EU SOCIAL AND EMPLOYMENT LAW

SECOND EDITION

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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Second Edition published in 2014

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013953731

ISBN 978–0–19–968915–6

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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INTRODUCTION

Social and employment law and policy in the European Union has evolved spasmodically and in a piecemeal manner. When the European Union was founded some fifty-five years ago as the European Economic Community, it had as its objective to achieve and maintain peace amongst nations, which had been torn apart by war during the previous half century, through economic union. The heads of state and governments of the six founder Member States: **1.01**

> Resolved by thus pooling their resources to preserve and strengthen peace and liberty and calling upon the other peoples of Europe who share their ideal to join in their efforts,
>
> Have decided to create a European Economic Union . . . (Preamble to Treaty establishing the European Economic Community)

An economic union was the means of achieving peace, not an end in itself. This is often forgotten.

The evolution of social and employment policy turns on six pivotal points in time in the life of the European Union: the accession of Denmark, Ireland, and the United Kingdom in 1973; the drive towards the completion of the internal market in the mid-1980s by the Delors Commission; the Maastricht Treaty and the Protocol on Social Policy annexed to the Maastricht Treaty; the Amsterdam Treaty; the Lisbon European Council; and the Lisbon Treaty and its aftermath. Each of these six points in time marked a move towards the creation of a Union social and employment policy. **1.02**

The purpose of this book is to set out the law and policy as it has evolved since the European Economic Community was established by six Member States in 1957 through its subsequent six enlargements to the European Union of twenty-eight countries. **1.03**

Union social and employment law and policy is characterized by a number of unique features. In terms of governance, it has spawned techniques and instruments, some of which have subsequently migrated to other areas of law and policy. The Community Charter of the Fundamental Social Rights of Workers was the first time use had been made of a charter to express a solemn commitment of the Member States to commonly held values. It has subsequently been used in other areas of Union policy, notably energy. The Open Method of Co-ordination had its origins in European Employment Strategy. It was institutionalized by the Treaty of Amsterdam as the means by which the common employment policy was to be formulated. In 1999 it was recognized as a general Union instrument of governance by the White Paper on Governance, and widely used in the implementation of the Lisbon Strategy and employment and social policy post the Lisbon Treaty. **1.04**

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1.05 The Treaty establishing the European Economic Community, signed on 25 March 1957 in Rome, and commonly referred to as the Treaty of Rome, made no reference to social and employment policy and few provisions in it dealt with the issue. The principle of equal pay for men and women was laid down not because the founder Member States believed that parity in pay was a morally or socially desirable objective, but for purely economic reasons. If some Member States provided for equal pay for equal work, and others did not, this could have prejudiced the attainment and functioning of the internal market. Business, particularly in labour-intensive sectors, it was feared, might move to countries where there was a pool of cheap female labour, and those countries which did pay men and women on an equal basis could find themselves at a competitive disadvantage due to their higher payroll costs. France, which required equal pay for equal work on a national level, was particularly concerned that its businesses might be prejudiced, and it was thus at France's instigation and insistence that the principle of equal pay for men and women was laid down in Article 119, which subsequently became Article 141 EC and is now Article 157 TFEU. It was not envisaged that the Union would implement that principle and thus no legislative competence was conferred on the Union institutions; the Member States were charged with achieving equal pay for men and women by 31 December 1963.

1.06 Apart from equal pay, no other specific social or employment policy was mentioned in the Treaty of Rome. It was assumed that economic prosperity would result in full employment and a progressive improvement in living and working conditions. The Union institutions were thus given no specific powers with respect to either social or employment policy. And it was not until 1997, by virtue of the Treaty of Amsterdam, that the Union, as a whole, was endowed with such powers, and social and employment policy became a shared competence.

1.07 Post-Amsterdam, social and employment policies have figured amongst the principal objectives of the Union and legislative competence of the Union institutions has been enhanced to achieve these objectives. Article 3 TEU stated that the Union had as its task to promote within the Union a 'highly competitive social market economy, aiming at full employment and social progress'. The Union was also to 'combat social exclusion and discrimination'.

1.08 The Treaty of Amsterdam marked a commitment on the part of the Union towards employment policy. It was henceforth seen as a policy objective central to economic and monetary union. Title VIII of the EC Treaty, introduced by the Treaty of Amsterdam and entitled 'Employment' had six provisions—Articles 125–130—which made employment policy an integral part of Union activity. The impact of all Union policies on employment must be taken into account both at the point of formulation and at implementation. The Treaty did not envisage the creation of a common employment policy, but rather the promotion of active co-operation between the Member States' national employment policies by taking initiatives, reporting on employment trends and prospects, undertaking research, and harnessing national employment policies to Union objectives. The diversity of national employment policies was respected, but the Member States were encouraged to act within the parameters, and in furtherance of defined common objectives. Title VIII of the EC Treaty is now Title IX TFEU.

1.09 Title I of the EC Treaty is entitled 'Social Policy'. If we understand social policy as meaning that policy which is designed to be addressed to the population at large as opposed to the economically active, it has to be said this Title has been little used for that purpose. Most of the objectives set out therein and the measures adopted on the basis of its provisions (with

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or without necessary bolstering from the general law-making provisions of the Treaty) are concerned with the economically active, notably the working conditions of the employed.

The Treaty of Lisbon introduced a provision reinforcing the place of the Social Dialogue in the Union policy and legislative process, and requires the Union to pay heed in the development and implementation of its policies and activities to the elimination of discrimination on the grounds articulated in Article 19 TFEU. **1.10**

Union legislative initiatives in social policy are largely driven by economic considerations or the implementation on a Union level of global social standards to which the Member States have subscribed. We see this in Chapter 7 on Union disability law and policy. Even in those areas of social policy where the Union is empowered to adopt legislation, increasingly, and in deference to the principle of subsidiarity, the Union's efforts are of a directional nature: the Union assuming responsibility for engendering debate on issues of social policy common to all and indicating how those issues should be managed to attain optimal results, but leaving the realization of those results to the individual Member States. This exercise is carried out within the Open Method of Co-ordination discussed in Chapter 4. **1.11**

The book divides into eight parts. **1.12**

Part I deals with general issues. It explores the sources of Union social and employment law and policy. The primary source is obviously the Treaties themselves (TEU and TFEU), but as will be seen from Chapter 3, for many years the Treaty had no specific provisions empowering the Union institutions to act. The result of this was twofold. To develop law and policy the Union institutions relied heavily on soft law measures, there being no other viable means to engage in the field. Although not legally binding, and hence neither a source of rights nor obligations, these measures were not without effect. They could be used as an interpretative tool. More importantly, when the Union began to acquire legislative competence many soft law measures formed the basis for legally binding instruments. Their presence in the corpus of Union policy facilitated their enactment into law. The Charter of the Fundamental Social Rights for Workers, the first time in which a charter was used to express commonly held values amongst the Member States, resulted in a detailed legislative programme. It has now been accorded Treaty status by virtue of Article 6(3) TEU. Since there were no specific legislative powers set out in the Treaty, legislation was made possible only by reliance on the Union's general law-making powers set out in what are now Articles 115 and 352 TFEU. These require, first, that the proposed legislative measure be necessary to achieve 'one of the objectives set out in the Treaties' (Article 352 TFEU) or in the case of approximation measures that they 'directly affect the establishment or functioning of the internal market' (Article 115 TFEU) and, secondly, a unanimous vote in the Council. The requirement of unanimity made legislation difficult to adopt and even when it was adopted it was of poor quality, in the sense that in order to secure agreement amongst the Member States many concepts were left undefined or inadequately defined. As a result legislation was difficult to interpret and apply. This led to numerous references for preliminary rulings to the Court of Justice of the European Union (CJEU) from courts and tribunals across the Union. The case law of the Court is thus an important source—and at times has been the sole source—of social and employment rights. For example, the right to equal pay, and the right to equality of treatment in the matter of occupational social security schemes, was established through preliminary rulings on references from national courts. **1.13**

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1.14 Chapters 4 and 5 discuss governance: how policy and law are made.

1.15 In Part II a number of social policy issues on which the Union is currently active are addressed. It consists of four brief chapters on social security, disability, corporate social responsibility, and combating social exclusion.

1.16 Part III is devoted to a discussion of the common employment policy: how it evolved; and how employment policy on a Union level is now created. Current employment initiatives, of which there are many, are also discussed.

1.17 Part IV sets out employment rights which are classified as 'collective' since they are generally framed as rights given to the workforce as a whole. Their collective nature does not mean that they do not confer rights; they do and often directly effective rights on individuals within the workforce which may be enforced by them before national courts.

1.18 For the purposes of this work, collective rights relate to situations experienced by the collectivity of the workforce due to changes brought about in their working environment by the decision or circumstances of their employer.

1.19 Collective rights derive from legislation, collective agreements, and industry practice. They have as their objective the protection of the employee in circumstances which are largely out of his or her personal control and, as such, can only exceptionally be waived or departed from even by agreement between the employer and the employee.

1.20 By contrast, individual employment rights pertain to the contract of employment or employment relationship and are the subject of negotiation between the employer and the employee save in so far as they are laid down by legislation or collective agreement and thus mandatorily applicable except where derogation therefrom is permitted under the instruments by which they came into being.

1.21 Collective employment rights were amongst the first measures of the Union to lay down common minimum standards in the employment sphere. In historical terms they precede the regulation of individual employment rights by some twenty years. They derive their origins from the Social Action Programme of 1974. As such, along with the directives on equal pay, equal opportunities, and equal treatment for men and women in social security, they can be said to constitute the first generation of social and employment rights in the European Union.

1.22 Three of the directives discussed in Part IV deal with the rights of the workforce in the event of multiple redundancies; the transfer of ownership of an undertaking; and the insolvency of the employer. The fourth bundle of collective rights relates to the information and consultation of the workforce and derives from a number of legislative instruments, some of which, although of fairly recent vintage, had their origins some decades before final adoption.

1.23 Much of this early legislation differs from measures concerning individual employment rights discussed in Part V, adopted following the Agreement on Social Policy enshrined in the Maastricht Treaty, which ultimately became, by virtue of the Treaty of Amsterdam, Title XI of the EC Treaty, tending to be less prescriptive, drafted in broad and general terms, and generally not conferring directly effective rights which can be relied upon by individuals.

1.24 The Collective Redundancies Directive (Chapter 11), the Transfers of Undertakings Directive (Chapter 12), and the Insolvency Directive (Chapter 13) had no specific legal

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basis in the EC Treaty. They were adopted under the general law-making powers conferred by Articles 115 and 352 TFEU. As already explained, these provisions can be invoked where measures are necessary for the functioning of the internal market, but where no specific legislative competence is given to the Union institutions in the Treaties. Such measures must be adopted on the basis of a unanimous vote in the Council of Ministers. The need to find a mutually acceptable common denominator has resulted in short and often loosely worded legislation which in turn has spawned a large and rich body of interpretative case law. The CJEU, faced with often skeletal and sometimes confusing legislative provisions, and culturally diverse business environments, has chosen a functional approach when applying the directives, looking beyond the textual wording to their objectives and interpreting and applying them accordingly. The extensive case law has necessitated a number of amendments to these three directives. The legislation on Collective Redundancies and the Transfer of Undertakings has been consolidated. The Insolvency Directive has been the subject of comparatively fewer references for preliminary rulings to the CJEU, with the result that the original directive was amended on only one occasion. The two directives have now been consolidated into one, which also codifies the interpretative case law of the CJEU. The information and consultation directives (see Chapter 14), being more recent, have been based on a number of specific Treaty provisions.

1.25 The objective of the Collective Redundancies Directive, the Transfer of Undertakings Directive, and the Insolvency Directive was to protect employees during periods of restructuring which it was believed would be necessary as the internal market developed.

1.26 These directives, for the most part, are an exercise in partial harmonization. They prescribe minimum standards. Many essential concepts are defined according to national law with the result that impact of the directives may be variable throughout the Union.

1.27 Part V is concerned with individual employment rights, that is, rights which attach to individual employees in the circumstances in which they pertain. All of the legislation discussed in this section has its origins in the Charter of the Fundamental Rights for Workers. It has been adopted over a period of some six years beginning in 1991 with the Terms of Employment Directive (Chapter 15). During this period we see a shift away from the use of the general law-making provisions as the legal basis for directives, as the Union begins to gain more specific law-making powers, beginning with the Single European Act, then the Agreement on Social Policy, and finally, following the Treaty of Amsterdam, what is now Article 153 TFEU. This period also marks the beginning of the sharing of the legislative function with the social partners.

1.28 Three measures were based on Article 118a of the Single European Act 1987, now incorporated into Article 153 TFEU, which provided for the first time a legal basis for the adoption, by way of a qualified majority vote, of directives to encourage improvements, especially in the working environment, as regards the health and safety of workers. The Pregnant Workers Directive aims to protect the health and safety of workers during pregnancy, in the immediate aftermath of birth, and during breastfeeding (Chapter 17). The Young Workers Directive has, as its objective, the protection of young persons against economic exploitation and working conditions likely to harm their health, safety, and social development or to prejudice their education, if still in full-time schooling (Chapter 18). The Working Time Directive lays down detailed rules in relation to almost every aspect of working time (Chapter 22). Its validity was challenged by the United Kingdom, which argued that the directive should have

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been based on either Article 115 or 352—both of which required a unanimous vote—rather than Article 153 as the directive was not concerned with health and safety. This challenge was unsuccessful. The Court held that Article 153 should be interpreted broadly as embracing all aspects of health and safety in the working environment with 'health' being defined as referring to 'a state of complete physical, mental and social well-being'.

1.29 Two further measures were based on the Agreement on Social Policy and hence therefore initially not applicable to the United Kingdom. Following a change of government in the United Kingdom, the directives were extended to it in 1997. A third measure on fixed-term employment was adopted on the basis of what is now Article 153 TFEU.

1.30 These three measures were the product of agreements between the social partners, becoming part of the Union legal order by means of Council directives. The Parental Leave Directive lays down minimum requirement for parental leave for the purpose of bringing up children and time off work for parents on the grounds of *force majeure*. Employees are given the right to a period of time, to be defined by the Member States, but which must be at least four months, to look after a child until a given age (again to be laid down by the Member States) of up to eight years. Employment rights are maintained during leave and workers have the right to return to their jobs or similar jobs (Chapter 16). The Part-time Work Directive has four objectives: to remove discrimination against part-time workers; to improve the quality of part-time work; to facilitate the development of part-time work on a voluntary basis; and to contribute to the flexible organization of working time in a manner which takes account of the needs of employers and workers (Chapter 19). The Fixed-Term Employment Directive, adopted in 1999, has as its purpose the protection of workers on fixed-term contracts by (i) eliminating discrimination between those employed on fixed-term contracts and workers employed under contracts of indefinite duration doing comparable work and (ii) preventing the abusive use of continuous fixed-term contracts or employment relationships (Chapter 20).

1.31 Chapter 23 deals with posted workers, that is persons working outside their home Member State, in the context of a contract for the provision of services, on a temporary basis. This type of employment is, at present, the most common form of economic movement of persons within the Union. Posted workers do not enter the labour market of the Member State to which they are sent by their employer. In general, they remain subject to the employment laws of their home country. Posting on the scale on which it presently occurs is problematic. It may result in skills and labour shortages as workers leave their home state to perform service contracts elsewhere in the Union. Recipient Member States have the advantage of the availability of services at a competitive price, but the disadvantages that such a challenge brings to the market position of the traditional home service provider may be considerable. Posted workers may be paid less than the nationals of the host Member State whom they work alongside doing comparable tasks. This may affect the overall harmony of the workplace and lead to general unease in the host Member State where posted workers may be perceived as taking away employment from nationals. Issues surrounding posting began to arise in the early 1980s before the CJEU, which sought to balance respect for the right to provide cross-border services, by, for example, prohibiting the levying of social security contributions by the host Member State in respect of risks covered by the social security system to which the posted worker was affiliated in his home state. In 1996 the Posted Workers Directive was adopted to co-ordinate the laws of the Member State to lay down a core of mandatory

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rules on the minimum protection of posted workers. Workers are guaranteed the basic terms and conditions of employment prevailing in the Member States in which the work is to be performed. Problems, however, persist with increasing tension between Member States who are recipients of services and those which are service providers. The whole sphere of posting is currently proving problematic given the lack of clarity in the governing legal provisions and the lack of rigour in the enforcement of them. This has led to unfortunate abusive practices. These issues and the steps that are being taken by the Union to address them are discussed in Chapter 23.

1.32 Parts VI, VII, and VIII are concerned with equality of treatment.

1.33 Part VI consists of four chapters dealing with equality of treatment between men and women with respect to pay, equal treatment in employment, social security, and occupational pensions.

1.34 Parts VII and VIII discuss what is now Article 19 TFEU and the legislation adopted to implement the objectives set out therein.

1.35 Two directives were adopted in 2000 to fulfil the objectives of Article 19. The first, Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[1] (the 'Race Directive'), is discussed in Chapter 28. The second, Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (the 'Framework Employment Directive')[2] is the subject of Chapter 29. Both directives have been the subject of a number of references for preliminary rulings to the CJEU from national courts and tribunals in a number of Member States. The Court has adopted a functional and broad approach to the directives. Whilst refusing to interpret key concepts in such a way as to extend the directives beyond their intended scope, it has looked to the risks or 'suspect classes' to define the persons to whom the legislation applies. This approach reflects that of the Equality of Treatment in Social Security Directive: what is protected is discriminatory treatment on specified grounds and thus protection may extend beyond the person who actually has the characteristics which give rise to the discriminatory treatment to others who are disadvantaged by association with him or her.

1.36 Chapter 30 offers some conclusions and looks to current issues preoccupying the Union and possible future developments.

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[1] [2000] OJ L180/22.
[2] [2000] OJ L303/16.