Administering the Needy Union Citizen: between Welfare State Bureaucracy and Migration Control

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* *“Here no one else can gain entry, since this entrance was assigned only to you. I’m going now to close it.”**[[2]](#footnote-2)*

# Abstract

*Although scholars have started to systematically research processes of judicial Europeanisation of national welfare states, the impact of EU (case) law on domestic administrative systems governing the social rights of Union citizens has attracted less attention*. *The question posed in this paper is if and how, in the shadow of EU law, Member States reorganise the administration of Union citizens’ access to their welfare system. The paper distils three ideal-typical models of administering Union citizens’ access to the welfare state. It is submitted that Member States generally move away from a model that centres on the Union citizens’ compliance with formal procedures in a highly linked but dispersed administrative system, to models that revolve around the administrative reconstruction of the actual activities of Union citizens in their host Member State. By creatively redesigning their administrative system and redirecting the function of both welfare and migration authorities, Member States are able to shift both the administrative burden and legal uncertainty to Union citizens contain their access to the welfare state. This claim is empirically supported by an in-depth case study of social assistance administration of the Netherlands between 2001-2016.*

# 1. Introduction

In classical migration literature it has generally been taken for granted that foreign Union citizens, as ‘privileged’ immigrants, enjoy a strong position in their host welfare state.[[3]](#footnote-3) It is true, indeed, that the principle of equal treatment connected to the status of Union citizenship has rendered differential treatment of foreign Union citizens in the field of social benefits by Member States increasingly difficult. At the same time, however, the right to free movement, or ‘lawful residence’ in another Member State, is not unconditional, but subject to limitations and conditions related to economic activity and economic self-sufficiency. These limitations and conditions have recently gained prominence when Member States increased efforts to restrict access of Union citizens to their welfare systems and found endorsement from the European Court of Justice (‘ECJ’), to the surprise of many.

Although the extension and, arguably, contraction, of cross-border social rights of Union citizens at both the EU and the domestic level has attracted extensive attention in both legal and social science literature, literature on the impact of EU law and judgments of the Court on *administrative systems* governing Union citizens’ right to residence and access to social benefits is limited. In other words, the question of *how* Member States administer free movement rights and enforce residence conditions in the context of the welfare state is relatively understudied. This is surprising for at least three reasons. First of all, Member States are confronted with legal ambiguity and specific legal constraints when administering Union citizens’ social rights. Ambiguity arises, for example, from the Member States’ obligation to treat Union citizens equally but simultaneously having the possibility to verify their compliance with the residence conditions. Another tension arises from the well-established doctrine that free movement rights, such as the right of residence and equal treatment, arise *directly* from EU law and are therefore enjoyed *independently* from the (non-)actions of national bureaucracies. As a result, traditional bureaucratic instruments used by Member States to verify the legal status of non-nationals when granting social rights, i.e. registration procedures and residence permits, have lost their autonomous worth and purpose in the context of the case law of the European Court of Justice.[[4]](#footnote-4) We might therefore expect the emergence of ‘specialised’ models of administration dealing with the social rights of Union citizens throughout EU Member States. Secondly, the extension of Union citizens’ cross-border access to social benefits in the context of the ECJ’s case law and EU legal concepts has been identified as mainly forming a burden for national *administrations*.[[5]](#footnote-5) It transpires from research that the impact of ECJ case law is not confined to changes in domestic welfare or migration legislation or their implementing regulations and policies, but often extends to lower regulations, work processes and discretion of street-level-bureaucrats.[[6]](#footnote-6) In the words of one interviewee, ‘who does what first and who does most, that is what it ordinarily comes down to.’[[7]](#footnote-7)The final reason follows at a more fundamental level: the way in which domestic bureaucracies operate to enforce both the right and restrictions to EU free movement not only determines the *actual* access of Union citizens to social benefits,[[8]](#footnote-8) but also shapes to a large extent Union citizens’ real world experience’ of what might be called a ‘social Europe’.

This paper therefore seeks to make an analytical contribution by asking if and how, in the shadow of EU law, Member States reorganise the administration of Union citizens’ access to their welfare system. It will be argued that the specific constellation of EU law will cause Member States to redesign their bureaucratic systems and that three different ideal-typical administrative models can be constructed. It does so by drawing inductively on the findings of an in-depth case study of rules and procedures designed to administer Union citizens’ right to social assistance in the Netherlands between 2001 and 2016.[[9]](#footnote-9) Faced with the requirements of EU law and the complexity of its administrative system, the Netherlands transformed from a comprehensive *a priori* verification system for Union citizens, including the requirement to register and obtain a residence permit, to the full abolition of any registration duty all together. Instead, the Netherlands slowly implemented complex procedures that centred around an *ex post* assessment of residence rights on the basis of ‘signals’ derived from the actual conduct of Union citizens and their engagement with the welfare state. This transformation was far from smooth and uncontested. Not only did the Netherlands vehemently defend its strict registration conditions for EU citizens entering its territory all the way up to the ECJ in 2008[[10]](#footnote-10) while voluntarily surrendering any form of registration for EU citizens in 2014, but also the Administrative High Court had to intervene in 2013 to create ‘order’ in what one interviewee described as an administrative ‘tombola’.[[11]](#footnote-11)

This paper starts by introducing the legal ambiguity Member States are confronted with when administering the social rights of Union citizens. The subsequent section draws on existing literature to formulate expectations as to how and under which conditions Member States might reorganise their administrative systems. The fourth section then seeks to theorise three ideal-typical models available for Member States in dealing with Union citizens’ access to the welfare state. The fifth section proceeds by presenting the findings of the Dutch case study, distinguishing three separate periods in which the Netherlands gradually redesigned its administrative system of dealing with Union citizens: the first characterised by conditionality and formality, a second characterised by administrative arbitrariness and inconsistency and a third characterised by an effective yet complex information-exchange system. A concluding section argues that, although it is difficult to conclude whether one administrative system creates a more or less restrictive regime towards Union citizens than the other, the choice for a specific system has great implications for the actual access of Union citizens to the welfare state and their experience of a ‘social Europe’ on the ground. By creatively redesigning their administration of Union citizens, Member States have been able to shift the administrative burden and legal uncertainty to Union citizens and contain their access to the welfare state.

# 2. The (Legal) Puzzle: Equal Treatment, Residence Conditions and the Independent Status

When dealing with migrant Union citizens in their welfare state, Member States are confronted with a threefold legal constellation. That is to say, Union citizens have (A) right to *equal* treatment, have (B) a *conditional* right to residence (subject to residence conditions) and can (C) directly enjoy of EU free movement *independent* from administrative formalities. The combined impact of these rights and conditions could be said to shake up traditional procedures of dealing with noncitizens in Member States and undermine stablished divisions of competences between welfare and immigration authorities. This section discusses

## A. Equal Treatment

The principle of equal treatment has gradually been extended to other categories beyond the circle of workers or self-employed, the so called ‘economically active’ Union citizens. A well-established doctrine in EU law holds that economically active Union citizens residing in another Member State enjoy equal access to its welfare system, even in cases when they work part-time or do not earn above the minimum subsistence level and hence have to rely on public benefits.[[12]](#footnote-12) After a year of economic activity, they enjoy a strengthened right of residence and extended right to equal treatment by retaining their status of worker despite losing their employment.[[13]](#footnote-13)

 Around the turn of the millennium, the European Court of Justice used the newly established status of Union citizenship to extend the principle of equal treatment to economically inactive Union citizens. In the case of *Martínez Sala*, a Spanish national who had spent most of her life in Germany and was authorized to live there, the Court found it irrelevant whether she qualified as a worker for the question of equal treatment. Instead, the Court held that any Union citizen who is lawfully residing in the territory of another Member State can rely on Treaty provisions attached to the status of Union citizenship and should therefore not suffer discrimination on grounds of nationality.[[14]](#footnote-14) Two years later, in the case of *Grzelczyk*, the Court declared Union citizenship as the ‘fundamental status of nationals of the Member States’, which should enable ‘those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for’.[[15]](#footnote-15)

 The principle of equal treatment and its exceptions are now laid down in secondary legislation.[[16]](#footnote-16) At the time of the *Grzelczyk* judgment, explicit exceptions were confined to the payment of maintenance grants to students benefiting from the right of residence.[[17]](#footnote-17) With the coming into force of Directive 2004/38 (‘Citizens Directive’), Member States are neither obliged to grant social assistance to economically inactive Union citizens in their first three months of residence or longer in case of work seekers.[[18]](#footnote-18)

## B. Residence Conditions

It should be remarked that the Court, even when expanding the scope of equal treatment, has always emphasised that the right to reside in another Member State is not unconditional. For a period up to three months a valid identity card suffices for lawful residence,[[19]](#footnote-19) but for longer periods Member States may require Union citizens to be either economically active or to have a sickness insurance and ‘sufficient resources not to become a burden on the social assistance system’.[[20]](#footnote-20) The Court has always left open the possibility for Member States to take the view that the Union citizen who applies for social assistance no longer fulfils the conditions of lawful residence, but in that case Member States have to explicitly terminate the Union citizen’s right to residence.[[21]](#footnote-21) Such measures, however, cannot become the *automatic* consequence of a Union citizen’s recourse to social assistance as Member States can only terminate residence when Union citizens become an *unreasonable* burden on the social assistance system of the host Member State.[[22]](#footnote-22) Member States may have legitimate interests to restrict Union citizens in exercising their free movement, but they must take into account the individual circumstances of Union citizens before removal measures can be considered proportionate.[[23]](#footnote-23) The right to permanent residence is granted to Union citizens who have resided legally for a continuous period of five years in the host Member State.[[24]](#footnote-24)

## C. The Independent Status of the EU Free Mover

A further complication that is added to the administration of the social rights of Union relates to the ‘independent status’ the ECJ has awarded to the Union citizen who exercises his/her right to free movement. Since the case of *Royer* (1976), the ECJ has been consistent in arguing that the right of residence is conferred directly by the Treaty and acquired *independently* of the issue of a residence permit by the competent Member State authority.[[25]](#footnote-25) A residence permit should therefore not be regarded ‘constitutive’, as a measure giving rise to rights, but merely ‘declaratory’, as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to EU law.[[26]](#footnote-26) This position was forcefully repeated in the case of *Martinez Sala* with respect to access to social benefits, in which the Court found the extra condition for foreign Union citizens applying for child benefits to possess a residence permit directly discriminatory.[[27]](#footnote-27) Such a condition would attach a constitutive force to the possession of a residence permit where EU citizens who are lawful resident in the territory of a host Member State should have a right to be treated equally within the material scope of the Treaty. In the case of *Dias*, the Court had to engage with the opposite situation: could a Union citizen derive a right of residence solely out of a validly issued residence permit while not meeting the conditions governing entitlement to any right of residence under EU law? Here the Court reasoned in favour of the Member States, stating that such periods, despite the possession of a valid residence period could not qualify as periods of ‘legal residence’ and be used for the acquisition of permanent residence status.[[28]](#footnote-28)

This line of jurisprudence was codified in secondary EU legislation. The Citizens Directive now confirms that registration certificates, residence permits or any other administrative formality cannot be made a precondition for the exercise of a right under Treaty.[[29]](#footnote-29) Failure to comply with requirements to register or obtain a residence permits may render the person concerned only liable to proportionate and non-discriminatory sanctions.[[30]](#footnote-30) Despite their declaratory character, the Directive still sets out rules concerning administrative formalities. For periods of residence longer than three months, Member States may require Union citizens to register with the competent authorities. Upon registration, the authorities may check whether the applicant complies with the conditions for a longer period residence, either as an economically active or economically inactive Union citizen.[[31]](#footnote-31) However, a registration certificate shall be ‘issued immediately’, rendering this screening necessarily limited. Administrative formalities attached to permanent residence are less clear-cut, as Member States have to issue, as soon as possible, Union citizens ‘entitled to permanent residence’ with a document certifying permanent residence after having verified their duration of residence.[[32]](#footnote-32)

The image appearing is ambiguous: registration and administrative formalities still exist under EU law, but their ‘worth and purpose’ has for a long time been undermined by the European Court of Justice.[[33]](#footnote-33) The mere ‘declaratory’ character of residence permits and registration requirements has challenged the Member State’s ability to rely on such instruments for authoritative decisions on Union citizens’ social rights.

## D. After Dano: Recent Developments

It should be stressed from the onset that, although this paper specifically deals with Member State responses to the legal constellation of earlier citizenship case law, a series of recent judgments has shed doubts on the Court’s commitment to uphold a general right to equal treatment for all Union citizens. Whereas the Court’s early citizenship case law emphasised the Union citizen’s right to equal treatment with respect to social benefits ‘simply as a citizen of the Union’[[34]](#footnote-34), it has been noted that its judgments in *Dano* (2014), *Alimanovic*, *Garcia-Nieto* (2015) and *Commission v. UK* (2016) have made the right to equal access to the social assistance *conditional* on the compliance of residence conditions. In Dano, for example, the Court stated that ‘so far as concerns access to social benefits, a Union citizen can claim equal treatment *only* if his or her residence in the territory of the host Member State complies with the conditions for lawful residence of the Citizenship Directive’.[[35]](#footnote-35) It should be expected that this reversal of order between equal treatment and lawful residence will, again, have implications for administrative procedures. The first indications in the Netherlands will be briefly discussed (section 5.4).

# 3. Policy Drift and Institutional Conversion in the Shadow of EU Free Movement Law

The specific requirements of EU law, as discussed in the previous section, may cause Member States to adjust their administrations. We might expect adjustment in – at least - two directions. First, Member States can maintain or abolish registration requirements for Union citizens. Although the specific legal challenges lead us to expect change, domestic factors, such as the general receptiveness of EU law or political climate can block or delay this process, resulting in fragmented and often arbitrary outcomes. Secondly, Member States can maintain a clearly defined division of competences between welfare and migration authorities with respect to the right of residence of Union citizens or (informally) delegate the responsibility to assess lawful residence to welfare authorities. Factors explaining this decision can be linked to the specific design of national laws – the relationship between social and migration law in particular – and the features of the national administrative system.

## A. Abolishing or Maintaining Administrative Formalities?

Although Member States vary in their respective immigration control and policies, most will have made use of registration requirements and residence documents (certificates or permits) to govern the (longer term) presence of Union citizens in their territory.[[36]](#footnote-36) The correct fulfilment of registration requirements and the possession of valid residence documents typically opened the door for Union citizens, like for regular immigrants, to access their host welfare state.[[37]](#footnote-37) As follows from the earlier discussion of EU law, however, Member States who use such instruments can be expected to face legal and policy pressures. First, they face difficulties in formulating and enforcing the *a priori* conditions for continued residence. Strict conditions ‘at entry’ are often considered disproportionate under EU law and one can also question the effectiveness of this initial check, as the ‘personal circumstances’ of Union citizens can change after entering another Member State and often do not reflect the initial situation any more when they apply for social benefits. Secondly, Member States who strictly rely on registration procedures and residence documents when granting social rights to Union citizens consistently face (the threat of) legal challenges by those Union citizens who rely on their autonomous or independent status under EU law. The intensity of the resulting (administrative) adjustment pressure will depend on the general receptiveness of domestic courts towards EU law and the information and support structure for Union citizens claiming their social rights under EU law.[[38]](#footnote-38)

Administrative adjustment cannot be taken for granted however. Various factors lead us to expect *institutional inertia*, or a delayed process of administrative adjustment. Empirical studies have already questioned the ‘myth of rights’ pertaining to conventional accounts about European law and the Court’s activism. With respect to the equal access of EU citizens to national social benefits, Lisa Conant has argued that member States are relatively free to engage in a strategy of ‘contained compliance’: while individual Union citizens might secure their rights in the courtroom, a substantial degree of national discrimination persists in the realm of policy and practice. This outcome can be explained by the combination of the organisational weakness of migrant Union citizens, the lack of a sustained and comprehensive programme of prosecution by the European Commission and the potential high costs of ‘opening up’ for national governments.[[39]](#footnote-39) Secondly, the use of residence documentation makes perfect sense and is defendable from the perspective of Weberian bureaucratic rationality in the sense that immigration and welfare authorities have different areas of competence, expertise and functions. Officials responsible for granting social assistance would probably feel more comfortable when relying on administrative evidence proving the Union citizen’s lawful residence that is produced by officials of the immigration authority. Even when welfare authorities actively seek ways to contain the provision of welfare, they might be confronted with the passiveness of immigration authorities who have few incentives to expel Union citizens in an open border Europe.[[40]](#footnote-40)

Institutional inertia, or ‘non-change’, can lead to *policy drift*, especially with respect to the function and purpose of residence documents.[[41]](#footnote-41) I use the concept of ‘drift’ in a relatively loose sense here, meaning that the new (legal) environment of EU free movement - characterized by supranational legal norms that can be directly invoked by Union citizens in a decentralized court system – undermines the effectiveness of traditional migration control while policy and institutions are not ‘updated’ to reflect these new circumstances. Even when national courts consistently invalidate administrative decisions of social authorities that attach authoritative value to residence documents and lead to altered outcomes on the ground, national decision-makers might choose *not* to act (sometimes deliberately). In the context of political climate - security discourse in particular – decision-makers might cling on the registration procedures and residence documentation in order maintain a form of ‘control’ over who enters the country while neglecting the implications this can have on the ground.

## B. Redesigning the Function of Welfare or Migration Authorities?

In order to decrease the administrative burden for migration authorities and limit the (unintended) consequences of issuing a worthless residence document, Member States might therefore decide to abolish the requirement for Union citizens to register with the migration authority and stop checking their compliance with the residence conditions ‘at entry’. Rather than seeking to ‘contain’ compliance with EU (case) law, such a strategic decision can be considered as a creative way of exploring EU (case) law in order to limit the broader implications for their national welfare state arrangements.[[42]](#footnote-42) Member States may want to resolve the very *ambiguity* of EU law by redesigning their administrations in such a way that they are both ‘ECJ-proof’ and contain welfare provision to Union citizens.[[43]](#footnote-43)

This decision to abolish registration requirements ‘at entry’ is likely to lead to *institutional conversion*: already existing institutions are transformed by actively shifting the purposes to which existing institutions or policies are put.[[44]](#footnote-44) Social policy – welfare provision in particular – can be discovered as an instrument of migration policy[[45]](#footnote-45) or, vice versa, migration policy is used as an instrument to contain welfare state spending. In certain Member States, welfare authorities will not be legally competent to decide on the legality of residence of Union citizens (see section 2.B.).[[46]](#footnote-46) They will have to cooperate with migration authorities to enforce the application of residence conditions with the result that migration authorities become partners of welfare authorities to contain the provision of welfare. Other Member States might take the step to make welfare authorities competent to verify the legality of residence of Union citizens who apply for social benefits. Arguably, welfare authorities have the greatest institutional interest in economizing welfare expenditure and might want to control ‘at the gate’. The result is, however, that welfare authorities become enforcement agents of migration policy. Important domestic factors determining the administrative adjustment process are therefore the division of competences between authorities, hence relationship between domestic social and migration law, and the features of the administrative system such as its effectiveness and the level of centralisation. Incentives to delegate the verification of residence conditions to social authorities can be expected to be stronger in Member States with decentralised administrations, where communication between different authorities and levels of administration levels is more complex.

# 4. Models of Administering Needy Union Citizens in a Welfare State

On the basis of the discussion of EU law, the expectations formulated in the previous section and the inductive case-study of the next section, we could distil three types of national administrations dealing with the legality of residence and access to social assistance of Union citizens: the form, signal and delegated model. These ideal-typical models can be considered as the generalised extreme points of possible ‘real world’ administrative systems. The use of typologies allows for analytical parsimony, comparison between Member State administration and describing and, to a lesser extent, explaining change.[[47]](#footnote-47) Importantly, this section also discusses the implications of these administrative models for Union citizens’ presence and access to the welfare system in their host Member State and in particular how the bureaucratic processes and *experiences* linked to these models pose different obstacles for the effective exercise of free movement rights.

Figure 1: Three ideal-typical models of administering Union citizens in a welfare state

**2. Signal**

Migration authority decides on residence status after signal from welfare authority

**3. Delegated**

Welfare authority decides on residence status when granting welfare

*Registration formalities*

*No registration formalities*

**1. Form:**

Residence documentation authoritative for access to welfare **state (form)**

*A priori verification*

*Ex post verification*

## A. The Form Model: The ‘Magical Act of the Form’

The first ideal type of administration centres around the rationale of – what might be called – the ‘magical act of the form’;[[48]](#footnote-48) interactions with welfare authorities are *linked* with the fulfilment of established bureaucratic procedures in the wider state administration. The decision of whether to grant access to welfare benefits is formally or ‘bureaucratically’ linked with the Union citizen’s ability to demonstrate his/her legal status, often by requiring the provision of the ‘right’ residence document or the ‘correct’ residence status in a database. It follows that Member States will make use of the opportunities offered by EU law to have Union citizens demonstrate their compliance with the conditions *prior* to their continued stay on their territory. After three months, Union citizens will typically have to register with the competent authorities (often migration authorities) and prove their legal *status* under EU free movement law, either as a worker, a self-supporting economically inactive or a student.[[49]](#footnote-49) This administrative act is bureaucratically processed to serve as information about the Union citizen’s legal entitlements within the welfare state.

It follows that the *form* - in its meaning as a written document or the fulfilment of the formal procedure - supports the coherent functioning of an administration that is characterised by a division of labour between different specialised offices who all have clearly-defined areas of competence and expertise. It makes sense and is defendable from the perspective of Weberian bureaucratic rationality[[50]](#footnote-50) and operates as a technique for ensuring predictability and impartiality of the state administration precisely because of the uniformity of the system and expertise of the official, supporting fairness in government. So-called ‘gate keepers’ of social authorities rely for their decision whether to grant benefits on the formal documentation available to them; Union citizens can know what to expect when duly completing established procedures and possessing the official paper-work signifying their residence status. However, when ‘faceless’ bureaucrats prioritise a commitment to the *form* over the *substantive* serving of the rights of citizens,[[51]](#footnote-51) The positive aspects of Weberian bureaucratic rationality can slip into ‘moral distancing’, arousing Kafkaesque feelings of alienation and dehumanisation.[[52]](#footnote-52) Attaching authoritative force to the ‘form’ can work both to the advantage and disadvantage of Union citizens.[[53]](#footnote-53) Some might gain access on the basis of earlier issued residence documents, resulting in ‘generosity by accident’, while others will be denied the possibility to claim their substantive rights under EU law because of their failure to fulfil domestic bureaucratic procedures.

In the specific context of EU law, the form model is especially susceptible to policy drift. Drifted versions of the form model can have many faces, but are characterised by the combined existence of residence documents *and* the legal prohibition to attach constitutive force to such documents in the welfare state. Oddly enough, this situation can also be created by implementation of the inherently ambiguous Citizens Directive, according to which Member States can require Union citizens to register but are prohibited to make the fulfilment of this procedure a precondition for the exercise of EU free movement rights.[[54]](#footnote-54) The result can be a confusing and highly arbitrary system for both Union citizens and welfare authorities in administrative practice: welfare authorities cannot attach value to documentation certifying a successful passing of the initial ‘check’ at entry and Union citizens who did not register at entry can still claim access to social assistance by directly relying on the substance of EU law. The administration of Union citizens’ social rights is fragmented and can be conceived of as a ‘tombola’ in practice: social authorities apply different procedures and policies with respect to Union citizens and domestic courts interpret European law differently.

## B. Institutional Conversion: The Signal and Delegation Models

Member States who make the strategic decision to abolish registration requirements will design alternative models administering the social rights of Union citizens. It follows from the abolishment of registration requirement that they will not make use anymore of the possibility to screen Union citizens’ compliance with conditions *prior* to their wish to stay longer than three months on their territory. As a result of this, (local) welfare authorities are faced with the *question* of lawful residence when assessing the eligibility of Union citizens to social benefits; their residence status is essentially unknown. As ember States accept that the legal status of Union citizens depends on their *actual* activities in their territory, they shift from an *a priori* to an *ex post* verification of residence conditions and focus on an administrative *reconstruction* of the actual activities of the Union citizen on the Member State’s territory that informs decisions on the continuation or termination of lawful residence. This generally implies a shift in the burden of proof, as Union citizens can be requested to present evidence of their economic activity (tax payments, employment contracts, etc.), financial resources, actual residence, social contributions, social integration, etc., for their entire stay in the host country, of which evidence is often incomplete. Member States can then choose whether to ‘reverse’ the traditional information flow between migration authorities and welfare authorities or to delegate competences to the welfare authorities. In terms of bureaucratic experience and implications for the Union citizen the two models differ substantially.

*The signal model.* In the second ideal-typical model, Member States have designed an administrative system in which Union citizens’ recourse to the welfare state informs a (first) decision on the right of residence of the Union citizen by the migration authorities. Social authorities will communicate with migration authorities when they grant social assistance to a Union citizen. On the basis of this information, the migration authorities will assess the potential consequences for the Union citizens’ right of residence under EU law. As a result, the residence status of foreign Union citizens residing in the Member State remains in many cases *unknown* and will only be determined when they come on the radar of migration authorities by through ‘signals’ sent by the welfare authorities. It is clear however, that the design and implementation of this model is challenging for a state administration as it requires a consistent and complex system of information exchange between different administrative offices. Therefore, the stability and ‘success’ of this model depends on the effectiveness of cooperation and information exchange between the separated authorities.

The signal model also creates a bureaucratic experience that closely resembles the situation in Kafka’s parable *Before the Law*.[[55]](#footnote-55) In a pure signal model, Union citizens will be treated equally with respect to access to social benefits, but their official interaction with the welfare state *can* have residential consequences. The metaphorical ‘gate’ towards social citizenship is initially open, but is characterised by a highly personalised *retrospective* construction of their conduct by the migration authority that might result in a termination of residence and an order to leave the country. As the very reason for applying for social assistance might invalidate their right of residence, the law applies forcefully in its *openness* and may deter foreign Union citizens from engagement with the welfare system at all.[[56]](#footnote-56) When a Member State does not expel or when Union citizens strategically decide not to apply for benefits, the result of this model is one of *de facto* stratification of the welfare state.

*The delegated model.* In the third model, Member States have delegated the competence to decide on the right of residence of Union citizens to welfare authorities. Welfare authorities can independently exclude Union citizens on the basis of the residence conditions under EU law and do not need the cooperation of migration authorities anymore. From the perspective of administration, this ‘delegation’ model entails a shift in administrative burden and professional expertise from the migration authorities to welfare authorities; civil servants responsible for granting social assistance have to be trained in assessing the legality of residence of EU migrants. The ‘success’ of this model depends on the uniform expansion of expertise amongst social authorities and their staff with respect to the residence rights of Union citizens. This process can therefore be expected to be less constraining for Member States with a high degree of centralization in welfare provision in contrast to Member States with decentralized (regional/local) authorities. Where the signal model still links the welfare state with territorial presence, the delegated model implies and leads to a welfare state with an accepted form of stratified membership. Since social authorities do not require an explicit decision form the migration authority, they will integrate an assessment of the residence conditions in their general decision of whether to grant a benefit and not act on possible territorial consequences. The result is a Member State within which certain residents are ‘tolerated’ but do not have access to the welfare state.

# 5. The Netherlands (2001-2016): From *Form* to *Signal* with Separated Authorities

This section proceeds by presenting a thick description of an in-depth qualitative case study of the transformation of the Netherlands’ social assistance administration between 2001 and 2016. For the purpose of this study, we can expect the Netherlands to be a ‘most-likely’ case to study administrative adjustment under EU free movement law. The country is generally classified as one in which domestic political concerns play a crucial role in the compliance with EU law[[57]](#footnote-57) while its courts are described as ‘strikingly receptive’ towards the message from Luxembourg.[[58]](#footnote-58) As a result, the administrative adjustment process will be politically informed with close attention to the message from Luxembourg as it is enforced through the national court system. Methodologically, the research relies on techniques of process tracing: a single case method with a focus on causal ‘within case’ inference aimed at explaining and understanding how an outcome is produced by studying the process leading up to it.[[59]](#footnote-59) The analysis draws on government documents and working instructions signifying legislative and policy changes, qualitative interviews, domestic case law and participatory research. Interviews were conducted with officials of five municipalities, the welfare authorities who are responsible for granting social assistance in the Netherlands, and civil servants of the Immigration and Naturalisation Service, responsible for assessing dossiers of Union citizens who applied for social assistance.[[60]](#footnote-60) I created a database containing all available and relevant domestic case law relating to Union citizens and questions about their right to social assistance in the period between 2000 and 2016.[[61]](#footnote-61) Finally, by volunteering for interest groups in the city of Amsterdam (2015-2016), I was able to observe the process of individual Union citizens who applied for social assistance and other social services, enabling me to trace the actual processes and procedures applied in various situations and corroborate the evidence retrieved from the other sources.

I distinguish three periods. Despite facing challenges from courts to treat the entitlements of Union citizens independently from administrative status, during a first period (2001-2007) Dutch authorities still had in place the administrative *modus operandi* applying to regular migrants, requiring them to have both a valid residence permit and the ‘correct’ residence code in the Aliens Database. A second period was initiated with the implementation of the Citizens Directive. Perhaps surprisingly, partly as a result of this, policy drift is observed with widely varying administrative practices of welfare authorities and a dysfunctional information procedure with the migration authority. A third period (2013 – 2016) can be identified with an important judgment of Administrative High Court (2013), declaring the Immigration Service the only competent authority to decide on the legality of residence of Union citizens, and the abolishment of any registration duty (2014). It will be argued that together these periods represent a contested yet gradual transformation from a *form* to a *signal* model. A final subsection indicates however that recent ECJ case law may lead to a process of delegation towards social authorities in the future.

**2. Signal (2013-2016)**

**3. Delegated (2017-…)**

*Registration formalities (A priori verification)*

*No registration formalities (Ex post verification)*

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**1. Form (2001-2007)**

*But drift: 2007-2013*

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Figure 2: The administrative adjustment process of granting social assistance to Union citizens in the Netherlands

2014

## A. The ‘Linking’ Principle – Form Model (2001 – 2007)

During the first period of analysis, the Netherlands still sought to control immigration of Union citizens by requiring them to obtain a residence permit. For an initial period of 6 months Union citizens could freely access and reside on the Dutch territory.[[62]](#footnote-62) If they wished to stay for a longer period, they could apply for a residence permit with the Immigration and Naturalisation Service. In order to obtain this permit, economically inactive and retired EU citizens had to prove their *independent* and *durable* sufficient resources for a period of at least a year.[[63]](#footnote-63) In principle, this permit was valid for a period of five years, but was shorter for certain categories in cases of temporary employment, service providers and students.[[64]](#footnote-64) Before 15 January 2004, Union citizens would be issued a residence permit that warned the bearer that ‘recourse to the public means invalidates the right to residence’, signifying the *automatic* suspension of lawful residence when claiming social assistance.[[65]](#footnote-65) When Union citizens had resided lawfully in the Netherlands for five years and had not been unemployed for more than a year in the preceding period, they could apply for a permanent residence permit under national law. This would mean that claims to social services would not have consequences for the right of residence anymore.[[66]](#footnote-66)

 A combination of evidence suggests that during this first reference period access to social assistance was connected to the possession of a valid residence permit and having the ‘correct’ residence status in the national database. The official policy instructions are ambiguous: although they emphasise the declaratory value of residence permits granted to Union citizens, they still require Union citizens to possess a residence permit in order to ‘demonstrate’ their lawful residence and qualify for certain ‘services or advantages’, including registration in the municipal database or the reception of social assistance.[[67]](#footnote-67) A report of the Municipal Ombudsman of Amsterdam from 2005 sums up the administrative practice of the Municipality of Amsterdam: Union citizens have free access to the Netherlands, but for a claim to social assistance they are required to present a valid residence permit and be registered with the ‘correct’ code in the Municipal Basic Administration (GBA).[[68]](#footnote-68) A similar picture emerges clearly from the case law, with municipalities being challenged for declining applications for social assistance by Union citizens for purely bureaucratic reasons, often successful.[[69]](#footnote-69)

Hence it appears from policy and administrative practice that Union citizens, despite their autonomous legal position, were still treated as ‘ordinary’ aliens and could often not claim their right to equal treatment in practice.[[70]](#footnote-70) This is not entirely surprising if one considers that the Netherlands, in contrast to other Member States like Germany, has never created a separate category for the Union citizen in its aliens’ legislation but still governs the legal status of the Union citizen through a system of *exceptions* to the ‘regular’ alien, adding complexity to the systematics of dealing with non-nationals.[[71]](#footnote-71) Access to welfare for non-nationals (‘vreemdelingen’) is governed through the principle of ‘koppeling’, best translated as ‘linking’. Enacted in 1998, this principle essentially excludes aliens who are not lawfully resident from entitlement to welfare benefits with the objective to prevent the continuation of their actual stay by relying on such benefits. [[72]](#footnote-72) Officials of welfare authorities are not only supposed to determine the residence status of applicants by checking their residence permit, but also their ‘residence code’ in the Municipal Personal Records Database (‘Basisregistratie Personen’), which attaches a residence status to every person residing in the Netherlands. Depending on this verification process, the application for social assistance is either rejected or accepted or, when the application gives rise to this, a further verification procedure is initiated with the migration authority.[[73]](#footnote-73)

It follows that without the permit in such a highly linked system, Union citizens ‘cannot function legally in the host state, and therefore, in practice, […] cannot reside.’[[74]](#footnote-74) Free movement law, in particular the doctrine of the autonomous Union citizen, being able to claim EU-based rights independent from national bureaucratic requirements, severely challenges a system where the whole administrative chain depends on the initial permit. We should expect policy change when this apparent misfit between the substance of EU case law combines with compliance pressures.

The practice of ‘linking’ access to social assistance to bureaucratic requirements with respect to Union citizens came under increased scrutiny through an infringement procedure by the European Commission and a consistent series of judgements by national judiciaries. Relying on the *Grzelczyk* judgment, the Commission first argued in 2001 that the withdrawal of a residence permit of an economically inactive Union citizen should in no case become ‘the automatic consequence’ of having recourse to the social assistance system.[[75]](#footnote-75) The Dutch government responded in 2004 by changing the text of the permit to the warning that ‘recourse to the public means *can* have consequences for the right to residence’.[[76]](#footnote-76) The Commission also challenged the Dutch condition to demonstrate the possession of ‘independent’ and ‘durable’ sufficient resources before an economically inactive EU citizens could obtain a residence permit. Despite reluctantly deleting the restrictions on the *independent* origin of the resources, the Dutch government stuck to its position that resources of economically inactive citizens and pensioners could only be considered ‘sufficient’ if they were available for at least a year. In the resulting case, the ECJ considered this requirement disproportionate as it was imposed regardless of the *real* period that the Union citizen would reside.[[77]](#footnote-77)

Secondly, a great majority of national courts scrutinised practices of municipalities that attached constitutive force to residence permits and residence ‘codes’, stressing the independent status Union citizens instead.[[78]](#footnote-78) These cases culminated in a judgment of the Administrative High Court that declared the practice of social authorities to verify residence status on the sole basis of residence codes in the Municipal Records Database invalid. Instead, the Court set a precedent for social authorities to verify independently, in cases of doubt, whether the Union citizen applying for social assistance enjoyed lawful residence under EU, in particular whether the applicant belonged to the category of ‘economically active’.[[79]](#footnote-79)

## B. Implementing the Citizens Directive and Policy Drift (2007-2013)

The second period of analysis is identified with the implementation of the Citizens Directive into national legislation and policy instructions in 2007. The first ‘free’ period of residence, during which the Union citizen just need to possess a valid identity card, was shortened from six to three months.[[80]](#footnote-80) At the same time however, the Social Assistance Act was amended so as to exclude Union citizens from an equal right to social assistance during this first period of residence or longer if they are jobseekers.[[81]](#footnote-81) Union citizens wishing to stay longer than three months were no longer required to obtain a residence permit. Instead, they had a duty to register within four months after entering the Dutch territory with the Immigration Service to receive a registration certificate.[[82]](#footnote-82) During a registration appointment, an assessment would take place on whether the Union citizen complied with the conditions for continued residence. The Immigration Service would verify the validity of the identity papers and verify the documents that Union citizens had brought to state and demonstrate the purpose of their stay in the Netherlands and proved their health care coverage.[[83]](#footnote-83) Since the Citizenship Directive demanded the immediate issue of a registration certificate, the system was described as ‘relatively flexible’.[[84]](#footnote-84) Only in case of doubts about lawful residence or when no proof of health insurance or the purpose of stay could be provided, no registration certificate would be issued.[[85]](#footnote-85) A special permanent residence status was created for the Union citizen who had resided in the Netherlands for an uninterrupted period of five years.[[86]](#footnote-86) The eligible EU citizen could apply for a permit of permanent residence when he showed his lawful residence, for instance by providing proof of registration in the Municipal Administration.[[87]](#footnote-87)

With the implementation of the Citizens’ Directive (2007), the Dutch authorities loosened the formal link between the possession of a residence document and access to the welfare state. Instead, the Aliens Circular would now state that on the basis of Directive 2004/38, proof of lawful residence does not follow from the provision of a residence document.[[88]](#footnote-88) This led to the rather paradoxical situation that although no documentation was required to prove lawful residence (and have access to social assistance) the Netherlands still tried to maintain some form of bureaucratic control by demanding registration with the Immigration Service. Probably as a result of this contradictory situation, a blurry picture emerges from Union citizens’ access to social assistance in practice. Based on interviews and case law, three different responses from municipalities can be distinguished; one expansive and two restrictive.

A first response for a municipality was to grant social assistance and send a report to the Immigration Service. By doing so, the Dutch administration might have acted more generous than the government had originally envisioned. With the implementation of the Citizens Directive, municipalities were asked to notify the Immigration Service when they granted social assistance to Union citizens so that the Immigration Service could assess the consequences for their residence status.[[89]](#footnote-89) In practice, however, cooperation and information exchange between municipalities and the Immigration Service was largely ineffective. An internal research report revealed that it was unclear for municipalities in which cases they should inform the Immigration Service, resulting in a relatively low number of reports.[[90]](#footnote-90) In addition, municipalities hardly ever received feedback from the Immigration Service.[[91]](#footnote-91) From the perspective of the Immigration Service, the termination of residence of Union citizens was described as ‘legally more complex’ and ‘almost impossible’ to do in practice.[[92]](#footnote-92) It was even acknowledged that in the period between August 2006 and the summer of 2008 Union citizens’ files were not assessed at all due to other (political) policy priorities.[[93]](#footnote-93) In other words, the ‘tombola’ situation resulting from the implementation of the Citizens Directive might have resulted in ‘generosity by accident’:[[94]](#footnote-94) some Union citizens who were not likely to meet residence conditions might have received social assistance on the basis of earlier issued registration certificates or due to administrative incapacity.

A second, rather restrictive response can be described as sending the Union citizen who applies for social assistance ‘from pillar to post’. This situation would take place when Union citizen did not register at all or only registered with the municipality but *not* with the Immigration Service. In the latter case, they would be registered in the database with a residence code that signified that the Union citizens residence status as ‘open’ under EU law, a process that would only be finalised if the Union citizen registered with the Immigration Service. While Union citizens with this residence code could have actually resided in the Netherlands for many years, they were refused social assistance and asked to report at the Immigration Service to change their ‘residence status’.[[95]](#footnote-95) The Immigration Service, however, did neither have the capacity nor the information to verify, retrospectively, the residence status of a Union citizen. Unable to change their residence status, Union citizens were regarded as workseekers by municipalities and refused social assistance. That the municipalities were even encouraged to adopt this practice appears from a letter from the Minister of Social Affairs, informing them that Union citizens who failed to register with the Immigration Service could be *assumed* to have resided in the Netherlands shorter than three months.[[96]](#footnote-96)

A third response by municipalities was to independently assess the residence status of Union citizens. It appears from both interviews and case law that it was common practice for municipalities to assess, on the basis of the residence conditions of the Citizens Directive, whether a Union citizen lawfully resided in the Netherlands and therefore enjoyed access to social assistance.[[97]](#footnote-97) It appears that, until a definitive judgment by the Administrative High Court in 2013 (see section 4.III), lower courts were divided over whether municipalities were competent to assess residence, with some of them stressing that municipalities were not the competent authority to check residence conditions[[98]](#footnote-98) and some explicitly requiring and allowing municipalities to directly test whether .[[99]](#footnote-99) An independent assessment offered municipalities the opportunities to reject claims to social assistance by arguing that the Union citizens did not have sufficient resources and, hence, did not enjoy lawful residence in the Netherlands.

 The conclusion to be drawn from second period of analysis is the following: administrative and legal incapacities and inconsistencies created a highly arbitrary system for Union citizens’ social rights in practice. Whereas, on the one hand, outdated registration certificates and administrative procedures could ‘accidently’ grant access to social assistance to some Union citizens, the same reasons provided an incentive for municipalities to restrictively test the right of residence themselves. The policy challenge formulated time and again during this period was not in changing the *law*, but rather to establish effective *working processes* between municipalities and the Immigration Service in order to swiftly withdraw the residence permit of aliens who, ‘in breach of the conditions’, had recourse to social assistance.[[100]](#footnote-100)

## C. Completing a Signal Model (2013-2016)

The third period of analysis is identified with a crucial judgment of the Administrative High Court in 2013. In combination with the administrative decision to abolish any form of registration duty for Union citizens in 2014, this judgement triggered the final reforms towards a *signal* model of administering Union citizens in the Dutch welfare state.

The Administrative High Court clearly decided in 2013 that welfare authorities are not competent to reject social benefits to Union citizens on the basis of residence conditions.[[101]](#footnote-101) Joining four separate cases, it held that municipalities are only responsible for assessing the right to social assistance while the Immigration Service is responsible for the assessment and eventual termination of lawful residence as a consequence of a claim to social assistance. For Union citizens who have resided longer than three months, municipalities have to *assume* their lawful residence for as long as the migration authorities have not taken an explicit decision on the legality of their residence on the basis of the signals they receive from welfare authorities.[[102]](#footnote-102) Although this presented an administrative challenge, municipalities received the judgement positively. Important: municipalities welcomed the decision because it provided clarity over the division of competences and municipal civil servants did not have to rely on the open and abstract concepts of Directive 2004/38. The judgement was even described as a ‘blessing’.[[103]](#footnote-103)

Secondly, the Netherlands definitively moved towards a *signal* model, also in terms of strategic reasoning, when it abolished the duty for Union citizens to register.[[104]](#footnote-104) The decision was directly motivated by EU law, namely by the doctrine that the right to residence is independent from administrative formalities, and highlighted the ‘false sense of certainty’ that could be created by testing residence conditions at the moment of registration.[[105]](#footnote-105) The situation at the moment of registration, in terms of EU law, could be totally different from the actual situation when a Union citizen applies for social assistance.[[106]](#footnote-106) The new procedure would be more ‘suitable and effective’ as the Immigration Service would test the legality of residence of Union citizens in specific situations in response to ‘indications’ from other authorities and would thus be ‘information led’.[[107]](#footnote-107) In other words, the Dutch authorities discovered that an *a priori* test of residence compliance turned out worthless in practice and it would more efficient to design a system that efficiently connected *actual* conduct of Union citizens, i.e. recourse to the welfare system, with its residential consequences.

The judgement in combination with the definitive abolishment of a registration duty led, probably for the first time, to a relatively clear division of labour between the social and immigration authorities. Welfare authorities had to apply the Social Assistance Act and could only reject social assistance to those categories of Union citizens listed in article 24 (2) of the Citizens Directive, i.e. economically inactive during their first three months of residence and longer for jobseekers.[[108]](#footnote-108) Left as the only possibility of excluding Union citizens from social assistance, it is apparent that municipalities started to search the legal limits of those categories.[[109]](#footnote-109) The workload of assessing residence conditions shifted towards the Immigration Service, which not only had to hire more employees to expand its capacity,[[110]](#footnote-110) but was now also faced with legal challenges against its decisions.[[111]](#footnote-111)

The judgment also required the establishment of an effective and uniform working procedure. In case of doubt about the residential consequences of the recourse to social assistance, the municipalities were requested to send a filled-out form concerning the EU citizen to the IND, which is to decide on the possible termination of lawful residence.[[112]](#footnote-112) It is noted that the Immigration Service had to hire more staff after the CRvB judgement in order to process the reports.[[113]](#footnote-113) In cases when the Immigration Service is uncertain about the legality of residence, the Union citizen will be sent a letter listing twenty-six questions concerning their personal situation in the past period, ranging from sources of income, residence, family ties, medical situation to the ultimate question: ‘Why do you think that you are not an unreasonable burden on the public resources and that in your case termination of your right to residence is a disproportionate measure?’[[114]](#footnote-114) On the basis of the evidence presented by the Union citizen, case workers of the Immigration Service ‘reconstruct’ his/her situation and activities under EU law and decide whether he/she (1) ever enjoyed lawful residence, (2) his/her residence already expired or (3) terminating residence would be proportionate measure in the light of personal circumstances.[[115]](#footnote-115) Any decision that involves a loss of residence is reported back to the municipalities, who are then able to stop granting social assistance. The Union citizen will receive a letter demanding him/her to leave the country within four weeks or otherwise face expulsion.[[116]](#footnote-116)

The combined result of this administrative adjustment is the establishment of a system that could be a described as a strong example of a *signal* model. In contrast to regular aliens, the residence status of Union citizens residing in the Netherlands remain in many cases *unknown* and will only be determined when they come on the radar of the Immigration Service through the bureaucratic procedures of its welfare state. It is for this reason that it is difficult to conclude whether domestic court activism in the application of EU law has led to a general ‘opening’ of the Dutch welfare system to needy Union citizens: the threat of losing the right of residence hangs over their head as a sword of Damocles.[[117]](#footnote-117) For Union citizens who are not likely to meet the residence conditions, the system might turn out generous, as they get to receive social assistance until the consequences for their residence are processed. For others, however, the termination of their social assistance and order to leave the country will come as an unpleasant surprise, especially if they have to leave their (Dutch) partner and possible children. And those Union citizens aware of the consequences might not even apply at all and opt instead for living a life under the minimum subsistence level.[[118]](#footnote-118) It is clear that Member State administrations not only make Union citizens enter their territory ‘at own risk’, but also apply for minimum subsistence support ‘at own risk’.[[119]](#footnote-119)

## D. After Dano: Towards a Delegation to Municipalities?

Despite a broadly shared view among interviewees that the Court’s restrictive reasoning in *Dano* and *Alimanovic* was a mere ‘confirmation’ of the correctness of current policies, recent events suggest that the Netherlands will use the newly created window of opportunity to expand the exclusion of Union citizens from social benefits. A recent policy document announces the development of a ‘policy guide’ to assist municipalities in deciding when social assistance should be granted and when such claims should be reported to the Immigration Service.[[120]](#footnote-120) Among announced measures are the possibilities for municipalities to independently stop the grant of social assistance of Union citizens who worked less than a year (Alimanovic) or not to grant social assistance to Union citizens who have never had work or sufficient financial resources since entering the country (Dano). Since the latter measure requires municipalities to rely on the conditions for lawful residence, this policy measure, once effected, implies an informal delegation of the competence to assess the legality of residence from migration to welfare authorities. It is therefore the question whether will not face scrutiny from the domestic court system.

# 6. Conclusion

The specific constellation of early EU citizenship case law has presented a formidable challenge to advanced welfare state administrations. The (1) right to equal treatment, (2) a right to residence, subject to certain conditions, and (3) the direct enjoyment of EU free movement rights independent from administrative formalities could be said to shake up established procedures and division of competences between welfare and immigration authorities. The modern, nationally bounded welfare state, in all its complexity, can be visualised as the wooden tower of ‘Jenga’ and the European Court of Justice as a player knocking out certain building blocks and placing new ones’ on top in order to promote an effective freedom of movement. Although the Court’s preference for the substance of EU law over the ‘magical act of the form’ must have empowered the position of the migrant Union citizens in their host welfare state, Member State administrations have been clinging on to bureaucratic formalities surprisingly long. This can be seen both as a way to passively ‘contain’ compliance with ECJ judgements in order to limit the financial consequences for the welfare state, but perhaps better as a form of institutional inertia produced by Weberian bureaucratic rationality based on the idea of separated offices with clearly-defined areas of competence and expertise.

 Through an extensive case-study of the Netherlands social assistance system the paper has demonstrated how Member States not only respond to the Court’s case law in terms of rules, but also by designing new administrative structures and procedures of dealing with individual Union citizens who have recourse to their welfare system. The original ‘form’ model, linked access of Union citizens to social assistance with their fulfilment of bureaucratic requirements, such as the possession of registration certificate and a ‘correct’ residence status in a national database. Adjustment pressures – either by EU institutions or from the domestic court system – may lead Member States to stop the monitoring of Union citizens’ compliance with the residence conditions ‘at entry’ , and start verifying at the moment of applying for social assistance. This shift from an *a priori* assessment to a ‘reconstruction’ of someone’s conduct in the light of EU law also implies a shift in the burden of proof to the Union citizen. Member States will vary in which administrative body will conduct this assessment. Since Dutch courts emphasised both the independent status of the Union citizen *and* respect for the division of competences between social and migration authorities, the Dutch authorities designed a ‘signal’ model: a verification of lawful residence is conducted by the migration authority once Union citizens comes on its radar through the bureaucratic procedures of the welfare state. Other Member States might opt to delegate this competence to their social authorities, which will fit a third ‘delegated’ model.

A study into the administrative responses of Member States to the early citizenship potentially moves the debate about the impact of EU law beyond mere opening or closure of national welfare systems. Account should also be taken different bureaucratic *experience* Union citizens of their rights. The very fact, for example, that a claim to social assistance *can* have consequences for their lawful residence can act as a deterrent for Union citizens to engage with the host welfare state at all; this impacts on both the functioning of territorial welfare states and social equality in practice and raises for question about the existence of ‘social Europe’ on the ground.

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2. F Kafka, ‘Before the Law’, in, *Metamorphosis and Other Stories* (Penguin Books, 2007), p 198 [↑](#footnote-ref-2)
3. See e.g., W R Brubaker, ‘Membership without citizenship: the economic and social rights of noncitizens’, in W R Brubaker (eds.) *Immigration and the Politics of Citizenship in Europe and North America*. [↑](#footnote-ref-3)
4. G Davies, ‘Bureaucracy and Free Movement: A Conflict of Form and Substance’, (2003) 4 *Nederlands Tijdschrift voor Europees Recht* 81, p 81 [↑](#footnote-ref-4)
5. M Blauberger and SK Schmidt, ‘Welfare Migration? Free Movement of Eu Citizens and Access to Social Benefits’, (2014) 1 (3) *Research and Politics* 1, p 3. Eurofound, 'Social Dimension of Intra-Eu Mobility: Impact on Public Services, ' in 2015); C Bruzelius, E Chase and M Seeleib-Kaiser, 'Semi-Sovereign Welfare States, Social Rights of Eu Migrant Citizens and the Need for Strong State Capacities', in (Oxford Institute for Social Policy, 2014). [↑](#footnote-ref-5)
6. D Sindbjerg Martinsen and J Sampson Thierry, ‘A European Social Union – for Whom?’, (Forthcoming) [↑](#footnote-ref-6)
7. Interview Legal Official Ministry of Justice and Security (19-01-2016). [↑](#footnote-ref-7)
8. A Heindlmayer and M Blauberger, ‘Enter at Your Own Risk: How Eu Member States Administer the Free Movement of Eu Citizens’, (Forthcoming in JEPP) [↑](#footnote-ref-8)
9. Whereas this paper relies on a detailed analysis of the Dutch case to inductively theorise the different administrative models and distilling factors for change, a final version of this paper seeks to be comparative, adding Germany and Austria as case studies. [↑](#footnote-ref-9)
10. *Commission v Netherlands*, C-398/06, EU:C:2008:214. [↑](#footnote-ref-10)
11. Interview legal official municipality Den Haag (1 april 2016). [↑](#footnote-ref-11)
12. *Kempf*, C-139/85, ECLI:EU:C:1986:223, para 7. [↑](#footnote-ref-12)
13. Article 7 (1) (a) and (3) Citizens Directive, as confirmed in *Alimanovic*, EU:C:2015:597. [↑](#footnote-ref-13)
14. *Martínez Sala*, ECLI:EU:C:1998:217, paras 59-62. [↑](#footnote-ref-14)
15. *Grzelczyk*, C-184/99, EU:C:2001:458, para 31. [↑](#footnote-ref-15)
16. Article 24 Citizens Directive. [↑](#footnote-ref-16)
17. Article 3 Directive 93/96. [↑](#footnote-ref-17)
18. Article 24 (2) Citizens Directive. [↑](#footnote-ref-18)
19. Article 6 Citizens Directive. [↑](#footnote-ref-19)
20. Article 7 (1) (b) Citizens Directive. This condition was already formulated in article 1 of Directive 90/364. [↑](#footnote-ref-20)
21. *Grzelczyk*, EU:C:2001:458, paragraph 42. *Trojani*, C-456/02, EU:C:2004:488, paragraph 45. [↑](#footnote-ref-21)
22. *Grzelczyk*, EU:C:2001:458, paras 42-43. [↑](#footnote-ref-22)
23. See also recital 16 and article 14 (3) of the Citizens Directive. [↑](#footnote-ref-23)
24. Article 16 Citizens Directive. [↑](#footnote-ref-24)
25. *Royer*, C-48/75, ECLI:EU:C:1976:57, paras 31-32 [↑](#footnote-ref-25)
26. Ibid., para. 33. [↑](#footnote-ref-26)
27. *Martínez Sala*, ECLI:EU:C:1998:217, paras 53-54. [↑](#footnote-ref-27)
28. *Maria Dias*, C-325/09, ECLI:EU:C:2011:498, para 55. [↑](#footnote-ref-28)
29. Article 25 (1) and recital 11 Citizens Directive. [↑](#footnote-ref-29)
30. Article 8 (2) Citizens Directive. [↑](#footnote-ref-30)
31. Article 7 (1) (b) Citizens Directive. [↑](#footnote-ref-31)
32. Article 19 Citizens Directive. [↑](#footnote-ref-32)
33. G Davies see footnote 3 above. In the less-noted case of *Huber*, the Court specifically dealt with what could be seen as an alternative type of administering residence rights of Union citizens. Germany operated a centralised register that contained certain personal data relating to Union citizens that could be consulted by a number of public and private bodies. The Court accepted that the processing and storing of personal data was legitimate for the purpose of providing support to the authorities responsible for the application of the legislation relating to the right of residence. *Huber*, C-524/06, ECLI:EU:C:2008:724, paras 58 and 69. However, the Court added, since a change in the personal situation of a Union citizen entitled to a right of residence may have an impact on his residence status, the responsible authority has to ensure that the data which are stored are brought up to date ‘so that, first, they reflect the actual situation of the data subjects and, secondly, irrelevant data are removed from that register’. Ibid, para. 60. [↑](#footnote-ref-33)
34. *Trojani*, EU:C:2004:488, para 31. [↑](#footnote-ref-34)
35. *Dano*, C-333/13, EU:C:2014:2358, para 69. [↑](#footnote-ref-35)
36. See for example the various contributions in T. Hammar (ed.), *European Immigration Policy: A Comparative Study*, Cambridge University Press, 1985, esp. chapter 9. [↑](#footnote-ref-36)
37. Ibid, and Brubaker, footnote 3 above. [↑](#footnote-ref-37)
38. See on the role of interest groups in the domestic enforcement of EU law, amongst others, R Slepcevic, ‘The Judicial Enforcement of Eu Law through National Courts: Possibilities and Limits’, (2009) 16 (3) *Journal of European Public Policy* , LJ Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press, 2002), pp. 24-29 and SK Schmidt, ‘Judicial Europeanisation: The Case of Zambrano in Ireland’, (2014) 37 (4) *West European Politics*, p. 778. [↑](#footnote-ref-38)
39. LJ Conant, , pp. 200-207. [↑](#footnote-ref-39)
40. Heindlmayer and Blauberger, footnote 9 above. [↑](#footnote-ref-40)
41. [↑](#footnote-ref-41)
42. M Blauberger, ‘National Responses to European Court Jurisprudence’, (2014) 37 (3) *West European Politics* [↑](#footnote-ref-42)
43. See SK Schmidt, ‘Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty’, (2008) 10 (3) *Journal of Comparative Policy Analysis: Research and Practice* ; M Blauberger, ‘With Luxembourg in Mind… the Remaking of National Policies in the Face of Ecj Jurisprudence’, (2012) 19 (1) *Journal of European Public Policy* 109, p 113. [↑](#footnote-ref-43)
44. Hacker, Pierson and Thelen, ‘Drift and Conversion: Hidden Faces of Institutional Change’, Paper prepared for the Annual Meetings of the American Political Science Association, Chicago, August 2013. [↑](#footnote-ref-44)
45. Gsir, Lafleur et al, 2016. [↑](#footnote-ref-45)
46. Although they might be able to exclude Union citizens from social benefits on the basis of explicit exceptions to the principle of equal treatment (see section 2.A.). [↑](#footnote-ref-46)
47. By analogy, G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (John Wiley & Sons, 1990) [↑](#footnote-ref-47)
48. I thank Clemens Kaupa for suggesting this lovely phrase. [↑](#footnote-ref-48)
49. As laid down in article 8 (2) of the Citizens’ Directive [↑](#footnote-ref-49)
50. These characteristics of the modern bureaucracy were originally formulated by M Weber, *Economy and Society* (University of California Press, 1978), p 956 ff [↑](#footnote-ref-50)
51. For the ‘conflict of form and substance’, see G Davies footnote 3 above. [↑](#footnote-ref-51)
52. An interesting account on moral distancing in Kakfa’s literature is provided by C Huber and I Munro, ‘“Moral Distance” in Organizations: An Inquiry into Ethical Violence in the Works of Kafka’, (2013) 124 (2) *Journal of Business Ethics* [↑](#footnote-ref-52)
53. This effect was already observed by Brubaker when he remarks that difficulties in assembling the paperwork required to demonstrate eligibility may exclude noncitizens from social services, but that gatekeeping social workers might also overlook legal eligibility conditions and grant certain noncitizens benefits to which they are not entitled. Brubaker, footnote X above. [↑](#footnote-ref-53)
54. See section 2.C. [↑](#footnote-ref-54)
55. F Kafka, pp 197-198, see footnote 2 above. [↑](#footnote-ref-55)
56. As loosely based on the interpretation of G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998), p 55. It should be stressed [↑](#footnote-ref-56)
57. G Falkner, M Hartlapp and O Treib, ‘Worlds of Compliance: Why Leading Approaches to European Union Implementation Are Only ?Sometimes-True Theories?’, (2007) 46 (3) *European Journal of Political Research* [↑](#footnote-ref-57)
58. M Claes and B De Witte, ‘Report on the Netherlands’, in A-M SlaughterAS Sweet & J Weiler (eds), *The European Court and the National Courts––Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Press, 1998) [↑](#footnote-ref-58)
59. See generally, D Beach and RB Pedersen, *Process-Tracing Methods : Foundations and Guidelines* (University of Michigan Press, 2013) [↑](#footnote-ref-59)
60. A total of 20 semi-structured interviews with 24 respondents were conducted between April 2015 and June 2016. The municipalities include Amsterdam, Rotterdam, The Hague and Utrecht (together the ‘big four’ cities in the Netherlands) and Westland, a less populous municipality, but hosting a high number of EU migrant workers. [↑](#footnote-ref-60)
61. This is based on the national database ‘rechtspraak.nl’. I searched for the terms Union citizen (‘EU onderdaan’) and social assistance (‘bijstand’), then manually selected 44 relevant cases. The database only contains published cases by the courts. All higher court cases are published. Lower court cases are only selected for publication on the basis of certain criteria, including but not limited to attention from media, publication or discussion in legal journals, blogs or websites, the importance for interest groups and the development of jurisprudence. [↑](#footnote-ref-61)
62. Article 3.3 (1) (d) Vb 2000 (1 April 2001). [↑](#footnote-ref-62)
63. B10/4.2.1.1 of the Vc 2000 (1 April 2001). The government considered *sufficient* resources as at least the minimum of the net amount of the social assistance norm of the relevant category (single, couple or family). See response of the Netherlands to the Reasoned Opinion of 3 April 2003 on 17 September 2003. Classified as SG (2003) A/9083. See also (TBV 2004/1, p. 4). [↑](#footnote-ref-63)
64. Article 8.11 (1) and 8.12 Vb 2000 (1 April 2001). [↑](#footnote-ref-64)
65. Article 4.3.2 of chapter B10 of the Aliens Circular 2000. [↑](#footnote-ref-65)
66. Aliens Circular, B10 2.8 and 2.10. [↑](#footnote-ref-66)
67. Aliens Circular, B10, 1.7 and 2.6. [↑](#footnote-ref-67)
68. Rapport Gemeentelijke Basisadministratie, Afwijzing bijstandsaanvraag; Sociale Dienst, region Zuidoost, Report Number RA0510502, 11 May 2005. [↑](#footnote-ref-68)
69. Most clearly from: Rechtbank Arnhem, 17-09-2004, ECLI:NL:RBARN:2004:AR3129, Rechtbank Maastricht, 23-12-2005, ECLI:NL:RBMAA:2005:AU9591, Rechtbank Maastricht, 11-04-2006, ECLI:NL:RBMAA:2006:AX3093 and Rechtbank Middelburg, 23-03-2007, ECLI:NL:RBMID:2007:BB5134. [↑](#footnote-ref-69)
70. A point also made by a legal scholar during this period, H Luijendijk, *Nederlandse Gemeenten En Het Europese Personenverkeer : Een Onderzoek Naar De Consequenties Van Het Personenverkeer Voor De Beleidsterreinen Burgerzaken En Ruimtelijke Ordening En Huisvesting* (Kluwer, 2005), pp 405-406, 375-377, 424 [↑](#footnote-ref-70)
71. As Brouwer and Middelkoop also conclude in their report on the Dutch aliens administration, ‘De gelaagdheid van de vreemdelingenregelgeving in historisch en vergelijkend perspectief’, eindrapport 2012, summary, p. 6. [↑](#footnote-ref-71)
72. Article 10 and 11 Aliens Act. See: FM Noordam and GJ Vonk, *Hoofdzaken Sociale Zekerheidsrecht* (Kluwer, 2011), p 54 [↑](#footnote-ref-72)
73. See for instance Policy Instructions Municipality of Amsterdam, point 4.1.2.1, available online <https://www.amsterdam.nl/beleidwerkeninkomen/4-specifieke/> (6 February 2017). [↑](#footnote-ref-73)
74. G Davies see footnote 3 above. [↑](#footnote-ref-74)
75. Letter from the Commission to the Netherlands, infringement no. 1999/2029, C(2003)990, 2 April 2003, p 15. [↑](#footnote-ref-75)
76. Response of the Netherlands to the Reasoned Opinion of 3 April 2003 on 17 September 2003. Classified as SG (2003) A/9083. And TBV 2004/1, p. 4. [↑](#footnote-ref-76)
77. *Commission v Netherlands*, C-398/06, EU:C:2008:214. [↑](#footnote-ref-77)
78. See cases in footnote 57 above, also Alkmaar, 25-08-2003, ECLI:NL:RBALK:2003:AI1807. One court decided differently, Arnhem, 17-09-2004, ECLI:NL:RBARN:2004:AR3129. [↑](#footnote-ref-78)
79. Centrale Raad van Beroep, 13-06-2006, ECLI:NL:CRVB:2006:AY3868. [↑](#footnote-ref-79)
80. Article 8.11 Vb 2000. [↑](#footnote-ref-80)
81. Article 11 Participation Act. [↑](#footnote-ref-81)
82. Article 8.12 (4) Vb 2000 (transposition Article 8 (1) and (2) Directive). [↑](#footnote-ref-82)
83. Stb. 2006, no. 215, pp 22-23. [↑](#footnote-ref-83)
84. Stb. 2006, no. 215, p. 22. [↑](#footnote-ref-84)
85. Information leaflet, ‘Inschrijving bij de IND voor EU-onderdanen’, Immigratie en Naturalisatie Dienst, October 2010. [↑](#footnote-ref-85)
86. Vb 2000, 8.17. Stb 2006, no. 215, p. 9. [↑](#footnote-ref-86)
87. Immigratie en Naturalisatie Dienst, ‘IND Registration for EU Citizens’, December 2007, p. 13. [↑](#footnote-ref-87)
88. Aliens Ciricular, B10, 2.6, Wijziging vreemdelingenciculaire 2007/01, Staatscourant 22 februari 2007, nr. 38 / pag. 7. [↑](#footnote-ref-88)
89. Stb. 215, p. 23. [↑](#footnote-ref-89)
90. Inspectie Werk en Inkomen / Informatie- en Analysecentrum IND, ‘Bijstand, WW en verblijfsvergunning’, V08/05, december 2008. [↑](#footnote-ref-90)
91. As also confirmed in interviews. Municipality Westland (13 January 2016) and Amsterdam (XXX) [↑](#footnote-ref-91)
92. Inspectie Werk en Inkomen / Informatie- en Analysecentrum IND, ‘Bijstand, WW en verblijfsvergunning’, V08/05, december 200, p [↑](#footnote-ref-92)
93. Inspectie Werk en Inkomen / Informatie- en Analysecentrum IND, ‘Bijstand, WW en verblijfsvergunning’, V08/05, december 2008, p. 25. [↑](#footnote-ref-93)
94. An unintended consequence of administrative adjustment coined by A Heindlmayer and M Blauberger footnote 6 above. [↑](#footnote-ref-94)
95. Interviews Policy Official Municipality Rotterdam (12 January 2016). CRvB, 29-07-2008, ECLI:NL:CRVB:2008:BD8847. [↑](#footnote-ref-95)
96. Verzamelbrief X. [↑](#footnote-ref-96)
97. P. 38. Interview Policy Official Municipality Utrecht (1 February 2016), Policy Official Den Haag ( ), Legal Official Den Haag (1 April 2016), Policy Official Rotterdam [↑](#footnote-ref-97)
98. Especially Rechtbank Breda, 04-10-2010, ECLI:NL:RBBRE:2010:BO2970, Rechtbank Almelo, 29-11--2011, ECLI:NL:RBALM:2011:BZ4052 [↑](#footnote-ref-98)
99. Especially Den Bosch, 13-09-2007, ECLI:NL:RBSHE:2007:BB3698 and Rechtbank Amsterdam, 21-02-2013, ECLI:NL:RBAMS:2013:BZ5689. [↑](#footnote-ref-99)
100. For instance, verzamelbrief mei 2005, 29 april 2005, p. 2 and verzamelbrief mei 2006, INTERCOM/2006/44364, p. 5. [↑](#footnote-ref-100)
101. Centrale Raad van Beroep, Case 12/165 and 12/166, NL:CRVB:2013:BZ3857. The importance of this judgment cannot be underestimated as a large majority of the interviewees, especially at the municipal level, independently refer to it. [↑](#footnote-ref-101)
102. PE Minderhoud, ‘Bevoegdheid Vaststellen Verblijfsrecht bij Bijstandsaanvraag EU Burger’, (2013) (86) *Rechtspraak Vreemdelingenrecht* 1. [↑](#footnote-ref-102)
103. Interviews municipality Den Haag (1 April 2016) and municipality Utrecht (1 February 2016). [↑](#footnote-ref-103)
104. Besluit van 8 juli 2014 tot wijziging van het Vreemdelingenbesluit 2000 (afschaffing meldplicht EU-burgers), Staatsblad 2014, 268, 8 July 2014. [↑](#footnote-ref-104)
105. Ibid, p. 3. [↑](#footnote-ref-105)
106. As interviewees also point out, interview Policy Official and Legal Official Ministry of Justice and Security (19-01-2016). [↑](#footnote-ref-106)
107. Staatsblad 2014 268, p 4. [↑](#footnote-ref-107)
108. This derogation was implemented in the Social Assistance Act. [↑](#footnote-ref-108)
109. Rechtbank Den Haag, 26-06-2015, ECLI:NL:RBDHA:2015:7297, interview Legal Official municipality Den Haag (1 April). [↑](#footnote-ref-109)
110. Interview Policy Official Ministry of Justice (19-01-2016) and Immigration Service case worker (09-02-2016). [↑](#footnote-ref-110)
111. Rechtbank Den Haag, 09-04-2015, ECLI:NL:RBDHA:2015:4962, Rechtbank Den Haag, 30-04-2015, ECLI:NL:RBDHA:2015:5204. [↑](#footnote-ref-111)
112. Verzamelbrief 2013. [↑](#footnote-ref-112)
113. On the basis of three interviews with Immigration Service case workers (09-02-2016). [↑](#footnote-ref-113)
114. Letter in possession of author. [↑](#footnote-ref-114)
115. Interviews [↑](#footnote-ref-115)
116. Letter in possession of author. [↑](#footnote-ref-116)
117. The potential deterring effect of this system is confirmed in a number of interviews (F, KL, M, P, W), by my experience in giving legal advice to Union citizens and in the case law, Amsterdam, 09-12-2015, ECLI:NL:RBAMS:2015:8734. [↑](#footnote-ref-117)
118. The reality of this situation is addressed explicitly in case law, ibid. See also D Kramer, ‘Kostendelersnorm, Bijstand En Unieburger: Koppelingswet 2.0?’, (2017) (1) *Asiel & Migrantenrecht* 4. [↑](#footnote-ref-118)
119. See A Heindlmayer and M Blauberger, p 6, footnote 6 above. [↑](#footnote-ref-119)
120. Verzamelbrief 2016-2 Ministerie SZW, pp 23-24. [↑](#footnote-ref-120)