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Chapter 1

Introduction

The men who negotiated the Treaty of Rome in the 1950s viewed social policy as the exclusive province of the member states; European Union (EU) intervention would only be necessary in order to facilitate labour mobility within the common market and channel resources (administered by the member states) to regions experiencing high unemployment. These limited social policy competences bore little resemblance to the social policy regimes in the member states. Indeed, the principle underlying EU social policy in the 1950s held that the member states would retain control over nearly all aspects of social policy. EU social policy would merely complement, rather than challenge or constrain, national social policy. Intergovernmental decision-making based on unanimity would ensure that the member states retained social policy sovereignty.

For all six original EU members (I will use the terms EU and EC (European Communities) synonymously throughout the book), the preservation of national social policy autonomy was a prerequisite for ratifying the Treaty of Rome; economic integration was predicated on the idea that social policy would be kept strictly separate from the process of market-building. At the time, Western European welfare states were in the initial phase of what would become a long expansion period, in which state policies guaranteed full employment and protection against a wide range of social risks (Esping-Andersen, 1990; Huber and Stephens, 2001). National social policies were to be essential elements of this process of state-building and rebuilding after the Second World War. Thus, the Treaty of Rome was signed against a backdrop of economic expansion and the extension of the *national* welfare state. In the new EC, European and national levels of social policy-making seemed to be safely separate. As Ferrera (2005) puts it, ‘national closure’ was a chief characteristic of welfare states in the decades immediately following the Second World War, and in signing the treaty, the six original member states wanted to keep things this way.

2 *Social Policy in the European Union*

After nearly six decades of European integration, it is clear that things did not turn out as the EU's founders expected. Today, EU law and policy touch almost every aspect of social policy:

- A highly developed body of law regulates equal treatment in statutory and occupational social security, as well as access to employment, and extensive regulation guarantees the coordination of national social security schemes, enabling workers to aggregate and export benefits earned in any member state.
- EU law intrudes into social services once considered immune to supranational influence. National health care systems have been opened up to allow patient mobility and service providers from other member states, and an extensive set of rules governs the translation of vocational and educational certificates across all member states.
- The EU has extended its reach to the areas of employment promotion, fighting social exclusion, and promoting the reform of national pension systems by using 'soft' governance tools.

The scope and content of EU social policy is in many ways different from conventional definitions of social policy. 'Social policy' refers to the set of public policies that influence the well-being and life chances of individuals (Titmuss, 1974). Conventional definitions of social policy emphasize the collective organization and financing of policies that protect individuals against market and social risks like sickness, unemployment, old age and parenthood. These policies are typically distributive, in the sense that they redistribute financial resources across social groups and involve the provision of collective social services. Elected governments – at local and national level – are usually viewed as the most important actors in the social field, although non-state actors like firms and mutual societies may also be involved in social policy. Core social policies include income maintenance programmes such as pensions and unemployment insurance, as well as social services like education and health care. These social policy programmes require the mobilization of considerable financial resources via taxes and social contributions, as well as extensive state administration in the case of publicly organized schemes.

The role of the EU in social policy differs dramatically from the conventional definition of social policy. The EU has extremely limited financial and administrative resources at its disposal, so its

role in the social field is mainly *regulatory* (Leibfried and Pierson, 1995; Majone, 1996; Mabbett, 2009). In other words, the member states continue to dominate the taxing and spending aspects of distributive social policy, but they do so in an environment in which the EU sets regulatory boundaries to these distributive policies.

A large literature explores the expansion of EU social policy competence despite the weakness of the social policy provisions in the founding treaties, stressing the unintended, uneven and incremental expansion of European initiatives (Collins, 1975; Leibfried and Pierson, 1995; Hantrais, 2007; Leibfried, 2010). If scholars largely agree on the drivers of these remarkable policy developments, they disagree mightily about the consequences of EU social policy integration. One school of thought stresses the largely negative impact of social policy-making that is ‘left to judges and markets’ (Höpner and Schäfer, 2010; Leibfried, 2010; Scharpf, 2010), arguing that the supranational activism of the European Commission and the European Court of Justice (ECJ) has given the European integration process a strong neoliberal dimension that undermines core features of the welfare states of Continental Europe and Scandinavia. A second group of scholars highlights the progressive dimensions of EU social policy integration. A growing literature argues that social policy integration has created an expanding catalogue of social rights that individuals may seek to enforce via national courts (Cichowski, 2007; Caporaso and Tarrow, 2009; Keleman, 2011). Similarly, accounts of EU soft governance in the social field stress the positive contribution of experimental and deliberative governance in highly sensitive policy areas like pensions and employment (de la Porte and Pochet, 2002a; Heidenreich and Zeitlin, 2009; Hemerijck, 2013). Analysts also point to the tangible successes of activist social policy, most prominently the increasingly strong status of social policy in the treaties and Commission initiatives like Social Action Programmes (Palier and Pochet, 2005), as well as the strengthening of social policy in the EU’s current growth agenda, Europe 2020 (Ferrera, 2008; Marlier and Natali, 2008).

This book enters these debates by emphasizing the variable effects of EU social policy in the context of multilevel governance. The impact of EU social policy on national welfare states differs across policy sectors and member states, because European integration reconfigures political opportunity structures, giving individual and collective actors new avenues to influence policy development.

The reconfiguration of political authority in the EU reflects the emergence of a novel form of multilevel governance (Scharpf, 1994; Leibfried and Pierson, 1995; Streeck, 1995; Hooghe and Marks, 2001). Member states pursue national policy objectives within the constraints of European law; national welfare states are embedded in a multilevel system of social policy governance. Member states participate in supranational policy-making, so European legislation largely reflects a compromise concerning member states' interests. But the EU's market-building efforts also affect the viability and desirability of national social policies, so national social policies face not only the constraints of European law, but also the pressures of the single European market. As Scharpf (1996) argues, European integration unleashes 'positive' and 'negative' integration. Positive integration refers to EU efforts to formulate common policies that apply to all member states, such as minimum rules governing occupational health and safety. Negative integration refers to EU policies that aim to remove barriers to competition and free movement, such as EU legislation and legal rulings concerning the right of EU nationals to live and work in other member states. The period since about 2000 has been a particularly interesting one in terms of positive integration, since social policy is increasingly subject to soft coordination via the open method of coordination (OMC). Despite this innovation, Pochet (2011) shows that the production of binding social policy directives at European level has not declined (see also Falkner et al., 2005). Nonetheless, the OMC is a core element of the new politics of European social policy integration, especially in areas where the member states jealously guard their social policy-making autonomy, such as pensions and health care.

As noted, the expansion of the EU's social policy role was neither intended nor foreseen by the framers of the Treaty of Rome (Leibfried and Pierson, 1995; Pierson, 1996). Indeed, the preservation of national social policy autonomy has been an important goal underlying the intergovernmental bargains driving the European integration process. Even when the member states could agree on the importance of 'Social Europe', there has been very little consensus on what Social Europe should look like. The member states, each with their own national social traditions, have been reluctant to relinquish their policy-making autonomy in a politically sensitive area. Unlike many other policies in which the EU is actively involved, social policy is characterized by institutional stickiness and member states' attempts to safeguard their policy-making

autonomy. Social policies like pensions, unemployment insurance and health care are the largest spending items in national governments' budgets; they often decide national elections, and have been central elements in the nation-building efforts of the 19th and early 20th centuries. These are sources of considerable institutional resilience. Thus, the transfer of social policy competences to the EU level is a particularly contested area because the benefits of integration are not easily visible for many member states. One need only think of the UK's opt-out of the Social Charter and the French and Dutch rejection of the Constitutional Treaty in 2005 to understand the controversy surrounding social policy-making in the EU.

This book analyses the development of social policy in the EU in the context of formidable barriers to social policy integration. Its approach is to analyse EU social policy-making in light of the welfare state and European integration literatures. The central arguments informing the chapter analyses of distinct policy areas draw on important contributions from both these literatures. The book argues that the status quo bias of EU decision-making institutions, the diversity of welfare provision in the EU, and the importance of social policies in member states' electoral politics shape patterns of EU social policy integration, as well as the ways in which the members states respond to EU social policy initiatives. Even if attempts at *positive* integration in the social policy field have been modest, the ECJ and the European Commission have done much to propel *negative* social policy integration forward (cf. Leibfried, 2010). The ECJ often promotes negative integration via its interpretations of the legal meaning of the treaties, and the Commission contributes to it because of its role as legislative agenda-setter and 'guardian of the treaties'. By drawing on the analytical concepts of historical institutionalism in the EU and welfare state literatures, this book intends not only to describe the development of social policy in the EU and its impact on national welfare states, but also to provide an analytical framework for understanding these developments.

The literature on EU social policy

Any account of the role of the EU in social policy must address two puzzles. The first concerns the expansion of EU social policy despite a weak treaty basis. The EU's social policy competences have steadily increased since the Treaty of Rome took effect in 1958. In

2014, the EU shares authority with the member states in many fields of social policy, including workplace health and safety, pensions, employment and health care. The extent of shared decision-making varies across social policy areas, but EU social policy has now developed far beyond the original six's resolution to shield national social policies from the European integration process. The second puzzle concerns the variable impact of EU social policy initiatives in the member states. The comparative political economy literature shows that national welfare regimes differ in their vulnerability to pressures for liberalization (Scharpf and Schmidt, 2000a, 2000b; Scharpf, 2010). In other words, positive and negative social policy integration affect member state social policies in different ways. These two puzzles frame the analysis in the chapters on specific policy areas that follow.

The first wave of research concerning the role of the EU in social policy emphasized the minimal nature of EU policy initiatives, attributing this mainly to the weakness of the relevant EU institutions. It was argued that EU influence on social welfare policy was likely to result in 'fragmented, partial, and piecemeal' policies (Lange, 1992) and the EU's role in social policy-making would be limited to a neoliberal, regulatory approach in which symbolic politics play a large role (Majone, 1996). In the 1990s, scholars began to question the minimalist interpretation of the EU's impact in the field of social policy. For example, Leibfried and Pierson (1995) conceptualized the EU as the central level of a multi-tiered system of social policy governance (see also Hooghe and Marks, 2001). Other important studies during this period investigated the expanded role of policy-making at EU level, especially corporatist policy-making institutions (Falkner, 1998), the influence of the Commission on EU social policy-making (Cram, 1993), the expansion of EU social policy in several fields (Hantrais, 2007), the EU's role in promoting women's rights (Hoskyns, 1996) and the social dimension of the internal market (Springer, 1992).

By the 2000s, European integration scholarship began to investigate more carefully the effects of EU policy-making on politics and policies in the member states. The centre of gravity of research concerning social policy and the EU thus shifted from efforts to explain the development of social policy at the EU level (EU policies as dependent variable) to the investigation of the 'domestic impact' of the EU (Falkner et al., 2005). This period saw the emergence of a large literature on the Europeanization of public policy, including

social policy. Research in this tradition traces the impact of European integration on politics and policies in member states. The purview of this literature is wide, encompassing every nook and cranny of public policy, from Economic and Monetary Union to environmental policy to agricultural and fisheries policy. Despite the often fragmented nature of this literature, there is widespread agreement that domestic institutions ‘filter’ the impact of European policies, even if researchers disagree about which domestic institutions matter most in mediating the effects of European integration (see most prominently Cowles et al., 2001). The central argument in much of this literature is that the European and national levels of policy-making interact largely in the way the multilevel governance literature argues (Leibfried and Pierson, 1995; Hooghe and Marks, 2001). Moreover, the impact of European initiatives on national social policy has not been as marginal as many early analyses argued (Falkner et al., 2005). Chapter 2 explores these theoretical perspectives in more detail. The next section summarizes the arguments that inform the policy chapters that follow.

Central arguments

The status quo bias of EU institutions

One of the central arguments of this book concerns the well-known constraints on large-scale, binding social policy decision-making in the EU (Leibfried and Pierson, 1995; Streeck, 1995; Scharpf, 2002). Despite the extension of qualified majority voting (QMV) to internal market issues in the Treaty of Maastricht (1993) (including several social policy areas) and the inclusion of employment as a matter of common concern in the Treaty of Amsterdam (1997), the EU has relatively few robust social policy competences. The member states remain masters of their own welfare states, at least on paper, and they want to keep it this way because of the importance of the welfare state in national politics. The most sensitive social policy areas remain subject to unanimity in the Council of Ministers. Even where QVM is possible, there must be a clear rationale for EU action because of the principle of subsidiarity.

The Treaty of Amsterdam broke with established practice by introducing ‘soft coordination’ to overcome the obstacles to supra-national policy agreement. Thus, the OMC has been introduced for employment policy, public pensions, social inclusion and health

care. The rapid extension of the OMC stems from its non-binding nature; soft coordination occurs via target-setting, benchmarking and mutual surveillance. As such, it is emblematic of what Streeck (1995) calls ‘neo-voluntarism’. The OMC and other forms of soft law have expanded largely because the European legislative decision-making channel is often blocked, making soft coordination (non-binding agreements) preferable to no agreement at all (Scharpf, 2002).

Social policy diversity in the member states

The second argument advanced in this book is that the wide diversity in social policy institutions in the member states renders positive integration difficult. Scharpf (2002) is the foremost proponent of this perspective, arguing that national social policies not only express normative and partisan commitments, but are also legitimate because they are the result of democratic decision-making. These normative and partisan commitments differ across the member states, as do the institutional arrangements adopted to realize them. This institutional diversity – and the high political salience of social policy (discussed below) – means that the member states are reluctant to relinquish their control over social policy. Chapter 2 discusses this institutional diversity at more length.

Why social policy is different from other European policies

The third argument underpinning the analysis is that social policy-making in the EU can only be understood when we recognize the role of social policy in national politics. Modern European democracies are, first and foremost, welfare states. Social programmes make up the lion’s share of public budgets; indeed, the primary task of government seems to be to tax and spend. In 2012, the 27 member states spent 27.2% of GDP on social protection and health. Denmark was the highest spender at 33.8% of GDP and Latvia was the lowest at 15.1% of GDP (Eurostat, 2014a). To use another measure, social protection and health accounted for more than half of government spending in the EU 27 in 2012 (Eurostat, 2014a). These statistics demonstrate the centrality of social policy in the domestic political processes of the member states. Simply put, social policy is the single largest area of government activity. It is fair to say that the welfare state touches the lives of all EU

citizens in the form of public education, income protection during unemployment, sickness, disability and old age, and social services such as health care. Social policies supplement and/or replace the incomes of large groups of voters, and social programmes provide essential services to large swathes of the electorate. As Chapter 2 discusses, the organization of social policy is an area of high political salience; elections are won and lost on issues of social policy, and social policy provides much of the legitimation for modern democratic governments.

Supranational activism and the expansion of negative integration

Despite the obstacles to social policy integration, the EU has expanded its reach into many areas of social policy, especially concerning the expansion of the internal market. Both the ECJ and the European Commission have, over time, loosed themselves from (some of) the shackles imposed on them by the Treaty of Rome. The ECJ succeeded in ‘constitutionalizing’ the treaties (Burley and Mattli, 1993; Alter, 1998), effectively asserting its sole right to interpret the legal meaning of the treaties. As many scholars have documented, ‘legal integration’ driven by the ECJ has benefited the market-making process and liberalization more than it has attempts to build Social Europe (Scharpf, 2002). Similarly, the Commission has exploited the modest powers allocated to it under the treaties to expand its role in policy-making. The Commission has agenda-setting powers (shared with the European Parliament) via its right to propose legislation, and it is the designated ‘guardian of the treaties’, which allows it to monitor the application of EU law. Both the ECJ and the Commission have used their powers to push the integration process in directions never intended by the Treaty of Rome.

To summarize, despite the considerable obstacles to social policy integration, the history of European integration is marked by considerable expansion of social policy competences. The introduction and expansion of the OMC represents an innovative approach to social policy integration in the face of strong institutional constraints, and it arguably marks a new phase in the development of social policy in the EU. The recent period of soft law innovation in social policy comes on the heels of several decades of legally driven expansion of treaty-based employment rights and the modest extension of EU social policy legislation concerning internal market

issues like workplace health and safety, parental leave and free movement. There are now 28 member states, and EU policies reach into the core areas of the welfare state. That the EU would be involved in influencing member states' pension, health care and social inclusion policies was certainly not on the minds of the men who negotiated the Treaty of Rome in 1957. The judicial activism of the ECJ, the entrepreneurial role of the Commission, and the unforeseen consequences of treaty commitments have been the central drivers of European social policy (Leibfried, 2010).

Plan of the book

Chapter 2 discusses the two relevant theoretical literatures concerning social policy in the EU: the comparative social policy literature and the literature that focuses on the dynamics of European integration, especially the 'Europeanization' of social policy. It provides the conceptual foundations for the chapters that follow by discussing the most important dimensions of social policies, including rules governing benefit access, financing and administration/provision. The chapter also discusses Esping-Andersen's well-known typology of 'welfare regimes' and other classifications that argue that there is a 'fourth' or Southern European model of welfare, as well as a poorly understood 'fifth' model after the accession of 13 Central and Eastern Europe nations since 2005. This section of the chapter provides the reader with the conceptual tools for understanding the ways in which member state social policies differ in terms of the role of the state, market and family in the provision and regulation of welfare. The chapter then moves to the EU level, discussing the central features of the multilevel governance perspective, as well as arguments focusing more specifically on social policy (Leibfried and Pierson, 1995; Majone, 1996; Scharpf, 1999, 2010). The chapter provides a synthesis of both sets of arguments in order to explain why agreement on common European social policies is difficult, but not impossible. It also considers the recent literature on the impact of European initiatives on member state policies (Falkner et al., 2005).

Chapter 3 discusses the social policy-making process at the EU level in historical perspective, tracing the ambiguous origins of social policy since the 1957 Treaty of Rome. Social policy was not an important component of the Treaty of Rome except for provi-

sions covering the rights of migrant workers. Until the late 1970s, social policy-making at the EU level was modest, but the plans for the internal market pushed social policy onto the EU's decision-making agenda. The Social Charter was adopted in 1989 (without the UK), and the Single European Act also expanded EU competences in social policy. The Treaties of Maastricht, Amsterdam and Nice all extended EU competences further, so that by the time the heads of government met in Lisbon in December 2007 to sign the EU's newest treaty, the extent of supranational control over important aspects of social policy in the EU was indeed impressive. Against this historical backdrop, Chapter 3 discusses the treaty bases for different types of social policy legislation, emphasizing the competences and activities of the Commission, the Council of Ministers and the ECJ. One important characteristic of EU social policy is the important role of the ECJ in interpreting the meaning of EU legislation as well as the market compatibility requirements of member states' social policies. The chapter emphasizes the dilemmas of multilevel or shared policy-making when the national policy space is already occupied by strongly institutionalized social policies.

Chapters 4–8 analyse the role of EU social policy in five areas: pensions and social insurance, employment policy, vocational training and higher education, health policy, and social inclusion. The choice for these policy fields has two advantages. First, they represent the most important types of social policy in the member states in terms of function and scope, which permits investigation of how the institutionalization of social policy in the member states shapes EU social policy-making and the implementation of EU social initiatives at the national level. Second, the dynamics of positive and negative integration operate differently in each of these five policy areas. In terms of negative integration, EU law concerning labour mobility has long shaped cash benefit programmes like pensions and social insurance, whereas the EU's competition regime has only recently begun to intrude into nationally organized services like health care. In contrast, the success of positive integration, at least in terms of binding legislation, is more limited. EU initiatives have been particularly important in the field of public health, occupational health and safety, and the reconciliation of work and family. In addition, EU policies based on soft governance tools (social inclusion, employment, pension reform) are important recent examples of positive integration.

Chapter 4 considers EU policies that affect statutory social security as well as collectively organized occupational schemes, such as pensions. EU legislation and ECJ judgements concerning the rights of mobile workers and the internal market have sometimes had far-reaching impacts on national social policies (gender equality provisions are discussed in Chapter 5). The chapter traces the policy-making dynamics at EU level as well as the influence of these two broad influences on national policies. Although the bulk of the chapter analyses the impact of ‘hard law’ on statutory and collective social security, it also includes a discussion of the recent introduction of the OMC process for reforming public pensions.

Chapter 5 focuses on the set of policies aimed at promoting a high level of employment in the member states, as well as the reconciliation of work and family. The inclusion of a separate employment title in the Treaty of Amsterdam was important in two respects: first, it marked the extension of EU-level efforts to promote higher levels of employment as well as ‘better’ employment conditions; and second, it marked the substantial expansion of the use of the OMC for social policy-making at the EU level. The chapter assesses the extent to which the European Employment Strategy (EES) has been successful in terms of concrete policy impact (more and better jobs) and ‘output-oriented legitimacy’ (Scharpf, 1999). The chapter’s second thematic focus is the EU’s recent activity in promoting the reconciliation of work and family in member states. EU policies in this area rely on hard and soft law, including the Parental Leave Directive as well as aspects of the EES. The chapter discusses and analyses this bundle of policies as well as their impact on the member states.

Chapter 6 charts and analyses EU policy concerning vocational training and higher education. The chapter discusses the role of the EU concerning the mutual recognition of educational and vocational qualifications, the Bologna Process and member state responses to it, as well as EU-level initiatives related to the establishment of a European Credit System for Vocational Education and Training and the European Qualification Framework. These two areas of policy innovation are analysed in the context of EU law concerning free movement, the Lisbon Strategy and the EES.

Chapter 7 addresses health care. European integration has never had much impact on national systems of social service provision and regulation, but the introduction and deepening of the internal market has changed this. This chapter discusses and analyses the

ways in which the legal ramifications of the internal market, as well as other dimensions of European law, impinge on the autonomy of member states to organize their social services on a purely national basis. It discusses the impact of EU law on patient mobility, as well as the impact of EU competition law. The chapter also describes and analyses EU-level initiatives in the area of occupational health and safety, in which the EU has long been active. Beginning in the 1970s and 80s, the EU expanded its competences in this area, and several directives and regulations have introduced European-wide health and safety standards in the workplace. The chapter considers the origins and impact of these policies.

Chapter 8 discusses and analyses the origins and impact of EU policy concerning poverty and social inclusion. It discusses the emergence of the EU's first initiatives concerning poverty in the 1970s, and the development of a fully fledged strategy for fighting social exclusion as part of the Lisbon Strategy and the Europe 2020 strategy. The chapter compares the use of the OMC in social inclusion to other policy fields that rely on the OMC: pensions and employment policy.

Chapter 9 provides a discussion of the direction and impact of EU social policy-making in the context of enlargement. It discusses the differential impact of EU social policy initiatives, such as the substantial progress concerning gender equality but limited results in employment and social inclusion. The chapter then discusses the likely future direction of social policy in a 28-member EU deeply affected by the global financial crisis and the euro crisis. The accession of 13 member states with radically different social policy traditions compared to the 'old' 15 member states is likely to slow down 'positive' social policy integration for the foreseeable future and increase the incentives for lowest common denominator regulatory policies.

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