has been encumbered by the overall complexity of the sector, where policy efforts quickly bleed over into other issue areas, such as competition policy and justice and home affairs, and have international consequences. Digital policy-making in Europe faces considerable challenges ahead, as EU institutions grapple with the rise of platform companies, disinformation campaigns, and transatlantic disputes over data privacy and the market power of US-based technology companies.