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SOCIAL RIGHTS AND EUROPEAN INTEGRATION THEORY: SITUATING CJEU JURISPRUDENCE IN THREE NATIONAL CONTEXTS

DERECHOS SOCIALES Y TEORÍA DE LA INTEGRACIÓN
EUROPEA: UBICANDO LA JURISPRUDENCIA DEL TJUE EN TRES
CONTEXTOS NACIONALES

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ABSTRACT

This article examines the jurisprudence of the Court of Justice of the European Union (CJEU) concerning the social rights of mobile EU citizens from the perspective of European integration theory. Our aim is to situate the effects of EU jurisprudence in 3 Member States – Germany, the Netherlands, and the UK and examine to what extent the selected Member States change their policies on social rights in relation to CJEU jurisprudence. Europeanization through law has been described as one of the most powerful meta-narratives of European integration: the adoption of common laws and standards coupled with the primacy and direct effect of EU law force the Member States to adjust their national policies and legislations in order to comply with EU rules. Europeanization literature has taken a keen interest in legislative acts, and although the importance of CJEU jurisprudence is acknowledged, Europeanization through case law remains a somewhat lesser explored area. The argument put forward in this article is that although EU legislative measures remain an important source of Europeanization of the welfare state, CJEU decisions play an equally important role in clarifying Member State obligations towards economically inactive mobile EU citizens.

KEYWORDS: EU citizens, Court of Justice, social benefits, Dano, Alimanovic, Garcia Nieto.

RESUMEN

Este artículo examina la jurisprudencia del Tribunal de Justicia de la Unión Europea (TJUE), en relación a los derechos sociales de ciudadanos comunitarios que migran dentro de la UE, y lo hacen desde la perspectiva de la teoría de la integración europea. Nuestro objetivo es analizar los efectos de la jurisprudencia comunitaria entre Estados Miembros -Alemania, los Países Bajos, y el Reino Unido- para ver hasta qué punto modifican sus políticas de derechos sociales en base a dicha jurisprudencia. La europeización a través de la ley (europeanisation through law) ha sido descrita como una de las más poderosas meta-narrativas de la integración europea: la adopción de leyes y estándares comunes junto con la primacía y efecto directo del derecho comunitario fuerzan a los Estados Miembros a ajustar sus políticas y legislaciones nacionales para poder cumplir con las normas de la UE. La literatura sobre europeización se ha centrado fundamentalmente en los actos legislativos, pero si bien la importancia de la jurisprudencia del TJUE es bien conocida, la europeización a través del derecho consuetudinario es un área menos explorada. El argumento defendido en este artículo es que las decisiones de la TJUE juegan un papel igualmente importante a la hora de clarificar las obligaciones de los Estados Miembros hacia los ciudadanos de la UE económicamente inactivos.

PALABRAS CLAVE: ciudadanos de la UE, Tribunal de Justicia, beneficios sociales, Dano, Alimanovic, García Nieto.

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V. DISCUSSION AND CONCLUDING REMARKS

I. INTRODUCTION

This article examines the jurisprudence of the Court of Justice of the European Union (CJEU) concerning the social rights of mobile EU citizens from the perspective of European integration theory. Our aim is to situate the effects of EU jurisprudence in three Member States -Germany, the Netherlands, and the UK- and examine to what extent the selected Member States change their policies on social rights in relation to CJEU jurisprudence. Europeanization through law has been described as one of the most powerful meta-narratives of European integration: the adoption of common laws and standards coupled with the primacy and direct effect of EU law force the Member States to adjust their national policies and legislations in order to comply with EU rules. Europeanization literature has taken a keen interest in legislative acts, and although the importance of CJEU jurisprudence is acknowledged, Europeanization through case law remains a somewhat lesser explored area. The argument put forward in this article is that although EU legislative measures remain an important source of Europeanization of the welfare state, CJEU decisions play an equally important role in clarifying Member State obligations towards economically inactive mobile EU citizens.

In the case of social rights and the welfare state more generally, several processes drive Europeanization adoption of EU rules via primary and secondary legislation, direct judicial action (EU citizens claiming a violation of their EU rights) and judicial activism (the interpretation given to rights by the CJEU). Under the current rules of EU citizenship, the link between the exercise of free movement and the performance of economic activities has been loosened to the extent that economically inactive EU citizens are entitled to move and reside in another EU state as long as they are economically self-sufficient and in possession of a comprehensive health insurance in order not to become an unreasonable burden on the host state's social assistance system. CJEU case law has played an important part in giving shape to the rights of economically inactive EU citizens by coupling EU citizenship with the principle of non-discrimination on the basis of nationality (Article 18 TFEU) to enlarge the pool of mobile EU citizens entitled to enjoy equal treatment with the host state's citizens in the area of social rights. These judicial developments are sometimes described as reasons for Member State resistance and discontent with EU citizenship and its model of mobility². In light of the role ascribed to CJEU jurisprudence in furthering the rights of mobile EU citizens, it is important to understand how the Member States respond to it: Do they change their policies and laws to comply with the interpretation given to EU law by the Court of Justice? Do they resist new jurisprudence?

II. JUDICIAL EUROPEANIZATION - SETTING THE FRAMEWORK

At a basic level, Europeanization can be defined as the impact of the EU on its Member States. Europeanization literature claims that EU matters and that the adoption of EU law causes change in domestic arrangements at Member State level. When we speak about Europeanization in the field of social rights and the welfare state, what we have in mind is how EU law impacts upon the national welfare systems in terms of demanding

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

adjustments to deal with EU requirements stemming from legislation and case law. Europeanization through law suggests that the adoption of EU law -which supposes common rules applicable in all the Member States- leads to European integration in this field. Thus, the traditional way to investigate the impact of the EU upon the Member States is by examining how Member States transpose and implement the relevant legal provisions in the field of social rights. Such an analysis can reveal compliance (or lack of) with EU law and is useful in highlighting the extent to which one can speak of domestic change that is linked to the process of European integration. In this vein, there is a growing body of literature that looks at the implementation of European directives and regulations by the Member States in order to explain how European integration takes shape on the ground and the extent to which the debate should be enlarged to cover not only directives and/or regulations, but also Commission decisions, soft law³.

Although (with some exceptions) CJEU case law is not perceived as a traditional avenue for Europeanization⁴, it plays an important role in shaping the interpretation of EU law: CJEU decisions are binding on the Member States as EU law and Member States are obliged to respect them in the same way that they need to respect the legal provisions of a directive or regulation. SCHMIDT has argued that Europeanization literature needs to look beyond compliance and focus also on negative integration (CJEU decisions) and include legal uncertainty into the catalogue of factors that influence how Europeanization occurs on the ground⁵. The temporal implications of Europeanization have been addressed by CHRISTENSEN who points out that policy making is a continuous process involving the enactment of new laws as well as the revision and updating of laws already in force⁶. Case law is one example of how a legal rule can be revised long after its transposition and implementation leading to a possible deepening of integration⁷.

The field of social rights for mobile EU citizens has not been studied extensively by European integration scholars and can be seen as forming a new area of interest for Europeanization literature in general. When examining the impact of EU jurisprudence at the domestic level, BLAUBERGER formulates two opposed expectations in relation to how Member States governments deal with the effects of EU jurisprudence: a strategy of *contained compliance* whereby they use loopholes in ECJ jurisprudence to minimise its effects or a strategy of *anticipatory obedience* whereby they engage in reforms to reduce pressure from interested litigants⁸. The chosen strategy will depend

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

⁴ For exceptions see, Blauburger, M.; 'With Luxembourg in Mind...The Remaking of National Policies in the Face of ECJ Jurisprudence', *Journal of European Public Policy* 19:1, 2012, pp. 109-126; Blauburger, M.; 'National Responses to European Court Jurisprudence', *West European Politics* 37:3, 2014, pp. 457-474.

⁵Schmidt, S. K.; 'Beyond Compliance: The Europeanisation of Member States through Negative Integration and Legal Uncertainty', *Journal of Comparative Policy Analysis: Research and Practice* 10:3, 2008, pp. 299-308.

⁶ Christensen, J. G.; 'EU Legislation and National Regulation: Uncertain Steps towards a European Public Policy', *Public Administration* 88:1, 2010, pp. 3-17.

⁷Idem.

⁸ Blauburger, M.; 'National Responses to European Court Jurisprudence', *West European Politics* 37:3, 2014, p. 471.

upon the distribution of the costs of legal uncertainty among the various actors involved.

In one of the few studies focusing specifically on social rights and the role of judiciary in furthering European integration, WASSERFALLEN argues that *‘the judiciary has direct influence on integration when its considerations and doctrines become incorporated in the policy-making process’*⁹. He cautions that activist judicial decisions are not automatically effective and that ‘contained compliance’ and implementation problems¹⁰ are rather effective in constraining the effects of European judicial activism since EU jurisprudence needs to be translated into national policy if it is to be generally effective – that is, produce effects beyond the individual case it stems from. While during the negotiation of new legislation, EU jurisprudence can act as focus point for policy making and shape the new direction of EU policy making, his study does not explain how the Member States react to EU jurisprudence at the national level. Our study fills a gap as it deals with the domestic impact of ECJ jurisprudence in the field of social rights. Our analysis is aimed at enriching the discussion on Europeanization through law by looking at how CJEU decisions are dealt with by selected Member States and the extent to which we can argue that CJEU jurisprudence has an impact on Member State policies or implementation of EU law.

III. SOCIAL RIGHTS FOR MOBILE EU CITIZENS: CAUGHT BETWEEN COORDINATION AND HARMONIZATION

The social rights of mobile EU citizens can be described as a complex field of law encompassing different pieces of EU legislation with different scopes of application and purposes. On one hand, social security is dealt with in Regulation 883/2004, while social assistance is dealt with in Directive 2004/38 and Regulation 492/2011 (as far as EU workers are concerned). In relation to social security benefits (which can be generally defined as contribution based), the EU does not aim to harmonize the social security systems of the Member States. Rather it limits itself to adopting rules that coordinate national systems. The premise of Regulation 883/2004, which is the main legislative instrument in the field of social security, is to ensure that mobile EU citizens do not lose out on social security entitlements simply because they are exercising their right to freedom of movement. Although the EU does not intervene in national welfare states by setting out what types of benefits a state can/should provide in its legislation, it asks the Member States to open up their national systems towards mobile EU citizens and in certain situations treat them equally to their own citizens. The coordination rules were initially designed for mobile EU workers but in time they were expanded to cover mobile EU citizens as a way of mirroring the expansion of the right to free movement to other categories than workers.

In this article, we focus only on the entitlements of mobile EU citizens to social assistance, thus a very specific issue relating to the Europeanization of domestic welfare systems. Directive 2004/38 lays down the EU rules applicable to mobile EU citizens who claim social assistance in their host state. The Directive makes a distinction between residence up to 3 months, residence from 3 months to 5 years and residence for

⁹Wasserfallen, F.; ‘The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union’, *Journal of European Public Policy* 17:8, 2010, p. 1129.

¹⁰Wasserfallen, 2010, p. 1133

longer than 5 years. Different conditions apply in each of these three categories. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons (such as EU workers or self-employed persons). All EU citizens have the right to enter an EU Member State without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months (Article 6). For residence longer than 3 months, economically inactive EU citizens must have sufficient resources and comprehensive medical insurance. These two conditions do not apply to workers, self-employed, persons who retain worker status based on the Directive or jobseekers. Union citizens who have resided legally and for a continuous period of 5 years in the host Member State have a right of permanent residence there. Union citizens (and their family members) enjoy this right without any further conditions, even if they no longer have sufficient resources or comprehensive sickness insurance cover.

Concerning equal treatment and social rights, the relevant rules are contained in Article 24 of Directive 2004/38. Article 24/1 states that Union citizens who reside on the basis of the Directive (that is, they fulfil the conditions attached to the type of residence right they fall under) enjoy equal treatment with nationals of the host state within the scope of the Treaty. However, a series of exceptions are envisaged: during the first three months of residence EU citizens are not entitled to any social assistance. EU citizens who move in search of employment can be excluded from social assistance for as long as they are looking for a job.

Finally, a host EU state is not obliged to award maintenance aid for studies (student grants and student loans) to EU citizens who have not obtained a right to permanent residence in the host state. EU citizens who are EU workers, self-employed or retain these statuses in line with the provisions of the Directive and their family members are not covered by this exception from equal treatment in respect of maintenance aid. The wording of the Directive in relation to the social rights of economically inactive mobile citizens and jobseekers can be described as lacking clarity and leading to legal uncertainty. On the one hand, the Directive only allows inactive persons to use their free movement rights if they have the necessary resources.

On the other hand, it includes all kinds of signals that when inactive persons apply for a social assistance benefit, they should be able to get such a benefit without having to fear automatic expulsion due to lack of sufficient resources. The Directive fails to offer a clear definition as to when an EU citizen becomes an ‘unreasonable burden’ to the social assistance system of his host state. The national examples we discuss further will show that this lack of clarity has been used by the Member States as an opportunity window to comply with the requirements of EU law while following their own national interest of reducing entitlement to social benefits for EU citizens.

Moreover, the interplay between social security and social assistance has started to be a contested issue in CJEU jurisprudence as shown by several decisions in which the Court of Justice was asked to clarify the interactions between special non-contributory benefits caught by the scope of Regulation 883/2004 and social assistance as regulated by Directive 2004/38¹¹.

¹¹ Case C-333/13 Dano, EU:C:2014:2358; Case C-67/14 Alimanovic, EU:C:2015:597; Case C-299/14 García-Nieto, EU:C:2016:114.

IV. SITUATING CASE LAW: INTERACTIONS BETWEEN CJEU CASE LAW AND THE NATIONAL LEVELS

As mentioned earlier, the traditional way of examining Europeanization would be to look at how the Member States have transposed and implemented the provisions of Directive 2004/38 dealing with the social rights of mobile EU citizens. In this contribution, we take a different route and ask instead what is the role of CJEU jurisprudence in affecting domestic change in the field of social rights and access to social benefits. Methodologically, we have tried to situate a couple of recent CJEU decisions -*Dano*, *Alimanovic*, *Garcia-Nieto*- in 3 national contexts to understand whether CJEU jurisprudence leads to changes in national policy beyond the Member States from which a specific case generates. All cases deal with the entitlement of EU citizens to social benefits in their host state and explore the limits of social solidarity to which mobile EU citizens are entitled to. *Dano*, *Alimanovic* and *Garcia-Nieto* concern German provisions of the Social Code that restrict access to job seeking allowances to EU citizens who move to Germany either to seek employment (the situation in *Alimanovic* and *Garcia-Nieto*) or to seek social benefits (the situation in *Dano*). In all cases, the Court was asked to clarify if such social benefits fall under the notion of social assistance used by Directive 2004/38 and whether EU citizens who were either job-seekers or economically inactive were entitled to such benefits. These judgments are generally described as indicating a shift in the Court's interpretation of EU citizenship provisions towards a restrictive interpretation of the rights of EU citizens. SPAVENTA has described the current trend as '*an apparent retreat from the Court's original vision of citizenship in favour of a minimalist interpretation, which reaffirms the centrality of the national link of belonging, positing the responsibility for the most vulnerable individuals in society firmly with the state of origin*'¹². The exact reasons for the Court's change of heart in relation to the interpretation of the rights of (economically inactive and job seeking) EU citizens remain unclear although several explanations have been put forward ranging from the effects of the economic crisis to the increasing contestation of CJEU jurisprudence in this area of free movement law by a number of sceptic EU governments.

Besides the legal uncertainty contained by Directive 2004/38 in relation to the limits of social solidarity, another factor that plays a role in explaining Europeanization concerns the highly politicized field of welfare rights. The countries selected for discussion in this paper (Germany, Netherlands and the UK) have expressed their desire to limit the rights of economically inactive EU citizens in relation to social benefits. In all three countries, the advantages of EU mobility have been questioned especially in relation to the end of transitional arrangements for the A2 countries (Romania and Bulgaria) in 2014. Fears about welfare tourism/social tourism and poverty migration are a common denominator in all 3 countries as evidenced, among others, by the letter sent by the ministers of interior of Austria, Germany, the Netherlands and the UK to the EU Commission asking for restrictive measures that would help curb the abuse of the right to free movement and protect the national welfare systems that were being 'abused' by EU citizens¹³.

¹²Spaventa, E.; 'Earned citizenship – understanding Union citizenship through its scope', in D. Kochenov (ed.) *EU Citizenship and Federalism: the Role of Rights*, Cambridge, forthcoming 2017.

¹³ Mantu, S. and Minderhoud, P.; "Exploring the limits of social solidarity: welfare tourism and EU citizenship". UNIO - EU Law Journal, n°1/2016.

There are also differences between the countries. Germany stands out since the decisions we discuss concern the same German social benefit suggesting a high degree of contestation and mismatch between the national and EU rules applicable to mobile EU citizens claiming that specific benefit. The UK system has been challenged but found to be in compliance with EU law. The Dutch implementation of the rules concerning social assistance for mobile EU citizens has not been challenged before the CJEU, which makes the Netherlands a good case to observe the effects of CJEU decisions in the absence of direct need to amend national measures to comply with CJEU case law.

A. GERMANY

The German social assistance system consists of two basic social benefits. The SGB II (Social Code Book 2), which regulates the contested benefit in the *Dano*, *Alimanovic* and *Garcia-Nieto* cases, provides for a basic social benefit for job-seekers who have no rights to the usual unemployment benefit scheme (*Grundsicherung für Arbeitsuchende*). Additionally, the SGB XII (Social Code Book 12) provides a basic social benefit for unemployed people who are not capable of work (*Sozialhilfe*). Section 21 of SGB XII however, states that nobody should be entitled to *Sozialhilfe* if they are in principle entitled to the *Grundsicherung für Arbeitsuchende*. Articles 1 and 20 of the German Basic Law uphold the right to a minimum level of dignified existence for every person legally residing in Germany. German authorities used the transposition of Directive 2004/38 and of Article 24(2) to limit the access of jobseekers to job seeking allowances. The Social Code II was changed to the extent that all foreigners, including EU citizens whose right of residence derives exclusively from the purpose of looking for employment, are not entitled to jobseeker allowances (*Arbeitslosengeld II*: jobseekers' allowances). This approach is in accordance with Article 24 of Directive 2004/38 but departs from the previous rules where ordinary residence in Germany gave rise to an entitlement to social rights. The drafting history of the amendment shows that the legislator wanted deliberately to exclude foreigners entering Germany for the purpose of seeking employment from accessing social benefits.

This change of legislation generated a fair amount of divergent national jurisprudence culminating in several CJEU references. The first of these references dates back to 2008. In the *Vatsouras* case, the Court of Justice was asked by the Nürnberg social court to clarify whether EU jobseekers are entitled to social benefits¹⁴. The German court was of the opinion that EU jobseekers are not entitled to any social assistance benefits based on the national legislation. However, they had doubts as to the nature of the job seeking allowance: social assistance or special non-contributory benefit. In the latter option, according to Regulation 883/2011 an EU citizen habitually resident in Germany was entitled to such an allowance. Moreover, the national court was concerned about the compatibility of Article 24/2 of Directive 2004/38 with Article 18 TFEU (the principle of non-discrimination on the basis of nationality) and the proper construction of the relationship between primary (Treaty) and secondary law (the Directive). The Court of Justice found that in view of the establishment of EU citizenship, jobseekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market. A Member State may, however, legitimately grant such an allowance only to job seekers that have a real link with the

¹⁴ Case C-22/08 *Vatsouras and Kouptantze*, EU:C:2009:344.

labour market of that State. This is the case where, for example, the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. It is for the competent national authorities and, where appropriate, the national courts to establish the existence of a real link with the labour market, and to assess the constituent elements of the benefit in question. The objective of that benefit must be analysed according to its results and not according to its formal structure. The ECJ points out that a condition such as that provided for in Germany for basic benefits in favour of job-seekers, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment. Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

In a decision from 19 October 2010, the Bundessozialgericht (the highest Court in social security cases in Germany) used a combination of EU law and the European Convention on Social and Medical Assistance (ECSMA) to find that EU jobseekers were entitled to equal treatment with national citizens when it came to job seeking allowances.¹⁵ The EU citizen in question was a jobseeker who had a right to reside based on Article 14(4)(b) of Directive 2004/38 and who was refused the Social Code II jobseekers allowance. ECSMA was concluded in 1953 under the auspices of the Council of Europe and provides that nationals of the contracting parties¹⁶ who are lawfully resident in a host state are entitled to equal treatment with own nationals in respect of social and medical assistance. Article 2 defines '*assistance*' as '*all assistance granted under the laws and regulations in force [...] under which persons without sufficient resources are granted means of subsistence and the care necessitated by their condition, other than non-contributory pensions and benefits paid in respect of war injuries due to foreign occupation*'. The German Court ruled that although the personal scope of the Social Code II jobseekers allowance is different from the personal scope of the German social assistance benefit (*Sozialhilfe*), both have the character of a general social assistance law (*Fürsorgegesetz*), and therefore both fall under the definition of Article 2 of the Convention. This position contradicts the view of the Court of Justice in the *Vatsouras* case, where the ECJ suggested that the Social Code II jobseekers allowance was not a social assistance benefit in the sense of Directive 2004/38. As a result of this jurisprudence, on 19 December 2011, the German government introduced a reservation to the ECSMA to the extent that the Convention is no longer applicable to section 7 of the Social Code II (SGB II), thus blocking the application of the convention to job seeking benefits¹⁷.

After the ECSMA route to claiming jobseekers allowances was closed, the issue surfaced again in relation to Directive 2004/38. Despite the *Vatsouras* decision, the German federal authorities have argued that the exclusion clause under Section 7(1) of the Social Code II continues to be applicable with respect to foreigners who are staying in Germany exclusively for the purpose of seeking employment since the social benefits

¹⁵ B 14 AS 23/10 R

¹⁶ Contracting parties to the ECSMA include: Belgium, Denmark, Estonia, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the UK. Turkey is also a party but Turkish nationals cannot reside as jobseekers on the basis of EU law.

¹⁷ <http://conventions.coe.int/Treaty/EN/Treaties/Html/014.htm>.

under this clause can be attributed to social assistance in the sense of Article 24(2) of the Directive 2004/38. Eventually this led to the *Dano*, *Alimanovic* and *Garcia-Nieto* references for further clarification on the interpretation of EU law suggesting that national courts were not (always) in agreement with the manner in which German authorities interpreted the provisions of Directive 2004/38. In the *Dano*, *Alimanovic* and *Garcia-Nieto* cases, the Court of Justice has reversed its jurisprudence by finding that the job seeking allowance in question can be seen as social assistance under Directive 2004/38, even if it remains a SNCB under Regulation 883/2011. As a result of the widening of the definition of ‘social assistance’ in Directive 2004/38, EU jobseekers (*Alimanovic* and *Garcia-Nieto*) can be refused this benefit in line with Article 24(2) of Directive 2004/38. Economically inactive EU citizens (*Dano*) claiming this benefit, now redefined as social assistance, can access social assistance in as much as they reside legally in Germany in line with the requirements of Article 7 of Directive 2004/38. However, a call on social assistance is indicative of not having sufficient resources, and thus not residing legally, thus justifying the refusal of social assistance.

Partly as a follow up to the *Alimanovic* judgment, the German Federal Social Court (Bundessozialgericht) made rulings in three cases on 3 December 2015 on the entitlement of EU citizens to social assistance benefits¹⁸. It ruled that EU citizens who reside legally for longer than 6 months in Germany have a right to a minimum level of dignified existence in line with the German Constitution and are therefore entitled to *Sozialhilfe*. Only in the case of residence shorter than 6 months, the implementation agency (*Sozialamt*) enjoyed discretion in deciding whether to award *Sozialhilfe*. In the case of Ms Alimanovic, the Bundessozialgericht followed the reasoning of the CJEU that the applicant had no right to a SGB II benefit, but suggested that she may nevertheless have a right to reside in Germany linked to her children’s status as children of a former worker who are pursuing education in Germany. According to Article 10 of Regulation 492/2011, the children of former workers have the right to pursue education in the state of (former) employment of their parents. CJEU jurisprudence shows that this right includes the right of the primary carer of the child to be present in that state with the child¹⁹. In such a situation, Ms Alimanovic would be entitled to a SGB XII benefit, since her residence in Germany relates not only to seeking employment, but also to her children’s education.

This line of jurisprudence is controversial²⁰ and contested by lower courts²¹. The German government has announced its intention to change the relevant legislation in

¹⁸German Supreme Social Court (Bundessozialgericht), Decision of 3 December 2015, B 4 AS 44/15 R, paras 36 ff; cf also Decisions of 20 January 2016, B 14 AS 15/15 R and B 14 AS 35/15 R, Press Release no 1/16 of the German Supreme Social Court referring to social assistance for jobseekers

¹⁹ Case C-480/08 Teixeira EU:C:2010:83.

²⁰Kanalan, I.; ‘Das Menschenrecht auf das Existenzminimum ernst genommen – Sozialleistungsansprüche von Unionsbürger_innen’. Verfassungsblog of 1 March 2016, available at <http://verfassungsblog.de/das-menschenrecht-auf-das-existenzminimum-ernst-genommen-sozialleistungsansprueche-von-unionsbuerger-innen/>, 5 March 2016; Wilksch, F.; ‘Das BSG und die Existenzsicherung arbeitssuchender und wirtschaftlich inaktiver Unionsbürger*innen’ Juwiss-Blog, available at <https://www.juwiss.de/89-2015/> and <https://www.juwiss.de/90-2015/>, 5 March 2016.

²¹Social Court of Second Instance Rheinland-Pfalz (Landessozialgericht Rheinland-Pfalz), Decision of 11 February 2016, L 3 AS 668/15 B ER, para. 22 ff.; Social Court of First Instance Dortmund (Sozialgericht Dortmund), Decision of 11 February 2016, S 35 AS 5396/15 ER, para. 23 ff.; Social Court of First Instance Berlin (Sozialgericht Berlin), Decision of 11 December 2015, S 149 AS 7191/13, para. 26 ff. LSG Niedersachsen-Bremen, 17.03.2016 - L 9 AS 1580/15 B ER.

order to exclude every inactive EU citizen from social benefits²². In April 2016, it published a proposal to exclude EU jobseekers, but also EU citizens who derive a right of residence as primary carer on the basis of Article 10 Regulation 492/2011 from social assistance for the first five years of their stay in Germany. During the first two years of residence, EU citizens without the right to a social assistance benefit can get a once-only transitional allowance of four weeks to help them leave the country²³.

B. THE NETHERLANDS

The Dutch case is another example of a Member State using the transposition of Directive 2004/38 to introduce clauses in social law explicitly excluding EU nationals and their family members from entitlement to public assistance during the first three months of residence in that state. Under the previous legislation, EU citizens were formally entitled to social assistance from the moment they entered The Netherlands. However, a request for social assistance would lead immediately to a termination of their residence status, and consequently to a loss of social assistance entitlement. While transposing Directive 2004/38, the Dutch government changed the Social Assistance Act by introducing a habitual residence requirement for all applicants to social assistance. The result was that EU citizens were excluded from social assistance for the first 3 months of their residence in the Netherlands. To ensure compliance with the EU principle of non-discrimination and uncertain what the Court of Justice would rule on the compatibility of such a ban with EU law, the same habitual residence test is applicable to Dutch citizens asking for social assistance. However, during the adoption of the law this issue was challenged in relation to the position of Dutch citizens who return from abroad and ask for social assistance. Under the new rules, returning Dutch citizens cannot be seen as satisfying the condition of habitual residence from the moment they enter the Netherlands. Yet, Article 20(3) of the Dutch Constitution entitles every Dutch citizen to social assistance, habitual resident or not. The law was approved only after the State Secretary of Social Affairs assured the First Chamber that this change of legislation did not mean that there was a waiting period of three months for Dutch citizens, who came from abroad to The Netherlands²⁴.

The transposition of Directive 2004/38 is supplemented by the Aliens Act Implementation Guidelines (Vc B 10/2.3). The Guidelines introduced a sliding scale to establish when a demand on public funds - consisting of an application for social assistance in accordance with the Work and Social Assistance Act (WWB) or for social services in the form of accommodation under the Social Support Act (Wmo) - results in the termination of the EU citizen's lawful residence by the immigration authorities (IND). Each application for social assistance during the first two years of residence is in any case considered unreasonable and will, in principle, result in termination of residence. In this scenario, the IND will assess the appropriateness while considering the following circumstances of each case: the reason for the inability to make a living,

²²See <http://www.stuttgarter-zeitung.de/inhalt.sozialleistungen-fuer-eu-auslaender-merkel-auf-camerons-linie.2e15407b-e011-4a70-b051-dfc4087de4d1.html>

²³<http://www.harald-thome.de/media/files/Referentenentwurf-Ausl-ndische-Personen-im-SGB-II-und-SGB-XII.pdf>

²⁴Minderhoud, P.; 'De mythe van de vrije toegang tot voorzieningen voor migranten', in Brugmans, E., Minderhoud, P. & van Vugt, J. (eds.). *Mythen en misverstanden over migratie*, Annalen van het Thijmgenootschap 95: 1, Valkhof Pers, Nijmegen, 2007, p. 178-204.

its temporary or permanent nature, ties with the country of origin, family situation, medical situation, age, other applications for (social) services, the extent of previously paid social security contributions, the level of integration and the expectation for future social assistance needs. With this sliding scale the IND has implemented the ambiguous nature of Directive 2004/38, balancing between the condition of sufficient resources and the possibility of access to social assistance as long as this does not become an unreasonable burden on the social assistance system of the host Member State.

In the Dutch case, the European Convention on Social and Medical Assistance was part of the Government's considerations when amending the rights of EU citizens with the occasion of the implementation of the Citizens' Directive. In 2006, while implementing Article 24(2) of Directive 2004/38, the Dutch government was aware of the problems the combination with the ECSMA could give. Therefore, it stipulated that the Netherlands only accepted the equal treatment obligation of the Convention towards EU citizens as far as this coincides with the corresponding obligation derived from EU legislation. The government wanted to avoid that EU citizens would try to use the equal treatment clause of the ECSMA as an escape²⁵.

There is not much case law on this subject in the Netherlands. This might indicate that there are not many inactive EU citizens (staying less than 5 years in the Netherlands), who ask for a social assistance benefit or that the IND does not withdraw often the right of residence of these citizens²⁶. In an unpublished court case, the IND relied on the *Dano* reasoning regarding an inactive EU citizen, who had never searched for work and asked for a social assistance benefit²⁷. According to the IND, it was the policy to consider such an EU citizen immediately as an unreasonable burden to the Dutch public funds, *'even if there was only an appeal of one day'*. This policy, however, seems contradictory to the written published guidelines, described above (Vc B 10/2.3). In another recent court case, the judge approved the decision of the IND to withdraw a right of residence of a French woman on the basis of lack of sufficient resources²⁸. Although she did not have a social assistance benefit herself, she was considered to live indirectly on the social assistance benefit of her husband.

In July 2014, VVD Member of Parliament Azmani submitted a private members' bill, which aims to ensure that in all cases the decision on an application for social assistance by both Union citizens as well as third country nationals is suspended until the IND has provided an opinion on the consequences for the lawfulness of the residence²⁹. This Bill is still pending in Parliament but it would bring the Dutch law closer to the Court's

²⁵ See Eleveld, A.; 'Het recht op een bijstandsuitkering voor economisch niet-actieve EU-burgers na Alimanovic', NTER 10, 2015, p. 317.

²⁶ The only available figures are from 2012, stating that in the first nine months 70 EU citizens were expelled because of an appeal to a social assistance benefit. It concerned Greek, Italian, Romanian and Czech citizens. See, Bonjour, S. et alii (eds) *Open grenzen, nieuwe uitdagingen*, Amsterdam University Press, 2015, p. 117-118

²⁷ District Court The Hague 1 September 2015, case number AWB 15/4877

²⁸ District Court The Hague 30 March 2016 ECLI:RBDHA:2016:4917

²⁹ *Wet toetsrecht hebbenden bijstand* (Act on the assessment of persons entitled to social assistance) (Parliamentary Documents 33984). We think that such prior systematic assessment could be problematic for Union citizens. The procedure where social assistance is granted first and subsequently withdrawn again if it becomes apparent that the right of residence ends is in our view generally more consistent with the basic principles of Directive No. 2004/38/EC. Moreover, the mandatory reporting system proposed by the Minister is already provided for in paragraph 7 of Art.107 of the Aliens Act 2000

recent case law that links a request for social assistance to the lawfulness of one's residence under EU law.

C. UNITED KINGDOM

As a general trend, in the past 2 decades or so, the UK welfare system has been changed to limit the entitlement of migrants to various benefits in a bid to reflect the attempts of various UK governments to limit immigration. Policy changes in this area of law are based on the assumption that the UK welfare system acts as a magnet for migrants (EU or otherwise), thus limiting the extent to which migrants can access various benefits is expected to discourage migration in general. According to Harris³⁰, there are 3 distinct phases of policy changes: a) the introduction of the habitual residence test in 1994; b) the introduction of a right to reside test after the 2004 EU enlargement, and c) the introduction of further restriction by the coalition government of 2010-2015 which are continued under the current Conservative government. Policy changes are seen as prompted by EU developments, such as the adoption of the Citizens Directive, the EU enlargements and certain CJEU decisions.

Introduced in 2004, the right to reside test asks EU citizens to show that they reside lawfully in the UK in order to be able to claim benefits, while no such requirements apply to UK nationals. Proof of having a right to reside requires EU workers to show that they earn more than 153 pounds per week (in 2014/2015) in order to meet the conditions of the definition of EU worker; earnings below this threshold will lead to a questioning of that persons' status as EU worker. The position of economically inactive EU citizens is further complicated by evidence that once they claim social assistance they are treated as not meeting the threshold of Article 7 of Directive 2004/38 that requires them to have sufficient resources not to become an unreasonable burden on the social assistance system of the host state³¹. Asking for a social benefit is treated as indication that the person does not reside lawfully, and is not entitled to social benefits on the basis of EU law. The effects of the right to reside test on EU citizens claiming Child Benefit and Child Tax Credit (which are social security benefits) have been challenged by the European Commission before the Court³². The Commission's claim was rejected on grounds that the right to reside test is justified under EU law, even if it introduces discrimination on the basis of nationality in the welfare system. The Court of Justice relied on its *Dano* decision to find that this discrimination is justified by the aim of preventing the abuse of the host State's welfare system. It should be pointed out that the UK has been interpreting EU law in this fashion prior to the *Dano* decision as such and that the media coverage of the decision in the UK presented the *Dano* decision as validating UK's interpretation of the Citizens Directive³³.

³⁰ Harris, N.; 'Demagnetization of social security and healthcare for migrants in the UK', in *European Journal of Social Security*, 2016, pp. 130-163.

³¹ O'Brien, C.; 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants'. *Journal of Social Welfare and Family Law* 37:1, 2015, pp. 111-136; McKechnie, K.; 'Benefits for EEA nationals March 2015. EWS briefing, Child Poverty Action Group in Scotland', 2015,

[http://www.cpag.org.uk/sites/default/files/EWS%20briefing%20EU%20migrants%20\(May%202015\).pdf](http://www.cpag.org.uk/sites/default/files/EWS%20briefing%20EU%20migrants%20(May%202015).pdf)

³² Case C-308/14, *Commission v. UK*, EU:C:2016:436.

³³ BBC News, EU 'benefit tourism' court ruling is common sense, says Cameron, 11 November 2014, <http://www.bbc.com/news/uk-politics-30002138>; Child Poverty Action Group. *Right to reside: Breytastic!*. Issue 236. October 2013, <http://www.cpag.org.uk/content/right-reside-breytastic>.

The UK coalition government (2010-2015) announced the overhaul of the benefits system and the introduction of a universal benefit called “Universal Credit” (UC) which is designed for people on a low income and people out of work. These changes are meant to reflect a new attitude towards work and welfare that 'will make work pay' and end the 'culture of entitlement' that is seen as one of the main issues affecting the welfare system. These changes will affect EU citizens exercising free movement rights in the UK; moreover, some measures target migrants in particular. Universal Credit (UC) is currently being implemented in phases throughout the UK and is expected to be fully operational by 2021 (initially, the date was set for 2017). UC replaces the following income-based benefits: Jobseeker's Allowance; Employment and Support Allowance; Housing Benefit; Income Support; Child Tax Credit and Working Tax Credit. The legal position of UC in relation to EU law is somewhat unclear - the UK government has argued that UC will not be covered by the scope of Regulation 883/2004 (it is neither social security nor SNCBs), whereas some parties (e.g., the AIRE Centre) argue that UC falls under the definition of SNCBs and therefore is covered by the Regulation³⁴. By exclusion, the position of the UK government seems to be that UC constitutes 'social assistance' and for EU citizens claiming UC, Article 24 of Directive 2004/38 will be relevant. This is explained by the definition given to UC as a 'new system of means-tested support for working-age households who are in or out of work'³⁵.

Child Tax Credit -one of the benefits replaced by UC- is however considered to be a social security benefit. If after the CJEU decision in the *Dano* case, the difference between SNCBs and social assistance in the context of Directive 2004/38 is no longer relevant since SNCBs are treated as social assistance, the difference between social assistance and social security remains relevant as EU citizens habitually resident in a host MS are entitled to social security based on Regulation 883/2004. However, the ECJ decision in *Commission v UK* (C-308/14) makes it possible for the UK to link the habitual residence test to the right to reside test and limit entitlement to social security benefits that according to Regulation 883/2004 are to be paid by the state of habitual residence. Consequently, it seems that only lawfully resident EU citizens are entitled to such benefits.

In 2015, new regulations were adopted aiming at preventing EU jobseekers from entitlement to UC³⁶. The new provisions state that an EU citizen who's only right to reside is based on job seeking cannot satisfy the habitual residence test and therefore cannot qualify for UC. If these new provisions seem to align UK legislation with that of Germany and the Netherlands, some of the proposals that circulated prior to the Brexit referendum go beyond the exclusion of EU jobseekers from social benefits. Prior to the referendum, the UK government demanded the possibility to end the exportation of child benefits for EU workers whose children reside outside of the UK (the issue is

³⁴ For a comprehensive discussion on special non-contributory benefits see AIRE Centre, Welfare Benefits for Marginalised EU Migrants: Special Non-Contributory Benefits in the UK, the Republic of Ireland & the Netherlands, http://www.airecentre.org/data/files/AIRE_ECSS_FINAL_REPORT.pdf SNCBs lie at the intersection of social security benefits and social assistance, providing vulnerable and low-income individuals who face social security risks, and the disabled, a minimum subsistence income, without a condition of contribution by the beneficiary.

³⁵ Department for Work and Pensions. Universal Credit at Work. 2014, p. 19, www.gov.uk/dwp

³⁶ Kennedy, S.; *People from abroad: what benefits can they claim?*, House of Commons Library, Briefing Paper 06847, 17 June 2015

regulated by Regulation 883/2004). Equally, it wanted to introduce a 4-year waiting period for paying in-work and housing benefits to EU workers. Another proposal concerned the introduction of an emergency mechanism to be activated in case of an increase in the number of EU citizens claiming benefits that would threaten the UK welfare system. While some of these issues seem redundant in light of the result of the Brexit referendum, the Commission in its proposal amending regulation 883/2004 has rejected the idea of limiting the exportation of child benefits for EU workers³⁷. The other proposals may be revived in the future.

Although UK authorities have introduced changes to the policy on social benefits, UK courts have not been keen on referring questions for clarification to the ECJ. Based on a number of complaints received from EU citizens who were prevented from accessing social benefits due to the right to reside test, the European Commission took the issue up, eventually leading to the *Commission v. UK* case before the Court of Justice. The Supreme Court decision in *Mirga and Samin* shows that CJEU jurisprudence was used to justify the compatibility of UK's legislation with the TFEU and the Citizens' Directive³⁸. The Supreme Court relied on *Dano* and *Alimanovic* to stress that the aim of Directive 2004/38 is to prevent abuse of the host state's welfare system by becoming an unreasonable burden. This in turn justifies the existing UK legislation and presents it as compatible with EU law. Since none of the appellants met the conditions of the right to reside test set out in the national implementing measures, they could be denied social assistance.

V. DISCUSSION AND CONCLUDING REMARKS

CJEU decisions have a role to play in understanding the process of Europeanization. First and foremost, they enable us to examine Europeanization as a long-term and dynamic process that stretches beyond transposition and implementation. The case law discussed here has emerged relatively long after the end of the transposition period of Directive 2004/38 (in 2006).

In this context, the transposition of the Citizens Directive was used by several Member States to restrict the access of certain categories of mobile EU citizens to social assistance and job seeking allowances. This can be described as an example of Europeanization as a 'two-way-process' where the Member States do not passively adapt to EU law, but rather use the integration process to pursue national interests³⁹. However, because the applicable EU rules and, in some cases the interaction between different rules (found in different legal instruments) leads to friction, the Court of Justice is asked to mediate by interpreting EU rules and deciding on the compatibility of national measure transposing those rules with EU law. Legal uncertainty is part of the policy cycle and something that is not entirely eradicated even when ECJ jurisprudence

³⁷ 'Fairness at the heart of Commission's proposal to update EU rules on social security coordination', IP/16/4301, http://europa.eu/rapid/press-release_IP-16-4301_en.htm

³⁸ *Mirga v Secretary of State for Work and Pensions; Samin v Westminster City Council* [2016] UKSC 1

³⁹ Radaelli, C. M.; 'The europeanization of public policy', in K. Featherstone and C. M. Radaelli (eds) *The Politics of Europeanization*, Oxford. Oxford University Press, 2003, pp. 27-56; Radaelli, C. M.; 'Europeanization: Solution or problem?', *European Integration Online Papers* 8:4, 2004, pp. 1-23; Börzel, T.; 'Towards convergence in Europe? Institutional adaptation to Europeanization in Germany and Spain', *Journal of Common Market Studies* 39:4, 1999, pp. 573-596; Börzel, T.; 'Member state responses to Europeanization', *Journal of Common Market Studies* 40:2, 2002, pp. 193-214.

is integrated into legislation. Our national case studies uphold Schmidt's theory that legal uncertainty - in our case stemming from the lack of clarity of Directive 2004/38 in relation to claims for social assistance by economically inactive EU citizens - creates opportunity structures for the Member States. The Member States use CJEU case law intended to end legal uncertainty as an opportunity structure in itself to claim legitimacy for their national policies. The UK case shows that the authorities and the courts relied on CJEU decisions to legitimize the national policy in relation to social rights that was at that moment challenged by the EU Commission as breaching EU law. SHAW has proposed a typology of strategies used by Member States to deal with EU law when they want to contest it: use resources internal to EU law; use resources external to EU law; or attempt to change EU law.⁴⁰ Her analysis draws on cases where the Member States are unhappy with the depth of European integration and would rather be able to rely on national policies or repatriate powers from the EU. The case studies discussed here look at situations where Member States are in favour of the interpretation given to EU law by the Court; they show that in such situations Member States are inclined to follow CJEU jurisprudence and rely on it to justify national implementation measures. The Member States appear as opportunistic users of EU law.

Domestic constellations and the national political context prove to be important elements in understanding how Europeanization actually takes place⁴¹ Judicial Europeanization allows us to focus on a set of actors whose role in Europeanization has not received too much attention. To this end, national courts can be described as agents of Europeanization as the German case illustrates but also as gatekeepers, which seems to be the default position taken by UK courts. They play a vital role in activating the CJEU and their positioning in relation to the national and European level deserves a better understanding. The UK courts have been reluctant to refer questions on the compatibility of the changes introduced since 2004 to limit access to benefits for EU migrants with EU law. This approach sits in stark contrast with the German situation where lower courts have opted for repeat referrals to the CJEU on similar issues. In our view, there is a more or less open conflict between the interpretation given by the German authorities to the rights of economically inactive EU citizens and the German courts. In the Netherlands, the issue seems less poignant but there is no clear explanation for this (except maybe drawing on the more flexible implementation of Article 24 of Directive 2004/38).

National jurisprudence shows that the national courts are aware of EU jurisprudence as they relied upon it to justify the compatibility of national legislation with EU law. This is shown in the UK and Dutch case studies where national courts have not referred questions for clarification although in the both Member States some issues regarding the transposition of Directive 2004/38 are legally questionable. The German case study illustrates the power of national courts to signal the failure to transpose EU law correctly but also the failure to implement EU jurisprudence. However, the German case illustrates very well the need to understand national context and constellations of actors that are involved in Europeanization. The German courts were blocked by the German

⁴⁰Shaw, J.; 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law', *Cambridge Yearbook of European Legal Studies*, 2015, pp. 247-286.

⁴¹ Thomann, E.; 'Customizing Europe: transposition as bottom-up implementation', *Journal of European Public Policy* 22:10, 2015, pp. 1368-1387.

executive that proposed and passed laws that reversed the national jurisprudence on social rights.

Further avenues for research could focus on how judicial Europeanization occurs in highly politicized national contexts. FALKNER, HARTLAPP and TREIB have proposed an alternative approach to explaining the implementation of EU law that focuses on national cultures of appraising and processing adaptation requirements. This led them to the theory of 'worlds of compliance' as a way of filtering the factors that are relevant in different Member States and their influence in assuring compliance with EU law.⁴² Germany, the Netherlands and the UK are all included in the same ideal type labelled 'the world of domestic politics'⁴³ in which the following factors are described as relevant for explaining domestic responses to European pressure: veto players, party political preferences, changes of government and interest group pressure⁴⁴. Our analysis shows that national courts can to a certain extent exercise veto power over executive interests (as in Germany). In the UK, national courts seem to be aligned with the executive, whereas in the Netherlands national courts seem to follow the CJEU directly as opposed to waiting for the executive to implement CJEU decisions.

Our analysis seems to confirm that CJEU decisions will have an impact primarily on the Member State from which they originate. However, when faced with jurisprudence that aligns with their own interests, the Member States will rely on CJEU jurisprudence. This leads us to argue that the member states are opportunistic users of EU jurisprudence. Moreover, although EU law does not oblige the Member States to restrict access to social assistance (they remain free to enact more favourable provisions) CJEU decisions are used by the Member States we studied as a source of legitimacy for restrictive policies. This is the case for Germany and the UK, whereas the Netherlands is in a more ambiguous position. This observation fits well with the description of Europeanization as a two-way process.

One aspect that is not dealt with expressly by Europeanization theories relates to the role of pressure exercised by non-EU forces. In Germany, the Constitution and the European Convention on Social and Medical Assistance (ECMSA) can be seen as sources of contestation for a restrictive interpretation of EU law. Thus, domestic responses to Europeanization can be influenced by sources outside EU law, although their relevance may be limited to a specific Member State. It would be interesting to examine why ECMSA plays no role in the UK, although it is party to it. In the Netherlands, ECMSA's role was circumvented by the Dutch executive similar to the German situation. The Dutch Constitution was seen as a source of protection but only for Dutch citizens. The role of such sources in shaping national responses to EU law is worth exploring in more depth.

⁴²Falkner, G., M. Hartlapp & O. Treib, 'Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories', *European Journal of Political Research* 46, 2007, pp. 395-416.

⁴³Idem, p. 405.

⁴⁴Idem, p. 409.