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Public Employment Services and European Law

Mark Freedland, Paul Craig,
Catherine Jacqueson, and Nicola Kountouris

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General Editor's Preface

This book sets out to examine the important and topical issue of the regulation of public services in Europe. It does so by using one specific case study, which is the regulation of public employment services. And it does so by taking both a 'European Union' and a 'comparative European' approach to the subject, which entails studying the topic in four different EU member states. Examining the state of regulation in Britain, Denmark, Italy, and Germany, the book studies the way in which EU law interacts with the different bodies of national law in this field. In choosing the specific topic of public employment services, it focuses on a sector which is a particularly interesting area of social and economic regulatory policy, one which the authors describe as 'a zone of contestation about the shape and viability of the "European Social Model"'.

The three underlying hypotheses of the book are that in this field—i.e. the regulation of public services in general and of public employment services in particular—there is contestation as to the public or private nature of the activity being regulated, contestation as to the economic or social rationale for the regulation, and contestation as to the national or EU level of regulation. A parallel theme of the book—as much normative as descriptive in its ambition—is its consideration of whether this particular field can be understood as a developing field of European social welfare law, or whether the clear dynamic of liberalization is unmatched by any genuine 'revindication of social welfare'.

The national studies are interesting and revealing. Ultimately, in the case of each of the three hypotheses, the material tends to bear out the initial assumption by indicating that there is an increasing move towards characterization of the services in question as a private activity, that there is a certain—although not unqualified—move towards the economization of legal regulation of public services, and that there has been a certain intensification of EU-level regulation in the field. In other words, the authors find a complex but nevertheless 'self-reinforcing dynamic of semi-privatization, economization, and of Community centralization' in the field of public services regulation in general and the regulation of public employment services in particular. They are at pains to emphasize that their eventual conclusions are not straightforward confirmations of the initial hypotheses, and that interesting complexities and nuances have been revealed in the 'dynamic of liberalization' exposed by the different studies. Amongst these are the fact that the third hypothesis—i.e. the assumed trend towards greater EU-level regulation—does not amount to a simplistic conclusion of 'centralization' of regulation but reveals a more complex picture of 'regulation by selective reflexivity', which stands somewhere on a spectrum between the imposition of norms by the EU and the idealized stereotype of neutral reflexivity.

This book is an empirically and theoretically rich study of a sector of European and national law and policy which should be of interest to EU lawyers, labour lawyers, public lawyers, and to all those interested in regulatory and governance studies, and in questions of Europeanization more generally.

Gráinne de Búrca

Preface

The main purpose of this Preface is to introduce and describe the research project of which the present work is the main outcome, and most especially to acknowledge its institutional location in St John's College Oxford, which was the professional base and home of all the authors during the currency of the project. The St John's College Research Centre was established in 2001, and commissioned a three-year European Law Research Project, to run from 2003–6, as one of its first major activities. The project enabled the Law Fellows of, or associated with, the College to be joined by two post-doctoral Research Centre Fellows, and Catherine Jacqueson and Nicola Kountouris were appointed as such. All four authors wish to record their very sincere gratitude to the President and Fellows of the College for this major research opportunity, and to the founding Director of the Research Centre, Professor Paul Tod, for his unwavering support for our research endeavours as embodied in this project.

We also wish to acknowledge the very valuable contribution of our other colleagues involved in the research project, Dr Elizabeth Fisher and Professor Simon Whittaker. The particular topic or focus of the present work, namely public employment services, was chosen or arrived at so as to reflect and combine the special research interests of the four authors. Although particular chapters are primarily the work of sub-groups, the four authors regard and present the work as one which is fully co-authored throughout. The reference date for the work, at which the law is stated, is 31 March 2007.

Many other thanks are also called for. We are very grateful to various colleagues both in Oxford and elsewhere for many discussions of the subject-matter of our researches. Selection is necessarily invidious, but we wish especially to thank Professors Desmond King, Franco Liso and Nick Wikeley, and also Professor Gráinne de Búrca, Mr John Louth and Dr Gwen Booth for their support in the development of our application for the publication of this work by Oxford University Press in its Oxford Studies in European Law Series. During the production process Fiona Stables and Lucy Stevenson ensured that both the exacting timetable and the impeccable quality standards of the Press were maintained, and we are very grateful to them for that. The larger infrastructure of personal support was, as ever, provided by, respectively, Geraldine, Anita, Philip and Isobel; we thank them deeply, and also Styrbjørn, born to Catherine and Philip on 16 June 2005, for becoming the mascot of our collaboration.

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List of Abbreviations

A	Arbejdsretten
Art	Article
AF	Arbejdsformidlingen
AG	Advocate General
<i>AJDA</i>	<i>Actualité Juridique - Droit Administratif</i>
ALMP	Active Labour Market Policies
ANPE	Agence Nationale pour l'Emploi
APEC	Association pour l'Emploi des Cadres
ASSEDIC	Association pour l'Emploi dans l'Industrie et le Commerce
<i>BJIR</i>	<i>British Journal of Industrial Relations</i>
<i>Cambridge Jnl of Econ</i>	<i>Cambridge Journal of Economics</i>
Ccass	Cour de Cassation
Ch	Chapter
CBI	The Confederation of British Industry
CC	Conseil Constitutionnel
<i>CDE</i>	<i>Cahiers de Droit Européen</i>
CE	Conseil d'Etat
CEEP	European Centre for Enterprises with Public Participation
CFI	Court of First Instance
<i>CMLRev</i>	<i>Common Market Law Review</i>
<i>D</i>	<i>Dalloz</i>
Déc	Décision
dlgs	Decreto Legislativo
DARES	Direction de l'animation de la recherche, des études et des statistiques
DfEE	Department for Education and Employment
DfES	Department for Education and Skills
DG	Directorate General
DGB	Deutscher Gewerkschaftsbund
DTI	Department for Trade and Industry
DWP	Department for Work and Pensions
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
<i>ECSA Review</i>	<i>Journal of the European Community Studies Association USA</i>
EEC	European Economic Community
EES	European Employment Strategy
<i>EIRO</i>	<i>European Industrial Relations Observatory Online</i>
<i>EIRR</i>	<i>European Industrial Relations Review</i>
<i>EJIR</i>	<i>European Journal of Industrial Relations</i>
<i>ELJ</i>	<i>European Law Journal</i>

<i>ELRev</i>	<i>European Law Review</i>
EP	European Parliament
<i>EPL</i>	<i>European Public Law</i>
ERASMUS	European Action Scheme for the Mobility of University Students
<i>ES</i>	<i>European Societies</i>
ESF	European Social Fund
ETUI	European Trade Union Institute
EU	European Union
EZ	Employment Zones
GB	Great Britain
GDP	Gross Domestic Product
HMSO	Her Majesty's Stationery Office
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICT	Information and Communication Technologies
IFS	Institute for Fiscal Studies
<i>ILJ</i>	<i>Industrial Law Journal</i>
ILO	International Labour Organization
<i>ILRev</i>	<i>International Law Review</i>
<i>Ind Rel</i>	<i>Industrial Relations</i>
<i>Int J Soc Welfare</i>	<i>International Journal of Social Welfare</i>
INPS	Istituto Nazionale Previdenza Sociale
<i>IRAS</i>	<i>International Review of Administrative Sciences</i>
<i>IRES</i>	<i>Institut de Recherches Economiques et Sociales</i>
<i>IRJ</i>	<i>Industrial Relations Journal</i>
<i>ISSRev</i>	<i>International Social Security Review</i>
<i>JCMS</i>	<i>Journal of Common Market Studies</i>
<i>JEPP</i>	<i>Journal of European Public Policy</i>
<i>JESP</i>	<i>Journal of European Social Policy</i>
JO	Journal Officiel
JSA	Jobseekers Act
<i>JSP</i>	<i>Journal of Social Policy</i>
<i>LIEI</i>	<i>Legal Issues of European Integration</i>
MISSOC	The Mutual Information System on Social Protection
<i>MLR</i>	<i>Modern Law Review</i>
MP	Member of Parliament
MWP	Making Work Pay
NHS	National Health Service
NPPA	Non-Profit Placement Agencies/Associations
<i>NZJIR</i>	<i>New Zealand Journal of Industrial Relations</i>
OECD	Organization for Economic Cooperation and Development
Ofcom	Office of Communications
OJ	Official Journal (of the EC)
PES	Public Employment Services
<i>Pol Qu</i>	<i>Political Quarterly</i>
PPP	Public Private Partnerships

PRES	Private Employment Services
PSA	Personnel Service Agency
<i>Pub Adm</i>	<i>Public Administration</i>
<i>RFDA</i>	<i>Revue Française de Droit Administratif</i>
<i>Scottish Jnl of Pol Econ</i>	<i>Scottish Journal of Political Economy</i>
SEA	Single European Act
SGI	Services of General Interest
SI	Statutory Instrument
<i>SPA</i>	<i>Social Policy and Administration</i>
SSA	Social Security Act
Trib Admin	Tribunal administratif
TC	Tribunal des Conflits
TGI	Tribunal de grande instance
UN	United Nations
UNEDIC	Union Nationale Interprofessionnelle pour l'Emploi dans l'Industrie et le Commerce
UNICE	Union of Industrial and Employers' Confederations of Europe
UK	United Kingdom
VET	Vocational Education and Training
WTO	World Trade Organization
<i>Yale LJ</i>	<i>Yale Law Journal</i>
<i>YBEL</i>	<i>Yearbook of European Law</i>

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Introduction

1. Objectives and methodology

The purpose of this book is to consider the regulation of public services in European law, focusing upon public employment services as the example which has been the subject of the case study the authors have conducted. Both public services and the law regulating them are in a state of intense and continuing ferment throughout Europe and so far as the European Union (EU) itself is concerned. Although this is less obvious or prominent in relation to employment services than it is in relation, for instance, to health care, it is no less true for them; and they provide an unexpectedly rich and revealing case study of a very extensive set of public services which are in states of transition. In this Introduction, we define our subject matter more precisely, explain our choice to focus upon public employment services as the object of our case study, and set out the theory or methodology which will be pursued in the main chapters of the book.

Let us first clarify the sense in which the term 'European law' is being used here. We do not presume to *define* European law, for it is a terminology which bears a number of meanings. We use it to signify the particular body of law which emerges from the interaction of EU law with that of the member states, or to be more precise, those member states the laws of which we have been able to consider in detail in the course of our study. We think that it is meaningful and useful to single out and examine the way in which a body of law relating to public employment services is formed by the impact of EU law upon the legal regimes applying to those services in member states such as the UK, France, Denmark, Italy, and Germany.

Hence our particular conception of 'European law' is at once supra-national and, at the same time, comparative as between different member states of the EU. We do not, however, in any sense have the objective of presenting an account of EU law which is fragmented by national differences; on the contrary, our aim is to tease out the underlying common themes and preoccupations of EU law as applied and developed, with regard to public employment services, in different national contexts. In short, our conception of European law is an essentially interactive and integrative one as between EU law *stricto sensu* and the corresponding laws and practices of member states. We hope that it is a conception or methodology which is conducive to an understanding of the way in which European law both

contributes to and responds to multi-level institutional change in the provision of public services.

It will also be useful to define at this stage the sense in which the terminology of 'public employment services' will be used in this work. Somewhat evasively, we shall do that in a specific way without at this stage engaging with the general problem of distinguishing between 'public services' and private service provision; we revert to that general issue later in this Introduction. With that caveat, we define 'public employment services' as 'the activity, conducted by or on behalf of the public state, of placing workers or potential workers in work or employment, and the associated activities of arranging for vocational training or other enhancements to employability'.

Finally by way of definition or explanation, we ought to clarify the sense in which the term 'regulation' is employed in this work, since that is another variously used and much contested term. Here we use the term in a very general way to mean the organization and control of an activity by means of the making and applying of rules, our concern being with the making and applying of legal rules. It is important to make this clear, because the terminology of regulation is often used in some more specific sense to refer, for instance, to the control of economic or market activity, or to the control of any activity which is exercised on the basis of economic principles. Our set of arguments would be misunderstood if our use of the term 'regulation' were read as being confined in some such way.

Armed with those explanations or definitions of our subject matter, we proceed to indicate and then to develop the themes which will underpin our study of it. Our methodology will be to explore and see how far we can substantiate three hypotheses, which between them may offer an explanation about the dynamics of change and development in the legal regulation of public services in Europe in general, and public employment services in particular. We revert in the final section of this Introduction to a discussion of the sources and status of these hypotheses, but confine ourselves at this stage to a simple statement of them.

The first hypothesis is that the regulation, in European law, of public services in general and public employment services in particular is increasingly contested as between regulation of the service as a public activity or as a private activity. The second hypothesis is that the regulation, in European law, of public services in general and public employment services in particular is increasingly contested as between social regulation and economic regulation. The third hypothesis is that the regulation, in European law, of public services in general and public employment services in particular is increasingly contested as between regulation at member state level and regulation at community level.

It should be stressed that these are put forward as hypotheses, rather than as firm *a priori* assertions. Moreover, even as hypotheses, these propositions are not advanced as necessarily being of equal validity. We may expect to find that the dynamics which they respectively describe are of varying strength or explanatory

power. In the succeeding sections of this Introduction, each of these three hypotheses will be respectively explained and explored. It will then be considered what is the aggregate significance of the results of those inquiries; in particular, we shall discuss whether and how far those outcomes point towards the emergence of something which can satisfactorily be regarded as European social welfare law, of which the law regulating public employment services can be seen as a subset or an example.

2. Regulation of public employment services as public activities or as private ones

In this section, we explore our first hypothesis, namely that the regulation, in European law, of public services in general and public employment services in particular is increasingly contested as between regulation of the service as a public activity or as a private activity. To explain and expand this hypothesis, we may identify this as a suggestion that, within the last 20 or so years, public employment services, instead of being regulated simply as public activities, have tended to be regulated more as private activities, in fact as ones which are semi-private in character. We proceed to indicate briefly the arguments and the evidence which might support or at least test this suggestion.

It should be noted that, although this hypothesis seems evocative of the distinction between regulation by public law and regulation by private law, it is not in fact framed in the terms of the public law/private law distinction. That is a deliberate choice, made because a simple public law/private law distinction would be too blunt an instrument for our present purpose, which demands an analysis that will have a number of dimensions and layers. That is true in more than one sense. First, it is still somewhat artificial to suggest that the public law/private law distinction applies straightforwardly in all EU member states. Secondly, even those EU member state legal systems which once manifested very sharp and clear divisions between the regime of public law and that of private law, no longer do so in any single or decisive way. So our hypothesis is framed in a way which is or consciously seeks to be a less dogmatic one, avoiding monolithic conceptions of 'the sphere of public law' and 'the sphere of private law'.

Through the optic of our hopefully more neutral hypothesis, it can, we suggest, be observed that much is occurring to disrupt the pattern of regulation of public employment services as straightforward public activities. For a long time, and indeed through many of the early years of what is now the EU, that pattern would have been an unquestioned one in most if not all member states. It would have seemed axiomatic, almost a truism, that public employment services were to be regulated as public activities, constituted by the state and conducted by

the state whether in its national or sub-national manifestations. In many member states, indeed, the activity of employment placement was perceived as so evidently and eminently a public one that it was actually confined by law to the state or its emanations.

In more recent years, according to a tendency or by a movement for which the UK has probably been the standard bearer within Europe, these assumptions have come to seem less obvious, indeed have been actively doubted or at least questioned. Public employment services have been seen as an example of public services which could be provided by private enterprises, so that the activity might be contracted out to such enterprises. Moreover, public service agencies providing such services have been increasingly seen as being in competition with private enterprises for the work of employment placement, whether that competition is envisaged as being direct and specific, or more general and notional in character. The provision of public employment services is increasingly seen as taking place within a 'mixed economy', hence one which is regulated in part as a public but in part also as a private activity.

Another equally important part of the conceptual apparatus which sustains and encourages this tendency consists of the development of a particular way of understanding or interpreting the nature of public employment services—a way of understanding which has become something of a modern paradigm for public service provision more widely. This 'modern paradigm' identifies many public services, and indeed public functions more generally, as the provision of services to individual citizens. This mounts a challenge to a more traditional paradigm in which public service activity consists primarily of the pursuance of public policy rather than service provision to individual citizens.

According to that traditional paradigm, the public provision of, for example, education or health care would tend to be seen as being in pursuance of a public policy of the state in question for the population to be better educated or in better health. The provision of public employment services actually fits especially well into that traditional paradigm in a certain particular way. That is because public employment services are generally instituted and provided partly at least in pursuance of a public policy of minimizing the demands on the state for social assistance by maximizing the proportion of the population which is in gainful employment. The public function of employment placement is and has long been intimately tied up with the social security functions and policies of European nation states.

It is that paradigm which has tended of late to be partially ousted, in a highly significant political evolution, by the contrasting paradigm in which public service provision is viewed on a much more contractual basis as between the public service agency in question and the individuals who are the immediate subjects of the public activity in question. In our example, that of public employment services, those individuals are the actual or potential members of the labour force who do not currently have gainful employment. (By a very significant conceptual twist, those individuals are, in current British parlance, ascribed the highly normative

description of 'jobseekers'.) So this constitutes another conceptual ground upon which public employment services come increasingly to be regarded as in part at least a transactional activity resembling dealings between private parties, and appropriate to be regulated as such.

3. Social regulation and economic regulation of public employment services

Our second hypothesis, to recapitulate, was that the regulation, in European legal systems, of public services in general and public employment services in particular is increasingly contested as between social regulation and economic regulation. This proposition overlaps with the first hypothesis about the increasing contestation between regulation of public employment services as public activities or as private ones; but it is by no means the same argument, for the social/economic contrast does not fully coincide with the public activity/private activity contrast; indeed, the two sets of contrasts may cut right across each other.

That said, we can discern some similarity of alignment between the two sets of contrasts, whereby activities regulated as public ones have tended to be the subject of social regulation, while activities regulated as private ones tend to be the subject of economic regulation. We should, of course, define our terms; we are using 'social regulation' to connote regulation mainly concerned with redistributive and dignitarian aims, and 'economic regulation' to connote regulation mainly concerned with the maximizing of the efficiency of the systems in question in their use of resources to produce the outcomes which are sought.

In those terms, then, it is probably accurate to regard public employment services as having traditionally been the subject of social regulation rather than of economic regulation (though, as we have earlier indicated, there has always been a more *sotto voce* macroeconomic or fiscal regulatory rationale of minimizing the cost of unemployment to the public purse). The regulation of public employment services has not been strongly confined or even linked to any one legal topic or discipline, but would generally have been regarded as falling under heads of administrative or public law, coupled with that mixture of labour law and social security which in various European legal systems is known precisely as 'social law'—*droit social* or *sozialrecht*. But latterly the regulation of public employment services can be seen to have become more contested as between that kind of social regulation and a differently oriented kind of economic regulation.

That implies the enhancement, in the regulation of public employment services, of the role of economic concerns and arguments. We can discern two such trends; one has to do with the increasing intrusion of regulatory disciplines of an inherently economic orientation; the other has to do with the increasing economization of the discourse of regulatory disciplines which were previously of

a social orientation. The former of those two trends is manifested, as we indicated in the previous section, in the emergence of contract law as an important part of the apparatus of regulation of public employment services. It is also displayed in the greatly enhanced role which competition law plays in their regulation, as when monopoly or dominant positions occupied by state public employment services are challenged by private enterprises.

The second trend is a more subtle one, but still we suggest clearly visible in the current practice of regulation of public employment services. We can observe a certain degree of economization both of administrative or public law, and of labour and social security law. In the administrative or public law of many European member states, there is an increasing deployment of discourse couched in the language of efficient allocation of resources, and of cost-benefit analysis or assessment. So far as labour and social security law are concerned, there is a growing propensity to present their discourse as one of 'labour market regulation', and as such one in which the primary mode of argumentation is apt to be an economic one.

It should, however, be acknowledged that, although there are these quite pronounced trends, the development of the legal regulation of public employment services is not wholly uni-directional towards economic regulation. We can also discern important impulses towards certain newer forms of social regulation, consisting in the elaboration and expansion of the law of human rights and the law concerning discrimination of various kinds. The existence and manifestation of those impulses somewhat qualifies or deflects both the trends towards the economization of regulation which we have identified, thus representing a partial resocializing of it.

This resocializing is, however, quite limited and fragile. This relates back to our previous hypothesis; the availability of human-rights-based protections may be horizontally limited, so that it is dependent upon the 'public' character or ascription of the institution providing the employment services in question. This reinforces the observation that EU 'social regulation' is still in its long infancy, inhibited by the continuing tensions over, on the one hand, any qualification of the mission of the EU for economic integration, and, on the other hand, over any extension of the 'social' competences of the EU as against neo-liberally minded member states.

So let us draw some tentative conclusions at this point about the validity of our second hypothesis. First, if there is a shift of the discipline or topic of the regulation of public employment services towards contract law and competition law, there is also a shift into discrimination law and human rights law. If, secondly, there is a move in the style of argumentation or discourse of regulation towards that of market regulation and cost/benefit analysis, there is also another move into the discourses of human and fundamental rights and the control of discrimination. Those trends are not perhaps strong enough to negate the general tendency towards the economization of the legal regulation of public employment services, but they are certainly sufficiently significant to render this a contested domain as between economic and social regulation.

4. Regulation at member state level and regulation at Community level

The observation with which we concluded the previous section leads on very naturally to an examination of our third and final hypothesis, which, it will be recalled, was that the regulation, in European law, of public services in general and public employment services in particular is increasingly contested as between regulation at member state level and regulation at Community level. In this section it will be argued that there is indeed an increase in that contestation, which results from certain tendencies towards the intensification of Community-level regulation. This links up with the discussions in the two preceding sections, because, as we shall seek to show, that intensification of Community-level regulation is itself strongly associated with the tendencies, noted in those sections, towards regulation of public employment services as semi-private activities rather than public ones, and towards economic regulation rather than social regulation.

If we take as our starting point for the exploration of this third hypothesis the legal regulation of public employment services as it stood 20 or 25 years ago, we find that the element of Community-level regulation was not a very significant one. There would be some involvement of Community Structural Funds in the subsidization of state and regional public employment services, but not very much else. Since then, the engagement of Community law has become very much more extensive, consisting especially of the intensification of regulation of freedom of movement of services and of persons, and of regulation concerned with completion of the single market, the securing of undistorted competition, the control of State Aid, and, last but by no means least, the promotion of Active Employment Policy designed to maximize the levels of employment within the Community.

This heightened and increasing engagement of the central law-making and law-applying institutions of the EU in the regulation of public employment services is fully discussed in the ensuing chapters. In this Introduction, it is therefore unnecessary to go into detail, and it will be sufficient, at this stage, first to indicate in what sense or senses this heightened engagement of EU law renders the distribution between national-level and Community-level regulation of public employment services a contested one, and, secondly, to consider how this trend towards heightened Community engagement interrelates with the tendencies identified in previous sections.

The heightened engagement of EU law renders the distribution between national-level and Community-level regulation of public employment services a contested one in various ways, of which it is useful to single out two. First, in a number of member states the acceptance of the curtailment or abolition of a state monopoly in the provision of employment services has been difficult and contentious. That is probably a matter of decreasing significance, as the thinking which sustained state monopolies becomes less and less fashionable; but of increasing

significance, on the other hand, is the adrogation to the central Community of powers to shape the functioning of public employment services in the name of Active Labour Market or Employment Policies. It is, no doubt, because of the potential for conflict about the division of powers in this area that the 'soft law' methodology of the Open Method of Co-ordination has been chosen and preferred over more directive Community regulation. That has, however, minimized or postponed this conflict rather than eliminating it.

The other matter for comment at this stage of the argument is the way in which this trend towards heightened, and also contested, Community engagement in the regulation of public employment services, interrelates with the tendencies identified in previous sections, that is to say the trends towards regulation of public employment services as semi-private ones rather than purely public ones, and towards economic rather than social regulation of them. This is a very interesting and important interrelationship; for there is a very real sense in which all these three trends are mutually reinforcing. As the member states devise various semi-privatized conceptions of public employment services, so the central Community starts to elaborate parallel conceptions, especially that of 'services of general economic interest'. As the member states increasingly concern themselves with the economic efficiency of their public employment services in minimizing social security costs by maximizing employment, so the central Community itself gradually prioritizes labour market regulation over more traditional 'social policy'.

Finally, moreover, as the central Community seeks to develop itself and its core conception of the 'single market', it can draw upon and harness those trends towards semi-privatization and the economization of regulation in the member states in order to legitimate its own policies and enhance its own momentum. Some would regard this as a virtuous circle, others would be more likely to see it as a vicious one. Our concern is not with that evaluation, but rather with the question of whether this depiction of a self-reinforcing dynamic of development is an accurate and complete one. There are, as we have stressed earlier, and as we might indeed expect, no slight complexities in this argument. We seek to address those in the next and concluding section of this Introduction.

5. Regulation of public services and European social welfare law

To recapitulate then, in the previous sections we have depicted a self-reinforcing dynamic of semi-privatization, economization, and of Community centralization (in the limited form of selective reflexivity), which, we suggest, shapes and may be expected to shape the development of legal regulation of public employment services in Europe. However, we have been at pains to stress that this dynamic is no simple or straightforward one; and it is in the qualifications and complications, of course, that the most interesting part of the whole discussion may lie. It is

in or through those qualifications and complications that some writers discern the emergence of European social welfare law, and in this concluding section we touch upon their arguments and consider how far those arguments might inform our whole discussion about the regulation in European law of public services in general and public employment services in particular.

The point to be made here is that, if EU law in its bearing upon the regulation of public services in general and public employment services in particular, both replicates and reinforces trends to semi-privatization and economization of regulation at member state level, so also does it replicate, reinforce, and indeed create, important trends to intensify the public and social character of that regulation. That is manifested in the development of concerns with the vindication of fundamental rights, the control of various kinds of discrimination, and the articulation of the notion of European citizenship as a positive social concept.

Two recent symposia of essays, one edited by Grainne de Burca¹ and the other by Michael Dougan and Eleanor Spaventa,² have considered how far those manifestations, as observed especially in fields such as the regulation of immigration, health care, social security provision, and education, constitute or give rise to EU social welfare law in the course of emergence. This is very much an edifice which is in the course of construction, though the work in those symposia has advanced its progress in no small measure. The hypotheses considered and the arguments advanced in the course of this Introduction may not on the face of them suggest that the regulation of public employment services would be an especially promising area in which to find more grist for that particular mill—that of course will be tested out in the chapters which follow.

It is not, on the other hand, that the present work has the purpose of fulfilling a normative aim with regard to the establishment of EU ‘social welfare law’. However, we hope that this Introduction, and the chapters which follow it, may succeed in demonstrating that the regulation of public employment services does provide an excellent laboratory in which to examine the dynamics and trajectories of European law as it concerns social welfare and the capacity of public services to enhance social welfare. For the maximizing of that capacity must, in a large and general sense, be one of the major goals of European and especially EU law, whatever differences there may be as to the means by which and the conceptual and practical framework within which that may most efficiently be achieved.

If in the course of this work we are to make good our initial claim that it has been useful and productive to have focused our research project upon public employment services, there are one or two further preliminary issues concerning the basic design of our work which we still need to address at this point, before proceeding to the substantive chapters. In order to deal more completely with

¹ G de Burca (ed), *EU Law and the Welfare State—In Search of Solidarity* (Oxford University Press, 2005).

² E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart, 2005).

the question, 'why public employment services?', it will be useful to return to the questions, which we earlier postponed, of what are the status and sources of our three investigatory hypotheses. We hope that a consideration of those questions will help both to explain and to justify the extent to which we have concentrated our work on public employment services.

An explanation of the status and sources of our three investigatory hypotheses is crucial to the understanding of the nature of the work presented in this book; it will we hope define the relationship between the purposes of the work and its methodology, and in particular our methodological choice to focus upon public employment services. The underlying purpose of the work is to make a contribution to the understanding of the provision, governance, and regulation of public services in general, by and in European law. The method of the work is sector-specific, that is to say it is focused upon public employment services. This choice on our part to address a set of issues, which is about public services in general, by means of this sector-specific method of concentrating upon public employment services, created from the outset a tension between general arguments and sector-specific arguments of which we needed to be consciously aware.

Our way of seeking to resolve, or at least to control, this tension between the general and the sector-specific in our work was to formulate, before the work was so far advanced as to make this an artificial or contrived exercise, our set of three investigatory hypotheses which we would proceed to test out in the sector-specific context of public employment services. The hypotheses were essentially tentative propositions derived from the knowledge and understanding of the provision, governance, and regulation of public services in general, by and in European law which the authors had brought into the research project, and which provided, therefore, our initial *acquis* or stock-in-trade for carrying out the project. The hypotheses arrived at on this basis became the starting point for evaluation and analysis of the material, about the provision, governance, and regulation of public employment services in particular, which has been gathered in the course of our researches and which is presented in the substantive chapters which follow.

Our choice to proceed in that fashion from that starting point denoted a commitment to producing a set of analyses which would be primarily sector-specific to public employment services. This left open the question of whether and how far those analyses would be secondarily applicable or extensible to other public services or to public services in general. We of course had the hope and ambition that there would be some such extensible results from our work, and we make a point of considering in the Conclusion how far we can regard those hopes and ambitions as having been fulfilled. The outcome in this regard must depend on the wisdom of our choices first to adopt a sector-specific focus for our work and secondly to select public employment services as that specific sector. We have probably said as much as we need to do, at this stage at least, about the first of those two choices on our part; but it will be useful to explain somewhat further our selection of public employment services as the sector on which to concentrate.

The selection of public employment services as the sector on which to concentrate had two main explanations; one was concerned with our own specialist expertise, as, so far as the specializations of the authors extend beyond public law, EU law, and competition law, that is predominantly in the direction of employment law. This might imply a selection based upon convenience, or a taking of the path of least resistance. But the other, more positive and important, element explaining our selection of public employment services consisted in our view that it was a public service presenting features especially relevant to and interesting in general for the kind of study of public services in European law which we wished to conduct and in particular for the investigation of our hypotheses. A full account of these interesting and relevant features is given in the course of Chapter 4 of this work, but it will be useful to highlight certain particular elements at this point.

Essentially, the special relevance of the area of public employment services consists in the way that it constitutes or falls within an especially prominent contested area of social and economic regulatory policy, within which arise pressing issues of employment and social security law and policy. This is the public service which has to put into operation a key part of *droit social*, and around which occur some of the most crucial contemporary confrontations between social policy and economic or market policy, and between public service institutions and private enterprises in the execution of those policies. To complete this Introduction, it remains to describe and to explain the structure and sequence of the following chapters in which we relate and analyse the detailed phenomena on the basis of which those assertions are made.

The sequence of chapters is one which moves from the more general to the more particular. In the first three chapters, a background is sketched out consisting of a depiction of the bases of EU regulation of public services in Europe, especially 'social' public services. Chapter 1 deals with EU competences in relation to social policy and public services. Chapter 2 explores the variety of conceptions of public services which underlie and inform the law and regulation of public services in Europe, both at national and supra-national levels. Chapter 3 examines the modes of governance and regulatory techniques which are involved in the regulation of social public services in Europe, especially the modes and techniques of EU-level regulation.

Those chapters, although ranging widely across and even beyond social public services, are themselves somewhat oriented towards an eventual focus upon public employment services. There then follows a sequence of fully sector-specific chapters which we hope bring out fully the special relevance of that particular sector and demonstrate the suitability of its selection as the case study for our more general inquiry. The first two of these are concerned, in a broad sense, with the institutional design of and regulatory structure for public employment services: Chapter 4 deals with conceptions or visions of employment services as a public service, thus particularizing the general notions of public service which were considered in Chapter 2. Chapter 5 in effect describes the recent evolutions of those