

# Free movement of People and Cross-Border Welfare in the European Union: Dynamic Rules, Limited Outcomes

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## ABSTRACT

For decades, the European legislators and the Court of Justice have extended the rights to free movement and cross-border welfare in the European Union (EU). Strong assumptions on the impact of these rules have been posed, some concluding these to be a fundamental challenge to the welfare state while others see the rules as confirming transnational welfare solidarity. However, studies of how these rules are implemented and what become the de-facto outcomes hereof remain scarce. We address this research gap, by examining domestic responses to and outcomes of dynamic EU rules. Based on a unique set of administrative data, we do so for all EU citizens residing in the universalistic, tax-financed welfare state of Denmark between 2002-2013. We find that domestic responses have been restrictive and outcomes limited. Extended EU rules and rights are responded to by limited national enforcement and tighter national administrative control

**Key words:** European Union, free movement of people, welfare state, domestic responses, outcomes

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## **Introduction**

The legislation of the European Union (EU) grants EU citizens a right to move and reside freely within the Union and a right to access welfare across borders. These rules and rights have long been contested and their impact on the welfare state discussed (Kvist 2004; Hemerijck 2013; Blauberger and Schmidt 2014; Ferrera 2005, 2017; Anderson 2015; Conant 2002; Verschueren 2012, 2015). Recently the political salience of these rules and rights stood out most clearly in the British debate on EU membership. EU citizens on the British labour market – and their rights to welfare benefits – resulted in a heated, polarised debate and the UK voted Leave (Reenen 2016; Geddes and Hadj-Abdou 2016). Also in the scholarly literature, the relationship between free movement of people and the welfare state is discussed. One strand of research finds the welfare state to be highly challenged by free movement, in particular social market economies and more inclusive welfare states (Scharpf 2002, 2010; Höpner and Schäfer 2012). Another strand of research takes a more optimistic view and argues that transnational welfare solidarity has developed (De Witte 2015). Here, the right to cross-border welfare in the European Union (EU) is posed as the scholarly example (Caporaso and Tarrow 2009). In particular, the Court of Justice of the European Union (CJEU) is found to be the main driver of change – an agent that has interpreted European rules “in ways that profoundly affect domestic economic, social, and cultural life” (Caporaso and Tarrow 2009, 594). According to this view, supranational social rights have been introduced through the judicial backdoor.

Both strands of research assume that the free movement of people has a considerable impact on the welfare state. They foster an image of the welfare state undergoing rather fundamental change. However, conclusions are reached primarily by examining EU rules and rights as they develop at the supranational level, whereas research into the subsequent domestic responses and outcomes of these dynamics has been lacking.<sup>1</sup> In this paper, we address this research gap in order to account for the dynamic scope and impact of EU rules when implemented on the ground (Versluis 2007). We first analyse how EU rules and rights have dynamically been set, gradually extending the rights of EU citizens to welfare benefits, traditionally reserved for own citizens or long term residents. In particular, the CJEU has been a key player, breaking new ground for a European social Union (de la Porte and Emmenegger 2017; Caporaso and Tarrow 2009; Blauberger and Schmidt 2014). We then turn to analysing the impact at the national level of these dynamic rules and rights. We take Denmark as our welfare state case. As detailed in the section on case selection below, Denmark

constitutes a critical case for examining such impact. Within Denmark, we analyse domestic responses and outcomes of EU rules and rights for two main non-contributory benefits: study grants and social assistance. EU political and legal integration makes it possible that these benefits, traditionally reserved to national citizens or long term residents, become more immediately accessible for EU citizens, thus breaching new ground for a European social union (Caporaso and Tarrow 2009; De Witte 2015). At the same time, EU integration implies new cost-containment challenges to the welfare state as entitlements to *non-contributory* benefits do not depend on contribution (Scharpf 2002, 2010; Höpner and Schäfer 2012). Our analysis questions: *To what extent have EU citizens gained more immediate access to non-contributory Danish welfare benefits, why or why not?*

The article is structured as follows. Below, we present Denmark as our case selected and the data for our analysis. We then turn to the dynamics of EU integration, adding in scholarly views on why domestic responses should be taken into account in order to understand and explain the impact of dynamics rules and rights. Subsequently, we analyse three forms of domestic responses; judicial, political and administrative. We then examine the outcomes of EU rules, measured as EU citizens' de facto use of the two non-contributory benefits in Denmark between 2002-2013. Finally, we conclude on the findings and explanations for why EU rules did not impact as public and scholarly assumptions have posed.

### **Case selection and data**

We examine responses and outcomes to EU rules in the Danish welfare state. The Danish welfare state is often presented as distinct. First, the Danish welfare state has traditionally been characterised as universalist, promoting equality of status among its citizens. Social policies are not targeted at low income groups, as in the residual welfare state but go to the middleclass as to the poor. Second, social rights are granted on the basis of residence (Cornelissen 1997, 32). A person is entitled to welfare because s/he has legal residence, and not as a result of social contributions or citizenship. Third, benefits have traditionally been tax-financed and not based on contributions. Social security is not dependent on labour market participation, as in the insurance-based welfare state (Korpi and Palme 1998). However, tax payment is not a direct requirement to receive a specific social benefit. Due to these characteristics, the Danish welfare state has been regarded as

more unfit to the rationales of EU cross-border welfare, in particular because residents can access welfare without necessarily contributing to its financing.

We examine responses and outcomes between 2002 to the the end of 2013. These years have been chosen because they cover a period of essential structural change in European integration. During this time, the EU experienced its grand enlargements, which included a considerable increase in socio-economic differences across the Union. Moreover, the period covers important changes in legal and political regional integration as well as the post-2008 financial and economic crises. Our outcome study is based on Danish register data. Data availability does not allow us to go beyond the end of 2013. However, this is a considerable temporal update, as we generally lack impact studies and in particular studies after the 2004 enlargement of the EU.

We research outcomes for two main non-contributory benefits: study grants and social assistance. EU political and legal integration makes it possible that these benefits, traditionally reserved to national citizens or long term residents, become more immediately accessible for EU citizens. Thereby access to these benefits potentially break new grounds for a European social Union while at the same time having negative cost-containment consequences for the welfare state because the EU citizen may be entitled to benefits without having contributed financially to them. The benefits are tax-financed, non-contributory and relatively generous. A Danish *study grant* is approximately 800 euro per month. This is a universal benefit granted to all students regardless of their parents' income. Additionally, students can take loans. A Danish *social assistance* benefit is approximately 1450 euro per month. Social assistance is a minimum means benefit granted to the unemployed who do not qualify for the higher contribution-dependent unemployment benefits. As study grants, social assistance is purely tax-financed and granted to individuals without other means of support.

We examine different types of domestic responses: judicial, political and administrative. Judicial responses cover domestic legal proceedings interpreting the specific EU rules and rights as they take place when national court rulings or quasi judicial proceedings consider EU law in relation to domestic policies and law. Political and administrative responses concern the domestic ex post interpretations of specific EU rules and rights. Domestic responses to EU rules may take two forms: *receptive*, i.e., applying EU rules, or *defensive*, i.e., aiming to protect the status quo of national institutions. For the analysis of domestic responses, different data have been collected. Judicial

responses are analysed by means of national court cases and quasi-judicial administrative decisions from 2002 to the end of 2013 considering EU law. Political and administrative responses are examined by means of qualitative interviews with key respondents. All interviews were semi-structured and lasted between 15 minutes and an hour.<sup>2</sup> Respondents are civil servants in the State Department, the Danish Immigration Service, the agency for 'Danish Students' Grants and Loans Scheme' and municipal offices administrating social assistance.

Outcomes are investigated through the development of EU citizens' actual consumption of the two non-contributory benefits. For this part of the analysis, we have compiled Danish register data, which is a unique source of administrative data. Our dataset includes repeated cross sections of the total population of EU citizens residing in Denmark on December 31st of each year between 2002 and 2013. We then examine the consumption of social benefits in the current year. We construct a dataset for each year by merging a host of administrative registers with the total population of EU citizens residing in Denmark. These administrative data contain information on each individual's total annual consumption of social benefits. Danish register data are highly reliable sources of individual information directly reported from the tax agency and local authorities to Statistics Denmark. However, gaining access to the full population is seldom granted and has, to our knowledge, never been compiled for Denmark or other countries. Thus, this unique dataset enables us to examine the evolution of EU citizens' consumption of the selected benefits over a long period of time. We compare this with the evolution of the rest of the population in Denmark using of the same benefits. Finally, we use population and migration administrative register information to measure the length of residence in Denmark that the EU citizen had up to the 31<sup>st</sup> of December of each year. By taking the length of residence into account, we examine the more immediate access to these benefits, i.e. the extent to which non-contributory benefits are granted after a short residence, which is defined as up to one year or depend on a certain degree on social integration, i.e., a longer period of residence.

### **Setting the scope of cross-border welfare: Dynamic rules and domestic responses**

The right to free movement and cross-border welfare is laid down by a complex set of rules. Regulation 883/2004 details the rules establishing the right of European citizens to cross-border welfare, including which benefits can be exported to other member states. Regulation 492/2011 establishes that migrant workers and national citizens have equal rights to the social advantages of

the hosting member states in which they work. Finally, Residence Directive 2004/38 defines the link between the right to reside and access to welfare benefits for the European migrant. The length of residence is crucial in this respect. The European legislature has declared that after 5 years of residence, an EU citizen can enjoy the same treatment to welfare provisions as national citizens. Before five years of residence, s/he may have a right to social assistance but not to study grants, unless s/he has status as worker, is self-employed or is the family member of a worker (see article 24 (2) of Residence Directive 2004/38).

The CJEU has played an important role in interpreting the meaning, scope and limits of these somewhat open rules. With the *Sala* case in 1998 (C-85/96), the Court established a judicial vision of Union citizenship as a fundamental status of member state nationals (Dougan 2013, 133). The vision was further developed and extended in the *Grzelczyk* and *Baumbast* (C-413/99) cases, among others. These cases granted Union citizens the right of residence and equal treatment, as well as access to the welfare schemes of the hosting member state despite being economically inactive. The Court stated that if a certain link has been established between the citizen and a host member state, such a link could justify the right to equal treatment. However, the Court did not determine when a sufficient link has been established. In these cases, the Court has emphasised the fundamental status of Union citizenship, as laid down in the primary law of the Treaty; a citizen of the Union enjoys ‘a right of residence by direct application of Article 18(1) EC’ (see the conclusion of C-413/99 *Baumbast*). In the *Grzelczyk* case, the Court established that EU citizens ‘may expect a certain degree of financial solidarity’ from the member states, thus suggesting the right to equal treatment before the legislated five years of residence.

The Residence Directive also establishes that the need for social protection may terminate the right to reside. One must not become an ‘unreasonable burden’ on the social assistance system of the host member state. In this aspect, the Residence Directive is more restrictive than the Regulations or the case-law establishing Union citizenship, as it sets limits on cross-border social protection. Although the EU legislature and the CJEU have had many years of clarifying the scope of cross-border welfare, key aspects still require greater specification: 1) the right to equal treatment before five years of residence and 2) the definition of ‘unreasonable burden’. These underarticulated or undefined concepts leave considerable discretion to the national government. As noted by Thym,

the EU legislature is likely to have deliberately left the definition open and ambiguous to allow for these discrepancies (Thym 2015, 26).

Furthermore, the EU legislature has not specified who is deemed a worker under EU law. The Court has interpreted this incomplete concept, but has not settled it. In the case of *Kempf* (C-139/85), the CJEU established that working 12 hours per week would suffice, and in the case of *Megner and Scheffel* (C-444/93), it ruled that 10 hours of work per week did not exclude a person from being regarded as a worker. In *Ninni-Orasche* (C-413/01), the CJEU stated that a fixed-term contract for ten weeks was sufficient to be a worker under EU law. If you are a worker according to EU law you have as set out in Regulation 492/2011 right to all social advantages in a hosting member states. Those who are workers therefore also have rights to non-contributory benefits such as social assistance and study-grant. Denmark has had only one preliminary reference before the CJEU concerning EU citizens entitlement to Danish welfare. The preliminary reference from the Danish Board of Appeal in 2013, *LN vs Styrelsen* (C-46/12),<sup>3</sup> lays down that a student who is also a worker according to EU law has a right to Danish study grant. Thus those EU citizens acquiring worker status remain more equal than others. However, at the same time, the expansive judicial interpretations have not been codified into secondary legislation by the EU legislature. Regulation 492/2011 does not confirm that in line with the jurisprudence of the Court, 10-12 hours a week for at least 10 weeks are sufficient to be considered a worker under EU law. In the absence of legislative codification, the status of ‘worker’ under EU law remains under-specified. Again, this allows for considerable variation in national implementation, where member states “have exercised, and stretched, their considerable discretion on undefined terms”. Comparing the domestic implementation of who is deemed a worker under EU law, a recent report notes that: “on the one hand the case law of the Court of Justice of the European Union (CJEU) is wavering; on the other hand, national authorities are giving a very restrictive interpretation of the guidance long established by the CJEU on who should be defined as a worker” (O’Brien, Spaventa, and De Corninck 2016, 14).

The process of filling the gap left by the EU legislator and the CJEU is thus an imperfect journey. Moreover, the path of legal integration has its own twists and turns, which introduces new uncertainties and thus more discretion for member states in implementing EU legislation. From 2008 onwards, the Court has embarked on a more restrictive course regarding the rights to social

benefits of the economically inactive. It has turned away from granting rights on basis of the Treaty's provision on European citizenship and started to pay more attention to the words of the EU legislature, as stated in its secondary legislation. In the *Förster* (C-158/07) case, the Court examined the more restrictive formulations of the secondary law, as contained in Residence Directive 2004/38, derogating from the general right to equal treatment of Union citizens (Dougan 2013: 140). The more restrictive judicial approach has become even more notable in the recent case-law of *Dano* (C-333/13), *Alimanovic* (C-67/14) and *García-Nieto* (C-299/14). More recent jurisprudence suggests that the Court now focuses more on the objectives of the EU legislature (Verschuere 2012, 2015; Dougan 2013; Hatzopoulos and Hervey 2013; Martinsen 2015).

This is the background against which member states take over when applying EU rules and rights onto the national level. Neither the EU legislature nor the judiciary have specified how to do so, and member states are left with certain discretion on how to apply these rather open and sometimes unclear concepts. Domestic responses thus embark on a new round of filling the gaps of somewhat unclear rules and rights. Three types of domestic responses stand out as relevant in order to understand and explain the impact of dynamics rules and rights; judicial, political and administrative.

*Judicial responses* concern the ways in which national courts make use of CJEU decisions and EU law in national legal proceedings and the extent to which they make preliminary references to the CJEU to clarify points of national and EU law. A key assumption is that national courts have been increasingly socialised into accepting CJEU decisions and will integrate these into domestic jurisprudence (Caporaso and Tarrow 2009, 615; Alter 2001). However, other scholars note that national courts are often reluctant to act as decentral enforcers of EU law (Slepcevic 2009; Börzel 2006; Davies 2012; Conant 2002; Wind 2009). Thus, the extent to which national courts act as decentral enforcers of EU law should be subject to empirical testing.

*Political responses* concern the ways in which national politicians react to changes in EU rules. When political or judicial changes occur at the supranational level, national politicians decide how to implement these rules. EU rules often leave room for discretion in terms of how to comply (Steunenberg and Toshkov 2009; Versluis 2007; Conant 2002; Dimitrova and Steunenberg 2016). How politicians react within this manoeuvrable space and the extent to which they adhere to EU



law is a conditioning factor on outcomes (Steunenberg and Toshkov 2009; Conant 2002). Consequently, domestic politics is a factor that should be considered when studying the implementation of EU rules.

*Administrative responses* concern the ways in which civil servants process EU rules, as adopted in national laws, decrees, instructions or domestic court cases, onto the target group. The target group in our case are EU citizens applying for social benefits. Implementation research reveals that civil servants' behaviour, capacity and attention are crucial to policy outputs and outcomes, as they make 'important discretionary decisions' about the implementation of policy for the target group (Winter 2012, 260). When processing EU rules all the way to concrete welfare outcomes, the behaviour and decisions of the local administration and the street-level bureaucrat also come into play (Lipsky 1980; Winter 2012; Dimitrova and Steunenberg 2016). The dispositions of local and street-level bureaucrats may also be influenced by judicial and political responses. The adherence of national courts to EU law becomes important in this regard (Conant 2002). If an issue is assigned high political salience, administrative actors are found to pay more attention (Winter 2012; Versluis 2007). Furthermore, the clarity of rules and rights may become important for their implementation and outcomes. Finally, supervision, clearly communicated goals and expectations may diminish divergence in between political objectives and implementation.

Therefore, domestic responses may take different directions, underpinning or hindering the effective implementation of EU law. We now turn to the way in which Danish actors responded to the dynamic rules of EU cross border welfare, in order to account for the outcomes which will be examined in the subsequent section.

### **Domestic Responses**

EU decision making results from long, detailed negotiations between the member states in the Council and the members of the European Parliament and subsequent legal interpretation. However, as demonstrated above gaps still exist in the regulatory framework. Such gaps are left for domestic actors to handle subsequently and apply in practice. Domestic gap-filling is done in courts, by the government and political majorities as well as by national civil-servants, whether they act from the ministries, the local municipalities or interpret rules on the ground.

### *Judicial Responses*

To cover the domestic judicial responses, we searched in national legal databases for national court cases concerning EU citizens and the two benefits analysed in our study. Secondly, we searched for principle administrative rulings on this issue. Principle administrative rulings are quasi-judicial proceedings decided by the Danish Board of Appeal. These administrative rulings are deemed to be of more principled character and thus can guide caseworkers in their future decisions (National Board of Appeal 2014). Thus, they play a crucial role in defining future administrative practice. By including these quasi-judicial proceedings in our analysis, we could identify whether a former administrative decision was reversed by the appeals system, ultimately granting the benefit. We then asked civil servants to consider these results during the interviews we conducted. The civil servants all confirmed our findings and provided background information on the ways in which the administrative principle rulings are applied and sometimes contested in practice.

Judicial considerations of EU law in Danish courts proved to be none for the two benefits examined within the studied period. No court cases have been decided regarding EU citizens and the two non-contributory benefits. Litigation is evidently not common. This can partly be explained by the fact that Denmark does not have social courts (Martinsen 2005). Social policy cases are normally handled within the administrative recourse system. Additionally, bringing an appeal to the court system is demanding both in terms of resources and time, which limits these beneficiary groups – being EU students and unemployed – from litigating, as they are less familiarised with the Danish administrative recourse system than Danes (*interviews*, civil servants, May 2016).

However, it should be noted that like judicial responses, principle administrative rulings are binding sources of law that practitioners shall take into consideration when deciding upon a benefit application (National Appeals Board 2014). The principle rulings concerning social assistance and study grants to EU nationals substantiate the need for clarification of the concept of a worker under EU law. Over time and with new principle rulings, clarification of when to deem someone a worker has developed. As data availability for this most recent part of the analysis allows us to include data up to May 2016, we include more recent decisions.

A total of 26 relevant principle rulings were identified dealing with the granting of either social assistance or study grants to EU nationals from January 2002 until May 2016. Seven were on social assistance, whereas the bulk – nineteen rulings – concerned study grants.

The principle rulings on social assistance do not as a whole reflect a restrictive response. Of the seven principle rulings on social assistance, four granted the benefit (decisions no. 27-07, 180-09, 190-11, 38-12). The principle rulings on study grants reflect a restrictive judicial response to a higher degree. They were all made after the CJEU ruling in *LN vs Styrelsen* from February 2013, and their relatively high number – nineteen – reflects the assessed need to define the new administrative practice (*interview*, civil servant, May 2016). Only two of these granted the benefit (10426, 10423), and the rest provided specifications defining when to reject study grants to EU nationals (9504, 9313\*, 9928, 9544\*, 9429\*, 10425, 9851, 9850, 9484\*, 9340\*, 9295, 10424, 9849\*, 9847\*, 9391, 9390\*, 9295).<sup>4</sup> Taking the large majority of *refusing* rulings together helps to form a clear interpretation of the concept of worker (*interview*, civil servant, May 2016). Presently, a prime restrictive interpretation is that the EU national loses his/her status as a worker immediately after s/he stops working. Hence, a student cannot retain worker status, as would be the case when granting other benefits, such as social assistance. The prime factor in defining a worker based on these cases is the number of hours worked per week (*interview*, civil servant, May 2016 and Danish Agency for Higher Education 2016). Approximately 10-12 hours constitutes the threshold (10425, 9851, 9391). However, other factors can also be taken into consideration, including hourly wage (9391), earnings (9504), the duration of employment (9851, 9391), whether one is employed under a collective agreement (9851, 9391), whether one is paid salary during holidays and sick days (9851, 9391), whether unemployment is due to the structural conditions of the labour market (9928, 10425, 9850, 9295), whether the work is carried out under the direction of another in return for remuneration (9851), and whether a temporal and substantive connection exists between work and education (10425, 9850, 9295). Of all these factors, restraining retained worker status stands out as an especially restrictive element in these quasi judicial decisions.

Overall, Danish judicial responses tend to be restrictive. We found no national court cases in this field. Instead, principle decisions from the appeals bodies should take EC law into account. However, principle decisions display a defensive clarification of EU legal obligations. The CJEU

ruling *LN vs Styrelsen* was followed by a long strand of judicial responses to specify, define and possibly control the impact of EU law on Danish administrative practices.

#### *Political and Administrative Responses*

Politically, the examined period is marked by change in government. From 27/11-2001 to 3/10-2011, the government was a right-wing coalition government led by the liberal party Venstre. The government changed to a Social Democratic-led coalition government from 3/10-2011 to 28/6-2015. Both parties are pro-EU. However, the Venstre government was dependent on the Danish Peoples Party, EU sceptics, to establish their parliamentary majority. Moreover, within this period, Venstre and the Social Democrats developed an increasingly critical position on cross-border welfare and the politicisation of the EU rules increased significantly (Authors and others, forthcoming).<sup>5</sup>

#### *Social Assistance*

At the administrative level, EU citizens' entitlement to social assistance is decided by the municipalities. To be eligible for social assistance, one must be a legal resident with no other means to support oneself. Social assistance is subject to activation measures. If in doubt, the municipalities can request the State Administration to determine a person's right to reside on the basis of having applied for or received social assistance. The State Administration thus decides on whether the EU citizen is an 'unreasonable burden' to the social security system.

While the municipalities have found EU rules to be unclear for years, greater clarity on the eligibility of EU citizens has gradually been established for social assistance and whether one's social assistance affects one's right to reside. The State Administration as well as the quasi-judicial decisions of the National Board of Appeal will inform municipalities how to administer rather open and unclear EU rules. The administrative practice in the municipalities appears to have become more restrictive. According to the State Administration, more municipalities now refuse applications for social assistance, and few EU citizens appeal such decisions (*interview*, civil servant, 28 September 2015). That the need for social assistance may negatively affect the right to reside has also become increasingly clear (*interview*, *ibid*). The local case-worker has access to data and information on an EU citizen's worker status, estate and on family members' personal situation. In this way, the caseworker can exert considerable administrative control on the right to benefits. A

more coherent but also restrictive administrative practice has developed over the years in which the entitlement to social assistance and how it conditions the right to reside depends on both the worker and residence status of EU citizens. The online appendix details how the right to have equal access to Danish social assistance depends on the category to which an EU citizen belongs.

### *Study grants*

The expanded access to the Danish study grants triggered by the CJEU ruling *LN vs Styrelsen* in February 2013 was subsequently limited by enhanced control mechanisms (*interview*, civil servant, May 2016). The ruling first triggered a political reaction that again resulted in an administrative response. The Danish government declared that Denmark would comply with this new ruling and established a broad agreement between all parties in the Danish parliament, except the left-wing party 'Enhedslisten' (Agency for the Danish students' Grants and Loans Scheme 2013). According to the agreement, the costs of complying with the ruling could not exceed 390 million DKK (app. 52 million euro), the equivalent of granting approximately 5500 EU citizens study grant on basis of their status as a worker. If the effects of compliance exceeded this amount, the parties were obliged to adopt 'safeguards'.<sup>6</sup> The agreement also ordered the Ministry of Higher Education and Science to follow the development and report back to the parties. Finally, the government believed that more control over the worker status of students should be exercised. Thus, the responsible agency introduced an automatic search every three months among all EU citizens receiving study grants to determine whether either the number of hours they worked or their salary has decreased. If so, their cases were to be assessed individually (*interview*, civil servant, May 2016).

These enhanced control mechanisms have resulted in over 1600 cases in which EU citizens have been asked to repay their study grants (Ministry for Higher Education and Science, May 2016). At the same time, the number of EU citizens receiving study grants as a result of the CJEU case has risen from 1345 students in 2013 to 4484 students in 2015. The costs of the study grants paid to EU workers amounts to 319 million DKK, which is still below the 390 million DKK mark that was established as the ceiling in the agreement of 2013 (Ibid.). In fact, 319 million DKK accounts for a rather modest 1.5% of the total Danish study grant costs of 21.5 billion DKK. Nevertheless, the current government has announced that it is ready to effectuate the agreement's safeguards, but has so far not been able to establish political majority to do so. Thus, the government is ready to adopt a general restrictive reform to reduce the effects of the EU law.

## Outcomes

We now turn to examine how actual outcomes have developed alongside the extension of cross-border welfare rights. Between 2002 and 2013, the number of EU citizens in Denmark rose significantly from 53,782 to 159,857 people.<sup>7</sup> By the end of 2013, the five main states of origin for EU citizens in Denmark were Poland, Romania, Sweden, Germany and the UK.

However, despite the significant increase of EU citizens in Denmark, as well as the extended rights to free movement and cross-border welfare, we find no corresponding increase in the proportion of eligible EU citizens receiving the two non-contributory benefits.

Figure 1 below depicts the proportion of EU citizens receiving social assistance as their main source of income for at least (but not necessarily consecutive) 26 weeks a year. We compare this portion of the population with the rest of the population in Denmark, i.e., Danes and third country nationals,<sup>8</sup> receiving the same benefits through the period.<sup>9</sup> We see that the percentage of EU citizens receiving benefits was almost twice as high in 2002 as in 2013. This percentage decreased significantly prior to 2008, followed by a modest increase. In 2002, 5.38 percent of EU citizens in Denmark between 16 and 64 years old received social assistance at least 26 weeks a year. At the end of 2013, 3.15 percent of eligible EU citizens did so. Between 2002 and 2004, the percentage of EU citizens receiving social assistance is slightly higher than the rest of the population in Denmark. After 2004, the pattern shifted, and at the end of 2013, the percentage of EU citizens receiving social assistance was considerably below that of the rest of the population in Denmark. Absolute numbers are presented in table 1 below.

**Figure 1: Proportion of EU citizens receiving social assistance among EU citizens 16-64 years old compared to the rest of the population in DK 2002-2013<sup>10</sup>**



**Table 1:** Social assistance recipients in DK in absolute numbers and as percentages of those eligible

Recipients	2002	% eligible	2013	% eligible
EU citizens	2,900	5.38	4,229	3.15
DK population, excl. EU citizens	183,640	5.31	163,128	4.76

We present the proportions of social assistance beneficiaries among EU citizens disaggregated by the duration of their residence in Denmark on December 31<sup>st</sup> of the year of measurement. As shown in Figure 2, the largest portion of EU citizens receiving social assistance are long-term residents, i.e., individuals who have resided in Denmark for more than five years and therefore are entitled to equal treatment according to the EU Residence Directive. Assessed by years of residence, we see that de facto a rather strong link is established between EU citizens and Denmark as a host state before social assistance is received. The more immediate access to social assistance is not supported by our findings.

**Figure 2:** Proportion of EU citizens receiving social assistance among EU citizens 16-64 years old, by years since residence, 2002-2013

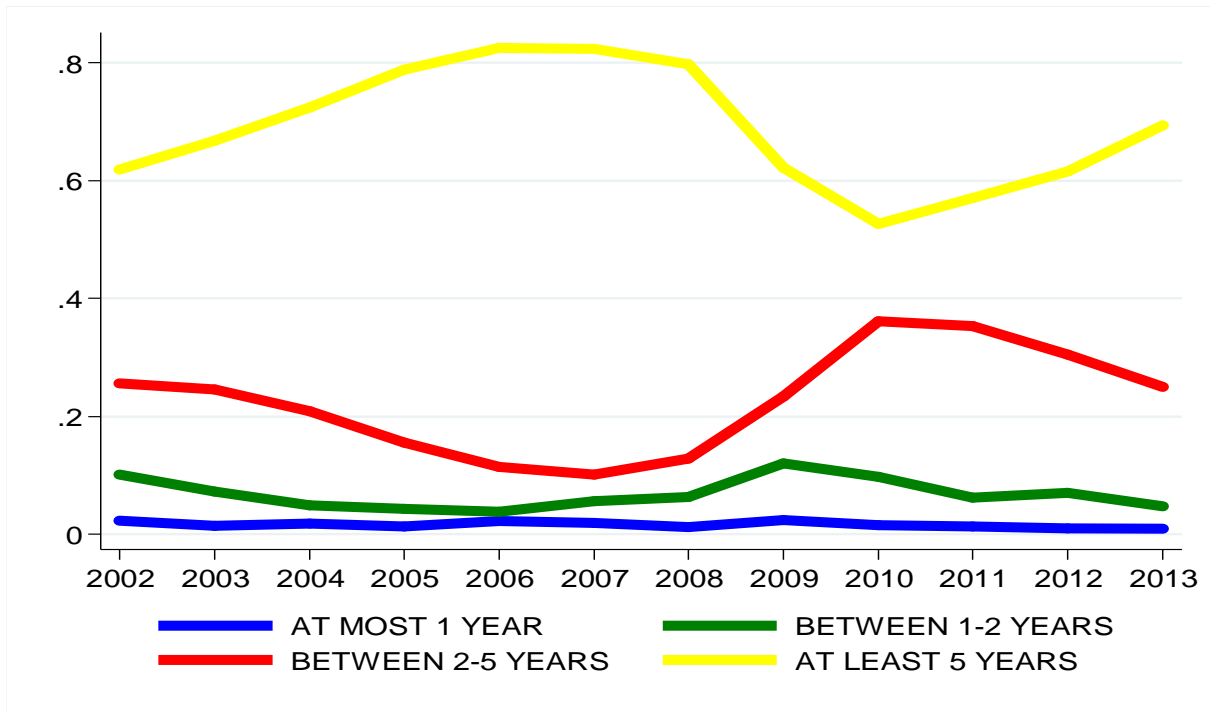


Table 2 supports the notion that long-term EU residents are the primary consumers of social assistance. Hence, for the two groups of EU residents that have resided in Denmark for fewer than two years, the proportion of recipients has declined from 2002 to 2013 both as a percentage of the total group of eligible EU citizens and in absolute numbers. Though the absolute numbers of both groups of EU residents having resided in Denmark more than two years have increased across the study period, the percentages of EU residents in Denmark receiving benefits among all eligible EU citizens have declined.

**Table 2:** EU citizens receiving social assistance for at least 6 months in absolute numbers and as percentages of those eligible

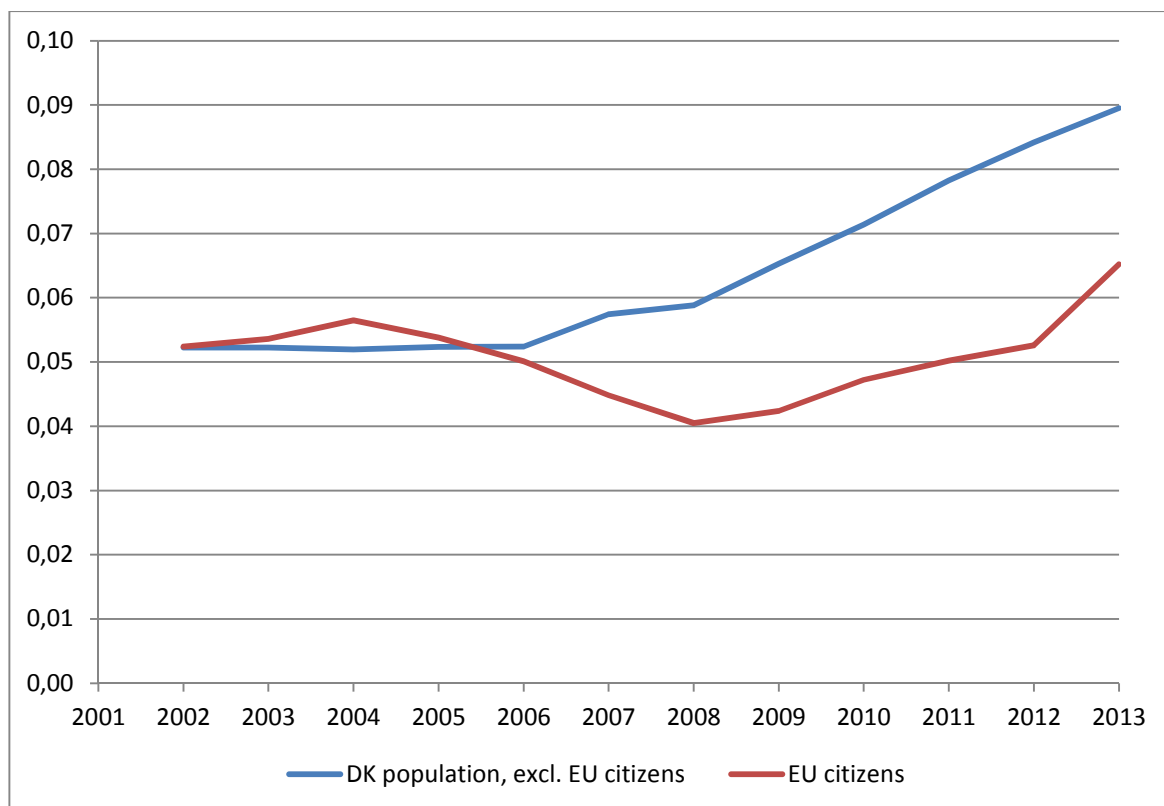
<b>Denmark</b>	Length of stay	2002	% eligible	2013	% eligible
	At most 1 year	53	0.10	33	0.02
	1-2 years	229	0.42	177	0.13
	2-5 years	576	1.07	932	0.7
	At least 5 years	2,042	3.79	3,087	2.3
	<b>Total</b>	<b>2,900</b>	<b>5.38</b>	<b>4,229</b>	<b>3.15</b>

Turning to study grants, we see that the proportion of EU citizens receiving this benefit decreased between 2004 and 2008 and then gradually increased within the period examined. In 2013, when



the CJEU issued its ruling, the increase is more considerable than in previous years. For study grants, we see that the percentage of EU citizens receiving the benefits increased from 5.24 percent in 2002 to 6.52 percent at the end of 2013. For this benefit, data availability has not made it possible to consider whether a study grant was received for a minimum period of time within a year. Receiving the benefit may therefore reflect everything between 1 month and a full year. As with social assistance, we compare the proportion of EU citizens receiving study grants with the proportion of the rest of the population in Denmark receiving study grants throughout the study period.<sup>11</sup> It should be noted that the study grant recipients among the rest of the population are full-year recipients. Between 2002 and 2005, the percentage of EU citizens receiving study grants was slightly higher than the percentage of the rest of the population in Denmark receiving study grants. After 2005, the pattern shifts; by the end of 2013, the percentage of EU citizens receiving study grants is considerably lower than the percentage of the rest of the population in Denmark receiving study grants. The absolute numbers are presented in table 3 below.

**Figure 3: Proportion of EU citizens receiving study grants among EU citizens 16-64 years old compared to the rest of the population in DK 2002-2013**

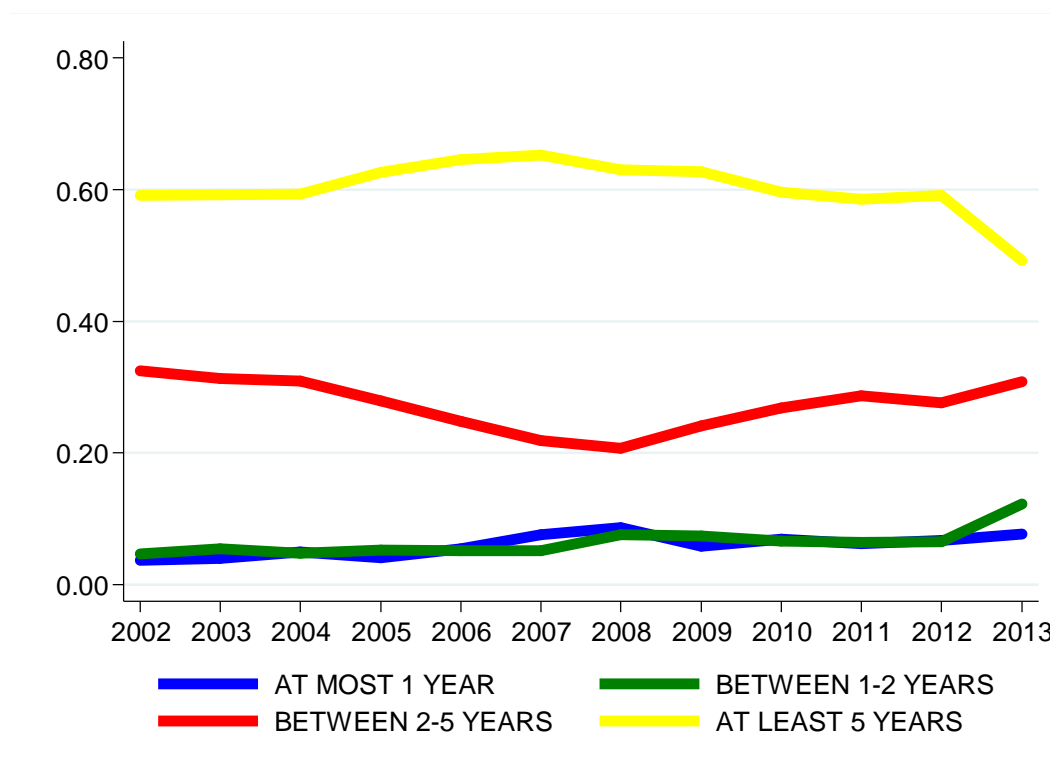


**Table 3:** Study grant recipients in DK in absolute numbers and as percentages of those eligible

Recipients	2002	% eligible	2013	% eligible
EU citizens	2,827	5,24	8,732	6.52
DK population, excl. EU citizens	180,773	5.23	307,070	8.95

We also examined the recipients of study grants by duration of residence in Denmark. As shown in Figure 4, throughout the study period, more than 50 percent of EU citizens receiving the benefit had been residing in Denmark for at least 5 years. Hence, in accordance with the Residence Directive, they enjoy equal treatment with the nationals of the hosting member state. In this way, this finding reflects the result for social assistance: a rather strong link between recipient and host state is established before the benefit is received. Table 4 summarizes the absolute numbers of EU citizens receiving the study grant benefit.

**Figure 4: Proportion of EU citizens receiving study grants among EU citizens 16-64 years old, by years since residence, 2002-2013**



The data in Table 4 elaborate on the results shown in Figure 4 by reporting the absolute numbers as well as the percentage of study grant recipients among all eligible EU citizens. Though an increase for groups having resided in Denmark for shorter periods of time has occurred, the data in table 4

show that the practical significance of the change is not dramatic. Thus, the changes in the percentage of study grant recipients among all eligible EU citizens are marginal.

**Table 4:** EU citizens receiving study grants in absolute numbers and as percentages of those eligible

<b>Denmark</b>	Length of stay	2002	% eligible	2013	% eligible
	At most 1 year	104	0.193	675	0.50
	1-2 years	131	0.25	1,073	0.80
	2-5 years	920	1.70	2,690	2.01
	At least 5 years	1,672	3.10	4,294	3.21
	<b>Total</b>	2,827	5.24	8,732	6.52

## Conclusion

The relationship between the free movement of people and the welfare state is an increasingly salient issue in the EU. Scholarly views are divided on the extent to which these rules challenge the welfare state, but most studies concentrate on the supranational development of rules and rights rather than their actual outcomes. As in comparative welfare studies (Green-Pedersen 2004), EU studies on free movement and the welfare state suffer from their own dependent variable problem in which the object of studying change differs widely and is oftentimes undefined. However, the need to be more precise when studying the nexus of EU migration and the welfare state is more than a theoretical call. Currently, the empirical call is equally strong, as EU rules are increasingly contested and has been noted as a main reason for Brexit (Geddes and Hadj-Abdou 2016; Reenen 2016).

In this paper, we asked the extent to which EU citizens have gained more immediate access to non-contributory Danish welfare benefits, and if so why or why not? Our findings first note that the percentages of EU citizens receiving social assistance and study grants remain low. On basis of the analysis of the time span 2002-2013, we demonstrated that neither grand enlargement nor an expansive reading of EU citizenship has changed that pattern. In fact, the percentage of EU citizens receiving social assistance was lower by the end of 2013 than in 2002. On the other hand, there has been a specific increase in the percentage of EU citizens receiving study grant benefits. Our data only allow us to go up to the end of 2013, but recent figures from the Danish Ministry of Education and Science reveal a more considerable increase after 2013. The figures from the Ministry show

that just approximately 4500 EU citizens received Danish study grants as a result of the CJEU ruling *C-46/12 L.N.*

The percentage of recipients of each benefit was considerably lower for EU citizens than for the rest of the population in Denmark. This difference suggests equal treatment following the five-year rule of the Residence Directive rather than the more expansive judicial interpretations. Our findings suggest two explanations why EU citizens have less frequently received the two non-contributory benefits. 1) EU citizens do not apply for such benefits. They tend to be weak claimants in a foreign system without sufficient information about their rights or sufficient knowledge about the appeal system. They may also fear that claiming their social benefit rights could impact their right to reside. 2) Domestic responses are restrictive, and in practice, equal treatment is rarely applied before people have resided in the country for at least five years. Over time, national control of entitlement to these benefits has been tightened.

Our analyses find that limited outcomes can be explained in part by defensive judicial, political and administrative responses in the domestic arena. When rules and rights were extended at the EU level, a national process of filling out the details followed. The discretionary scope and concepts left open at the Union level were narrowed down and clarified nationally. National courts have not acted as decentral enforcers of EU law. They have not been agents of social change and domestic judicial responses have not convincingly functioned as a leverage of European rights. Instead, the quasi-judicial administrative recourse system came to emphasise the limits of European law. Thus, over the last decade, it has become much clearer who qualifies for cross-border welfare – and who does not. Furthermore, our findings demonstrate that appealing one's case has little likelihood of success. Local administration and caseworkers do not have to fear national court cases changing their administrative decisions. There were none for the examined benefits, and the administrative recourse system developed restrictive eligibility principles. Local administration and caseworkers have discretion and can exert considerable administrative control when deciding on EU citizens' welfare rights. Both in judicial, political and administrative terms, national actors address rather open and unclear EU rules restrictively.

In sum, the leeway created by EU rules and developments in constructing transnational welfare met its limit in domestic responses. Extended EU rules and rights are responded to by limited national enforcement and tighter national administrative control. We have identified some institutional changes, but those changes are deliberately designed to restrict the outcomes of EU law. Equal

treatment is applied to long term residents. The assumption that EU citizens become more immediate beneficiaries is not supported by our findings. This is in line with EU secondary legislation, whereas the CJEU interpretations suggesting equal treatment before five years of residence have had limited outcomes. The study grant case demonstrates that political responses are more willing to dismantle welfare for all, i.e., the amount of study grant for EU citizens *and* nationals, than to allow for considerable increases in outcomes.

Domestic responses generally proved to be restrictive, and when filling the gaps of unclear rules and litigation at the national level, welfare state's borders are established anew through administrative procedures of control and eligibility tests. At these new borders of the welfare state sits the caseworker who has become increasingly familiarised with assessing the rights of EU citizens. The right to have rights is not an easy test to pass in Denmark. After the extension of EU rights, national institutional safeguards, extended conditionality and control follow. Partly for that reason, we see limited outcomes. Additionally, we see that the benefit recipient has normally established a certain social link to the hosting state. That social link has typically been established through years of working in the host state. The right to reside is still firmly tied to being a worker or being able to provide for oneself. Our findings do not support that the link between obligations and rights have withered away due to EU rules and litigation. In practice, it is still upheld. More immediate access to the universalistic welfare state is not supported by our findings. Domestic responses appear more willing to dismantle social benefits for all than allow for transnational welfare. In researching a period of unprecedented change, our study of domestic responses and outcomes points to the welfare state as rather robust to EU migration. Rather than welfare dismantlement or transnational welfare in the making, we see domestic responses of a resilient welfare state in times of free movement.

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## On line appendix: Worker status, length of residence and the right to social assistance

Length of residence	The right to reside	The right to social assistance
Up to 3 months	All <i>European citizens</i>	No right to social assistance for non-workers
From 3 months to five years	The <i>involuntarily unemployed</i> retain the status of worker if: a) they have worked more than 1 year and registered as a jobseeker, b) they have worked less than 1 year and registered as a jobseeker; the status is retained for no less than 6 months.	<p>a) In this situation, the worker has a right to social assistance for more than 6 months. Social assistance may affect the right to permanent residence. The person must be available for the labour market and take part in activation programmes.</p> <p>b) In this situation, the worker can receive social assistance for up to 6 months. Social assistance is likely to terminate the right to reside. The person must be available for the labour market and take part in activation programmes.</p>
	<i>Jobseekers</i> have the right to reside as long as they can prove that they are continuing to seek employment and have a genuine chance of being employed.	Jobseekers have no right to social assistance. If applying to the social assistance system, they can be expelled.
	<i>Economically inactive citizens</i> with sufficient resources not to become an unreasonable burden on the social assistance system of the host member state and have sickness insurance cover in the host member state	The economically inactive have no right to social assistance. If applying to the social assistance system, they can be expelled.
Longer than 5 years	All <i>European citizens</i>	If granted permanent residence, the right to social assistance is equal to that of Danish citizens and is granted under the same conditions.



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<sup>1</sup> For a seminal exception, see Conant (2002).

<sup>2</sup> However, one interview was based upon an e-mail exchange.

<sup>3</sup> Case C-46/12, 21 February 2013, L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte. Preliminary ruling made by Ankenævnet for Statens Uddannelsesstøtte - Denmark

<sup>4</sup> The asterisks indicate that the principle ruling does not concern the concept of worker as such but addresses related matters such as derivative rights as a family member of a Union worker.

<sup>5</sup> See, for example, political opinions as expressed by Trine Bramsen, the Social Democrats, 29 June 2013, Politiken; and current Danish Prime Minister Lars Løkke Rasmussen, the Liberal Party 'Venstre', 25<sup>th</sup> February 2014, Berlingske Nyhedsbureau.

<sup>6</sup> See the agreement, "Aftale om reform af SU-systemet og rammerne for studiegennemførelse" of 18 April 2013, p. 10.

<sup>7</sup> These numbers refer to the 100 percent population of EU citizens residing in Denmark on the December 31st of each year between 2002 and 2013. Residing citizens from the new member states are not included before EU membership.

<sup>8</sup> Data on the total number of citizens in Denmark between the age of 16-64 years are extracted from Statistics Denmark through the codes FOLK1A (2008 onwards) and BEF1A (before 2007) and BEF607 (2007). Numbers represent January 1 in the subsequent year. To exclude the number of EU citizens inhabiting Denmark in this time period, the number of EU citizens are taken out. The number of EU citizens inhabiting Denmark comes from the administrative data compiled specifically for this study (not publicly accessible).

<sup>9</sup> Data on the total number of full year recipients are found in Statistics Denmark's database with the code KY028 (2006 onwards). Data prior to 2006 is found using the code KONT1X. From the latter database, only 'affected' people appear, and thus one cannot distinguish between 'affected' and 'full years'. Therefore, the number of 'affected' people is used for pre-2006 estimates. The number of EU citizens receiving SA is excluded.

<sup>10</sup> EU citizens receiving social assistance between 27-52 weeks a year. For the rest of the population in Denmark, we calculate the full year recipients ('helårsmodtagere').

<sup>11</sup> Data on the total number of full year recipients are found in Statistics Denmark's database with code AUKS02 (2007 onwards). Data prior to 2007 is developed by the Ministry of Higher Education and Science and can be retrieved on <http://www.su.dk/om-su/su-statistikker/>. The number of EU citizens receiving study grants is excluded.