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Responding to Free Movement: Quarantining Mobile Union Citizens in European Welfare States

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Abstract

It is often held that free movement within the European Union and the expansion of social rights of mobile citizens by the European Court of Justice place national welfare states under pressure, potentially leading to welfare retrenchment. Yet thorough empirical investigation of this claim has been surprisingly limited. In this article, we distinguish three possible responses to such pressures: ‘embedding’, the inclusion of Union citizens in the welfare system; ‘quarantining’, restrictive measures excluding mobile Union citizens; and ‘retrenchment’, general cutbacks in benefit programmes. Through a longitudinal comparative case study of generous non-contributory welfare benefits in Denmark and the Netherlands, we find general welfare retrenchment in response to Europeanisation strikingly limited. Instead, welfare states remain resilient by creatively quarantining mobile Union citizens from the coverage of social benefits. Legal cultures and degrees of politicisation are important factors, shaping the pathways towards these creative but exclusionary responses.

Keywords

Europeanisation; Free movement; Quarantining; Retrenchment; Resilience; Welfare state.

Introduction

European welfare states are claimed in both academic and media reporting to be threatened by increasing intra-EU mobility and expanded social rights for Union citizens. While some point at the positive effects of ‘embedding’ mobile Union citizens in national welfare states (Caporaso and Tarrow 2009), others argue that unlimited access of mobile Union citizens to national welfare benefits could also challenge collective solidarity bonds and ultimately result in downward pressures on the generosity of European welfare states (Scharpf 2008; Höpner and Schäfer 2012). Whereas legal scholarship has raised such expectations in response to the activist line of case law by the European Court of Justice (Menéndez 2009; Ashiagbor 2013), political science scholarship has addressed these dynamics at a theoretical level (Bellamy 2009; Caporaso and Tarrow 2009; Höpner and Schäfer 2012; Scharpf 2008). Given this fear for the undermining of collective solidarity and retrenchment of generous welfare states, surprisingly little systematic empirical research has been devoted to this theme.

This article investigates how resilient European welfare states actually have been when responding to pressures generated by European free movement and subsequent cross-border social protection. Resilience is understood as the maintenance of welfare programmes both concerning the conditions for coverage, i.e. eligibility, and the size of the benefit, i.e. generosity (Pierson 1994). To fully grasp welfare state responses to Europeanisation pressures, we go beyond the simple distinction between resilience and retrenchment common in the welfare state literature (Starke 2006). Instead, we distinguish ‘embedding’ and ‘quarantining’ as two forms of resilience. While embedding refers to the social inclusion of mobile Union citizens into the welfare state, quarantining refers to the opposite, namely excluding mobile Union citizens from benefit entitlements. In both instances, the welfare state is maintained for national citizens and

benefits are not subject to general retrenchment, yet the social consequences for mobile citizens – and the meaning of Social Europe in general - are substantially distinct. Our objective is twofold: first, to map these various responses in two generous European welfare states over time and, second, to understand why different options have been chosen.

In a comparative case study design we compare two non-contributory social benefits, social assistance and study grants, in two generous European welfare states, the Netherlands and Denmark. We investigate to what extent these benefits have been resilient in the face of Europeanisation pressures and how distinct national political and institutional conditions have contributed to different responses (Treib 2014; Martinsen and Vollaard, 2014). We go beyond formal national policy change, which cannot capture the full range of welfare state responses to EU free movement (Versluis 2007; Blauburger and Schmidt 2017), and also include the practical implementation of EU law in our analysis.

Hereafter we set out a framework for understanding and explaining the impact of European free movement rights on the welfare state, followed by a description of our research design. Subsequently we map policy responses in the Netherlands and Denmark and assess potential explanations. The conclusion reflects on the implications of the comparative case study results.

Analytical Framework: Understanding and Explaining Policy Responses

Until recently, the European Court of Justice (ECJ) has incrementally expanded social rights awarded to a growing group of Union citizens, thereby opening up national welfare states for migrants' access (see Schmidt et al. 2018; Martinsen and Werner 2018). Whereas EU law has historically granted extensive equal treatment rights to workers who move to other Member

States (current article 45 TFEU), after the Treaty of Maastricht, the ECJ has gradually extended the principle of equal treatment and access to for example social assistance benefits to previously excluded Union citizens (Wollenschläger 2011: 20). With respect to Union citizens studying in other Member States ('EU students'), the Court has similarly moved from granting workers and their family members a right to study grants, to granting non-working Union citizens benefits intended for access to education and finally to access on the basis of long-term residency (Schenk and Schmidt 2018).

Only recently, arguably with the *Dano* judgment in 2014 (C-333/13) and later *Alimanovic* (C-67/14) and *García-Nieto and Others* (C-299/14), the Court broke with this expansionary line of case law and ruled in favour of Member States who used the limitations and conditions attached to free movement and residence to justify the exclusion of Union citizens from social benefits (Blauberger et al. 2018). Meanwhile, high consensus hurdles for political legislation and conflicts of interests among extremely heterogeneous Member States have generally made it difficult to politically 'correct' the expansive case law of the ECJ at the European policy level (Scharpf 2008) especially since the EU enlargements of 2004 and 2007 (Scharpf 2010: 223). Therefore, Member States fearing adverse consequences for their welfare systems have generally been left with one option, namely to respond at the domestic level.

Some scholars have argued that the cited line of ECJ jurisprudence allows for a Polanyian 'countermovement' against free European markets, 're-embedding' them in new social and political arrangements. Mobile Union citizens' free movement rights would be 'increasingly infused with social content' (Caporaso and Tarrow 2009: 610; see also Conant 2006: 96). Others, however, find the possibility that European case law triggers welfare state retrenchment 'at least as plausible' (Höpner and Schäfer 2012: 448): unconditioned welfare access of mobile Union

citizens would undermine the reciprocity between the rights and duties and therefore put both the effectiveness and legitimacy of national social policy under pressure (Höpner and Schäfer 2012: 445-448; Ashiagbor 2013). Since national budgets are not 'infinitely elastic' (Bellamy 2009: 20), rendering the criteria of welfare redistribution more encompassing may come 'at the price of actually reducing the substantive content of entitlements' (Menéndez 2010).

Recently, scholars have started to doubt whether policy responses necessarily either embed mobile citizens or lead to welfare state retrenchment. Geddes and Hadj-Abdou (2016), for example, rather expect the toughening of controls on welfare state access for Union citizens. Following this reasoning, we distinguish between three categories of responses Member States can employ when confronted with the expansion of social rights of mobile Union citizens. In addition to the 'embedding' of Union citizens and the retrenchment of welfare programmes, we add 'quarantining' of Union citizens as a third strategic option that a Member State might follow. Below, we briefly explain these different options and discuss under which domestic conditions they can be expected.

Embedding refers to the inclusion of previously excluded Union citizens into welfare programmes without a significant change in those programmes in terms of general eligibility and generosity. Embedding is therefore understood as a form of welfare state resilience in the face of Europeanisation pressures. Inspired by strands of EU compliance literature, we expect that embedding is encouraged by domestic legal institutions that are receptive to EU law (Slepcevic 2009) and a culture of EU law observance (Falkner et al. 2007). In addition, pro-EU or centre-left parties could be more willing to extend social rights on ideological grounds, especially when politicisation of the matter is low.

A *quarantining* strategy serves to simultaneously isolate mobile Union citizens from welfare programmes and to maintain the generosity of these programmes for national citizens. Quarantining of mobile Union citizens takes place through policies and administrative strategies that specifically aim to exclude mobile Union citizens or raise the barrier of entrance, either at the formal (national) policy level or at the (local) administrative level. Because welfare programmes for national citizens remain unaffected, we consider this strategy as another form of welfare state resilience. Some forms of quarantining are permitted by EU law, especially by article 24 (2) of Directive 2004/38 which provides for explicit derogations from the principle of equal treatment. Other forms of quarantining require Member States to move into the politically sensitive 'grey' area of discrimination – whether direct or indirect – and find 'creative' ways to circumvent EU legal restrictions (Blauberger 2012). This can be done by reforming the infrastructure of the benefit (Blauberger and Schmidt 2014), by strategically exploring the wiggling room of EU law (see e.g. Shaw 2015: 19-21), by increasing administrative control or even by obscuring the rights of mobile Union citizens. Such strategies amount to assertive interpretations of EU law and therefore entail the risk of litigation (Davies 2016). We therefore expect that quarantining strategies are less likely in case of domestic legal institutions receptive to EU law, which may slap such efforts (Slepcevic 2009; Conant et al. 2017), while they are more likely in countries where EU law compliance is politically contested (Falkner et al. 2007), when politicisation is high (Geddes and Habj-Abdou 2016) or with anti-EU or populist/welfare-chauvinist parties in government (Keskinen et al. 2016).

Retrenchment refers to cost containment through general cuts in generosity or restrictions of eligibility criteria that (also) negatively affect country nationals. We expect governments to resort to retrenchment in response to the expansion of social rights of mobile Union citizens

when problem pressure, for example due to the embedding of Union citizens, is perceived to be high (Starke 2006) or when strategies of quarantining Union citizens have failed. Consequently, receptive legal institutions and a culture of compliance, which we expect to obstruct quarantining, may contribute to retrenchment. Meanwhile, we expect that spill-over from embedding or quarantining to general retrenchment is less likely when (centre-)left pro-welfare state parties are in government or when there is strong political support for the welfare state. Meanwhile, retrenchment could also occur when centre-right politicians seeking welfare state retrenchment strategically highlight EU mobility as a 'scapegoat' to achieve their goals.

Research Design

To map and explain welfare state responses to Europeanisation pressures, we conducted a longitudinal comparative case study. This allows us to identify which events and conditions contributed to policy change. The focus of our investigation is explicitly on welfare state changes that were informed by Europeanisation pressures, which we distinguish from policy changes that were motivated differently, e.g. by economic crisis or national political aims. Consequently, the aim of the analysis is not to investigate welfare state resilience in general, but to understand how far the specific challenges stemming from intra-EU mobility and enhanced social rights have led to welfare state reform.

The cases of the Netherlands and Denmark were selected because these are both generous welfare states which have had substantial non-contributory study financing and social assistance benefits¹ vulnerable to the expanding social rights for mobile citizens. Therefore, we assume that the cases are unlikely to be resilient (Gerring 2007: 232). In other words, if these welfare states

are resilient despite all pressures, we would expect most other European welfare states to be so to.

Meanwhile, the two selected country cases differ on several theoretically important dimensions. First, given its very generous and largely tax-financed welfare state, Denmark should be most strongly affected by Europeanisation pressures (Scharpf 2010; Martinsen and Werner 2018), while the Netherlands, with its mixture of contributory and non-contributory benefits, could be under somewhat less direct pressure. Second, the countries' *legal systems* and traditions in relation to social policy differ. Although national courts are not allowed to review the constitutionality of legislation in the Netherlands, they are – in a spirit of legal monism – required to directly apply binding provisions of international law (Article 93 Dutch Constitution) and review the compatibility of legislation and regulation with international treaties (Article 94 Constitution). Dutch courts are hence described as 'strikingly receptive' towards the message from Luxembourg (Claes and De Witte 1998), even demonstrating a certain 'eagerness' or a 'proactive attitude' when embracing their European mandate (De Visser 2012: 250). In Denmark, as in other Nordic countries, however, due to traditions of strong dualism and majoritarian democracy, judges have reservations towards European judicial review (Wind 2010). In addition, independent administrative courts and a special appeal tribunal decide on welfare disputes in the Netherlands (*Centrale Raad van Beroep*), whereas in Denmark the separation of powers between the judicial and the executive strands of government is weaker with welfare appeal boards (*Ankestyrelsen* and *Ankenævnet*) being part of the administrative system. Third, the countries' compliance with EU law has historically differed, with Denmark being more 'law observant', while compliance has been more politically contested in the Netherlands (Falkner et al. 2007). Finally, as will become clear in the case description below,

politicisation of Europeanisation and 'welfare tourism' has been much stronger in Denmark than in the Netherlands.

The case study analysis is based on 28 interviews with a total of 36 actors at all administrative levels from ministries to local frontline bureaucrats in both Member States conducted between April 2015 and January 2018. Interview data are supplemented with a longitudinal analysis of relevant parliamentary documents, newspaper articles, and archival records of relevant domestic court cases and legislation. This empirical material enables us to go beyond formal policy change and dig into the real lived world of how European social regulation is implemented or resisted in both policies and practices. The paper covers a period from 1992, when a Dutch preliminary reference case before the ECJ (*Raulin*, C-357/89) led to policy responses in the Netherlands, up until Autumn 2017. Importantly, this period covers the two Central and Eastern European enlargements in 2004 and 2007 combined with the enactment of the Citizenship Directive 2004/38, which together increased Europeanisation pressure.

Responding to Europeanisation Pressures: Case Studies

The Netherlands

While the Netherlands has experienced a steady increase in numbers of registered Union citizens (488.000 at the end of 2007; 662.000 at the end of 2015), non-contributory benefit take-up has remained low (numbers below). Although the EU enlargements of 2004 and 2007 led to considerable public and political debate, for example about labour market impact, the issue of social rights of Union citizens or the phenomenon of 'welfare tourism' has never been particularly salient or provoked significant media attention (Blauberger et al. 2018). Nevertheless, the topic has been occasionally addressed in Parliament and the government has

always taken a proactive stance on 'welfare tourism', being one of the four countries signing a well-known joint letter to the Presidency of the Justice and Home Affairs Council in 2013 lamenting 'a significant number of new migrants [...] burdening the host countries' social welfare systems'.² Similarly, in 2015, a Labour party minister advocated extended qualification periods for mobile Union citizens before earning access to social assistance.³

Study Grants

The Dutch study finance system is based on the principle that the state, the family and the individual contribute to the maintenance of the student. In recent years, study financing has shifted from a hybrid system combining universal grants with supplementary loans to a predominantly loan-based system with supplementary needs-based grants. Study loans and grants are administered centrally by the Education Executive Agency. Although the number of EU/EEA students in Dutch higher education has increased to more than 9 percent of its total student population in 2016 (49.193), only a small and steady portion of them receives study financing: in the academic year 2015-2016, 7.151 EU students received full study grants and 2.501 EU students received tuition fee loans.

Since the early 1990s, EU students have been *embedded* within the Dutch study financing system in three categories: as 'working' students, 'Raulin'-students and 'long-term' students. First, EU students could be eligible for full study grants when they qualified as a 'worker' in the context of EU law or derived this status from a working family member. To simplify procedures and create clarity, the executive authority adopted a '32-hour criterion' in 2005: to qualify as a worker, in the course of a year EU students should work at least 32 hours per month on average.⁴ Second, other EU students were entitled to a special grant covering the payment of tuition fees.

This grant was created exclusively for EU students as a direct response to the *Raulin* case (1992) in which the ECJ decided that all EU students – no matter their employment situation – were entitled to Dutch study grants in as far as these covered ‘access to education’.⁵ Finally, after the 2005 ECJ *Bidar* case against the UK, EU students in the Netherlands were also granted full study grants after five years of residency.

The eventual fate of the so-called ‘Raulin’ grant is a first example of a series of *quarantining* measures in Dutch study financing. Growing costs and an increase in the number of recipients of the grant (8.000 in 2001; 12.500 in 2005) were increasingly seen as a financial problem by centre-right parties in Parliament.⁶ An opportunity to repeal the grant emerged when the government introduced an extra lending facility for *all* students, including Dutch students, to finance tuition fees (interviews Ministry of Education, April 2017 and January 2018).⁷ Since EU law only required Member States to treat EU students equally with respect to *access* to education (including grants covering tuition fees), the government could entitle EU students to the newly created *loan* and abolish the special ‘Raulin’ *grant*, thereby reportedly saving costs.⁸ In sum, while a new student loan covering tuition fees was created for both Dutch and EU students, a specific grant only available for EU students was abolished.

The most recent quarantining measure followed in a period of increased parliamentary attention to the financial costs and benefits of foreign students in 2012. Upon request from Conservative-Liberal MPs and citing rising numbers of migrant workers receiving study grants, the new Labour party minister changed the ‘worker’ definition from 32 to 56 hours per month.⁹ The decision was politically motivated while actually discouraged by administrative officials who feared EU litigation (interviews Education Executive Agency and Ministry of Education, March and April 2017). Since the introduction of this new threshold in 2014, a significant

decrease in EU students with migrant worker status can be observed (2911 in 2013/14; 1627 in 2015/16).

In the realm of study grants we found one example of unsuccessful *quarantining* spilling over into *retrenchment*. In 2007, the Netherlands introduced portable study grants using a 'three-out-of-six-years' residence rule: students could take their Dutch study grants with them when studying abroad, but this was made conditional upon the student – irrespective of nationality – having resided lawfully in the Netherlands during at least three out of the preceding six years.¹⁰ In 2012, a successful infringement action by the European Commission forced the Dutch authorities to remove the 'three-out-of-six' rule with respect to migrant workers and their family members (C-542/09). In response, due to the fear that many EU students would apply for portable study financing, in 2013 a Labour Party minister successfully passed legislation to impose a cap upon the number of students eligible to portable funding on a 'first-come first-served basis', hence also potentially affecting Dutch students.¹¹

Social Assistance

The Netherlands provides a generous social assistance benefit administered by municipalities and granted to people with no other means. The number of Union citizens receiving social assistance benefits increased from 9.1140 in 2012 to 15.520 in 2015, but this still only amounted to 3 percent of social assistance granted in the Netherlands.

Until 2004, economically inactive Union citizens automatically lost their right to residence when they applied for social assistance.¹² Forced by the Commission in the early stage of an infringement procedure (*Commission v. Netherlands*, C-398/06), the Netherlands changed this policy in the light of the *Grzelczyk*-judgment (2001),¹³ by introducing a 'sliding scale'.¹⁴ The

scale defined that the longer a Union citizen remained self-supportive, the more access (s)he acquired to Dutch social assistance without losing legal residence (Kramer 2016). Notably, while this policy formally at least partly *embedded* economically inactive Union citizens, it was expected that most of the Union citizens that would arrive after the 2004 EU enlargement could be rejected in this way. Therefore, the scale was politically presented by the centre-right governing coalition as a restrictive policy measure.

A phase of quarantining followed when a right-wing minority government supported by the populist Freedom Party took office in 2010. At that time, aldermen of major cities expressed concerns about rising numbers of migrant workers from Eastern Europe who were believed to cause ‘numerous problems’ including increased claims to social benefits.¹⁵ In response, the government proposed an ‘action package’ specifically targeting ‘social assistance tourists’.¹⁶ The package included a restriction of the sliding scale by raising the thresholds for periods of economic self-sufficiency needed to qualify for social assistance benefits in 2011.¹⁷ *Control* was also intensified. In order to swiftly assess and – if need be – terminate residence rights of Union citizens relying on social assistance, cooperation between the municipalities and the Immigration and Naturalisation Service was intensified and administrative capacity temporarily expanded at the latter (interviews Ministry of Security and Justice and Immigration and Naturalisation Service, January and February 2016). In fact, the number of terminations of legal residence after an unreasonable recourse to social assistance increased from a mere 20 in 2012 to 680 in 2016.¹⁸ Enhanced controls also appear to deter social assistance applications from Union citizens, as they fear to lose their right to residence (interviews ministry of Security and Justice, January 2016, and municipalities, February and April 2016).¹⁹ Recently, the rulings of *Dano* and *Alimanovic* have allowed for a new phase of quarantining. In late 2017, the Ministry of Social Affairs

instructed municipalities to independently and automatically – without interference from the Immigration Service – exclude economically inactive Union citizens who never had financial resources and to stop benefits after 6 months for Union citizens who have worked less than a year.²⁰

One quarantining measure announced in the earlier mentioned ‘action package’ failed and spilled-over into *retrenchment*. In 2010, a conservative-liberal MP had proposed to test Dutch language skills of non-nationals applying for or receiving social assistance. Criticised by the Council of State, the country’s advisory body on legislation and governance, for violating the non-discrimination provision of Directive 2004/38, the proposal was amended in order to cover all social assistance applicants, including Dutch nationals.²¹ Legislation was further developed by a conservative-liberal/labour coalition and was finally adopted by parliament in 2015.²² While the Ministry of Social Affairs legitimated the test as a measure to facilitate access to the labour market, officials at municipal level point at the symbolic exclusionary character of language test (interviews municipalities, February and April 2016).

Denmark

Similar to the Netherlands, EU migration to Denmark has risen remarkably since the Central and Eastern European enlargements in 2004 and 2007 (from 80.508 in 2007 to 194.480 in 2017).²³ The number of Union citizens receiving social assistance benefits increased after the financial crisis, but they continued to be less likely to receive social assistance than native Danes. Meanwhile, the number of EU students receiving Danish study grants mounted rapidly from 440 in 2012 to 9.664 in 2016 (Ministry of Higher Education 2017: 2). This subject has also been highly politicised (cf. Blauberger et al. 2018), whereas Union citizens’ access to social assistance

has not received the same media attention. Nevertheless, intense politicisation of Union citizens' access to study grants and child care allowance partly spilled over into measures on social assistance, as will be explained below.

Study Grants

Danish study grants consist of a generous, universal benefit which is administered centrally by the Danish Agency for Institutions and Educational Grants (DAIEG). While working EU students in the Netherlands had already obtained access to Dutch study grants in the early 2000s, they were not included in the Danish study grant scheme until 2013. In that year, the ECJ ruled against this exclusionary practice in the *LN* case (C-46/12), establishing that a Union worker had the right to Danish study grants while studying even if the primary intention of moving was to study. The ruling shook Danish society and was claimed to be a 'bomb under the Danish welfare state'.²⁴ Various ministries and high-ranking civil servants were taken by surprise (interview DAIEG, June 2017), and Europeanisation of welfare suddenly dominated the headlines in Danish media (Blauberger et al. 2018). Forced by the ECJ's ruling, the Danish Social Democratic-led coalition Government *embedded* working EU students into the study grants programme.

This embedding was quickly followed by attempts to *quarantine*, including first of all by the introduction of continuous, automatised and individual *control* of the worker status of all EU students receiving study grants in order to restrict their access to the benefit in practice (interview DAIEG, March 2017). For example, if the EU student has not earned enough to indicate continued worker status the person's case file is taken out for manual control (interview DAIEG, March 2017). Another, less visible quarantining measure is practiced as retention of worker status of EU students after their unemployment in practice has been allowed for a shorter

period than other social benefits (interview DAIEG, June 2017).²⁵ Moreover, information about options for retaining worker status and consequently the study benefit is not circulated widely among students (interview DAIEG, June 2017). Consequently, EU students are hardly informed of their rights. Compared with the overall elaborate instructions given to own nationals, an indirect, but rather efficient, quarantining in the form of *silencing rights* is thus put into place, allowing contained compliance.

Over time, the *LN* case has also resulted in a form of retrenchment. In response to the ruling, a broad coalition in the Parliament defined in 2013 that no more than 420 million Danish kroner (before taxes, 2016 level) should be spent on granting Union students Danish study grants.²⁶ Consequently, the expenses were closely monitored and by 2017, they had almost reached this ceiling (interview DAIEG, March and June 2017). This brought up the question whether general benefit retrenchment was necessary in order to finance the new group of beneficiaries. However, in March 2017, the Danish Parliament explicitly agreed to abstain from general retrenchment and to 'preserve the current Danish study grant system'. 'It is not reasonable nor responsible,' the Parliament stated, 'to resolve a problem relating to a minor share of the overall study grant expenses by weakening the conditions for all Danish recipients of study grants'.²⁷ The Parliament therefore encouraged the Government to initiate 'protection measures ensuring that the expenses to mobile workers are restricted'.²⁸ Such a 'protection measure' was introduced in March 2017 through an attempt to reduce the intake of students at English-language business academies and vocational colleges, which tended to have a large share of non-Danish students (interview DAIEG, June 2017).²⁹ In November 2017, the Minister declared the policy a success as the intake in 2017 was reduced with 27,8 percent compared to 2015.³⁰ Consequently, knowledge of Danish has been used as an indirect barrier for studying in

Denmark and thereby for receiving Danish study grants. While explicitly being intended as quarantining measure, this initiative in principle affects all potential beneficiaries, including Danes, and can therefore be seen as a case of retrenchment.

Social Assistance

A universal minimum subsistence benefit is granted to unemployed with legal residence with no other means. The benefit is administered by municipalities. The percentage of Union citizens receiving the benefit has increased after the two EU enlargements in 2004 and 2007 and the subsequent financial crisis, but remains lower than the percentage of Danes relying on social assistance (Martinsen et al. 2018).

EU nationals have been gradually *embedded* in the Danish social assistance scheme since Danish EU membership in 1973. A Union citizen is eligible if (s)he has worked for about 10-12 hours per week for about 10 weeks, while previous employment for less than a year leads to qualification for no more than 6 months of benefits.³¹ In 2014, general politicisation of 'welfare tourism', fuelled by developments in study grants and child care allowance, spilled over to create concerns about social assistance (interview Ministry of Employment, March 2017).³² As a result, *quarantining* and *retrenchment* measures were introduced through a policy package, 'the five initiatives', launched in March 2014 by the Social Democratic Government coalition, aiming in various ways to restrict EU nationals' access to social assistance.

The first initiative in the package entailed quarantining through additional *controls* on benefit applications by Union citizens, becoming subject to de facto double casework. While municipalities granted social assistance on the basis of assessing the legal residence of the applicant, in addition the State Administration, responsible for residence permits, was instructed

to check the grounds for residence again whenever municipalities had granted social assistance to Union citizens.³³ Interviews with municipalities confirm that this new quarantining practice is put into action (interviews municipalities, March and April 2017).

Another initiative introduced an element of *retrenchment*. It introduced a language requirement by stipulating that ‘no matter if one is born and raised in Denmark’, all citizens ‘with short association to the Danish labour market and little knowledge of Danish’ were required to attend a Danish language course and show up for more frequent interviews.³⁴ In practice, this made it more demanding for Union citizens than for the majority of the Danes to comply with requirements posed by the jobcentre.³⁵ Moreover, it was explicitly introduced to ‘increase control with and the demands placed on Union citizens receiving social assistance’ even though it in principle addresses all beneficiaries³⁶. Interviewees confirm that the initiative indirectly targets Union citizens because of the political wish ‘just to do something’ to combat so-called ‘social tourism’ (interview Ministry of Employment, March 2017).

Explaining Responses

Table 1 gives an overview of the embedding, quarantining and retrenchment measures implemented in response to Europeanisation pressures in the Netherlands and Denmark, including an indication of different types of quarantining strategies employed. The primary response to the pressures associated with European free movement has been through a series of embedding measures which in recent years has been combined with quarantining. As table 1 illustrates, quarantining was implemented through various strategies; i.e. in the form of increasing control, silencing rights, changing the infrastructure of the benefit or introducing higher thresholds. In both countries, many of these measures entail practical and administrative

rather than legal changes. While the table also indicates four instances of retrenchment, it should be noted that three of these involved the strategic introduction of language requirements. While these measures are in principle applicable to all citizens, and were therefore classified as retrenchment, the case studies clearly showed that these measures had the explicit or implicit aim to exclude mobile Union citizens. Therefore, they closely approximate quarantining efforts.

INSERT TABLE 1 ABOUT HERE

Domestic conditions have shaped the responses to Europeanisation pressure in diverse patterns. In general, *embedding* has often been the direct response to ECJ rulings. The proactiveness of Dutch social courts in enforcing Dutch compliance with EU (case) law resulted in the embedding of Union citizens in study financing and social assistance at an early stage. In Denmark, the pattern diverged for social assistance and study grants. Union citizens were embedded into the social assistance scheme at an early stage but by contrast, weak litigation culture for a long time shielded Denmark from the expansion of social rights to EU students. Consequently, it took until 2013 before a ECJ ruling led to the embedding of working EU students in Danish study grants. Differences in legal cultures have had profound political implications. Whereas continuous correction by domestic courts and the ECJ has been an 'everyday' working condition for Dutch ministries, agencies and municipalities, Danish authorities were rather taken by surprise by the 2013 ECJ study grants ruling. As an infrequent challenger of Union legislation (Falkner et al. 2007), Denmark was not used to being corrected by the ECJ. Consequently, the Court ruling induced a strong political and public reaction, which led to the implementation of a series of administrative quarantining measures. The intense politicisation of the 2013 ECJ ruling has led

to a form of political resistance against Europeanisation uncharacteristic for a Member State previously characterised as 'law observant' (Falkner et al. 2007).

Compared to Denmark, politicisation in terms of media attention was never very strong in the Netherlands. Here, quarantining measures were the result of politicians, often but not only from the political right, attempting to save costs by excluding Union citizens. Interviewees at all levels of Dutch administration explained to act in anticipation of possible problem pressure stemming from the inflow of Union citizens – to find 'a real solution to a perceived problem' (interview Ministry of Security and Justice, January 2016). Although a modest politicisation of problems related to post-enlargement EU immigration led to the introduction of various quarantining measures, they must rather be understood in the context of a constant aim to contain and control welfare state expenditure more generally (Van Hooren et al. 2014). The continuous interaction with and dependence on domestic courts forced the Dutch administration and legislator to be creative and assertive in its interpretation of EU law. Designing and defending legislation and policies all the way up to the Court of Justice has been part of a political and administrative strategy. This can be successful and shape EU law at the European level but may also require a return to the 'drawing table' as the example of portable study grants demonstrated. Modest general retrenchment in response to Europeanisation pressure only really occurred in the Netherlands in the form of a (potential) cap on portable study grants. This was introduced when the legal corridor of EU law was found too narrow to quarantine Union citizens. All other identified instances of retrenchment were strategically targeting non-nationals through language requirements. In Denmark, the option of general retrenchment appeared on the table after a substantial rise in expenses on study grants to mobile Union citizens but was explicitly rejected by Parliament. This rejection then paved the way for the introduction of language barriers.

Strikingly, while we found that litigation and compliance culture as well as politicisation played an important role shaping policy responses to Europeanisation, we did not find the same for the partisan composition of governments. Although right-wing parties in the Netherlands have been proactively pushing for the quarantining of Union citizens, parties on the left have been equally eager to cooperate upon such restrictive matters. Instead it seems that a 'welfare chauvinist' willingness to exclude Union citizens has cut across the old political axis of left and right and has made the colour of the government in charge largely irrelevant.

Lastly, the respective centralised or decentralised administration of a benefit played a role for the ability to quarantine effectively. In both Member States, the fact that social assistance is administered and partly financed by municipalities, made surveillance and close control by central authorities more difficult than with centralised benefits, like study grants. However, the consequences of the lack of central control were diverse. Whereas in Denmark, municipalities acted generously for a long period up until they were corrected by the government in 2014 with the 'five initiatives', municipalities in the Netherlands were eager to communicate effectively with the central level in search for ways to contain expenses as several rounds of financial decentralisation have made them fully responsible for social assistance expenditure (Van Berkel 2006).

Conclusion: Creative and Exclusionary Resilience

In the face of increasing intra-EU migration and mobile citizens' extended access to welfare state benefits enforced by the ECJ, the predominant response of the Dutch and Danish welfare states has been to creatively *quarantine* mobile citizens and to manoeuvre around EU law. Only in rare cases do we find spill over into general retrenchment. Therefore, we conclude that these welfare

states have remained largely resilient. This resilience, even under conditions of limited control over who enters their territory and who is eligible for social benefits, suggests that welfare states can be resilient in the face of immigration more generally and that generous welfare states can coexist with free movement. However, rather than obediently embedding mobile Union citizens, states have creatively and assertively adapted to new challenges by finding new ways to exclude mobile citizens through a range of quarantining measures and targeted retrenchment in the form of language requirements.

The study's results underline the importance of looking beyond formal legal policy changes to also include practical policy implementation. When concentrating on legal changes, many quarantining measures at the fringes of EU law, such as the silencing of rights or increased controls for mobile Union citizens, would have gone unnoticed. In fact, the effective impact of and responses to EU (case) law is not confined to changes in welfare or migration legislation or their implementing regulations and policies, but often extends to lower regulation, such as working instructions, administrative capacities and procedures.

Two different pathways led to quarantining outcomes. In the Netherlands, a political will to limit welfare expenditure in combination with a culture of strong litigation led to a continuous search for the limits of EU law. This tendency resulted in early quarantining efforts without politicisation. By contrast, in Denmark, not used to being corrected by the ECJ, a Court ruling on study grants in 2013 led to sudden massive politicisation and a political willingness to seek administrative ways to combine the new Court-driven embedding of Union citizens with quarantining measures. Thereby, Danish politicians seem to have moved away from their 'law observant' track record (Falkner et al. 2007) towards a politically motivated search for the limits of EU law, thus becoming a bit more like the Netherlands.³⁷ Our analysis reveals that legal

culture is an important factor that deserves to be incorporated more systematically in studies of the politics of welfare reform.

Finally, we expected that the most generous welfare state (Denmark) with most non-contributory tax-financed benefits would be most affected by Europeanisation pressures. While we did find that politicisation of Europeanisation was very strong in Denmark, we also found this welfare state to be most resilient due to strong enduring public and political support for welfare state schemes. The mere threat of potential retrenchment of Danish study grants even explicitly reinforced quarantining attempts. Further research is needed to understand how different types of welfare states with more or less tax-financed benefits respond to the same Europeanisation pressures. If the most universal and generous welfare states show to be most resilient, Europeanisation might come with the unintended result of creating an even bigger divide in welfare state generosity across Member States.

Biographical note

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Notes

¹ Marchal et al. (2011: 16) show that in 2009, Danish and Dutch net minimum income benefits were among the most generous in Europe measured as percentage of median income. Dutch study financing has later been partly transformed from a grant to a loan-based system. Hence by 2017, the Danish study grant was significantly more generous (approximately 809 euros/month) compared to the Netherlands (offering a loan up to about 1000 euros/month).

² Council of the European Union document 10313/13, Brussels, 31 May 2013.

³ Proceedings TK 2014-2015, appendix no. 1084.

⁴ 'Beleidsregel controlebeleid migrerend werknemerschap', 4 maart 2005, AG/OCW/MT-05.11. Centrale Raad van Beroep, 16-03-2007, ECLI:NL:CRVB:2007:BA1063.

⁵ Case note D. Curtin & R. Van Ooik, 'Noot bij Raulin en Bernini', SEW 3 (1994): 180 – 190.

⁶ TK 2005–2006, 30 387 and 22 452, no. 53: 2. Proceedings TK 2005–2006, no. 86: 5259–5294.

⁷ TK 2005-2006, 30 387, no. 3.

⁸ Letter from the minister and state secretary of Education, Culture and Science, 'Beleidsbrief meeneembare studiefinanciering', 5 December 2005: 13. Beleidsregel Intrekking beleidsregels Bidar en Raulin, alsmede uitstel

invoering negatieve consequenties van implementatie van de Richtlijn 2004/38/EG. 6 november 2006,

AGOCenW/MT-06.049.

⁹ Proceedings TK 2011–2012, appendix no. 901; 'Beleidsregel controlebeleid migrerend werknemerschap', 13-12-2012, nr. HO&S/463528.

¹⁰ Staatsblad 2007, no. 200.

¹¹ TK 2012-2013, 33 453, no. 3. Staatsblad 2013, no. 180.

¹² See e.g. article 4.3.2. of Chapter B4 of the Aliens Circular, October 1998.

¹³ Letter from the Commission to the Netherlands, infringement no. 1999/2029, C(2003)990, 2 April 2003: 15.

¹⁴ TBV 2004/1, Staatscourant 13 January 2004, no. 7: 13.

¹⁵ TK 29 407, no. 118 and 132, p. 2.

¹⁶ TK 29 407, no. 132, p. 15.

¹⁷ Staatscourant 2011, no. 23324, 23 December 2011.

¹⁸ Manual registration by the Immigration and Naturalisation Service. Numbers rounded off to nearest 10.

¹⁹ As also apparent from case law, e.g. Rechtbank Amsterdam, 9-12-2015, ECLI:NL:RBAMS:2015:8734.

²⁰ 'Handreiking migranten en bijstand', Stimulansz in opdracht van het ministerie SZW, april 2017, bijlage bij Verzamelbrief 2017-3, 24 oktober 2017, p. 8-9.

²¹ TK 2009-2010, 32 328, no. 3 and no. 5.

²² Staatsblad 2015, no. 136.

²³ Statistics Denmark, population 1 January.

²⁴ TV218 July 2013, 'En bombe under vores velfærdssystem', available at <http://nyheder.tv2.dk/article.php/id-70159407> (accessed May 2018)

²⁵ E.g. social assistance where status as a worker can be retained for six months upon employment for less than a year. See e.g. Danish Immigration Services 2015: 3, 3.4.3 and 3.4.4, (available at

<http://www.statsforvaltningen.dk/sfdocs/EU->

[omr%C3%A5det/Vejledningen%20\(prim%C3%A6r%20bev%C3%A6gelighed\).pdf](http://www.statsforvaltningen.dk/sfdocs/EU-omr%C3%A5det/Vejledningen%20(prim%C3%A6r%20bev%C3%A6gelighed).pdf), accessed April 2018).

²⁶ Ministry of Higher Education and Science 2013, available at <https://ufm.dk/lovstof/politiske-aftaler/reform-af-su-systemet-og-rammerne-for-studiegennemforelse/reform-af-su-systemet-og-rammerne-for-studiegennemfoerelse.pdf>

(accessed April 2018).

²⁷ Folketinget 2017. V 50, available at <http://www.ft.dk/samling/20161/vedtagelse/v50/index.htm> (accessed April 2018).

²⁸ Folketinget 2017. V 50, available at <http://www.ft.dk/samling/20161/vedtagelse/v50/index.htm> (accessed April 2018).

²⁹ Ministry of Higher Education and Science 30 March 2017, available at

<https://ufm.dk/aktuelt/pressemeddelelser/2017/opbremsning-i-optaget-af-studerende-pa-engelsksprogede-uddannelser> (accessed April 2018).

³⁰ Ministry of Higher Education and Science 7 November 2017, available at

<https://ufm.dk/uddannelse/videregaende-uddannelse/erhvervsakademier/nyheder-om-erhvervsakademier-uddannelser/markant-faerre-studerende-er-optaget-pa-de-engelsksprogede-uddannelsere111ee6efe284b398e1ff62d4e71d2af> (accessed April April 2018).

³¹ VEJ nr 9468 af 30/06/2014

³² See also Ministry of Employment 2014a, 'Skarpere kontrol med EU-borgere på danske ydelser', available at

<http://bm.dk/da/Aktuelt/Pressemeddelelser/Arkiv/2014/03/Skarpere%20kontrol%20med%20EUborgere%20pa%20danske%20ydelser.aspx> (accessed April April 2018).

³³ Ministry of Employment 2014b, 'Forslag 1: Øget kontrol af kontanthjælpsmodtageres arbejdstagerstatus', available at

<http://bm.dk/~media/BEM/Files/Dokumenter/Pressemeddelelser/2014/Regeringens%20forslag/Forslag%201%20->

[%20Oeget%20kontrol%20af%20arbejdstagerstatus%20for%20kontanthjaelpsmodtagere%20pdf.ashx](#) (accessed April 2018).

³⁴ Ministry of Employment 2014c, 'Forslag 3: Måltrettet indsats for kontanthjælpsmodtagere med kort tilknytning til det danske arbejdsmarked og dårlige danskundskaber', available at <http://bm.dk/~-/media/BEM/Files/Dokumenter/Pressemeddelelser/2014/Regeringens%20forslag/Forslag%203%20-%20Oeget%20maalrettet%20indsats%20for%20ansoegere%20og%20modtagere%20af%20kontanthjaelp%20pdf.ashx> (accessed April 2018).

³⁵ LBK nr 1342 af 21/11/2016, available at <https://www.retsinformation.dk/forms/r0710.aspx?id=184891> (accessed 30 April 2018).

³⁶ Ministry of Employment 10 October 2014, 'S 12 endeligt svar', available at <http://www.ft.dk/samling/20141/spoergsmaal/s12/svar/1161803/1407568.pdf>, accessed April 2018).

³⁷ Also reflected in the letter sent to the Commission by Denmark, Germany, Ireland and Austria on their wish of indexation of child care allowance July 27 2017.

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Table 1: Mapping responses to Europeanisation pressures in the Netherlands and Denmark

| | Embedding | Quarantining | Quarantining strategy | Retrenchment |
|-----------|---|--|--|--|
| NL | <p>Study grants</p> <p>1993: Introduction of <i>Raulin</i> grant</p> <p>1990s: 32 hours criterion</p> <p>2006: 5 years residence rule</p> | <p>2006: Replacement of <i>Raulin</i> grant with loan</p> <p>2014: Worker criterion from 32 to 56 hours/month</p> | <p><i>Changing the infrastructure of the benefit</i></p> <p><i>Raising the threshold</i></p> | <p>2013: Possibility to maximise number of students eligible for portable funding</p> |
| | <p>Social assistance</p> <p>2003: Introduction of 'sliding scale'</p> | <p>2011: Restriction of 'sliding scale'</p> <p>2011: Increased cooperation with Immigration Service to assess legal residence</p> <p>2017: Option of direct exclusion by municipalities</p> | <p><i>Raising the threshold Control</i></p> <p><i>Control</i></p> | <p>2016: Introduction of language test</p> |
| DK | <p>Study grants</p> <p>2013: Study grant access for working EU students</p> | <p>2013: Introduction of intense control mechanisms</p> <p>2013-17: Silencing rights for EU students with retained worker status</p> | <p><i>Control</i></p> <p><i>Silencing</i></p> | <p>2017: Reduced intake via language barriers</p> |
| | <p>Social assistance</p> <p>Since 1973: Gradual embedding of Union citizens who have worked 10-12 weekly hours for at least 10 weeks</p> | <p>2013: 'The five initiatives' where EU nationals are subject to additional checks of applications</p> | <p><i>Control</i></p> | <p>2013: Higher demands at jobcentres through language barriers</p> |