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Social rights as a case of Europeanization through law – the role of CJEU jurisprudence

*Sandra Mantu & Paul Minderhoud **

Abstract

Europeanization through law is described as one of the most powerful meta-narratives of European integration. Social rights make an interesting field of inquiry since in their case Europeanization through harmonization of laws has been limited to coordination of social security rights as a result of the failure to politically agree on harmonization. At the same time, social rights are an area of law in which Europeanization through citizens' legal activism has played an important role. Focusing on social rights for mobile EU citizens, Europeanization has been advanced by direct judicial action (citizens) combined with judicial activism (the CJEU). However, direct judicial action and activism remain only partial manifestations of Europeanization, in which case it is important to explore what happens at the national level in order to have a better understanding of how Europeanization works. In this paper we take a series of landmark cases in the field of social rights adjudicated on the basis of EU citizenship to test how Europeanization through law occurs (or not) at the national level. We follow up the impact of the *Brey*, *Dano*, *Alimanovic* and *Garcia-Nieto* decisions in three national jurisdictions: Netherlands, Germany and the UK all of which have intimated their intention to change their social policy in respect of EU migrants.

Keywords

EU citizenship, social assistance; economically inactive EU citizens; *Brey*; *Dano*; *Alimanovic*, *Garcia-Nieto*

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Introduction

Europeanization through law has been described as one of the most powerful meta-narratives of European integration¹. Social rights make an interesting field of inquiry since in their case Europeanization through harmonization of laws has been limited to coordination of social security rights as a result of the failure to politically agree on harmonization. At the same time, social rights are an excellent example of a different ideal type of Europeanization identified by Vauchez, namely Europeanization through citizens' legal activism. In the field of social rights for mobile EU citizens, direct judicial action (citizens) and judicial activism (the CJEU) have been drivers of the Europeanization process alongside legislation. Whereas Europeanization literature focuses mainly on legislative acts, we would like to suggest that our understanding of Europeanization could be enriched by looking more closely at the impact of CJEU decisions at the national level.

Under the current rules of EU citizenship, the link between the exercise of free movement and the performance of economic activities has been loosened to the extent that economically inactive EU citizens are entitled to move and reside in another EU state as long as they are economically self-sufficient and in possession of a comprehensive health insurance in order not to become an unreasonable burden on the host state's social assistance system. CJEU case law has played an important part in giving shape to the rights of economically inactive EU citizens by coupling EU citizenship with the principle of non-discrimination on the basis of nationality and by enlarging the scope of those mobile citizens who were designated as entitled to enjoy equality with the national citizens of the host state in the area of social rights. This process led to the (partial) uncoupling of the exercise of free movement rights from the performance of an economic activity. Together these developments are described by some commentators as a reason for Member State resistance and discontent with EU citizenship and its model of mobility.² Whereas EU legislative measures remain an important source of Europeanization, CJEU decisions play an equally important role in clarifying Member State obligations towards economically inactive mobile EU citizens.

¹ A. Vauchez (2008) 'Integration-through-Law' Contribution to a Socio-history of EU Political Commonsense, EUI Working Paper RSCAS 2008/10; A. Vauchez (2008) Democratic empowerment through euro-law?, *European Political Science* 7, pp 444-452

² D. Thym (2015) The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens, *Common Market Law Review* 52, pp 17-50; R. Bellamy (2008) Evaluating Union Citizenship: Belonging, Rights and Participation within the EU, *Citizenship Studies* 12:6, pp 597-611

The paper will provide a discussion of selected CJEU decisions (*Brey*, *Dano*, *Alimanovic* and *Garcia-Nieto*), followed by the description of national developments in terms of social rights for EU citizens in Germany, the Netherlands and the UK. Finally, we will problematize the role of jurisprudence in the process of Europeanization while drawing on Shaw's typology of strategies used by Member States to deal with EU law when they want to contest it. Our case studies will look at situations where Member States are in favour of the interpretation given to EU law by the Court; they show that in such situations Member States are inclined to follow CJEU jurisprudence and rely on it to justify national implementation measures. This forces us to engage more deeply with the position of the Member States in relation to the whole European integration process, especially when it comes to translating EU jurisprudence into national policy.

2. Social rights and Europeanization

At a basic level, Europeanization can be defined as the impact of the EU on its Member States. Europeanization literature claims that EU matters and that the adoption of EU law causes change in domestic arrangements at Member State level. While the fact that the EU impacts upon its Member States is undeniable, the exact impact it has on the Member States is disputed. Europeanization literature offers insights into how the EU impacts its Member States differently, depending on the field of law, type of competence, type of instruments used by the EU (hard law, soft law etc.), domestic contexts and so on.³ When we speak about Europeanization in the field of social rights and the welfare state, what we have in mind is how EU law impacts upon the national welfare systems in terms of demanding adjustments to deal with EU requirements. Europeanization through law suggests that the adoption of EU law – which supposes common rules applicable in all the Member States – leads to European integration in this field.

Social rights for mobile EU citizens can be described as a complex field of law not least because different pieces of legislation with different purposes and scopes of application regulate entitlement to, on one hand, social security

³ G. Falkner (2003) Comparing Europeanisation effects: From metaphor to operationalisation, *European Integration online Papers (EIoP)* 7(13); G. Falkner (2005) *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press; G. Falkner, M. Hartlapp, & O. Treib (2007) Worlds of compliance: why leading approaches to European Union implementation are only 'sometimes-true theories', *European Journal of Political Research* 46(3), pp 395-416; P. R. Graziano (2011) Europeanization and domestic employment policy change: conceptual and methodological background, *Governance* 24(3), pp 583-605; S. K. Schmidt (2008) Beyond compliance: the Europeanization of member states through negative integration and legal uncertainty, *Journal of Comparative Policy Analysis* 10(3), pp 299-308

(Regulation 883/2004)⁴ and, on the other hand, social assistance (Directive 2004/38).⁵ In relation to social security benefits (which can be generally defined as contribution based), the EU does not aim to harmonize the social security systems of the Member States. The EU limits itself to adopting rules that coordinate the national social security systems in order to make sure that mobile EU citizens are caught by the safety net of one social security system. The premise of Regulation 883/2004, which is the main legislative instrument in the field of social security, is making sure that mobile EU citizens do not lose out on social security entitlements simply because they are exercising their right to freedom of movement. We can argue that the EU requires its Member States to open up their social security systems to mobile EU citizens; it does not intervene in terms of setting out what type of benefits a Member State should provide as part of its system nor the rules of attribution. While the coordination rules were initially designed for mobile EU workers, in time they were expanded to cover mobile EU citizens as a way of mirroring the expansion of the right to free movement to other categories than workers. In the case of social assistance (which is needs based), there are no attempts to create a coordination system. Where mobile EU citizens are concerned, the interplay between social security and social assistance is increasingly becoming a contested issue in CJEU jurisprudence (see *Brey*, *Dano* etc.).

In this paper, the CJEU decisions we focus on deal with the entitlements of mobile EU citizens to social assistance in their host state. As such, the paper offers an in-depth study on a very specific issue relating to the Europeanization of domestic welfare systems. The EU rules applicable to mobile EU citizens who claim social assistance in their host state are laid down by Directive 2004/38. The Directive makes a distinction between residence up to 3 months, residence from 3 months to 5 years and residence for longer than 5 years. Different conditions apply in each of these three categories. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons. All EU citizens have the right to enter any EU Member State without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months (Article 6). For residence longer than 3 months, economically inactive EU citizens must have sufficient resources and comprehen-

⁴ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, (OJ L 158/77, 30.04.2004)

⁵ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 200, 7.6.2004, pp. 1-49)

sive medical insurance. These two conditions do not apply to workers, self-employed, persons who retain worker status based on the Directive or job-seekers. Union citizens who have resided legally and for a continuous period of 5 years in the host Member State have a right of permanent residence there. Union citizens (and their family members) enjoy this right without any further conditions, even if they no longer have sufficient resources or comprehensive sickness insurance cover.

According to Article 24 of the Directive, Union citizens who reside on the basis of the Directive (that is, they fulfil the conditions attached to the type of residence right they fall under) enjoy equal treatment with nationals of the host state within the scope of the Treaty. However, exceptions from the general rule are allowed under Article 24(2):

“by way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.”

The wording of the Directive in relation to the social rights of economically inactive mobile citizens and jobseekers can be described as lacking clarity and leading to legal uncertainty. On the one hand, the Directive only allows inactive persons to use their free movement rights if they have the necessary resources. On the other hand, it includes all kinds of signals that when inactive persons apply for a social assistance benefit, they should be able to get such a benefit without having to fear automatic expulsion due to lack of sufficient resources. The Directive fails to offer a clear definition as to when an EU citizen becomes an ‘unreasonable burden’ to the social assistance system of his host state. Leeway is given to Member States to examine whether financial difficulties may be temporary, which some states duly used by developing own definitions.

One way in which Europeanization can be explored is by analysing how Member States have transposed the provisions of Directive 2004/38 in their national systems and explain variation in the degree of domestic change. There is a growing body of literature that looks at the implementation of European directives and regulations by the Member States in order to explain how European integration takes shape on the ground and the extent to which the de-

bate should be enlarged to cover not only directives and/or regulations, but also Commission decisions, soft law.⁶ In this context, the transposition of the Citizens Directive was used by several Member States to restrict the access of certain categories of mobile EU citizens to social assistance and job seeking allowances. This can be described as an example of Europeanization as a 'two-way-process' where the Member States do not passively adapt to EU law but rather use the integration process to pursue national interests.⁷ However, because the applicable EU rules and, in some cases the interaction between different rules (found in different legal instruments) leads to friction, the Court is asked to mediate by interpreting EU rules and deciding on the compatibility of national measure transposing those rules with EU law.

Our analysis is aimed at enriching the discussion on Europeanization through law by looking at how CJEU decisions are dealt with by selected Member States and the extent to which we can argue that CJEU jurisprudence has an impact on Member states policies or implementation of EU law. Although (with some exceptions) CJEU case law is not perceived as a traditional avenue for Europeanization,⁸ it plays an important role in shaping the interpretation of EU law: CJEU decisions are binding on the Member States as EU law and Member States are obliged to respect them in the same way that they need to respect the legal provisions of a directive or regulation. Some authors have discussed the temporal implications of Europeanization by pointing out that policy making is a continuous process involving the enactment of new laws as well as the revision and updating of laws already in force.⁹ Case law is one example of how

⁶ O. Treib (2008) Implementing and complying with EU governance output, *Living Reviews in European Governance* 3, pp 1–30; G. Falkner, O. Treib, M. Hartlapp & S. Leiber (2005) *Complying with Europe. EU harmonisation and soft law in the member states*, Cambridge: Cambridge University Press

⁷ C. M. Radaelli, (2003) The europeanization of public policy, in K. Featherstone and C. M. Radaelli (eds) *The Politics of Europeanization*. (Oxford: Oxford University Press) pp 27-56; C. M. Radaelli, (2004) Europeanization: Solution or problem? *European Integration online Papers* 8(4), pp 1-23; Börzel, T (1999) Towards convergence in Europe? Institutional adaptation to Europeanization in Germany and Spain, *Journal of Common Market Studies* 39(4), pp 573-596; T. Börzel (2002) Member State responses to Europeanization, *Journal of Common Market Studies* 40(2), pp 193-214.

⁸ For exceptions see, M. Blauberger (2012) 'With Luxembourg in Mind...The Remaking of National Policies in the Face of ECJ Jurisprudence', *Journal of European Public Policy* 19:1, pp 109-126; M. Blauberger (2014) National Responses to European Court Jurisprudence, *West European Politics* 37:3, pp 457-474

⁹ J. G. Christensen (2010) EU Legislation and National Regulation: Uncertain Steps towards a European Public Policy, *Public Administration* 88:1, pp 3-17

a legal rule can be revised long after its transposition and implementation leading to a possible deepening of integration.¹⁰

3. CJEU decisions on social rights (Brey, Dano, Alimanovic, Garcia-Nieto)

The decisions we have selected are generally described as indicating a shift in the Court's interpretation of EU citizenship provisions towards a restrictive interpretation of the rights of EU citizens. Spaventa has described the current trend as '*an apparent retreat from the Court's original vision of citizenship in favour of a minimalist interpretation, which reaffirms the centrality of the national link of belonging, positing the responsibility for the most vulnerable individuals in society firmly with the state of origin.*'¹¹ The exact reasons for the Court's change of heart in relation to the interpretation of the rights of (economically inactive and job seeking) EU citizens remain unclear although several explanations have been put forward ranging from the effects of the economic crisis to the increasing contestation of CJEU jurisprudence in this area of free movement law by a number of sceptic EU governments as epitomized by the spectre of Brexit.¹² All cases deal with the entitlement of EU citizens to social benefits in their host state and explore the limits of social solidarity to which mobile EU citizens are entitled to.

*Brey*¹³

The case concerned a German national, who was in receipt of a German invalidity pension of €1.087,74 and who moved together with his wife to Austria. He applied for an Austrian compensatory supplement which aimed at guaranteeing the person concerned a minimum subsistence income in Austria. The Austrian authorities refused to grant this benefit because, in their view, Mr Brey did not meet the conditions required to obtain the right to reside, due to a lack of sufficient resources.

According to the Court the fact that an economically inactive national from another Member State may be eligible, in the light of a low pension, to receive that compensatory supplement benefit, could be an indication that the national in question does not have sufficient resources to avoid becoming an unreason-

¹⁰ Christensen (2010)

¹¹ E. Spaventa, *Earned citizenship – understanding Union citizenship through its scope*, in D. Kochenov (ed) *EU Citizenship and Federalism: the Role of Rights*, Cambridge (CUP, forthcoming).

¹² See, S.A. Mantu & P.E. Minderhoud (2015). *Solidarity (still) in the making or a bridge too far?* (Nijmegen Migration Law Working Papers Series, no 2015/01). Nijmegen: Radboud University

¹³ Case C-140/12 *Brey*, ECLI:EU:C:2013:565

able burden on the social assistance system of the host Member State, for the purposes of obtaining or retaining the right to reside under Article 7(1)(b) of Directive 2004/38. Although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned. National authorities must carry out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole by reference to the personal circumstances characterizing the individual situation of the person concerned. The mere fact that a national of a Member State receives social assistance is not sufficient to demonstrate that he constitutes an unreasonable burden on the social assistance system of the host Member State. The Austrian legislation, by virtue of which the mere fact that an economically inactive migrant EU citizen has applied for the 'compensatory supplement' is sufficient to preclude that citizen from receiving it, is not compatible with EU law. This automatic refusal prevents the national authorities from carrying out an overall assessment of the specific burden.

*Dano*¹⁴

A year after *Brey*, the CJEU delivered its judgment in the *Dano* case where it took a different approach. In *Dano*, two Romanian nationals, mother and son who lived in Germany were refused access to a SGB II benefit under the German basic provision rules. Ms Dano had not entered Germany to seek employment and although she applied for a benefit reserved to job-seekers, the case file showed that she had not been looking for a job. She had no professional qualifications and had never exercised any profession in Germany or Romania. The Court reversed its previous jurisprudence and declared that the SGB II benefit should be seen as social assistance for the purposes of Directive 2004/38. As regards access to social benefits, the Court held that nationals of other Member States are only entitled to be treated equally with nationals of the host Member State if their residence in the territory of the host Member State meets the requirements of Directive 2004/38. The Court argued that the Directive seeks to prevent Union citizens from using the host Member State's social assistance system to fund their means of subsistence. The fact that Union citizens who have used their freedom of movement and of residence are being treated differently from the host Member State's own nationals with regard to social benefits is described as an inevitable consequence of Directive 2004/38 (paragraphs 77 and 78). This potentially unequal treatment is in fact based on

¹⁴ Case C-333/13 *Dano*, ECLI:EU:C:2014:2358

the link between sufficient resources being a residence requirement on the one hand and, on the other, the desire to prevent the burden on the social assistance system of the Member States, established by the Union legislator in Article 7 of that Directive. A Member State must have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to free movement for the sole purpose of obtaining another Member State's social assistance, although they do not have sufficient resources in order to qualify for a right of residence. According to the Court, Ms Dano and her son lack sufficient resources and, pursuant to Directive 2004/38, are therefore not entitled to a right of residence in Germany, nor are they entitled to the SGB II benefit.

The *Dano* decision seems to imply that the fact that economically inactive EU citizens (residing for less than five years in another Member State) apply for a social assistance benefit automatically means that they have no (longer) sufficient resources and consequently no residence right under Directive 2004/38. Thus, if in *Brey* applying for a benefit was an 'indication' of lack of sufficient resources, in *Dano* this has become 'certainty'. The reasoning in *Dano* leads to the paradoxical situation where a Union citizen would only be entitled to social assistance if he has sufficient resources and therefore is not in need of any social assistance. We seem to be in the presence of a real Catch-22 situation.

*Alimanovic*¹⁵

Ms Alimanovic and her three children are all Swedish nationals. The three children were born in Germany. After living abroad for ten years, the family re-entered Germany in June 2010. Between then and May 2011, Ms Alimanovic and her eldest daughter worked for less than a year in short-term jobs or under employment-promotion measures in Germany. The two women have not worked since. From 1 December 2011 to 31 May 2012, they received subsistence allowances for beneficiaries fit for work ('SGB II benefit', the same benefit Ms Dano applied for), while the other children received social allowances for beneficiaries unfit for work. Subsequently, the competent German authority stopped paying those allowances because according to the German legislation, non-nationals (and members of their family), whose right of residence arises solely out of the search for employment, may not claim such benefits.

According to the Court, Ms Alimanovic and her daughter were not covered by the Directive as former workers anymore because on the basis of Article 7(3)(c)

¹⁵ Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597

of the Directive Union citizens who have worked in a host Member State for less than a year retain their right of residence for at least six months after becoming unemployed, after which the Member State (as Germany did) can terminate the worker status. It is only for those six months that they are entitled to equal treatment with nationals of the host State. This does not mean, however, that Ms Alimanovic and her daughter can be expelled. As long as they are job seekers and continue to have a genuine chance of being engaged in work, expulsion is not possible. But after six months of job seeking, they no longer retain the status of worker and go back to being first-time job seekers who are not entitled to social assistance. Interestingly, according to the CJEU Ms Alimanovic and her daughter can rely in that situation on a right of residence directly on the basis of Article 14(4)(b) Directive 2004/38. The big difference between Ms Alimanovic and Ms Dano is that the first one has a residence right under Directive 2004/38 and the latter does not. The resemblance is that they both have no access to social assistance benefits.

*García-Nieto*¹⁶

This case can be seen as the final piece of a triptych together with the *Dano* and *Alimanovic* cases, since all cases deal with entitlement to the same benefit - the German SGB II. The *García-Nieto* case concerns a Spanish couple with two children. Ms *García-Nieto* and her daughter moved to Germany in April 2012 and shortly after the mother began working as a kitchen assistant. In June 2012, her unmarried and not registered partner, Mr Peña Cuevas, and his son joined the other two in Germany. In July, the family applied for SGB II benefits, which was refused for Mr Peña Cuevas and his son, because at the time of the application Mr Peña Cuevas had resided in Germany for less than three months and did not have the status of worker or self-employed person. The Court argued that a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) Directive 2004/38 only if his residence in the territory of the host Member State complies with the conditions of the Directive. The applicant could base his right of residence on Article 6(1) of the directive, since this article provides that Union citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. However, in such a case, the host Member State may rely on the derogation in Article 24(2) of Directive 2004/38 in order to refuse to grant that citizen the social assistance sought.

¹⁶ Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114

4. Social rights for EU citizens at the national level

The countries selected for discussion in this paper (Germany, Netherlands and the UK) have expressed their desire to limit the rights of economically inactive EU citizens and as will be explained in the paper, increasingly also the rights of persons falling under the notion of EU worker in relation to a series of social benefits. In all three countries, the advantages of EU mobility have been questioned especially in relation to the end of transitional arrangements for the A2 countries (Romania and Bulgaria) in 2014. Fears about welfare tourism/social tourism and 'poverty migration' are a common denominator in all 3 countries as evidenced, among others, by the letter sent by the ministers of interior of Austria, Germany, the Netherlands and the UK to the EU Commission asking for restrictive measures that would help curb the abuse of the right to free movement and protect the national welfare systems that were being 'abused' by EU citizens.¹⁷ The letter also suggested that the only EU citizens whose mobility should be encouraged are workers, students and those wishing to set up a business in another Member State. We can argue that Germany, the Netherlands and the UK share a certain vision of EU citizenship that resembles more the initial phase of EU integration in this area of law where the right to free movement was exclusively connected to the exercise of an economic activity in either an employed or self-employed capacity. There are also differences between the countries. Germany stands out since 3 of the decisions we discuss concern the same German social benefit suggesting a high degree of contestation and mismatch between the national and EU rules applicable to mobile EU citizens claiming that specific benefit. The UK system has been challenged but the Court has found no violation of EU law. The Dutch implementation of the rules concerning social assistance for mobile EU citizens has not been challenged before the CJEU, which makes the Netherlands a good case to observe the effects of CJEU decisions in the absence of direct need to amend national measures to comply with CJEU case law.

¹⁷ Council document 10313/13

Germany

In Germany, the implementation of Directive 2004/38 has been used to limit the access of jobseekers to job seeking allowances. An amendment of the Social Code II (the Second Book of the Social Code) changed the rules on entitlement to social benefits as a jobseeker by making use of the restrictions of Directive 2004/38 under Article 24(2). According to this amendment all foreigners, including EU citizens whose right of residence derives exclusively from the purpose of looking for employment, are not entitled to jobseeker allowances. According to the drafting history of this new provision, the legislator wanted deliberately to exclude access to social benefits for foreigners entering Germany for the purpose of seeking employment. Contrary to the previous less restrictive provisions which granted an entitlement to every foreigner on the basis of ordinary residence in Germany the access to social benefits under the Social Code II (*Arbeitslosengeld II*: job-seekers' allowances) is excluded explicitly even beyond the time period of three months in accordance with Article 24 (2) of Directive 2004/38.

This change of legislation was challenged before several German social courts with different results. Early 2008 the social court of Nürnberg held the opinion that EU citizens, whose right of residence in Germany derives only from the fact that they are jobseekers, should have no entitlement to any social assistance at all. To get more clarity on this issue the court referred to the Court of Justice of the European Union for a preliminary ruling. The answer of the CJEU came in the *Vatsouras and Koupatantze* decision¹⁸ in which the CJEU examines the possibility of refusing a social assistance benefit to job seekers who do not have the status of workers. The Court found that in view of the establishment of citizenship of the Union, jobseekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market. A Member State may, however, legitimately grant such an allowance only to jobseekers who have a real link with the labour market of that State. The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. It follows that citizens of the Union who have established real links with the labour market of another Member State can enjoy a benefit of a financial nature which is, independently of its status under national law, intended to facilitate access to the labour market. It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market,

¹⁸ Case C-22/08 *Vatsouras and Koupatantze*, ECLI:EU:C:2009:344

but also to assess the constituent elements of the benefit in question. The objective of that benefit must be analysed according to its results and not according to its formal structure. The Court points out that a condition such as that provided for in Germany for basic benefits in favour of jobseekers, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment. Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. But the CJEU also adds that examination of this question has not disclosed any factor capable of affecting the validity of Article 24(2) of Directive 2004/38.

In 2010, a different approach was chosen by the German judiciary in a judgment from the Bundessozialgericht (the highest Court in social security cases in Germany) delivered on 19 October.¹⁹ This case concerned a French citizen who moved to Berlin in 2007. As he had a small job for a short period of time, he first had a right to stay in Germany as a worker. After he got unemployed, he retained his right as a worker for six months on the basis of article 7(3)(c) 2004/38. During this period, he was entitled to the Social Code II jobseekers allowance, which was the same benefit that was disputed in the *Vatsouras* case. After these six months his residence right was based on the fact that he was still looking for work and therefore he was a jobseeker. The German authorities however stopped his Social Code II benefit, which excludes foreign job seekers from entitlement, as we have also seen above in the *Vatsouras* case. However, according to the German Court this refusal was in breach with Article 1 of the European Convention on Social and Medical Assistance (ECSMA), which is a treaty concluded in 1953 under the auspices of the Council of Europe.²⁰ Article 1 of ECSMA reads:

"Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance provided by the legislation in force from time to time in that part of its territory".

According to Article 2 for the purposes of this Convention the term "assistance" means in relation to each Contracting Party all assistance granted under the

¹⁹ B 14 AS 23/10 R

²⁰ <http://conventions.coe.int/Treaty/EN/Treaties/Html/014.htm>

laws and regulations in force in any part of its territory under which persons without sufficient resources are granted means of subsistence and the care necessitated by their condition, other than non-contributory pensions and benefits paid in respect of war injuries due to foreign occupation. The German Court ruled that although the personal scope of this Social Code II jobseekers allowance is different from the personal scope of the German social assistance benefit (*Sozialhilfe*), both have the character of a general social assistance law (*Fürsorgegesetz*) and therefore both fall under the definition of Article 2 of the Convention. This is in contrast with the decision of the CJEU in the *Vatsouras* case, which stated that the Social Code II jobseekers allowance was not a social assistance benefit in the sense of Directive 2004/38.

As the Frenchman in this case was lawfully residing as a jobseeker in Germany, based on Article 14(4)(b) Directive 2004/38, and as German citizens, who were in the same position did receive this jobseekers allowance, the German Court decided the Frenchman had to be treated equally. This decision was relevant only for those EU citizens who were also nationals of the Contracting Parties to the ECSMA. The Contracting Parties as far as relevant here are: Belgium, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Spain, Sweden and the UK. Turkey is also a Contracting Party, but Turkish citizens cannot derive a right of residence as a jobseeker on EU law as EU citizens can. Norway and Iceland are also Contracting Parties and have the right of residence as a job seeker because Directive 2004/38 has been integrated in the EEA Agreement. In reaction to the decision of the German court, the government of the Federal Republic of Germany on 19 December 2011 has registered this provision to the annex of this Convention, which lists provisions excluded from the scope of the Convention. Implementing rules explain that the Convention now has stopped to apply to section 7 of the Social Code II (SGB II). By this action the judgment of the German Court has effectively been reversed by the executive.

After the ECSMA route to claiming social assistance was closed, the issue surfaced again in relation to Directive 2004/38. Despite the *Vatsouras* decision, the German federal authorities have argued that the exclusion clause under Section 7(1) of the Social Code II continues to be applicable with respect to foreigners who are staying in Germany exclusively for the purpose of seeking labour since the social benefits under this clause can be attributed to social assistance in the sense of Article 24(2) of the Directive 2004/38. Eventually this led to the *Dano*, *Alimanovic* and *Garcia-Nieto* references for further clarification on the interpretation of EU law suggesting that national courts were not (always) in agreement with the manner in which German authorities interpreted

the provisions of Directive 2004/38. Part of the problems dealt with in the CJEU cases is caused by the fact that the German social assistance system is complicated. It consists of two basic social benefits. The SGB II (Social Code Book 2), which is the contested benefit in the *Dano*, *Alimanovic* and *Garcia-Nieto* cases, provides a basic social benefit for jobseekers who have no rights to the usual unemployment benefit scheme (*Grundsicherung für Arbeitsuchende*). Additionally, the SGB XII (Social Code Book 12) provides a basic social benefit for jobless people who are not capable of work (*Sozialhilfe*). Section 21 of SGB XII however, states that nobody should be entitled to this *Sozialhilfe* if they are in principle entitled to the *Grundsicherung für Arbeitsuchende*. Based on Articles 1 and 20 of the German Basic Law, there is however a right to a minimum level of dignified existence for everyone legally residing in Germany.

Partly as a follow up to the *Alimanovic* judgment, the German Federal Social Court (*Bundessozialgericht*) made rulings in 3 cases on 3 December 2015 on the entitlement of EU citizens to social assistance benefits. The highest German Social Court ruled that EU citizens who reside legally for longer than 6 months in Germany have a right to a minimum level of dignified existence and are therefore entitled to *Sozialhilfe*. It was only in the case of residence shorter than 6 months that the implementation agency (*Sozialamt*) was left with discretion to provide such *Sozialhilfe* or not. In the case of Ms Alimanovic, the *Bundessozialgericht* confirms the position of the CJEU that she has no right to a SGB II benefit but it had to be checked whether Ms Alimanovic did not have another basis for her residence right in Germany, which was related to the education and integration of the children. In that case she will be entitled to a SGB XII benefit as well.

This jurisprudence is controversially debated²¹ and questioned by some lower social courts.²² As a reaction to this new case law, the German government has announced its intention to change the relevant legislation in order to exclude

21 I. Kanalan, Das Menschenrecht auf das Existenzminimum ernst genommen – Sozialleistungsansprüche von Unionsbürger_innen, Verfassungsblog of 1 March 2016, available at http://verfassungsblog.de/das-menschenrecht-auf-das-existenzminimum-ernst-genommen-sozialleistungsansprueche-von-unionsbuerger_innen/, 5 March 2016; F. Wilksch, Das BSG und die Existenzsicherung arbeitssuchender und wirtschaftlich inaktiver Unionsbürger*innen, Juwiss-Blog, available at <https://www.juwiss.de/89-2015/> and <https://www.juwiss.de/90-2015/>, 5 March 2016.

22 Social Court of Second Instance Rheinland-Pfalz (Landessozialgericht Rheinland-Pfalz), Decision of 11 February 2016, L 3 AS 668/15 B ER, para. 22 ff.; Social Court of First Instance Dortmund (Sozialgericht Dortmund), Decision of 11 February 2016, S 35 AS 5396/15 ER, para. 23 ff.; Social Court of First Instance Berlin (Sozialgericht Berlin), Decision of 11 December 2015, S 149 AS 7191/13, para. 26 ff. LSG Niedersachsen-Bremen, 17.03.2016 - L 9 AS 1580/15 B ER.

every inactive EU citizen from social benefits.²³ In April 2016, the German government published a proposal to exclude EU jobseekers, but also EU citizens who derive a right of residence as primary carer on the basis of Article 10 Regulation 492/2011 from social assistance for the first five years of their stay in Germany. During the first two years of residence, EU citizens without the right to a social assistance benefit can get a once-only transitional allowance of four weeks to help them leave the country.²⁴

The Netherlands

The Dutch case is another example of a Member State using the transposition of Directive 2004/38 to introduce clauses in social law explicitly excluding EU nationals and their family members from entitlement to public assistance during the first three months of residence in that state, referring to Article 24(2) of the Directive. While transposing Directive 2004/38, the Dutch government changed the Social Assistance Act and introduced legislation excluding all EU citizens explicitly from social assistance benefits during the first three months of their stay. Under the old legislation these EU citizens were formally entitled to social assistance from the moment they entered The Netherlands. However, an appeal on social assistance would lead immediately to a termination of their residence status and consequently to a loss of social assistance entitlement.

To prevent discrimination, the Dutch government took the opportunity of this change of legislation to introduce in the Social Assistance Act the condition of habitual residence for the entitlement of social assistance for all claimants (Dutch or non-Dutch). Also Dutch citizens, who came from abroad would no longer be entitled to social assistance for at least the first three months of their residence because they would not be seen as habitual residents immediately. This provision was challenged in the First Chamber of the Dutch Parliament, because it was seen in breach with the Dutch Constitution, which entitles in Article 20(3) every Dutch citizen to social assistance, habitual resident or not. After the State Secretary of Social Affairs had assured the First Chamber that this change of legislation did not mean that there was a waiting period of three months for Dutch citizens, who came from abroad to The Netherlands, the Bill was approved. This solution raises the question whether it is possible in the light

²³ <http://www.stuttgarter-zeitung.de/inhalt.sozialleistungen-fuer-eu-auslaender-merkel-auf-camerons-linie.2e15407b-e011-4a70-b051-dfc4087de4d1.html>

²⁴ <http://www.harald-thome.de/media/files/Referentenentwurf-Ausl-ndische-Personen-im-SGB-II-und-SGB-XII.pdf>

of Article 18 TFEU to impose this three months waiting period on EU citizens or not.²⁵

After the implementation of Directive 2004/38 in the Dutch legislation in the Netherlands, the Aliens Act Implementation Guidelines (Vc B 10/2.3) provide very detailed information in the form of a sliding scale about when a demand on public funds (consisting of an application for social assistance in accordance with the Work and Social Assistance Act (WWB) or for social services in the form of accommodation under the Social Support Act (Wmo)) results in the termination of the EU citizen's lawful residence by the immigration authorities (IND). Each application for social assistance during the first two years of residence is in any case considered unreasonable and will, in principle, result in termination of residence. In this scenario, the IND will assess the appropriateness while considering the following circumstances of each case: the reason for the inability to make a living, its temporary or permanent nature, ties with the country of origin, family situation, medical situation, age, other applications for (social) services, the extent of previously paid social security contributions, the level of integration and the expectation for future social assistance needs. With this sliding scale the IND has implemented the ambiguous nature of Directive 2004/38, balancing between the condition of sufficient resources and the possibility of access to social assistance as long as this does not become an unreasonable burden on the social assistance system of the host Member State.

Incidentally, if Ms Dano had come to the Netherlands instead of Germany her intentional application for social assistance would in my opinion undoubtedly have led to the termination of her lawful residence as a Union citizen as well.

In the Dutch case, the European Convention on Social and Medical Assistance was part of the Government's considerations when amending the rights of EU citizens with the occasion of the implementation of the Citizens' Directive. In 2006, when the Dutch government implemented Article 24(2) of Directive 2004/38, it was aware of the problems the combination with the ECSMA could give. Therefore, it laid down that the Netherlands only accepted the equal treatment obligation of the Convention towards EU citizens as far as this coincides with the corresponding obligation derived from EU legislation. The government wanted to avoid that EU citizens would try to use the equal treatment

²⁵ See Paul Minderhoud, De mythe van de vrije toegang tot voorzieningen voor migranten, in: Edith Brugmans, Paul Minderhoud en Joos van Vugt (red.), *Mythen en misverstanden over migratie*, Annalen van het Thijmgenootschap 95, afl. 1, Valkhof Pers, Nijmegen, 2007, p. 178-204

clause of the ECSMA as an escape.²⁶ But until recently, the Dutch government had forgotten to notify this reservation to the Secretary General of the Council of Europe, as requested by Article 16(b) of the ECSMA. The reservation is not listed in Annex II to the Convention, which deals with Reservations formulated by the Contracting Parties. The German reservation, made in 2011, can be found on this Annex.²⁷ But a reservation contained in a Note verbale from the Permanent Representation of the Netherlands, dated 16 February 2016, registered at the Secretariat General on 22 February 2016 can now be found on the website of the Council of Europe.²⁸ It is unclear if this verbal notice fulfils the requirements for formal notice.

There is not much case law on this subject in the Netherlands. This might indicate that there are not many inactive EU citizens (staying less than 5 years in the Netherlands), who ask for a social assistance benefit or that the IND does not withdraw often the right of residence of these citizens.²⁹ In an unpublished court case the IND used in September 2015 the *Dano* reasoning regarding an inactive EU citizen, who never had been searching for work and asked for a social assistance benefit.³⁰ According to the IND it was the policy to consider such an EU citizen immediately as an unreasonable burden to the Dutch public funds, “even if there was only an appeal of one day”. This policy, however, seems contradictory to the written published guidelines, described above (Vc B 10/2.3). In another recent court case the judge approved the decision of the IND to withdraw a right of residence of a French woman on the basis of lack of sufficient resources. Although she did not have a social assistance benefit herself, she was considered to live indirectly on the social assistance benefit of her husband which was only based on a single norm.³¹

In July 2014, VVD Member of Parliament Azmani submitted a private members’ bill³², which aims to ensure that in all cases the decision on an application

²⁶ See A. Eleveld, Het recht op een bijstandsuitkering voor economisch niet-actieve EU-burgers na Ali-manovic, *NTER* 2015, nr. 10, p. 317 and Stb. 2006, 373

²⁷ European Convention on Social and Medical Assistance (European Treaty Series no. 14) Annex II – Reservations formulated by the Contracting Parties

²⁸ http://www.coe.int/en/web/conventions/full-list/ /conventions/treaty/014/declarations?p_auth=97Tw59xA

²⁹ The only available figures are from 2012, stating that in the first nine months 70 EU citizens were expelled because of an appeal to a social assistance benefit. It concerned Greek, Italian, Romanian and Czech citizens. See S. Bonjour et alii (eds) (2015) *Open grenzen, nieuwe uitdagingen*, Amsterdam University Press, 2015, p. 117-118

³⁰ District Court The Hague 1 September 2015, case number AWB 15/4877

³¹ District Court The Hague 30 March 2016 ECLI:RBDHA:2016:4917

³² *Wet toets rechthebbenden bijstand* (Act on the assessment of persons entitled to social assistance) (Parliamentary Documents 33984)

for social assistance by both Union citizens as well as third country nationals is suspended until the IND has provided an opinion on the consequences for the lawfulness of the residence.³³ This Bill is still pending in Parliament.

United Kingdom

As a general trend, in the past 2 decades or so the UK welfare system has been changed to limit the entitlement of migrants to various benefits in a bid to reflect the attempts of various UK governments to limit immigration. Policy changes in this area of law are based on the assumption that the UK welfare system acts as a magnet for migrants (EU or otherwise) - limiting the extent to which migrants can access various benefits is expected to discourage migration in general. This issue has figured strongly in the debates around a possible Brexit and the renegotiation of UK's membership in the EU. According to Harris³⁴, there are 3 distinct phases of policy changes: a) the introduction of the habitual residence test in 1994; b) the introduction of a right to reside test after the 2004 EU enlargement, and c) the introduction of further restriction by the coalition government of 2010-2015 which are continued under the current Conservative government. Although there is agreement over the fact that some of these changes were prompted by EU developments such as the adoption of the Citizens Directive, the EU enlargements and certain CJEU decisions, one can question the extent to which the CJEU decisions discussed in this paper have as such led to policy changes; it may be more correct to say that policy changes had already taken place in the UK and that the CJEU decisions are simply confirming the validity of those changes in relation to (current interpretation of) EU law.

Part of the changes introduced by the UK executive, such as the right to reside test and its exclusionary effects for EU migrants in relation to Child Benefit and Child Tax Credit (which are social security benefits) have been challenged by the EU Commission before the Court. The Court's decision (C-308/14 Commission v UK) validated the opinion by AG Cruz Villalon who proposed the rejection of the claim on grounds that the right to reside test is justified under EU law - the Citizens Directive more precisely, not Regulation 883/2004 - and the aim

³³ We think that such prior systematic assessment could be problematic for Union citizens. The procedure where social assistance is granted first and subsequently withdrawn again if it becomes apparent that the right of residence ends is in our view generally more consistent with the basic principles of Directive No. 2004/38/EC. Moreover, the mandatory reporting system proposed by the Minister is already provided for in paragraph 7 of Art.107 of the Aliens Act 2000

³⁴ N. Harris (2016) Demagnetization of social security and healthcare for migrants in the UK, *European Journal of Social Security*, pp 130-163

to prevent abuse of the welfare system of the host Member State is enough justification for the discrimination on grounds of nationality that the right to reside test introduces in the welfare system. Under the test, EU citizens are required to show that they reside lawfully in the UK in order to be able to claim benefits, while no such requirements apply to UK nationals³⁵. Proof of having a right to reside requires EU workers to show that they earn more than 153 pounds per week (in 2014/2015); earnings below this threshold will lead to a questioning of that persons' status as EU worker. The position of economically inactive EU citizens is further complicated by evidence that once they claim social assistance they are treated as not meeting the threshold of Article 7 of Directive 2004/38 and therefore not having a right to reside in the UK.³⁶ This amounts to an automatic exclusion from social assistance which at the moment may seem correct in light of the *Dano* decision. However, it should be pointed out that the UK has been interpreting EU law in this fashion prior to the *Dano* decision as such and that the media coverage of the decision in the UK presented *Dano* as validating the UK's interpretation of the Citizens Directive.³⁷ The *Brey* decision has also been described as a confirmation of the validity of the habitual residence test applied by the UK.³⁸

The UK coalition government (2010-2015) announced the overhaul of the benefits system and the introduction of a universal benefit called "Universal Credit" (UC) which is designed for people on a low income and people out of work. These changes are meant to reflect a new attitude to work and the welfare system that 'will make work pay' and end the 'culture of entitlement' that is seen as one of the main issues affecting the welfare system. These changes will affect EU citizens exercising free movement rights in the UK; moreover, some measures target migrants in particular. Universal Credit (UC) is currently being implemented in phases throughout the UK. It is expected that UC will be fully operational by 2021 (initially, the date was set for 2017). UC replaces the following income-based benefits: Jobseeker's Allowance; Employment and Support Allowance; Housing Benefit; Income Support; Child Tax Credit and

³⁵ Case C-308/14, *Commission v. UK*, ECLI:EU:C:2016:436

³⁶ C. O'Brien (2015) The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants, *Journal of Social Welfare and Family Law* 37:1, pp 111-136; K. McKechnie (2015) Benefits for EEA nationals March 2015, EWS briefing, Child Poverty Action Group in Scotland, [http://www.cpaq.org.uk/sites/default/files/EWS%20briefing%20EU%20migrants%20\(May%202015\).pdf](http://www.cpaq.org.uk/sites/default/files/EWS%20briefing%20EU%20migrants%20(May%202015).pdf)

³⁷ BBC News, EU 'benefit tourism' court ruling is common sense, says Cameron, 11 November 2014, <http://www.bbc.com/news/uk-politics-30002138>

³⁸ Child Poverty Action Group, *Right to reside: Breytastic!*, Issue 236 (October 2013), <http://www.cpaq.org.uk/content/right-reside-breytastic>

Working Tax Credit. The legal position of UC in relation to EU law is somewhat unclear - the UK government has argued that UC will not be covered by the scope of Regulation 883/2004 (it is neither social security nor SNCBs³⁹), whereas some parties (e.g., the AIRE Centre) argue that UC falls under the definition of SNCBs and therefore is covered by the Regulation. By exclusion, the position of the UK government seems to be that UC constitutes 'social assistance' and for EU citizens claiming UC, Article 24 of Directive 2004/38 will be relevant.⁴⁰ This is explained by the definition given to UC as a "new system of means-tested support for working-age households who are in or out of work".⁴¹ Child Tax Credit – one of the benefits replaced by UC - is however considered to be a social security benefit. If after the CJEU decision in the *Dano* case, the difference between SNCBs and social assistance in the context of Directive 2004/38 is no longer relevant since SNCBs are treated as social assistance, the difference between social assistance and social security remains relevant as EU citizens habitually resident in a host Member State are entitled to social security based on Regulation 883/2004.

In 2015, new regulations were adopted aiming at preventing EU jobseekers from entitlement to UC.⁴² The new provisions state that an EU citizen who's only right to reside is based on job seeking cannot satisfy the habitual residence test and therefore cannot qualify for UC. Questions were raised as to whether UC or at least some elements of it can be treated as a *Vatsouras*-like benefit, aimed at facilitating access to the employment market and therefore not covered by the notion of social assistance and its exclusion from equal treatment in Article 24(2) of the Directive. However, in light of the *Dano*, *Alimanovic* and *Garcia Nieto* cases concerning the German SNCB defined by the Court as social assistance for the purposes of Directive 2004/38, this argument seems irrelevant.

Besides the changes introduced by UC, at policy level the discussions around Brexit are equally relevant for the position of EU citizens. One of the demands

³⁹ For a comprehensive discussion on special non-contributory benefits see AIRE Centre, *Welfare Benefits for Marginalised EU Migrants: Special Non-Contributory Benefits in the UK, the Republic of Ireland & the Netherlands*, http://www.airecentre.org/data/files/AIRE_ECSS_FINAL_REPORT.pdf. SNCBs lie at the intersection of social security benefits and social assistance, providing vulnerable and low-income individuals who face social security risks, and the disabled, a minimum subsistence income, without a condition of contribution by the beneficiary.

⁴⁰ N. Harris (2016) Demagnetization of social security and healthcare for migrants in the UK, *European Journal of Social Security*, pp 130-163

⁴¹ Department for Work and Pensions (2014) Universal Credit at Work, p. 19, www.gov.uk/dwp

⁴² S. Kennedy (2015) *People from abroad: what benefits can they claim?*, House of Commons Library, Briefing Paper 06847, 17 June 2015

made by the UK executive towards the EU institutions as part of the renegotiation of UK's position in the EU concerns welfare benefits. The important development is that this is no longer about economically inactive EU citizens but increasingly also about EU workers. The demands were that UK would no longer export child benefits for EU workers whose children reside outside of the UK and that in-work and housing benefits would be subject to a 4-year waiting period before being available to EU workers in the UK. In terms of child benefits, as discussed earlier the current rules require that the EU citizen has a right to reside in the UK before entitlement to such benefits arises. The proposed measure would require that the child is in addition resident in the UK. Under the current rules, housing benefits are not available for EU jobseekers but what is proposed is a further extension of exclusion from entitlement for workers which would constitute direct discrimination based on nationality which is prohibited by Article 45 TFEU. In light of the results of the Brexit referendum and the lack of clarity concerning UK's future relationship with the EU, it is difficult to say what role EU law will have in the future in relation to access to welfare rights for EU citizens in general.

Although UK courts have not been active in referring questions for clarification to the CJEU, the decision of the Supreme Court in *Mirga* and *Samin*⁴³ is indicative of how the UK authorities and the UK courts interpret the interplay between the rules of the Citizens' Directive and the UK welfare legislation; the decision is also relevant for understanding the combined effects of *Dano* and *Alimanovic* at the national level of jurisdiction. The joined decision in *Mirga* and *Samin* concerns the refusal of the UK authorities to grant income support in case of pregnancy to Ms *Mirga* and housing support for homeless persons to Mr *Samin*, both EU citizens living in the UK; the benefits in question can be labelled as social assistance. Ms *Mirga* is a Polish national resident in the UK since 2004; in August 2006 she claimed income support because of pregnancy and by that time had done only 7 months of registered work in the UK. Mr *Samin* is an Austrian national who came to the UK in December 2005 and who until 2010 occupied private accommodation, after which he applied for housing assistance for homeless persons; he is described as socially isolated and mentally and physically poorly. In both cases, the UK authorities considered that the applicants were '*persons from abroad*' who did not meet the right to reside test and could not be seen as '*workers*' within the definition given to the term under the national provisions implementing Directive 2004/38, namely the EEA Regu-

⁴³ *Mirga v Secretary of State for Work and Pensions; Samin v Westminster City Council* [2016] UKSC

lations or the A8 Regulations applicable (at that moment in time) to Polish workers in the UK.

When assessing the compatibility of UK's legislation with the TFEU and the Citizens' Directive, the Supreme Court relied on *Dano* and *Alimanovic* to stress that the aim of Directive 2004/38 is to prevent abuse of the host state's welfare system by becoming an unreasonable burden. Since none of the appellants met the conditions of the right to reside test set out in the national implementing measures, they can be denied social assistance. Article 18 TFEU and discrimination claims do not come into play since Mr Samin does not enjoy a right to reside and cannot be said to be enjoying a TFEU right - on this interpretation of Article 18 TFEU, a non-discrimination claim can succeed only where a person is exercising a Treaty right and meets the conditions of secondary legislation implementing that right; Mr Samin does not meet the conditions of Article 7 Directive 2004/38 therefore he cannot be said to come within the scope of the Treaty, thus discrimination is a non-issue. The *Dano* and *Alimanovic* decisions are used as arguments in favour of this particular interpretation.

A remarkable aspect of the national decision concerns the interpretation of the *Dano* and *Alimanovic* decisions' engagement with proportionality issues. In both decisions, the Court of Justice made remarks to the extent that individual assessment of each case was not necessary since the applicant did not meet the requirements of Article 7 in respect of the right to reside for longer than 3 months, thus they did not come within the scope of Article 24 of the Directive to start with. The UK Supreme Court uses this line of argumentation to decide that *'it is unrealistic to require an individual examination of each particular case [...] where a national of another member state is not a worker, self-employed or a student and had no, or very limited, means of support and no medical insurance, it would undermine the whole thrust of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances.'*

Furthermore,

'it would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence or the right against discrimination was invoked' (paras 68-69).

Thus, the UK Supreme Court is using CJEU jurisprudence to uphold and legitimise the practice of UK authorities that according to O' Brien do not examine the individual circumstances of economically inactive EU citizens asking for social assistance; instead the UK authorities *'automatically bar EU citizens from*

claiming social assistance because they are automatically treated as not having resources at the point of claim'.⁴⁴

5. Looking for signs of Europeanization

Methodologically, tracing the impact of individual CJEU decisions at the national level is a rather difficult thing to achieve and several approaches could be deployed, such as looking at policy instructions; assessing whether national courts change their jurisprudence and/or cite CJEU decisions in similar cases; assessing whether policy changes are made to comply with CJEU decisions etc. However, it is rather clear that CJEU decisions have a role to play in understanding the process of Europeanization. First and foremost, they enable us to examine Europeanization as a long-term and dynamic process that stretches beyond transposition and implementation; the case law discussed here has emerged relatively long after the end of the transposition period of Directive 2004/38 ended (in 2006). In a similar vein, Schmidt has argued that Europeanization literature needs to look beyond compliance and focus also on negative integration (CJEU decisions) and include legal uncertainty into the catalogue of factors that influence how Europeanization occurs on the ground.⁴⁵ Our national case studies uphold her theory that legal uncertainty - in our case stemming from the lack of clarity of Directive 2004/38 in relation to claims for social assistance by economically inactive EU citizens - creates opportunity structures for the Member States. What we have also shown is that the Member States are using CJEU case law intended to end legal uncertainty as an opportunity structure in itself to claim legitimacy for their national policies. This is most evident in the UK case where the authorities and the courts have relied on CJEU decisions to uphold the legitimacy of national policy in relation to social rights that has been challenged by the EU Commission as potentially breaching EU law. In the UK, the national courts have been reluctant to refer questions on the compatibility of the changes introduced since 2004 to limit access to benefits for EU migrants with EU law. This approach sits in contrast with the German situation where lower courts have opted for repeat referrals to the CJEU on similar issues. In our view, there is a more or less open conflict between the interpretation given by the German authorities to the rights of economically inactive EU citizens and (some) German courts. In the Netherlands, the issue seems

⁴⁴ C. O'Brien (2015) The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants, *Journal of Social Welfare and Family Law* 37:1, pp 111-136

⁴⁵ S. K. Schmidt (2008) Beyond Compliance: The Europeanisation of Member States through Negative Integration and Legal Uncertainty, *Journal of Comparative Policy Analysis: Research and Practice* 10:3, pp 299-308

less poignant but there is no clear explanation for this (except maybe drawing on the more flexible implementation of Article 24 of Directive 2004/38).

Shaw has argued that Member States can draw on a number of strategies when trying to limit the effects of EU law: they can use resources internal to EU law; use resources external to EU law; or attempt to change EU law.⁴⁶ Her analysis draws on cases where the Member States are unhappy with the depth of European integration and would rather be able to rely on national policies or repatriate powers from the EU. Our analysis seems to confirm that CJEU decisions will have an impact primarily on the Member State from which they originate. The Member States appear as opportunistic users of EU law - in this case, CJEU decisions that are favourable to their own national policies. Moreover, although EU law does not oblige the Member States to restrict access to social assistance (they remain free to enact more favourable provisions) CJEU decisions are used by the Member States we studied as a source of legitimacy for restrictive policies. This is the case for Germany and the UK, whereas the Netherlands is in a more ambiguous position. This observation fits well with the description of Europeanization as a two-way process.

Domestic constellations and the national political context prove to be important elements in understanding how Europeanization actually takes place.⁴⁷ Judicial Europeanization allows us to focus on a set of actors whose role in Europeanization has not received too much attention. To this end, national courts can be described as agents of Europeanization as the German case illustrates but also as gatekeepers which seems to be the default position taken by UK courts. They play a vital role in activating the CJEU and their positioning in relation to the national and European level deserves a better understanding. That being said, judicial Europeanization fails in our view to engage with one group of actors - EU citizens since their role in the process of affecting change remains difficult to capture (ultimately it is the national court that decides whether to refer questions or not).

One aspect that is not dealt with expressly by Europeanization theories relates to the role of pressure exercised by non-EU forces. In Germany, the Constitution can be seen as a source of contestation for a restrictive interpretation of EU law, while in the Netherlands the European Convention on Social and Medical

⁴⁶ J. Shaw (2015) *Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law*, *Cambridge Yearbook of European Legal Studies*, pp 247-286

⁴⁷ E. Thomann (2015) *Customizing Europe: transposition as bottom-up implementation*, *Journal of European Public Policy* 22:10, pp 1368-1387

Assistance may still play a similar role. Thus, domestic responses to Europeanization can be influenced by sources outside EU law, although their relevance may be limited to a specific Member State (eg the UK is signatory to the EC-SMA but this does not seem to exercise any influence on the social rights of mobile EU citizens).

Further avenues for research could focus on how judicial Europeanization occurs in highly politicized national contexts. Falkner, Hartlapp and Treib have proposed an alternative approach to explaining the implementation of EU law that focuses on national cultures of appraising and processing adaptation requirements. This led them to the theory of 'worlds of compliance' as a way of filtering the factors that are relevant in different Member States and their influence in assuring compliance with EU law.⁴⁸ Germany, the Netherlands and the UK are all included in the same ideal type labelled 'the world of domestic politics'⁴⁹ in which the following factors are described as relevant for explaining domestic responses to European pressure: veto players, party political preferences, changes of government and interest group pressure.⁵⁰ Our analysis shows that political preference plays indeed an important role when it comes to CJEU decisions being implemented into national policy but equally that national courts can exercise veto power over executive interests (as in Germany). In the UK, national courts seem to be aligned with the executive, whereas in the Netherlands national courts seem to follow the CJEU directly as opposed to waiting for the executive to implement CJEU decisions.

Judicial Europeanization is an avenue worth exploring in terms of understanding the interactions between the different levels and actors involved in the process of transforming EU law into enforceable rights for mobile EU citizens in a national context other than their own. More than the implementation of directives or regulations, it shows the engagement of the national and local levels with EU law long after the transposition process has ended and highlights the recalibration efforts that are sometimes required to ensure effective implementation.

⁴⁸ G. Falkner, M. Hartlapp & O. Treib (2007) Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories', *European Journal of Political Research* 46, pp 395-416

⁴⁹ Idem, p 405

⁵⁰ Idem, p 409