

# The Blind Spot of Europeanisation: How Great Expectations in Brussels are Dashed by Local Practices

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\*This is work in progress. Please do not cite\*

## Disclaimer

This is a very preliminary draft. For readability purposes, sections that are not yet written are represented with a title and a short description.

The paper is intended as a comparative study between the Member States of Denmark and the Netherlands. So far, only Denmark is included.

As some respondents have busy schedules, two case municipalities (out of five) are lacking from this version. One municipality, however, has given brief information over email which allows me to refer to them when relevant and possible. Both municipalities have agreed to participate later this year and will be included in a future version.

The empirical findings still needs fine-tuning so please focus the reading on the argument, framework and theoretical background.

The draft is rather long already. I apologise for that.

All comment are of course received thankfully. Thank you for reading.

## Introduction

The idea of a Social Europe is ambitious but contested widely across European welfare Member States. Most recently, Europe is facing Brexit which is highly motivated by a wish to retrench the social space and EU nationals' access to British welfare (Independent 2017). The foundational right to free movement in the Union comes with increasingly expanded social rights (Verschueren 2008). This ensures a safety net for millions of mobile EU nationals but, on the other hand, increases scepticism in 'receiving' Member States (Blauberger and Schmidt 2014, Verschueren 2015).

Maybe not surprisingly, the European Commission states that there is no statistical relationship between welfare state generosity and inflow of mobile EU nationals (Commission 2014). No matter what can be proven empirically on this point, the fear of 'welfare tourism' remains a political issue in European welfare.

Contestation in Member States has resulted in numerous Court case by the Court of Justice of the European Union (CJEU) and infringement proceedings by European Commission. The European institutions protect the free movement of persons and the social rights that follow and in this way ensures Europeanisation by force. This was the case, for example, in the rulings *Commission vs the Netherlands*<sup>1</sup> and *LN vs Styrelsen*<sup>2</sup> where the Court established mobile EU nationals' right to social benefits. The national administrations did as told and corrected their practices despite sceptical public debates. Europeanisation was in this way completed.

This paper argues, however, that Europeanisation studies have a blind spot. National administrations might comply with EU law, by force or by default, but what happens beyond transposition? This question remains relevant especially when compliance is politicised in the national political sphere and the field is shaped by legal uncertainty as is the case here, where the expansion of social rights to a large extent is driven by the Court of Justice of the European Union (CJEU) (Schmidt 2008).

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<sup>1</sup> C-542/09

<sup>2</sup> C-46/12 - N

National level legislation and practices are monitored by the European institutions, the Court as well as the Commission in its role as the guardian of the Treaty. But it remains overlooked and understudied what happens when EU law is transformed into actual material social rights on the ground. Europeanisation of local implementing levels is just as crucial, but somehow remains a blind spot.

This paper argues that practical implementation carried out in local level administrative practices are equally crucial to Europeanisation studies and, furthermore, that when a policy is contested and yet efficiently supervised by the European institutions, as seen with the policies of Social Europe, potential contestation might shape the local level practical implementation.

Ambitions on a Union Citizenship have long been prevalent, but access to most social benefits in other Member States remains dependent on whether the EU national has ‘earned’ his right through obtaining status as a worker in the receiving Member State (Spaventa 2014, Kramer 2016). This makes the status of worker a key gateway to social benefits in other Member States. The concept itself, however, remains unclear. This paper therefore studies how such a fluffy, yet highly fundamental, concept is administered in practice in national and local levels in two European Member States.

Denmark and the Netherlands have been chosen for this purpose as both are generous welfare states, on the one hand, and sceptical towards allowing EU nationals access to social benefits, on the other. The topic is highly salient in both Member States and much is perceived to be at stake. Social Europe is contested, but does this contestation inform national implementation? Compliance with EU law requires both transposition of EU law into national regulation but furthermore, and this remains the focus of this paper, full implementation all the way to the ground. EU implementation studies have lacked focus on practical implementation and this final and crucial level can thus risk hiding potential resistance. Both Member States have transposed the relevant secondary legislation, respectively Directive 2004/38 and Regulation 883/2004. On these grounds, this paper wonders what happens beyond transposition. The goal of this paper therefore is to study *whether potential contestation, easy to overlook if only focused on transposition, informs the implementation of the concept of worker in the Member States of Denmark and the Netherlands when granting three social benefits to EU nationals, and how and in which forms such contestation is manifested.*

To this end, I have interviewed<sup>3</sup> 14 respondents from all implementing levels in Denmark, i.e. national level actors in ministries and agencies as well as local level actors in municipalities who are responsible for the disbursement of social assistance, and the relevant agencies responsible for disbursement of study grants and child care allowance.<sup>4</sup> In addition to this, I have examined how national legislation on this matter is translated into legislative guidelines both at national and local level.

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<sup>3</sup> 10 respondents were interviewed in person or over the phone and 4 respondents were ‘interviewed’ over longer written correspondences. I will describe and explain further in the section ‘Data Collection’ beneath.

<sup>4</sup> I define local level according to the actors’ function. Following this, I categorise agencies with caseworker function, handling concrete administrative procedures, to be local level actors even though the disbursement is centralised and thus lies within a central organ.

An original analytical framework, developed to identify potential contestation in local level administrative practices, enables me to finally conclude on how the concept of worker is administered in practice and whether local actors aim to resist Europe.

This paper studies potential contestation when European welfare Member States administer social EU law ‘in action’ (Versluis 2007). Hence, centre of the interest is practice and how EU law is transformed from theoretical concepts to actual rights for EU nationals who exercise their right to free movement within the Union. A central concept in this context is the concept of worker. Living up to the definition of worker makes a world of a difference for the mobile EU national who needs support in another Member State. The relevant secondary legislation only provided superficial general definitions (see Directive 2004/38 art. X and later 2011/492 art. X) which leave Member State administrations in the hands of case law by the CJEU. Court rulings, however, provide only specific, narrow answers to the specific question raised and the case law thus only functions as a patchwork of random bits and pieces that national administrators then are left to gather (Schmidt 2008). This creates a large discretionary space and increases the risk of cherry-picking according to national preferences (Martinsen 2011). This paper sheds light over how sceptical implementing actors manoeuvre in this space. As Mastenbroek states, the really interesting question is not how laws in the books are transposed, but to which extent these are given effect (Mastenbroek 2005: 1116).

The paper is structured as follows.

After reviewing relevant literature, the European concept of worker is defined on the basis of relevant secondary and Court case law. The section will sum up all relevant parameters of the worker concept. Subsequently, the parameters will be ‘tested’ in the real-life practices in local level administrations in order to analyse how they can be assessed as *sedimented*, *politicised* and *non-politicised*. Furthermore, the wish is here to identify whether practices deviate from the content of the parameters or national legislative guidelines. Thirdly, I will reflect on how both national and local actors resort to find new forms of contesting practices.

## Methods and Analytical Framework

### Case Selection and Data Collection

This paper compares implementation practices in two sceptical welfare states in Europe, Denmark and the Netherlands. These Member States have been selected as they both, firstly, represent ‘receiving’ welfare

states in terms of EU migration according to Eurostat comparative data and, secondly, both have public debates shaped by the threat of ‘welfare tourism’ (Peers 2014, Verschueren 2015). Despite these similarities the two Member States vary in terms of level of generosity as well as the welfare organisational arrangement. Originally, the Netherlands was first categorised as a corporatist welfare state according to Esping-Andersen’s seminal work on the ‘Three Worlds of Welfare Capitalism’ (Esping-Andersen 2013), but has later obtained traits of a Nordic welfare state along with Denmark, Norway and Sweden now offering universal access to benefits and high level of social protection (Eleveld and van Vliet 2013, Sapir 2006, Draxler and Van Vliet 2010).<sup>5</sup> The concrete levels of benefits still varies, making Denmark yet the most generous of the two states.

Both Member States are generally perceived as sceptical at the political level towards granting benefits to other EU nationals (Peers 2014, Verschueren 2015, Thym 2015). Furthermore, both Member States have recently faced Court cases instructing them to increase EU nationals’ access to social benefits (cf. *LN vs Styrelsen* and *Commission vs the Netherlands*).

The Danish administration of social assistance is decentralised and carried out by municipalities. For this reason, I have selected five case municipalities in each of the two Member States. These case municipalities have been selected upon the high presence of EU nationals combined with a dispersion in geography and political leadership. In the Danish case, the municipalities of Copenhagen, Frederiksberg, Odense, Århus and Esbjerg have been selected. Due to protection of respondent anonymity, they will from this point only be referred to as M1-5 in random order.

The selection of Dutch municipalities will be described in a future version of this paper.

Lastly, this paper compares how three social benefits, social assistance, study grants and child care allowance, are implemented within the two Member states. These benefits vary according to target group as social assistance is a minimum subsistence benefit directed at the least privileged citizens; study grants is a benefit directed at a privileged group (to come), students, and as a cross-cutting benefit, child care allowances directed at all citizens with children under the age of 18. No matter which kind of sympathy either of these groups should enjoy, this ensures a broad variation. Another difference here is that whereas social assistance and study grants are administered according to Directive 2004/38, child care allowance is coordinated according to Regulation 883/2004, art. 6. Consequences of this will be further elaborated in a future version of this paper.

Finally, the selected benefits vary also in organisational arrangement. In Denmark, child care allowance and study grants are, in contrast to social assistance, administered centrally by the Agency Disbursement Denmark (*Udbetaling Danmark*) and the Agency for Institutions and Study Grants (*Styrelsen for Institutioner og Uddannelsesstøtte*) respectively. Such variation is important as proximity to the political level might influence responsiveness to potential political contestation.

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<sup>5</sup> It will be further elaborated how the Dutch and Danish welfare states can be compared and contrasted in a future version of this paper.

In summary, this case selection strategy ensures variation at the relevant dimensions, as recommended by (Seawright and Gerring 2008: 294).

The two different parts in this paper is supported by different data. They rest upon a triangulation between 1) interviews with civil servants and caseworkers Spring 2017, 2) official legislation and legislative guidelines and 3) observations submitted to the Court of Justice of the European Union (CJEU). See Annex I for further description.

### **An Analytical Framework for Examining Local Level Contestation**

The section beneath provides with a detailed definition of the concept of worker as defined in EU law with all its major and minor facets. This definition draws upon secondary legislation in the form of Directive 2004/38 and 2011/492 as well as a long strand of Courts rulings relevant to define the essence and fringes of the concept. Together, this results in a comprehensive and thorough definition reflecting all the aspects attributed to the idea of worker. Both parameters concerning obtaining and retaining worker status are included. The section identifies all parameters necessary to consider when deciding on worker status. Hence, considering all these parameters for each and every case would be the ideal-type EU compliant administrative procedure.

These parameters are subsequently ‘tested’ in real-life to see how they correspond with interview accounts, national legislation and national as well as local legislative guidelines. This reveals an interesting encounter between the ‘law in the books’ and the ‘law in action’. Some parameters are both clearly *defined* in national guidelines as well as *deemed relevant* for the assessment of worker status. I term this pool of parameters *sedimented*. Another group of parameters are *deemed relevant*, but in contrast to the sedimented, only *ill-defined* in national guidelines, if defined at all. I term this pool of parameters the *politicised*. A third group comprise the parameters that are *not deemed relevant* for the assessment of worker status and similarly only *ill-defined*. I term this pool of parameters *non-politicised*.

Interesting here is that contestation can be detected through potential deviations from national definitions. In a sedimented parameter, deviation is clearly a breach and will potentially express contestation against the national and hence Union law. In a politicised parameter, deviation can either be due to confusion, because the parameter is ill-defined and that local level actors consequently are left in the blind. Alternatively, it can be due to political will, as a politicised parameter also is deemed relevant for assessing worker status and thus imply a high motivation structure for exploiting the lack of or poor definition. In the non-politicised parameter, deviation is not really possible, as no rules have been defined by the national level.

In this way, through differentiation between the three categorisations, this framework enables us to identify potential local contestation against national and Union instructions. In other words, it helps us identify if local level actors have actively chosen to dissent from the otherwise chosen path.

## Literature review

Ferrera has eloquently theorised how the logic of closure in welfare states collides with the logic of opening in Social Europe (2005). This could potentially result in resistance in welfare Member States against complying with European social regulation. Especially if the welfare state is a universal, generous and tax-financed as is the case with the Member State of Denmark. Consequently, a basic presumption for the analysis as a whole that the public debate expresses resistance against granting social benefits to EU nationals and thus a misfit between the logic of Social Europe and that of Danish welfare state. It is beyond the scope of this paper to study this presumption separately.

Falkner et al. 2007, however, have showed how compliance culture also influences the likability of whether a Member State transposes correctly and timely. Since Danish compliance culture in general can be identified to be law observant, Danish transposition can from this perspective be expected to be fully compliant. This clash in theoretical expectations triggers a wish to examine whether potential resistance against complying with Social Europe materialises in other so far uncovered forms. Inspired by the strand of literature focused on practises of Europeanisation, this paper wonders whether potential resistance is hidden behind correct transposition but materialises through restrictive *de facto* practices. To this end, this paper studies *de facto* practices at national and local levels of the Danish administration. *Hence, the second theoretical expectation is that transposition at the national level is correct, but that potential resistance against Social Europe can be identified in de facto practices at the local level.* This expectation is covered in Part I. Following from this, it is furthermore *the third expectation of this paper that potential national resistance might be revealed through other forms than mere transposition.* This expectation is covered in Part II.

## Politicisation of Social Europe

Social Europe as a phenomenon has become increasingly politicised in European welfare states along the expansion of the free movement rights in the EU and consequently expanded social rights (Dougan and Spaventa 2005, Davies 2016). The solidarity of European welfare states seemingly ends at the national borders (Ferrera 2005).

Politicisation of a topic concerns more than simply a public debate once in a while. Politicisation as a process lifts up a topic from a stable fact to being questionable. Hence, politicisation triggers a destabilisation and questions foundational aspects of the phenomenon. According to De Wilde, politicisation of European integration manifests itself as an ‘increase in polarization of opinions, interests

or values and the extent to which they are publicly advanced towards the process of policy formulation within the EU' (2011: 560).

National public debates on the scope of solidarity and comprehensiveness of welfare state services have in this way shaped the reality that faces EU nationals searching for work in other Member States. The issue of granting social benefits to other EU nationals has become, as Versluis frames it, *salient* (Versluis 2004). To her, issue salience 'in general terms refers to the visibility of and the importance attached to a topic and starts from the assumption that visibility of an issue conditions behaviour' (2004: 10). In this respect, behaviour concerns how Member States implement the legislation behind Social Europe. Inherent in her argument lies that issue salience defines which regulation Member States choose to focus on and which to implement without further inspection (Versluis 2004: 10). Referring to Noordegraaf ((Noordegraaf 2000) and his notion of 'distribution of attention', she argues that administrations are in lack of resources and must focus their attention on the pieces of regulation with the highest risk of attention and the level of the risks is central to assessing the compelling character of a saliented topic (Versluis, 2004: 10). In this way, issue salience plays a pivotal role when administrations choose their what to focus on among a large pool of regulations. Versluis states that salience 'refers to the visibility of and the importance attached to a topic and starts from the assumption that visibility of an issue conditions behaviour' (Versluis 2004: 10). According to De Wilde, the term politicisation covers 'an increase in polarization of opinions' (De Wilde 2011).

Also, Versluis refers to the importance of 'focusing events' as defined by Kingdon (1995). Kingdon has formulated a multiple-streams model that defines how agenda-setting is enabled through respectively a problem stream, a policy-option stream and a political stream. Especially the problem stream is relevant here, as it captures the way an issue can rise in the public debate and through this process form the policy outcome. In the case of Social Europe, especially rulings from the CJEU or European Parliamentary elections can function as such focusing events, since they function as dramatic incidents pushing the topic onto the agenda.

## **Complying with Europe at all Levels**

The prominent work of Pressman and Wildavsky (1973) laid the first stone how to, decades later, study European compliance. They introduced the intriguing puzzle of how and why regulation from a federal level influences lower level administrations, pointing out 'how it's amazing' that such a process can work at all (Pressman and Wildavsky 1973).

Complying with EU law is, admittedly, a wonder but is, as we all know, also not perfect. Contestation and high level of misfit are potential barriers.

A central focus of this paper is how EU law transforms into practice on the ground and a central understanding is therefore that this street-level stage should be included in the notion of compliance. Hence, we should be aware that there is a world beyond 'the books' and that we risk overlooking essential dynamics if we do not also include this dimension. This otherwise blind spot of Europeanisation, *de facto*



implementation, concerns the final stage of implementation where caseworkers at the local level carry out ideas defined in Brussels (see Versluis 2007: 51 for a similar understanding). On a similar line, Winter defines implementation output as a ‘policy content at a much more operational level than a law. It is policy as it is being delivered to the citizens’ (Winter and Ren 2006: 10). Mastenbroek, similarly, criticises seemingly successful transposition measures of neglecting ‘actual application and enforcement’ (Mastenbroek 2005: 1104).

In this way, compliance as a concept is perceived to cover both transposition and implementation and thus a *de facto* complete accordance with EU law from national legislation all the way down to the everyday practices on the ground.

Both transposition and implementation studies play a central role in the overall literature on Europeanisation. Various transposition studies have examined how specific Directives have been incorporated into national legislation timely and correctly and which barriers might inform such a process, see both country specific (Mastenbroek 2003, Hartlapp 2009) as well as sector specific studies (refs). Reasons given are numerous and vary from administrative shortcomings to institutional (Knill 2001) and policy misfits (Börzel and Risse 2000). The general hypothesis in goodness of fit theory states that a certain misfit is a precondition for change (Börzel and Risse 2000: 5), but that too big a misfit might lead to contestation and failed compliance. Other factors – framed as ‘mediating factors’ (Green Cowles, Caporaso, and Risse 2001, Börzel and Risse 2000) – have later been introduced as possible reasons for non-compliance. This could be the number of veto players, decision-making culture, pressure from interest groups, norm entrepreneurs as change agents but also administrative shortcomings and the role of administrative institutions (Falkner, Hartlapp, and Treib 2007, Bursens 2002). The goodness of fit theory has been debated widely (for an overview, see e.g. Mastenbroek and Kaeding 2006). The clash between Social Europe and the closed welfare state entails a misfit. In this way, this functions as a theoretical starting point in this chapter for studying how potential contestation might influence national and local practices when administering the access to social benefits of EU nationals.

Another strand of literature on transposition takes in the importance of culture. Correct transposition, Falkner et al. argue (2007), depends on the national compliance culture which inform the actions of Member States when facing new Union regulation. Here, they categorise Member States according to their compliance culture and in this way argue that Europe is informed by three ideal-type ‘worlds of compliance’, respectively a ‘world of law observance’, a ‘world of domestic politics’ and a ‘world of transposition neglect’. Later following the Central and Eastern European enlargement, the authors (2008) added a fourth typology, ‘the world of dead letters’ (Falkner et al. 2008).

As depicted here, and as Schmidt argues (2008), much Europeanisation literature has focused on transposition of secondary legislation, i.e. how Directives are transposed into national legislation. We must, she argues, however go ‘beyond compliance’ and study negative integration in the form of judicial policy-

making, often empirically through rulings of the Court (Schmidt 2008: 300). This is specifically important to the field of Social Europe as the expansion of social rights has been driven by the Court (Martinsen 2015, Wasserfallen 2010). Important in Schmidt is the argument that Court rulings often bring with them 'legal uncertainty'. i.e. the lack of predictability as to which exact domestic implications a ruling might have (Schmidt 2008: 300). Potential legal uncertainty from implementing Court rulings on access to social benefits for mobile workers is an essential consideration in this paper and the concept thus informs the mere research puzzle expressed here.

As argued above, I perceive compliance as covering both transposition and implementation. Whereas transposition concerns the incorporation of EU regulation into national law, as in the examples above, implementation concerns how rules are applied in practice on the ground and thus the actual *de facto* materialisation of law (Versluis 2007: 51). Consequently, this paper's object of study is the concrete materialisation of European Social legislation in the shape of the social benefits to mobile workers. Versluis sums up that we thus need to 'open the black box' of EU law in action instead of merely concentrating on the 'law in the books' (2007). On a similar line, Mastebroek (2005) argues that we should bring in domestic politics, just as embeddedness of institutions and policy context into our explanations and similarly Mastebroek and Kaeding (2006: 337) argue that in this consideration of the domestic, we should include domestic preferences or beliefs.

Aiming to raise awareness the blind spot of Europeanisation, argued to be the *de facto* practices on the ground, requires a brief understanding of what Lipsky (2010) termed street-level bureaucracy. Street-level bureaucrats, in this paper termed 'caseworkers' are central actors when transforming law into action. As described by Lipsky (2010) street-level bureaucrats have agency themselves and are not mere implementing robots but make decisions informed by institutional settings, limited resources, emotional requirements and sympathy in direct client contact (Hunter et al. 2016: 81). They deliver services at the frontlines on the ground with discretionary power (Lipsky 2010: 13) and in doing so many such variables might influence. It is beyond the scope of this paper to study all the variables, but a foundational assumption that caseworkers are 'policy-makers', as he argues and their choices are just as relevant for an implementation process as the choices made at higher levels. Therefore this paper focuses also on local level practices.

## Defining a Worker – No Easy Task: The Concept of Worker in EU Law

*This section will be produced in a future version of this paper. It will provide an in-depth description of the concept of worker as defined in both secondary law and rulings by the CJEU. The section will conclude that a long strand of parameters together form the concept of worker and should be taken into account when administering the concept and consequently mobile EU nationals' access to social benefits in other Member States. While some parameters concern the obtainment of worker status, others concern how to retain it once one faces unemployment.*

## **Obtaining Worker Status**

*The identified parameters are:*

Weekly working hours

Duration of employment

Covered by collective agreement providing paid holiday and sickness, pension etc.

Level of salary

Reference period concerning weekly working hours

Quid pro quo salary

Internship/training

## **Retaining Worker Status**

*The identified parameters are:*

Involuntary unemployment

Registration at jobcentre

The duration of retained worker status when having worked *less* than 12 months

The duration of retained worker status when having worked *more* than 12 months

Pregnancy and parental leave

It must be stressed that most national and local actors and guidelines state that obtaining and retaining worker status always is a question of individual concrete assessment. A clear pattern of how such an assessment is made, however, has come to light.

## **Part I: Local Europe Strikes Back**

Social Europe is a very ambitious, but also contested project (Dougan and Spaventa 2005, Martinsen and Vollaard 2014, Scharpf 2010). This is illustrated in Part I above where it is shown how the discussions on whether to allow EU nationals access to national social benefits have increased tremendously since the first Eastern European enlargement in 2004 and, similarly, how the term ‘welfare tourism’ gains ground. Meantime, European institutions such as the European Commission and the Court of Justice of the European Union (CJEU) have been eager to impose even more expansive regulation upon sceptical Member States. National Member States have been forced to change national pieces of legislations and guidelines. The continuous contestation of Social Europe makes it now interesting to follow whether the local practical *de facto* administration follow the Europeanisation as instructed by national level. The goal of Part II is then to consider whether how local levels respond to and administer this opening up of national welfare to fellow Union citizens. In concrete, this Part II studies how national levels in respectively the Netherlands and Denmark implement the concept of worker when granting social assistance, study grants and child care allowance to EU nationals and how local caseworkers manoeuvre in this contested regulation when transforming EU law into practice on the ground.

Defining worker status is a complicated matter, as evident from the section above. Here, a multitude of parameters were high-lighted to be relevant when Member States are to assess whether an EU national can be defined as a worker or, on the other hand, left outside the circle of Union solidarity. Firstly, this complicates implementation. Secondly, it leaves room for the Member States to focus on preferred parameters and leave others ignored. In other words, the multifaceted concept of worker enables to a large extent Member States to define their own practice. The decisions made when transforming this complex concept into practice thus becomes highly important.

## **Local Level Practices in Denmark**

The Court ruled against Denmark in 2013 in the case *LN vs Styrelsen* and instructed the Danish Study Grant Agency to allow EU nationals access to Danish study grants provided that they have worker status. A pilot letter from the Commission in 2013 imposed on Denmark to allow EU nationals residing in Denmark full access to the child care allowance and not merely an earned access through the so-called ‘principle of earning’ (Commission 2013). Both events resulted in Europeanisation by force and national legislation was changed to meet the requirements by the European institutions. The result was a new study grant legislation and subsequent guidelines as well as a new child care allowance legislation and subsequent guidelines (R12 SG, *interview* March 2017). Hence, Europeanisation of Danish welfare was implemented at national level. This paper examines how local levels respond to this change.

‘We cannot have a grasshopper model where grasshoppers, in this context Eastern Europeans, jump into the fields, suck out all nourishment and subsequently continue jumping into the next field,’ the then spokesman on tax affairs from the Danish Conservative Party, Brian Mikkelsen, stated in July 2013 (my

translation, Berlingske 2014.<sup>6</sup> This is one of many examples of how weekly working hours and duration of employment for recently arrived Union citizens have been eagerly debated in the media. Unlike what could be expected from this, however, these two parameters are not politicised in practice. On the contrary, criteria for having worked enough hours and for a long enough period are clear and undebated when asking practitioners. In this way, what seems to be politicised from the public debate is in fact sedimented in practice. In essence, only very few parameters are discussed by politicians in the media whereas the final assessment is mostly made upon a wide variety of parameters. This section offers insight into a clear pattern where some parameters are deemed sedimented, others politicised and yet others non-politicised. Furthermore it reveals when otherwise established practices deviate from this pattern.

## Sedimented Parameters

The pool of sedimented parameters provide the most essential understanding of how the concept of worker is administered in practice. They cover the well-established criteria for when and how to access social benefits. The sedimented parameters are thus both well-defined and deemed important when assessing whether an EU national should be incorporated into the national solidarity space.

From interviews, official documents and guidelines, it is clearly established that obtaining worker status is primarily assessed upon weekly working hours (approximately 10-12 hours per week) and duration of employment (around 10 weeks). Local actors follow suit and in general this is widely implemented at local level (R13M5, R7M1 *interviews* April to March 2017, guidelines SG, M1 2017). This rule of thumb is clearly communicated from the ministries and agencies through both legislation guidelines, website and courses and practitioners primarily single out these two parameters upon asked how they assess worker status (all interviews March-April 2017). Other parameters, also well-defined and deemed relevant, are considered secondary but nonetheless still appear sedimented. This pool of parameters require the unemployment to be involuntary; the worker to register at a jobcentre; and retention of worker status to depend on whether the worker has worked *less* or *more* than 12 months, respectively ensuring retention of worker status for 6 months (R7M1 *interviews* April to March 2017, and *guidelines* M1) and continuously under certain circumstances in case (s)he has worked longer (R7M1 *interviews* April to March 2017, and *guidelines* M1). These parameters are, in addition, the most objective, either being positive or negative and thus no grey zone, and accordingly the discretionary space is rather small.

Despite rather clear communication on these matters, few respondents and local guidelines, however, report deviations from this well-established practice. These deviations concern the two benefits that have been Europeanised by force; respectively child care allowance in the form of a pilot letter from the

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<sup>6</sup> Original text in Danish: »Vi kan ikke have en græshoppe-model, hvor nogle græshopper, i dette tilfælde østeuropæere, hopper ind på marken, suger al energi ud og derefter hopper videre til næste mark«

European Commission (2013) and study grants in the form of a ruling by the Court (*LN vs Styrelsen*). Social assistance is administered in a deviating manner in one municipality.

Specifically the first two deviations stand out. The first became apparent as I requested access to documents in the form of the guidelines that caseworkers are subject to follow when granting child care allowance to EU nationals. As described above, European Commission had sent a pilot letter to Denmark requiring Denmark to change practice and modify ‘the principle of earning’ so that EU nationals could include years resided in other Member States and thus enjoy full equal treatment (Commission 2013). This was highly debated in the media but the Danish government June 2013 responded and declared to put an end to ‘the principle of earning’ ‘as soon as possible’ (Ministry of Taxation 2013a and 2013b). Local caseworker guidelines, however, reveal that now, four years later, caseworker guidelines are confusing and self-contradictory to such an extent that ‘the principle of earning’ is at risk of still being in effect. The guidelines state clearly that ‘EEA citizens fall within the scope of the principle of earning’ (2017: 9)<sup>7</sup>. This set of caseworker guidelines goes directly against the official website orientation where it is clearly stated that Denmark has been required to change practice. Interesting here is how unclear the communication is. Close to the end of the document (2017: 21), references are made to Regulation 883/2004 and coordination of social security with the point that periods of employment or residence in other Member States should be included when calculating how much right an EU national has earned. This is a crucial point since an EU national, having resided or worked in another Member State including his/her home Member State, in practice has full access to the benefit. When the ‘accrual principle’ is mentioned in the beginning, no references are made to the aggregation rules. Six pages in a row are dedicated to explain the principle of earning (2017: 16-21) but only two sentences in the end mention the coordination rules and hence that EU nationals might have the full right to the benefit.

Granting child care allowance to EU nationals has been highly politicised in the Danish media. Furthermore, the history of receiving a pilot letter from the European Commission and promptly, as a result, changing practice so that EU nationals could access the benefit made the topic highly salient. While Denmark officially now administers in accordance with EU law, the caseworker guidelines are so unclear that *de facto* compliance can be questioned.

While all these deviations make access to the benefits more restrictive, one deviation at first glance reflects a less restrictive concept of worker. When obtaining status as a worker in order to access child care allowance, an EU national is obliged to work only 8,7 hours per week – and not 10-12 hours – and only for a period of a month – not 10 weeks (*CCA guidelines* 2017: 3 and Ministry of Taxation 2014)<sup>9</sup>, or as the guidelines define it: 39 hours per month.<sup>10</sup> These rules are administered so strictly that in practice they are as restrictive as the other benefits. The weekly working hours is a clear-cut threshold and, importantly, the

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<sup>7</sup> Original text in Danish: ‘EØS-borgerne er omfattet af reglerne om optjeningsprincippet’.

<sup>8</sup> The 8,7 hours per week is calculated upon the requirement of having worked 39 hours per month (*guidelines* 2017: 3).

<sup>9</sup> The 8,7 hours per week is calculated upon the requirement of having worked 39 hours per month (*guidelines* 2017: 3).

<sup>10</sup> This rule is defined as the ‘employment requirement’ and in principle only relevant for frontier workers but the administrative barriers for being assessed upon residence make the requirement relevant also for EU nationals residing in Denmark.

reference period administered in a highly strict manner. The minimum of 39 hours worked are required to be within the *same* month no matter how high the number of hours is. Firstly, having only one month's reference period is stricter than the case with either of the other benefits. Secondly, this means that in case an EU national has worked 60 hours in total over four weeks but this employment is partly in April (30 hours) and partly in May (30 hours), both months will be registered as below the 39 hours threshold and neither of the months will live up to the concept of worker (guidelines 2017: 3). Such calculating rules might appear to be technicalities but in practice they function as *de facto* and very efficient barriers against obtaining access to the benefit.

A second deviation stands out. The case of *LN vs Styrelsen* instructed Denmark to allow EU students with worker status access to Danish study grants. What now leaps to the eye is that EU nationals with active worker status are granted study grants, while the conditions for EU students with retained worker status are much more uncertain. 'When it comes to study grants, one thing is different from probably all the other social benefits,' the respondent says; 'this is a benefit that one can be granted as a worker, but only *while* being a worker' (R12SG *interview* 2017).<sup>11</sup> The disbursement of study grants is thus reconsidered by a caseworker *as soon as* the employment has stopped.<sup>12</sup> Practice is quite ambiguous at this point but the respondent indicates that in the current practice there is no opportunity to remain on study grants upon a retained worker status beyond a 'limited period'. What she also reveals is that their practice has been stricter than EU law instructs both concerning EU students who have worked less and more than a year. 'What we realised only recently,' the respondent explains, 'is that those who have worked for more than a year are surely eligible to benefits for a long time (R12SG *interview* 2017).'<sup>13</sup> 'We probably end up with a similar practice as the other social benefits,' she notes, 'but negotiations are still on the table' (R12SG *interview* 2017).<sup>14</sup> As a result, both EU nationals with employment for less and more than a year remain with uncertain rights in this respect. Intensive control measures support this strict practice, as will be elaborated in the section below.

A few clear deviations are identified concerning social assistance. This benefit has not been politicised to the same extent in Denmark as the other benefits. Two municipalities practice against this well-established norm of 10 week requirement. The first municipality explains; unless the EU applicant has more than a year of employment (s)he is perceived to be so much on the fringes of worker status that the municipality cannot decide on the case (R4M4 *interview* 2017). 'We have become stricter – more rigid – in our interpretation of the same rules' (R4M4 *interview* 2017). Hence, as a last resort, this municipality employs strict interpretation as their only possibility to restrict access. When elaborating, it becomes clear that it is in conflict with both EU law and Danish legislative guidelines. 'It is a grey zone before a year,' the

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<sup>11</sup> Original quote in Danish: 'Der er jo også en ting, der er anderledes ved SU-området end stort set alle andre sociale ydelser; det her er jo en ydelse, som du kun kan få som arbejdstager mens du er arbejdstager.'

<sup>12</sup> The Agency is notified automatically every third month if an EU student's employment activities is below a certain threshold. See the section below for elaboration, cf. *Pushing EU Law to the Limit: Introduction of Control Measures*).

<sup>13</sup> Original quote in Danish: 'Det, som vi har fundet ud af for nyligt, er, at dem, der har arbejdet i over et år, de har godt nok ret til støtte i lang tid.'

<sup>14</sup> Original quote in Danish: 'Vi ender nok med at lægge os op ad praksis ved de andre ydelser. Der er jo ikke så meget at diskutere – det er jo EU-ret'

respondent explains, 'because typically they will be told to leave by the State Administration' (R4M4 *interview* 2017). She adds; 'if they have not worked more than a year, they will probably be sent back home (R4M4 *interview* 2017).' When asked about the ministerial guidelines of 10 weeks employment she responds that according to her experience, this is not what is practice on the ground. 'We do see some EU nationals who clearly have worked more than the 10 weeks but who lose their worker status and are told that they will not get anything – 'you won't get any money' – and then they go out and find new work (R4M4 *interview* 2017).'

Furthermore, typically only EU nationals with full-time employment are deemed workers in this case municipality. Again, they refer all EU cases to the State Administration but experience that such applications are rejected. 'We do not, really, define actual and efficient work,' the respondent states (R4M4 *interview* 2017). 'We do have some who received residence permit upon 15 hours,' she explains, 'but others needed full-time' (R4M4 *interview* 2017). In general, her descriptions of the State Administration express random and rather arbitrary administrative procedures. Instead of deciding themselves, they refer it to the State Administration for further consideration and further review time. Referring to the State Administration leaves only little risk of granting social assistance unnecessarily which makes it attractive in the case that the municipality wishes very restricted access. Other municipalities make so-called supposition decisions as a routine.

The second municipality reveals deviating practices concerning the number of hours required to obtain worker status (R6M1 and R7M1 *interview* 2017). Whereas practice is clearly described in national legislative guidelines, they require 10 weeks' employment full-time and if the employment is part-time, the number of weeks worked should be correspondingly longer (R6M1 and R7M1 *interview* 2017). 'Så skal man jo arbejde desto længere tid – så kan det være 20-30 uger eller hvad man nu så kommer op på' (R6M1 and R7M1 *interview* 2017). In addition, the same municipality requires that an EU worker registers at the jobcentre the day after becoming unemployed, which is in direct breach with the national guidelines that allow it to take 14 days.

Europeanisation has been imposed on two Danish benefits – child care allowance and study grants – despite massive national resistance in the public debate. National legislation was changed accordingly and legislative guidelines now instruct caseworkers to grant the benefits to EU workers. One piece of legislation even dedicated the first chapter to describing EU nationals' access with the calculated awareness to appear compliant and express willingness to transform practices (R12SG *interview* 2017). Secondly, mobile workers' access to social assistance, though being less politicised in the public debate in Denmark, still reveal creative measures on the ground of resisting Europeanisation. This section shows that even sedimented parameters of the concept of worker, those both assessed well-defined and relevant, are faced with ambiguous and sometimes non-compliant practice on the ground.



## Politicised Parameters

The politicised parameters are deemed important but, in contrast to the sedimented parameters, only poorly defined in national legislation and guidelines. This produces a risk of confusion and divergent practices across municipalities and benefits and creates leeway for potential political agendas to inform the practices concerning the disbursement of the benefit. These parameters are at the risk of politicisation, understood widely as influenced by agendas rather than law observance.

Two politicised parameters can be identified in the data; the level of salary and the reference period concerning weekly working hours. In other words, it is unclear to caseworkers, firstly, how much an EU national should earn in order to live up to the concept of worker. Secondly, they doubt whether weekly working hours should be calculated as an average across several weeks, and in that case how many weeks, or whether the number of hours worked should be live up to the rule of thumb-number every week of employment.

The level of salary is deemed important for assessing worker status by many actors (R13M5, R11SA, R5M1 *interviews* 2017, and *guidelines* M1). Likewise and paradoxically, just as many find themselves in doubt. In addition, divergent practices concerning whether salary should be assessed upon total monthly salary disbursed, no matter how many hours worked, or upon hourly wage (R7M1, R13M5, R11SA *interviews* 2017).

The State Administration plays a predominant administrative role when it comes to final assessment of residence and worker status and hence, indirectly, access to social benefits. Despite this central role, the Agency itself is in doubt about how to assess the level of salary. ‘How little,’ the respondent asks to illustrate their doubt, ‘are you allowed to earn and still be deemed a worker?’ (R11SA, *interview* 2017).<sup>15</sup> They have raised the very same question to the Immigration Services who are responsible for implementing Directive 2004/38 and thus for the final interpretation thereof. In their current practice they consistently reject EU applicants who earn no more than 1000 DKR per week (R11SA, *interview* 2017). But salaries above that level still cause uncertainty. And while waiting for a response from the Immigration Services, which typically takes around a year, the practice of the State Administration on this matter is bound to be continuously uncertain. Consequently, municipalities and the other agencies are left with ambiguity and decentralised ad hoc solutions.

The only official guidance from the Immigration Service on the matter of the level of salary is found in their guideline to the State Administration. The formulations here remain vague and ambiguous and repeat rather than interpret EU law. Well-known wordings such as that the employment should, from an overall assessment, be ‘actual and real’ and that the employment must not simply be a ‘marginal supplement’ (SA *guideline* 2015: 3) inform the guidelines. The only more substantial, and yet very general, guideline is made with reference to the *Genç*<sup>16</sup> case and instruct that worker status should be made upon an overall

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<sup>15</sup> Original quote in Danish: ‘Hvor lidt må man tjene og stadig være arbejdstager?’

<sup>16</sup> C-14/09

assessment of the conditions, including whether the worker is covered by a collective agreement (SA *guidelines* 2015: 3). Soon after, however, it is stated that even cases below the average salary can from an overall assessment be deemed within the concept of worker (SA *guidelines* 2015: 4). As a result, these formulations do not provide much more clarity than already found in EU law. In this way, the guidelines implement EU law as required but without providing useful interpretation of the generic formulations used in the Directive 2004/38 as should otherwise be expected from an implementing process.

Also municipalities express uncertainty about which levels of salaries they should accept when granting social assistance to EU nationals (M5). 'It is,' a respondent bursts out, 'exceedingly difficult to assess what a marginal income is. And it must be an income one can live off' (R13M5 *interview* 2017)<sup>17</sup> One municipality administers according to a threshold level on hourly wage equivalent to that of social assistance (R7M1 *interview* 2017).

The introduction of another lower-level minimum subsistence benefit, the integration benefit (*integrationsydelsen*), in 2015 for certain non-EU groups in society<sup>18</sup> confuses the field even more, as the same logic might apply to the level of salaries. This could potentially allow EU nationals with very low income and who earlier would have been rejected now to be given the status of a worker. Importantly, however, practices are unclear here. As a respondent expresses; 'And now we have a government who has introduced the integration benefit and then we might be disposed to be inspired by that level. But I will not lay my head on the block that we have not had cases below' (R13M5, *interview* 2017).

Likewise, weekly working hours are essential for assessing worker status, as seen from the section on *sedimented* parameters. How to calculate them, however, remains unclear and practices differ tremendously across municipalities and benefits. This matter is not simply an issue of technicality but, as also argued above, a potential way to set up *de facto* barriers. This was the case with the reference period on child care allowance, as described above. Here, an on the surface non-strict low number of weekly working hours (8,7 hours) is supplemented with a very strict reference period, which in practice results in rather strict requirements. Interviews and guidelines show that the reference periods concerning the two most politicised benefits, child care allowance and study grants, are administered very strictly. The void of a national guidelines on this matter opens up for the opportunity to administer restrictively.

Reference period is highly relevant when it comes to jobs on the fringes of the labour market. When considering a person employed on an on-call contract or as a substitute and consequently with a varying number of hours, potentially even a zero-hour contract with no guarantee of hours, it is highly relevant to know which reference period to calculate upon. A substitute might have a high number of hours in one month and close to nothing in the next. Does this make her/him a worker in the first and an economically inactive person the next? Respondents express doubt on this matter. 'cases with many irregular hours still

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<sup>17</sup> Original quote in Danish: 'Men det er jo hamrende svært at vurdere, hvad der er en marginal indkomst. Og det skal jo være en indkomst man kan leve af.'

<sup>18</sup> The integration benefit is granted to those who are not eligible to social assistance upon introduction of a residence requirement of the last 7 out of 8 years.

cause uncertainty' (R13M5 *interview* 2017). 'We do not have a clearly established guideline on this matter, the same municipality states. It relies on a concrete assessment from case to case' (R13M5 *interview* 2017).

One municipality sums up how legal uncertainty disturbs their administrative procedures; 'assessing worker status has caused challenges. If there had been very clear rules, for instance saying that an EU national should be employed no less than 10 weeks precisely; that the salary should be at the level of collective agreements – let's say 85-100 DKR per hour; that there were completely definite criteria. But there is not. It is a concrete assessment and rules of thumb. And I am certain that if you ask all municipalities their practices are probably adjacent to those rules of thumb, but you can deviate from them'(R13M5 *interview* 2017).<sup>19</sup> In conclusion she says, that 'the result is that these cases are more complicated than just a completely ordinary Dane' (R13M5 *interview* 2017).<sup>20</sup>

Two parameters of the concept of worker – the level of remuneration as well as reference period – are politicised, and are in this way deemed relevant for the assessment but not clearly defined in national legislation nor guidelines. The result is divergent practices across benefits and municipalities caused by both confusion and, potentially, contestation.

## Non-Politicised Parameters

A few parameters of the concept of worker are non-politicised as they appear neither relevant nor defined in national legislative guidelines.

When a topic is non-politicised it opens up for the risk of rather random practices. Should a caseworker include parental leave or *quid pro quo* remuneration in her/his assessment of worker status? Only routine helps answering such a question. Facing concrete cases of real-life administrative dilemmas indeed facilitates a caseworker's ability to make a lawful decision. Can, for instance, an EU national prolong her retained worker status in the case that she becomes pregnant and goes on maternity leave? Or will she 'spend' her six months of social assistance on her maternity leave and subsequently be a mother without work nor benefits? Or what is possible if an unemployed male EU national wishes to take part in the parental leave as many other Danish men do? The real world is a mess of unclear ambiguous situations and if the caseworker is not acquainted with all such facets of the law, the administrative procedures follow suit and become just as messy as the real-world examples.

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<sup>19</sup> Original quote in Danish: 'det om man har arbejdstagerstatus har voldt udfordringer. Hvis nu der var nogle helt klare regler, der fx sagde, at du skal være ansat præcis 10 uger; du skal have haft mindst overenskomstmæssig løn – lad os sige, at den er 85-100 kr. i timen; at der var nogle helt faste objektive kriterier. Men det er der ikke. Det er en konkret vurdering og det er tommelfingerregler. Og jeg er sikker på, at hvis man spørger alle kommuner, så ligger man tæt op ad den tommelfingerregel, men det er en regel man kan fravige.'

<sup>20</sup> 'Original quote in Danish: Det volder det, at sagerne er mere komplicerede end en helt almindelig dansker, der søger.'

It is unclear from reading national legislation and guidelines whether *quid pro quo* can be tolerated as remuneration. *Quid pro quo* remuneration covers, as settled in the *Trojani*<sup>21</sup> ruling, that board, lodging and a little pocket money can be sufficient remuneration to be deemed a worker. While this might appear to only a very theoretical question detached from real-life labour market, some reports that offering lodging as part of the salary is presumably on the increase in fringe work, especially in the construction industry (see as an example Jyllands-Posten 2007). As an example, the BAT Cartel has documented by that mobile workers officially are paid reasonable salaries but in return are required to pay ‘exorbitant prices’ for living under ‘miserable conditions’ in basements and containers.

In official documents, remuneration is only mentioned in the shape of salary. Likewise, the State Administration and one municipality deny the possibility of tolerating *quid pro quo* (R11SA, R7M1 *interviews* 2017). Reflecting that this is a non-politicised parameter, however, the respondent initially hesitates upon the question of whether they have a practice here at all (R11SA *interview* 2017). ‘No,’ the respondent replies after further consideration, ‘because the EU national should be able to live off it. You would probably get residence permit as a self-sufficient person unless he has contractual commitments’ (R11SA *interview* 2017).<sup>22</sup> Similarly, another respondent explains that ‘in order to be deemed a worker according to EU law, the person needs to receive remuneration, typically in the shape of salary’ (R3SG *interview* 2017).<sup>23</sup> Other actors, reflecting that this is a non-politicised parameter, express that they are uncertain of their practice on this matter as they have not yet faced any such cases (R3SG, R4M4 *interview* 2017).

One municipality might accept *quid pro quo* as remuneration (R13M5 *interview* 2017). Their municipal guidelines require ‘*quid pro quo*, often in the shape of salary’ and are in this way theoretically open to the scenario that the work is not remunerated with salary but another kind of compensation (M5 guidelines: 5).<sup>24</sup> But, the respondent explains, has not seen such a case in practice (R13M5 *interview* 2017).

One ruling by the CJEU, the *Saint Prix*<sup>25</sup>, established in 2014 the basic right for mobile workers to go on parental leave and, at the same time, not lose worker status. Here, the woman was employed when becoming pregnant and thus the case only clarifies a worker’s rights to retain worker status during employment. The CJEU ruled against the UK and established that a worker has a right to income support in case that she cannot work due to late stages in her pregnancy or subsequent parental leave. The Danish case is different from the UK case, however, since all workers are eligible to a higher-level parental leave benefit and not just social assistance. Therefore discussing access to social assistance for mobile workers on parental leave in Denmark is redundant. Ministerial guidelines to the municipalities instruct that an EU national should retain worker status during late stages of pregnancy and parental leave *as long as*, and this addition is rather important, she takes up work after a ‘reasonable period of’ leave (Ministry of

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<sup>21</sup> C-456/02

<sup>22</sup> Original quote in Danish: ‘Nej, for man skal jo kunne leve af det. Man vil få opholdsret som selvforsørgende, men mindre man har nogle kontraktretlige forpligtelser’

<sup>23</sup> Original quote in Danish: ‘For at kunne betragtes som arbejdstager efter EU-retten skal personen derfor modtage vederlag for det udførte arbejde, hvilket typisk er løn.’

<sup>24</sup> Original text in Danish: ‘... modydelse, typisk i form af løn’

<sup>25</sup> C-507/12

Employment 2011: 6 and Immigration Service 2015: 3). Consequently, these guidelines do not allow retention of worker status on the basis of being involuntarily unemployed after becoming a parent. This remains within the scope of the *Saint Prix* ruling but still places the EU national worse than if she had chosen not to become a parent because in such case involuntary unemployment would be accepted. This issue, however, point to how corners of the concept of workers are still to be sharpened, presumably through future case law of the Court.

Responses to the questions raised in the introductory paragraph above concerning parental leave are still not provided by secondary legislation nor case law of the Court. Therefore, it is also beyond the scope of this paper to study how administrative practices are on this matter even though it might evoke confusion on the ground if caseworkers faced such a concrete issue. Whether an EU national should retain worker status, and for how long, during late stages of pregnancy and subsequent parental leave when the person in question was *not* working but, instead, on social assistance, remains to be clarified in potential future case law.

## Summary

Sedimented parameters are deemed relevant and well-defined and yet local level practices deviate from the instructions in legislative guidelines. This indicates that political contestation potentially informs the practices and non-compliance, which the theoretical expectation predicted. This is especially the case with study grants and child care allowance, both of which have been Europeanised either through Court case or Commission pilot letter. Practices concerning the non-politicised reflect both contestation and confusion. Non-politicised parameters – primarily interesting for Denmark is *quid pro quo* salary – cause confusion.

**Figure 1: Assessing Worker Status**

Parameters for Assessing the Obtainment (O) and Retention (R) of Worker Status			
	<b>Sedimented</b>	<b>Politicised</b>	<b>Non-politicised</b>
Definition	Relevant and well-defined parameter	Relevant but ill-defined parameter	Irrelevant and ill-defined parameter
Parameters	Weekly working hours (O)	Level of salary (O)	<i>Quid pro quo</i> salary (O)
	Duration of employment (O)	Reference period concerning weekly working hours (O)	Internship/training (O)
	Covered by collective agreement providing paid holiday and sickness, pension etc. (O)		Pregnancy and parental leave (R)
	Involuntary unemployment (R)		
	Registration at jobcentre (R)		
	The duration of retained worker status when having worked <i>less</i> than 12 months (R)		
	The duration of retained worker status when having worked <i>more</i> than 12 months (R)		

## Part II: Controlled Compliance

This section reflects upon the last part of my research question, namely how and in which forms contestation is manifested in the implementation of the concept of worker. Surprisingly not only the local level shows contestation in their administrative practices but also the national practices. This is despite correct transposition and legislation as well as legislative guidelines being in accordance with EU law.

### Pushing EU Law to the Limit: Introduction of Control Measures

When EU law does not leave sufficient room to satisfy Member States' wish to restrict EU nationals' access to social benefits, what remains is the possibility of introducing control measures. Interviews have revealed how the use of control measures indicate whether or not the authorities attempt to limit the access to social benefits. As a respondent puts it, 'when these criteria over time have become so clear and indisputable and we cannot challenge them further, control is our remaining remedy' (R13M5 *interview* 2017). Another respondent replies that they have acknowledged that Danish interpretation of Community law is already pushing it to a limit and that the only remaining and thus more efficient tool now is to increase control (R10STAR *interview* 2017).

The usage of the term *control* is here not perceived necessarily merely as a concrete measure placed upon an administrative procedure, but an overall notion of all initiatives motivated by the possibility to regain control, i.e. through a form of mastering. Hence, a wide variety of control measures are covered in this section all of which are somehow introduced in order to claw back as much influence to the Member States as possible.

The wish for control materialises in many initiatives. These initiatives range from being very intense and directly placed upon the individual EU recipient on the one hand, and extensive, general control of the area as a whole. The usage of the categorisations '*intense*' vs. '*extensive*' reflect the extent to which *all* EU individuals are examined or whether, on the other hand, the control measure rather rests upon ad hoc cases among the larger pool of EU nationals. The usage of the categorisations '*direct*' vs. '*general*' reflect whether the control measure concerns the specific administrative procedure of the specific EU recipient case or whether, on the other hand, the control measure rather concerns the field as a whole e.g. through general policies or guidelines. While the scale of control is not quantifiable based upon numbers, concrete control measures can, however, still be somehow considered as expressing somehow different degrees of control. This is illustrated in the concluding Figure 3 in the end of this section.

First of all, a direct and intensive control is conducted by the Study Grant Agency in the form of ***continuous control of EU nationals*** receiving study grants. The control is carried out every third month upon every single EU recipient of study grants through the digital income register 'e-indkomst' to ensure that (s)he has earned enough salary to live up to the required working hour threshold. If not, a warning is sent automatically to a caseworker who then reconsiders the case manually to check whether the conditions for receiving study grants are still met. A similar procedure is used when controlling the disbursement of child allowance. In this case, Disbursement Denmark is automatically notified in case that an EU recipient

no longer lives up to the ‘employment requirement’ of 39 hours per month (i.e. 8,7 hours per week) (CCA *guidelines* 2017).

Also the arrangement of granting social assistance to EU nationals is defined by direct and intensive control measure placed upon every EU recipient individually. Eligibility to social assistance is preconditioned upon lawful residence status; hence when granting social assistance to an EU national, the municipality assesses residence status as a first tier procedure. As an extra control measure, however, the State Administration guidelines require that every individual decision made by a municipality granting an EU national social assistance should be referred to the State Administration subsequent to the decision. This reference procedure thus guarantees that the State Administration can manually check the correctness of the assessment of the residence permit. The result, subsequently, is ***de facto double casework***.

A less direct, but yet intense, control measure has been introduced on the disbursement of study grants to EU nationals. Since the CJEU ruling against Denmark on this matter, *LN vs Styrelsen*, Danish political awareness has been very high on this topic (R12SG *interview* 2017). As a respondent says, ‘the topic has become top priority of the politicians’ (R12SG *interview* 2017). The Danish political awareness is reflected in the matter that the Ministry of Justice demanded that the very first chapter of the new piece of study grant legislation would be dedicated to the issue of EU nationals’ eligibility (R12SG *interview* 2017). The political disturbance resulted in the initiation of ***close monitoring*** of the field; on a yearly basis, a report accounts of the total number of EU recipients, measured month by month, as well as the nationalities of and the expenses spent on this group (R12SG *interview* 2017). The publication of the report has high salience and can be used in order to initiate new restrictive measures. Publication of the 2017 report is in the offing and it has already been leaked that expenditures on EU recipients is getting so close to the maximum level allowed by a coalition of political parties that specific ‘restrictive measures’ (*værnsinitiativer*) must be installed (R12SG *interview* 2017). This wording, however, is merely political, a respondent invokes, as such measures, however, are not feasible within the scope of EU law. Danish practice, the respondent replies, is already pushed to the limit of what is in accordance with EU law (R12SG *interview* 2017). Instead, she expects, the growing number of EU recipients of Danish study grants will be financed by a general cut-back of the benefit (R12SG *interview* 2017). Hence, the report is highly salient and has direct effect on new restrictive policy-making – not just related to the access of EU nationals to Danish benefits, but also in effect, the study grant level for Danish recipients.

Yet another control measure, still direct but less intense is ***specialisation*** of caseworkers in order for them to build up high expertise in handling EU law in practice. Specialisation could, in theory, also be introduced in order simply to administer correctly and not necessarily restrictively. Increased knowledge on the relevant EU law, however, is, I would argue, a precondition for controlling it. In order to push the administration to the limit, civil servants need knowledge of where this limit goes. Furthermore it reflects a general administrative or political attention on the topic which, similarly, again must be argued to be a necessary condition for controlling it.



Specialisation is both introduced in the form of dedicating specific caseworkers only to handle EU cases but also on a larger scale through upgrading staff through courses. Some municipalities report that the financial crisis resulted in a remarkable increase in the number of EU applications for social assistance. This resulted in the need to specialise caseworkers, one municipality explains. Here, the leadership decided, in the tumult of the financial crisis, to reorganise the caseworkers in order to dedicate three caseworkers for a longer period to only handle applications from EU nationals. In this way, the respondent rationalises, ‘they became experts in how to interpret EU law and hence could assist their colleagues in doing so at a later stage’ (R13M5 *interview* 2017). After a few years they built up sufficient training and ‘now,’ she points out, they ‘have enough practice with how to handle EU cases that all caseworkers can handle EU cases again’ (R13M5 *interview* 2017). In addition, many municipalities report that they spend and have spent extra resources on courses in EU law (M1, M4) – some courses offered by the organisation of municipalities, Local Government Denmark (LGDK) and others by private companies.

Another less direct and less intense control measure is the attempt to influence the Court when a ruling is in the pipeline. Such pressure is placed by the government through so-called **observations**. If successful, however, the measure influences the field as a whole. A thorough, fully-dressed examination of all relevant Court cases on the free movement of workers and persons shows that Denmark has used the method and even done so increasingly. See Figure 2 below.

### Figure 2 (TBD)

As is evident from the Figure, Danish awareness on the role of the Court has increased. Especially the *LN vs Styrelsen* ruling against Denmark, a respondent explains, triggered a European awareness. Before that, ‘we did not read the CJEU rulings at all’ (R12SG *interview* 2017).

Respondents reveal that a clear political motivation behind the observations has been to, firstly, clarify the boundaries of the concept of worker, but secondly, the wish to raise the weekly working hours to more than 10-12 hours (R8BM, R9BM *interview* 2017). This attempt, however, failed, and the government was forced to accept that no more negotiation on this matter was feasible within the borders of EU law.

*The findings will be examined further in a future version of the paper.*

A final initiative in the attempt to control the area is the conduction of a **‘neighbour check’** to identify potential other ways of implementing the EU legislation among neighbouring Member States. This control measure is neither direct on specific EU individuals nor intense, but rather extensive with the potential of influencing the field as a whole. This is softer, yet potentially efficient measure, given that it can be used as inspiration for possible ways to restrict access to social benefits.

For exact this reason, the Minister of Employment ordered the Ministry of Employment to conduct a ‘neighbour check’ resulting in a ministerial minute March 2017 (R8BM, R9BM *interview* 2017).

*The findings will be examined further in a future version of the paper.*

One reservation must be made in this respect; some of these parameters might not necessarily lead to control in the attempt to *restrict* access to social benefits but simply ensure quality and consistency in the administrative procedures. One municipality (M1) stresses the motivation for controlling to be the need of having lawful procedures that make sure that the citizens receive what they are entitled to and reiterate that this is their defined responsibility as civil servants. This specific municipality had just recently employed three new caseworkers only with the task of controlling administrative procedures carried out by their colleagues (R5M1 *interview* 2017). Predominant, however, and as reported above, is the response that these various measures are made in order to restrict access to the benefit.

Control measures do not necessarily result in restricted access to the benefits, but ensure that nothing is granted beyond what is minimally required. Submitting written observations, as the only measure, offers the possibility of influencing the law itself. Granting benefits are in this way (mostly) within – but pushed to the limit of – European law.

While the paper so far focused on detecting possible contestation at local level, interviews along with triangulation has shown that despite the transposition of the concept of worker, the Danish national level administration practices in a way that expresses a culture not so law observant as could otherwise be expected from Falkner et al. (2005). Yes, the national level administers in accordance in EU law. But, however, the comprehensive introduction of control measures aiming at limiting the effect as much as possible indicates comprehensive contestation.

## **Summary**

In realising that Danish practice is pushed to the limit of EU law, the Danish government and local level actors have introduces various control measures as a new form of contestation.

The degree of control in these measures are evidently not quantifiable, but do, none the matter, reflect different levels of intensity. The most intense and direct control measures are placed in the left side of the Figure 3 below, and the most extensive, general control measures on the right side. Figure 3 thus illustrate different variations of control measures.



Especially contested regulation, as is the case with European social law, is at risk of being circumvented as salience might condition behaviour. This makes it highly relevant to be able to identify contestation also in local level practices, where the law ‘in the books’ is transformed into material rights on the ground.

In local level administrations, a combination of confusion and contestation informs the practice. In addition, this paper reveals how Danish compliance culture is not formed by law observance, but rather a culture of control.

More specifically, this paper has compared the practical implementation of the concept of worker in two European welfare Member States, respectively Denmark and the Netherlands. The implementation of the concept is studied upon how local levels administer EU nationals’ access to three social benefits, namely social assistance, study grants and child care allowance. The public debates in these Member States express scepticism towards allowing EU nationals access to social benefits. National levels, however, comply with EU law despite contestation. This paper has been motivated by a wonder of whether contestation travels down the administrative ladder and inform local level practices.

The analytical framework, developed in order to grasp potential contestation when caseworkers transform theoretical concepts into ‘law in action’, show that a combination of confusion and contestation inform the practices in local level administrations. This is the case in the practices around all three social benefits but remarkably more predominant when it comes to study grants and child care allowance. In contrast to social assistance, specifically the Danish administration of these two benefits has been under scrutiny and subsequent correction by respectively the Court of Justice of the European Union (CJEU) and the European Commission. The contestation in the local level practices indicate that the local levels strike back. Hence, this paper shows how great expectations in Brussels are dashed by local practices.

Another more general experience was made on the Danish compliance culture as a whole. Danish national practices appear to be in perfect line with EU law. The paper finds, however, that contestation materialises in other forms. While national actors have realised that the concept of worker is administered as strict as EU law allows, a culture of control has emerged. This is identified through a wide range of control measures that have been introduced with the calculated goal of restricting access to social benefits as much as possible. The control measures vary from being intensive and direct placed upon EU individuals to extensive and general control of the area as a whole. This variation shows that control is placed at all possible levels, both national and local; both intensive and extensive; and both on specific EU recipients and on the area as a whole.. In conclusion, we need to take up to revision what Falkner et al. (2005) argued to be a Danish culture of law observance. Instead I argue that Danish administrations at all levels aim at regaining control and practice a culture of ‘*controlled compliance*’. Through such new, less visible forms of contestation, Denmark – and potentially also other sceptical welfare Member States – has found its way to

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## Annex I: Data Collection

The two different parts in this paper is supported by different data.

Part I and II rest upon a triangulation between 1) interviews, 2) official legislation and legislative guidelines and 3) observations submitted to the Court of Justice of the European Union (CJEU).

Studying practice, as is the goal of this paper, can be rather messy. Hands-on reality is never as rigid and simple as the world in the books. Therefore, semi-structured interviews are suitable for grasping all the important dimensions of the complex and highly political topic guiding this paper. This kind of interviews allows access to unique, in-depth knowledge but also often shed light over themes or standpoints otherwise not grasped.

For the Danish case, 10 respondents were interviewed; some in person, some over the phone; some together and some in small groups. The interviews were complemented with semi-structured written ‘interviews’ over email with another 4 respondents. While this in deed is not the ideal in this context it was simply the only possible interview form and all correspondences were rather long, allowing me to ask follow-up questions as you would also do in a normal interview setting. The format of the interview has been adapted to the wish of the respondent in order to make the interviews feasible at all. While some respondents were restricted in time, others offered written responses as a creative solution to circumvent internal rules on not to take interview questions. Due to protection of respondent anonymity, they will from this point only be referred to as R1-10 in random order.

These interviews will be followed by two more municipalities who agreed to participate in the Spring 2017, thus ensuring responses from all five case municipalities.

The official legislation and legislative guidelines have been identified via interviews and collected via official websites, shared by respondents or, in one case, delivered upon my request of access to documents.

Observations submitted to the CJEU by the Danish government are relevant insofar as they concern a ruling by the Court on the access of mobile EU nationals to social benefits in other Member States. This pool of rulings thus adhere under the larger theme of free movement and social security coordination. The identified relevant rulings date back as far as to the *Levin* case from March 1982 (C-53/81). I have chosen to include observations this far back, and thus way beyond the general time frame of this paper, in order to illustrate the development in the governments’ eagerness to submit observations over time.

The observations were identified and collected partly through the Danish EU Information Centre website ([www.eu.dk](http://www.eu.dk)) that contains a database with all observations submitted in the years 2007-2015. Observations made in the years before and after that time span are identified upon assistance from a civil servant in the Danish EU Information Centre and upon manually reading all remaining rulings in order to check whether references are made to potential Danish observations.