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**Welfare Policies under European Pressure?  
The Domestic Impact of Cross Border Social Security  
in the European Union**

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## Welfare Policies under European Pressure?

### The Domestic Impact of Cross Border Social Security in the European Union

By Dorte Sindbjerg Martinsen\*

*Abstract:*

*This paper considers the adaptive pressure and domestic impact on Danish and German welfare policies exerted by the institutionalisation of intra-European social security rights. The paper thus addresses the effects of a specific part of social Europe, which has been incrementally enhanced through political and judicial decision-making. It has been argued that the social security integration process foremost 'misfit' the principles of the Danish residence-based welfare model and may ultimately cause its convergence with the dominating social insurance pattern of the EU member states. The research findings, depicted in this paper, however, prove that adaptive pressure and domestic impact depend not only on national institutions, but likewise on de facto immigration and the domestic political, legal and administrative response to European institutionalisation. The article concludes that these intervening variables are decisive to domestic impact, which varies between member states, across policies and over time.*

#### **Introduction**

Since the foundation of the European Economic Community, the free movement of labour has been one of the Community's cornerstones (Cornelissen 1997, p. 29; Pennings 1998, p. 3). In order to realise the Community objective of free movement of workers as well as its subsequent extension to other persons, Regulation 1408/71<sup>1</sup> has for decades coordinated EU migrants' social security rights across member states' borders.<sup>2</sup> The framework coordinating social security rights is based on the assumption that in order to stimulate intra-Community migration, it is necessary to abolish national

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<sup>1</sup> Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; as amended by Regulation (EC) 118/97 of the Council of 2.12.1996 (OJ L 28 of 30.01.1997).

<sup>2</sup> Since the coming into effect of the Agreement on the European Economic Area (EEA) on the 1st of January 1994, Regulation 1408/71 also applies to the nationals from Norway, Iceland and Liechtenstein. This means that the rights and obligations entailed in the Regulation apply to 18 states. This paper will, however, not distinguish between EU and EEA nationals, but simply refer to the rights of EU or European citizens.

barriers to movement. Such a barrier might be the loss or risk of losing social security entitlements, which would make the Community worker reluctant or unwilling to take up work outside his own member state (Flynn 1997, p. 18). The Regulation prescribes that migrant workers/persons in the Community have equal social security rights when settling in another member state as the nationals of that state, as migrants have a right (at least partly) to export their social security rights when deciding to reside in another member state. The aim of the Regulation is to spur intra-European migration, which according to the Commission serves as a means to labour market flexibility, again assumed to cause prosperity.

The Community institution thus influences some of the core principles and historical reasoning of the welfare nation-state. From a historical perspective, welfare policies have served as important means of national integration and identification (Eichenhofer 1999, 2000; Lidegaard 2003). From an organisational perspective, the decisions on access to and the territorial scope of welfare policies have traditionally been regarded as a national prerogative, beyond the realm of Community law and policy. Welfare policies have been organised through clear links between the state and the entitled, demarcating benefits to the nation and to the long-term resident or the insured and confined within national borders. The organising principles of the policy domain have traditionally been social citizenship and territoriality (Marshall 1950; Altmaier 1995; Leibfried & Pierson 1995; Cornellissen 1997).

This paper is divided into five sections. The *first* section serves to introduce the challenge of transnational welfare. The system coordinating Community social security rights has recurrently been ascribed convergence effect. *Secondly*, the European process of institutionalising cross border social security is depicted, a process which has gradually extended the material scope of cross border welfare, as well as it has enhanced rights to an ever wider personal scope. The *third* section of the paper describes two aspects of adaptational pressure. It first discusses the likely historical reasoning for why Europeanisation should be a challenge to nation-state welfare, as expressed in organising principles and boundaries for welfare. It then considers the de facto adaptive pressure in terms of EU-related immigration to Denmark and Germany respectively. Whereas de facto EU-immigration does not sustain the hypothesis of welfare tourism, the historical and symbolic embeddedness of the modern welfare state may explain why the hypothesis remains alive and well. The *fourth* section compares the domestic impacts of supranational institutionalisation on Danish

and German welfare institutions. It demonstrates how Denmark has implemented political and judicial decision-making; and how German national courts have questioned the scope of Community law against national policy, for which reason judicial activism has had a direct influence on the insurance-based welfare state. The *final* section concludes on the findings.

### **1: The Adaptive Pressure of Transnational Welfare**

Through subtle steps of integration, the European Court of Justice, the European Commission and the Council of Ministers have gradually enhanced intra-European social security rights. Compared to a very modest point of departure, where transnational welfare was only assigned to a small number of workers of “proven qualifications”<sup>3</sup>, the access to and substance of intra-European social security rights as they exist today are indeed remarkable.

The coordination system institutionalised by Regulation 1408 has been viewed as the most advanced social policy achievement of the EU, and as the most comprehensive system of access to cross-border health care in international social law (Eichenhofer 2001; Palm et. al 2000). Above all, the coordination system gives ‘life’ to Europe, by extending concrete rights beyond national borders, by solving very practical and material problems for the one crossing borders, and thus adding flesh to the skeleton of European citizenship. However, the success and practical effect of Regulation 1408 may only be acknowledged by the relative small number of EU workers and citizens who cross borders. As noted by Eichenhofer, despite its radical achievement, the social security dimension of the European Union has not received much recognition:

“[Regulation 1408] has been the most significant development so far in social policy at the European level. Its success has been remarkable, yet its implementation has been scarcely noticeable. For decades pensions have been exported, medical treatment has been available for tourists travelling between Member States, and pro-rata pensions have been payable to those who have spent their working lives in more than one Member State. Such benefits of EU social security co-ordination is today taken for granted” (Eichenhofer 2000b, p. 231).

Although the regulation weaves social responsibilities across national borders, welfare policies are held to be the exclusive competence of the member state. Despite a general intensified process of European integration, social policies have appeared as a stronghold of the sovereign nation-state

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<sup>3</sup> As laid down by the Paris Treaty of 1951, article 69 (4). For a description of the very early institutionalisation, see Holloway 1981; Martinsen 2004.

against the influence of European law and policy – ‘an island beyond its reach’<sup>4</sup> (Eichenhofer 1999b, p. 102).

Formally, the organisation of social security policy is the national prerogative (Maydell 1999, p. 9). Member states decide on the content and scope of their individual policies. Social security is entirely based on national systems, and no social security is awarded at the Community level. EU interference in this policy realm is therefore limited to ‘coordination’, a conceptual contrast to ‘harmonisation’. However, the exact border between the two concepts is far from given but it remains clear that ‘coordination’ is not pure technicality, rather an intervening policy tool (Christensen & Malmstedt 2000, p. 14). It furthermore remains clear that there is no exact separation of national and community social competences, when internal market rules overlap with national prerogatives.

The contradictions are therefore many, as here formulated regarding health care. The quotation, however, also serves as a general description of the paradoxical meeting between national social security policies and Community law:

“Health care policy in the European Union has, at its centre, a fundamental contradiction. On the one hand, recent Treaties, which are the definitive statements on the scope of European law, state explicitly that health care is a responsibility for Member States. On the other hand, as health systems involve interaction with people (staff and patients), goods (pharmaceuticals and devices) and services (health care funders and providers), all of whose freedom to move across borders is guaranteed by the same Treaty, it is increasingly apparent that many of their activities are subject to European law (Mossialos et al. 2001, p. 11).

### **1.1: On Adaptive Pressure and Domestic Impact**

The work of Risse, Cowles and Caporaso defines ‘adaptive pressure’ of European integration as constituted by the degree of compatibility (the ‘fit’) between the principles and obligations of a given European integration process and those of national institutions (Risse, Cowles & Caporaso 2001, pp. 6-7).<sup>5</sup> The extent of adaptive pressure is therefore not decided solely by supranational

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<sup>4</sup> As formulated by advocate general Tesauro in the cases C-120/95 Decker and C-158/96 Kohll, para 17.

<sup>5</sup> The work of Risse, Cowles and Caporaso on “Europeanisation and Domestic Change” as well as the work of Börzel suggest that the adaptational pressure exerted by Europeanisation varies depending on the ‘goodness of fit’ between a specific European integration process and the national institutions in place (Risse, Cowles and Caporaso 2001; Börzel 1999; Börzel & Risse 2000). By identifying the degree of ‘fit’ or ‘misfit’, one identifies the adaptational pressure on domestic institutions which may cause change.

institutionalisation, but equally by how that process relates to established national institutions. To examine *adaptive pressure* thus requires that both the specific integration process and national institutions are identified. Since national institutions are most diverse among member states of the European Union, European integration does not exert the same degree of adaptive pressure:

“A country whose domestic institutions are perfectly compatible with Europeanisation experiences no adaptational pressure. In such a case, we expect no domestic institutional change” (Risse, Cowles & Caporaso 2001, p. 2).

Then, on the other hand, adaptive pressure is expected when:

“The lower the compatibility (fit) between European institutions, on the one hand, and national institutions, on the other, the higher the adaptational pressures” (Risse Cowles & Caporaso 2001, p. 7; Börzel & Risse 2000, p. 6).

However, even when adaptive pressure is exerted against national institutions, it may not cause significant domestic impact in terms of change, since national actors may not respond in accordance with the adaptive pressure (Risse Cowles & Caporaso 2001, p. 2; Goetz 2001, pp. 214-215 & p. 227). However, without any close examination of domestic response, much adaptive pressure and domestic impact have been ascribed to the system coordinating social security rights across Europe.

## **1.2: Adaptive Pressure on National Welfare**

Although ‘co-ordination’ stands as a softer means of European integration, a significant impact on national welfare policies has been attributed to the Regulation.

It has been argued that since the coordination framework was established by the founding fathers of the European Community, its principles were laid down in accordance with their welfare tradition. Apart from a few exceptions in individual schemes, the social security systems of the six original member states were based on the exercise of a work activity and built up as Bismarckian oriented social insurance schemes (Cornelissen 1997, p. 35; Pieters 1997, p. 190). It was therefore a natural choice that ‘lex loci laboris’ became a ruling principle of the Regulation, when deciding the applicable legislation (Christensen & Malmstedt 2000, p. 76). Furthermore, the social insurance systems ensured that the migrant would not be entitled to benefits without having contributed to the financing of welfare schemes, either through contributions or taxes.

In continuation of these arguments, it has been held that the core rationales of the Regulation mainly ‘fit’ the social insurance welfare model, and equally ‘misfit’ the principles of the residence-based welfare model, thus exerting different ‘adaptive pressures’ on national social security institutions (Banke 1998, p. 30; Ketscher 1998, 2002; Abrahamson & Borchorst 2000).

The two member states represent diverging welfare schemes. The Danish welfare state is predominantly tax-financed and residence-based, whereas German welfare tradition is basically contributory financed, and linked to the exercise of a work activity. Furthermore, Germany counts as one of the Community's founding fathers, and thus took part in the original formulation of the regulatory text, whereas Denmark became a Community member in 1973 and took over the *acquis communautaire* as well as its embedded rationale.

The ‘misfit’ between institutionalised intra-European social security rights and the residence-based welfare state has been widely debated in parts of Danish academia as well as in the public debate. Even the Danish central administration has from time to time publicly claimed that an extension of Regulation 1408 may cause ‘welfare tourism’ (Martinsen 2004, p. 277). According to the argument, more propitious welfare schemes are likely to attract immigrants. The argument is trenchant and has successfully influenced the recurring Danish debate for and against further integration. Its effective influence therefore reaches far beyond the isolated scope of 1408. Concretely, it has been put forward that when considering intra-European social security and residence-based welfare, we face two contrary logics. Free movement and Regulation 1408 favour an individualistic insurance principle with its direct relation between social entitlements and contributions, since it ensures the financial equilibrium of the welfare budget. On the other hand, the residence-based welfare state grants residents access to welfare without contribution, and its financial equilibrium depends on people staying and over their life cycle contributing to the economy. Against this background, the EU coordination system exerts adaptive pressure on the Danish welfare model to such an extent that it gradually forces it to change towards the dominating social insurance pattern of the EU member states (Ketscher 1998, 2002). According to the argument, the adaptive pressure exerted may cause welfare autonomy to be a thing of the past.

“In a long-term perspective, it cannot be doubted that Union membership will increasingly influence the design of Danish social legislation. That applies to both the design of individual rights and to the financing of the social security system. Concerning individual rights, it must be envisaged that these to a greater degree will become labour market related, but which correspond to the general development in Danish social law.

Furthermore, it may be imagined that rights will be more insurance-based, in which the relation between contributions and benefits becomes more direct. In any case, a process seems already to have started in which social benefits develop differently from traditional tax-financing [...] it should therefore be concluded that a greater pressure against the Danish model is likely, because it is very ill-suited to participate in a Community built on the principle of free movement. That will in itself cause a greater harmonisation of the social protection in the Union” (Ketscher 2002, pp. 221-222, own translation).

In a comparative light, the convergence hypothesis as here put forward by Ketscher invites us not only to think that integration will cause harmonisation but also that the insurance-based welfare state faces a significantly less adaptive pressure from European integration.

However, as will be demonstrated below, Germany has faced a higher de facto adaptive pressure in terms of EU-immigration. Furthermore, German national courts have continuously tested and questioned the scope and content of Regulation 1408/71 in relation to national policies and practices by preliminary references to the European Court of Justice. Germany has thus from time to time been forced to admit rights and change policies due to a direct legal injunction. The insurance-based welfare state has moreover been one of the most critical member states on ECJ decisions extending the exportability of social security rights (Sieveking 2000, p. 147). The German government initially spoke out very strongly against the Decker/Kohl judgments, which will be further discussed below. The former German Minister of Health, Seehofer, argued quite impetuously in the wake of the judgments saying that the member states had to overturn the rulings by a Treaty amendment and that Germany would not comply with the premises of the judgments (Langer 1999, p. 54; Børsen, 7. May 1998; Politiken 9. June 1998). The ex-minister found the Decker/Kohl case-law revolutionary and argued that if Germany adopted its premises those would be a long term threat to the sustainability of the German health system (Spiegel 17/98, Fokus from 4 May 1998; Schaaf 1999, p. 274; Eichenhofer 1999b, p. 114; Eichenhofer 1999c, p. 2; Interview, Deutsche Verbindungsstelle, 18 September 2001). Such German reactions do not confirm that the principles of contemporary German welfare simply ‘fit’ the institutionalisation of cross-border welfare. Since traditional and contemporary welfare institutions contain various principles and criteria, an examination of adaptive pressures and impact must necessarily take these into account although this means that analytical results may come to reflect such complexity and refute any simple fit/misfit assumptions. Distinct forms of impact and processes of change may thus occur referring to the same cause.

In order to compare domestic impacts on the Danish and the German welfare states respectively, this paper contains the three following stages; an identification of the process integrating intra-European social security rights: a mapping of national institutions in place; and finally, an examination of the coordination system's impact on established national welfare institutions of the Danish and German states.

## ***2: Institutionalising Intra-European Social Security Rights***

The present scope and content of Regulation 1408/71 is an outcome of a long historical process. The regulative endeavour to coordinate social security across borders is almost as old as the nation-state institution of social security itself, the first bilateral agreement being adopted in 1904.<sup>6</sup> Regulation no. 1408, as it was adopted in 1971, inherited principles from bilateral and international agreements as well as from its Community predecessor, Regulation no. 3/58<sup>7</sup>. However, Regulation 1408 has developed far beyond its institutional inheritance, covering a wide range of social security schemes and an ever wider personal scope.

### **2.1: The material scope**

1408/71 covers a very extensive range of material benefits, applying to all national social security legislation on (a) illness and maternity; (b) invalidity benefits; (c) old-age pensions; (d) survivors' benefits; (e) occupation-related accidents and disease; (f) death grants; (g) unemployment benefits; (h) family benefits. Since, its adoption in 1971, originally laid down, the substantive scope has been extended on the basis of developments in national social security legislation, Regulation 1408's own premises and its Treaty base<sup>8</sup>.

Over the years, the European Court of Justice and the Council of Ministers have disputed and clarified which social security benefits are exportable. Social assistance is excluded from the

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<sup>6</sup> The first bilateral agreement on social security was reached in 1904 between France and Italy on industrial accidents, old age and unemployment insurance (Eichenhofer 2001, p. 25; Holloway 1981, p. 124).

<sup>7</sup> Council Regulation no. 3/58 of 25 September 1958.

<sup>8</sup> Article 42 (ex. Art. 51) constitutes the Treaty base of Regulation 1408/71.

material scope of the Regulation.<sup>9</sup> It has, however, been far from obvious which benefits are to be defined as ‘social security’ and which as ‘social assistance. In the 1980s, the Court initiated an interpretative praxis where benefits with a disputable classification were defined as ‘social security’ and thus included in the material scope of the Regulation *and* made exportable.<sup>10</sup> The Council, however, reacted collectively and codified that ‘certain non-contributory benefits’ were included in the material scope, but at the same time these benefits were made non-exportable.<sup>11</sup> The compromise constructed between legal reasoning and political preferences thus determined that for these particular non-contributory benefits, the Community principle of equal treatment applied but, at the same time, national principles of territoriality were justified.

Another ongoing dispute has called for consolidation. Regulation 1408 entitles residents in one member state to acute health care in another member state, as well as to have the costs of a treatment from another member state reimbursed when authorised beforehand by the competent national institution.<sup>12</sup> The dispute between the Court and member states has concerned when a member state may be obliged to authorise a treatment abroad and when internal market rules may entitle a patient to foreign health care paid or reimbursed by the national health insurance without having obtained prior authorisation. In its recent cluster of case-law, the Court seemed about to establish precedent. In the absence of political response, litigation has unilaterally clarified how the national competence to formulate its own health policy is in keeping with Community obligations. During the last five years, the Court has initiated the clarification of a long list of open questions, including: that the Community principles of free movement of goods and services apply to the policy field of health care<sup>13</sup>; that hospital care is a service within the meaning of the Treaty<sup>14</sup>; that

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<sup>9</sup> As laid down in Article 4 (4) of the Regulation.

<sup>10</sup> See among other case 139/82, 5. May 1983. *Paola Piscitello v Istituto Nazionale della Previdenza Sociale (INPS)*. ECR 1983, page 1427; Joined Cases 379 to 381/85 and 93/86 *Caisse regionale d’assurance maladie Rhone-Alps v Anna Giletti, Directeur regional des affaires sanitaires et sociales de Lorra v Domenico Giardini, Caisse regionale d’assurance maladie du Nord-Est v Feliciano Tampan, Severino Severini v Caisse primaire centrale d’assurance maladie*, ECR 1985, p. 955.

<sup>11</sup> Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

<sup>12</sup> According to article 22 (1) (a) and (1) (c) of the Regulation.

<sup>13</sup> Case C-120/95, 28 April 1998. *Nicolas Decker v Caisse de Maladie des Employés de Privés*. ECR 1998, page I-1831; Case C-158/96, 28 April 1998. *Raymond Kohll v Union des Caisses de Maladie*. ECR 1998, page I-1931.

national authorisation policies are barriers to the free movement of services, also for health care systems based on benefits in kind<sup>15</sup>; that such barriers, however, are not unjustified under certain conditions<sup>16</sup>; that the fundamental principle of freedom to provide services precludes the authorisation requirement, even under benefit in kind systems, for non-hospital care<sup>17</sup>; that authorisation to hospital care may not be refused when the treatment that one is entitled to in the Member State of affiliation cannot be obtained there without undue delay.<sup>18</sup> Although the European Court of Justice has clarified key aspects of the conditions under which the costs of foreign health care may be reimbursed, many questions are still left open on how to integrate the health care supply of other member states. The Commission has recently communicated its response on the matter.<sup>19</sup> After a long period of official silence, it has proposed a directive on services in the internal market<sup>20</sup> where article 23 not only proposes an internal market for non-hospital care, but also specifies that authorisation must be given to treatment in another member state if the national system cannot provide the care within an acceptable time limit.<sup>21</sup> The constant jurisprudence of the Court has thus charted the course towards an internal health market in Europe. The Commission has proposed future amendments, which consolidate the precedent established by the Court. The Council has responded initially. The member states have so far collectively refused to abolish the principle of prior authorisation for non-hospital care, but has accepted to codify that prior

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<sup>14</sup> Case C-157/99, 12 July 2001. *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms c Stichting CZ Groep Zorgverzekeringen*. ECR 2001, page I-05473.

<sup>15</sup> Case C-157/99 *Geraets-Smits & Peerbooms*.

<sup>16</sup> Case C-157/99 *Geraets-Smits & Peerbooms*.

<sup>17</sup> Case C-385/99, 13 May 2003. *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen and Van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*. ECR 2003, p. I-04509.

<sup>18</sup> Case C-157/99 *Geraets-Smits & Peerbooms*; Case C-56/01, 23 October 2003. *Patricia Inizan v Caisse primaire d'assurance maladie des Hauts-de-Seine*. ECR 2003, p. 0000.

<sup>19</sup> Communication from the Commission, COM (2004) 301, 20 April 2004. *Follow-up to the high level reflection process on patient mobility and healthcare developments in the European Union*.

<sup>20</sup> COM (2004) 2, 5 March 2004. *Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market*.

<sup>21</sup> Article 23 of COM (2004) 2 reads as follows: “1. Member States may not make assumption of the costs of non-hospital care in another Member State subject to the granting of an authorisation, where the cost of that care, if it had been provided in their territory, would have been assumed by their social security system [...] 2. Member States shall ensure that authorisation for assumption by their social security system of the cost of hospital care provided in another Member State is not refused where the treatment in question is among the benefits provided for by the legislation of the Member State of affiliation and where such treatment cannot be given to the patient within a time frame which is medically acceptable in the light of the patient’s current state of health and the probable course of the illness [...]”

authorisation to health care in another member state shall be accorded when the medical circumstances require it.<sup>22</sup>

## 2.2: The Personal Scope

The personal scope of Regulation 1408 has also undergone a gradual, but continual development. From entitling only the worker ‘*stricto sensu*’, i.e., the market citizens<sup>23</sup>, to cross-border welfare, the personal scope has been incrementally expanded to the point where the Regulation this year will be extended to all European citizens and where legally residing third country nationals have recently been included in its personal scope. The development is thus a specific reflection of the general development from economic community to political union. The current personal scope of the Regulation has been settled through a detailed legal-political dialogue, consisting of piecemeal judicial interpretations, Commission proposals and the Council's codification thereof.<sup>24</sup>

January 2004 marks the forthcoming and perhaps most remarkable extension of Regulation 1408/71's personal scope, and thus temporarily closes the long-running history of defining those with a right to cross border social security. On 26 January 2004, the Council unanimously adopted a common position on the amendment proposal COM (98) 779, and hereby agreed that *all nationals* of member states covered by the social security legislation of a member state shall be part of Regulation 1408's personal scope.<sup>25</sup> This means that not only employed workers, self-employed workers, civil servants, students and pensioners but also *non-active persons* are to be protected from the coordination rules. Furthermore, as of 1 June 2003, *nationals from third countries* as well as their family members and survivors, provided that they are legal residents in the territory of a

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<sup>22</sup> As stated in Article 20 of the Council's common position no. 18/2004 of 26 January 2004, concerning amendment proposal COM (1998) 779 on Regulation 1408/71.

<sup>23</sup> The concept of ‘market citizen’, as it is used here, refers to one who exercises economic activity and the worker “*stricto sensu*” refers to the one with a contract of employment (Shaw 1997; Everson 1995).

<sup>24</sup> For a more detailed description of the gradual process see, among others, Holloway 1981; Schulte 1998; Igl 1998; Haverkate & Huster 1999; Christensen & Malmstedt 2000; Pennings 2001; Martinsen 2003.

<sup>25</sup> COM (2004) 44 final, by 27 January 2004. Communication from the Commission to the European Parliament concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council, on the coordination of social security systems.

Member State and that they have moved between member states, are covered by the Regulation.<sup>26</sup> Although, on the face of it the inclusion of third country nationals marks another, remarkable, step towards a generalised personal scope irrespective of nationality, the practicable rights of third country nationals are much more restricted, since they lack the underlying right of free movement.

The inclusion of non-active persons and third country nationals marks a provisional conclusion of a 'long-running saga' (Peers 2002, p. 1395). Traditionally, the Regulation has entailed a criterion of Community nationality, waived only for refugees, stateless persons, and family members. This meant that a *third country national* would not enjoy any rights according to Regulation 1408, unless he or she was a family member of a Community national, in which case nationality became irrelevant, or else, if he or she was a refugee or a stateless person. The Regulation thus clearly discriminated against third country workers despite their possibly considerable contributions to a member state's economy. Apparently, the amendment adopted in 2003 puts an end to an intense debate between the Commission, Council, Parliament and Court on the status of third country nationals, and finally gives equal rights to a previously deprived group. However radical such an extension may seem, it should be noted that in practice it is not of much use. Third country nationals legally residing in member states have no right to free movement, but they can *only* invoke the rights according to Regulation 1408 if they *do move* between member states. Furthermore, Denmark is not bound by the recent amendment, due to its exemption from the Treaty's Title IV on 'visas, asylum, immigration and other policies related to the free movement of persons'. Third country nationals who enter Danish territory from another member state or leave Danish territory bound for another member state thus continue to have variable protection levels.

Another long-running dispute has been whether the Regulation should include *non-active persons* and thus definitively break the link with the exercise of an economic activity. Over the years, the activism of the Court of Justice has compromised the link between work activity and rights according to the Regulation, by extending rights to those no longer in active employment, but still enjoying the status as 'employed persons'<sup>27</sup>; by clarifying that movement motivated by leisure may

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<sup>26</sup> As laid down by Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

<sup>27</sup> Case 75/63 Mrs *Hoekstra* (née Unger) v Bestuur der Cont. Bedrijfsvereniging voor Detailhandel en Ambachten, 19 March 1964. ECR 1964, p. 177.

generate rights<sup>28</sup>; by extending the rights of family members<sup>29</sup>; and by denying that employment status depends on the hours spent on the work-activity<sup>30</sup>. Through its successive case-law, the Court declared that the migrant's family has an individual right to equal treatment<sup>31</sup>, that the meanings of employed<sup>32</sup> and self-employed<sup>33</sup> are extensive, and that the number of hours spent working does not influence one's status as a worker whatsoever. The legal reasoning has thus come close to a practical recognition of European citizenship.

The Court's interpretative line has been seconded by the Commission. Since the adoption of the general right of residence in 1990 with the three residence directives<sup>34</sup>, the Commission has persistently used the soft-law tool of recommendations to emphasize how “the peoples of Europe” merited equal rights, and brought European citizenship in as the new dimension of European integration.

On the agenda since the early 1990s, the Council has recently adopted its common position on COM (1998) 779, which lays down that Regulation 1408/71 will apply to all “nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families

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<sup>28</sup> Case 44/65 *Hessische Knappschaft v Maison Singer et Fils*, 9. December 1965. ECR 1965, p. 1191.

<sup>29</sup> Case 7/75, 17 June 1975. *Mr and Mrs Fracas v Belgian State*. ECR 1975, page 679.

<sup>30</sup> Case C-2/89, 3 May 1990. *Bestuur van de Sociale Verzekeringsbank v G.J. Kits van Heijningen*. ECR 1990, page 1755.

<sup>31</sup> Case C-308/93, 30 April 1996. *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte*. ECR 1996, page I-2097.

<sup>32</sup> Case 17/76 *M. L. E. Brack, widow of R. J. Brack v Insurance Officer*, 29 September 1976, ECR 1976, Page 1429.

<sup>33</sup> Case 300/84, 23 October 1986. *A.J.M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen*. ECR 1986, page 3097.

<sup>34</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ L 180, 13.7.1990, p. 26); Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180, 13.7.1990, p. 28) and 90/366/EEC of 28 June 1990 on the right of residence for students. The Court, however, did not accept Article 235 as treaty basis for students and annulled the directive in 1992. The directive was subsequently amended to 93/96/EEC of 29 October, 1993 (OJ L 317, of 18.12.1993, p. 59).

and to their survivors”.<sup>35</sup> The impending extension of intra-European social security rights to all Community nationals adds substantial rights to the skeleton of European citizenship, since cross-border social rights are, finally, granted irrespective of economic activity. However, as long as the right to move and reside within the Community are conditioned by the ability to provide for oneself, as laid down in the residence directives, the ‘social self’ of Europe is still subordinated to economic imperatives.<sup>36</sup> In reality, ‘work’ will still be the entry point into another member state for the majority of European migrants, and continue to constitute the basic condition upon which foreign social rights are granted.

For the time being, the legitimacy of Regulation 1408/71 is, through its confirmed link with the provision on the free movement of workers,<sup>37</sup> essentially granted by market integration. However, since the path to social security integration has proven to be incremental, but dynamic, and with a high degree of issue-linkage between different economic and political rationales, the substance and reach of future cross-border social security rights are difficult to predict. However, its historical development and contemporary achievement suggest that we are facing a key part of Europe’s social identity in formation.

Despite these reservations, it is clear that this detailed, but rather discreet, process of integration over time has enhanced very concrete and material rights for the European migrant. The institutional innovation of Regulation 1408/71 as well as its subsequent institutionalisation exert adaptive pressure and domestic impact on the committed member states. The question is, however, to what extent.

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<sup>35</sup> Common position no. 18/2004 of 26 January 2004, Article 2. The Parliament has subsequently given opinion on the Council’s common position 20 April 2004 (see EP document A5-0234/2004, 6 April 2004).

<sup>36</sup> For a description of Europe’s social self, see Maduro 2000.

<sup>37</sup> That Regulation 1408/71 has not yet achieved a status as an independent social protection instrument was confirmed by the dispute between Commission the member states on the extension of the Regulation to third country nationals and whether this extension could be based on article 42 of the Treaty, as held by the Commission, or should be based on the Treaty’s article 63 (4), as argued by individual member states. For a detailed description of the dispute, see Martinsen 2003; 2004.

### **3: Adaptive Pressures on Two Welfare States**

European institutionalisation of the free movement of workers and later persons and the attached right to access foreign welfare regimes have been kept under close surveillance for its possible impact on the national welfare policy autonomy. That member governments continue to view the free movement principle and the coordination of social security as a threat to social sovereignty has recently been reaffirmed by the fact that the EU-15 member states have introduced restrictions on national social policies or on the free movement of labour to migrants coming from the new Union members. Furthermore, individual member states have insisted on keeping the veto right on the social security area in the negotiations on the future European constitution.

The strong urge to defend welfare autonomy has deep-rooted historical, ideological and organisational explanations, for which reason the European impact on national welfare may, compared with other policy areas, be especially sensitive. Europeanisation and welfare policies contradict each other in their historical reasoning, since the institutionalisation of the modern welfare state reflects a century long process of nationalisation (Ferrera 2003). Gradually, social security became a material right, creating stronger ties between the nation-state and its citizens, between national politicians and voters. It can be argued that from the very beginning, welfare was tactically motivated by the need to create an ordered relationship between the nation-state and its citizens, to integrate the marginalized and to avoid social unrest (Eichenhofer 1999; Lidegaard 2003). Residence-based as well as insurance-based welfare states have an “idea of national solidarity” embedded, which despite their variations on core dimensions and in elements of interpersonal or intertemporal redistribution generally reflect “the core principle of social security” (Flora & Alber 1981, p. 54).

The following two subsections will first outline the differences in the organising principles between the residence-based, i.e., the *Danish* welfare state and the insurance-based, i.e., the *German* welfare state and depict their traditional boundaries for welfare. Second, *de facto* adaptive pressures on the two member states in terms of actual EU-immigration will be discussed from a statistical point of view.

### 3.1: Organising Principles and Boundaries for Welfare

A main characteristic of the *residence-based welfare model* is that social rights are granted on the basis of residence (Cornelissen 1997, p. 32). A person is entitled to welfare because she/he is a citizen or a habitual resident, and not on basis of contributions by her/him to a specific scheme. The institutionalisation of welfare has moved in the direction of 'social citizenship' as releasing criteria and the residence based model has traditionally vested its citizens "with a basic right to a very broad range of services and benefits which, as a whole, is intended to constitute a democratic right to a socially adequate level of living (Esping-Andersen & Korpi 1987, pp. 42-43). Most welfare benefits are universally granted. The openness of the system is therefore relatively high and does, in general, cover the whole population (Hansen 2002, p. 9). Rights are mainly granted on an objective, legal basis and not on a discretionary one (Goul Andersen 1999, p. 44). Another key characteristic of the residence model is that benefits are generally not based on contributions, but tax financed. The payment of taxes is, however, not a requirement to receive specific social benefits (Ketscher 1998, pp. 254-255). Benefits are generally granted as flat-rate payments which do not reflect previous income, tax-payment or other contributions. For that reason, a person who has never contributed to the Danish economy or paid considerable taxes will enjoy the same rights as the one who has been a regular tax payer all his working life. For a large part of welfare schemes, work position is irrelevant.

A main characteristic of the *social insurance model* is that market participation gives access to a social security scheme and the degree thereof corresponds to the level of social entitlements. Those who hold a work position are compulsorily insured against the risks covered by social security. The principle of *lex loci laboris* decides who is covered, not residence (Altmaier 1995, p. 77). The individual earns his social rights by paying contributions (Goul-Andersen 1999, pp. 42-43). Contributions are levied according to one's income status as, for example, employee, self-employed or employer. As contributions are earnings-related, benefits will be related to previous income. The correspondence between individual contributions and rights is therefore high. For example, an aim of the pension scheme is to link the pension level with the previous income level and thus make a maintenance of living standard possible in the old age (Schmähl 1991 & 1992). The social insurance scheme is inter-temporally redistributive over the life cycle, and minimises the cost of a

social security risk at the individual level. The scheme is, however, also interpersonally redistributive, which makes it different from private insurance (Schmähl 1992, pp. 6-7).<sup>38</sup>

No matter how accessible welfare may be for the working or residing population, it remains a conditional and restricted right. Boundaries for welfare limit rights to a defined set of beneficiaries, thus traditionally making social solidarity conditional on personal and territorial association. The formation and consolidation of modern social policies took place within the territorial borders of the nation-state. State formation and nation building were thus early stages of the long history of the modern welfare state that reigns today. Social policy was and is closely associated with the idea of the nation-state (Eichenhofer 2001, p. 55). The welfare state inherited its sovereignty and strong emphasis on territoriality. Traditionally, the welfare state has autonomously defined who qualifies as social beneficiaries, targeting benefits to its own citizens, residents or workers. Furthermore, it has been in a sovereign position to exercise spatial control, insisting that social benefits and services should be consumed within its own territory (Leibfried & Pierson 1995). Social citizenship and territoriality have been the defining principles for the reach of welfare.

*'Social citizenship'* was originally conceptualised by T. H. Marshall as part of his evolutionary description of citizenship (Marshall 1950). Marshall theorised that modern citizenship developed in three stages through which societal coherence was created, and where 'social citizenship' was the culmination of a long-running process. Civic citizenship rights of the 18<sup>th</sup> century were supplemented by the political participation rights of the 19<sup>th</sup> century, culminating in the social citizenship rights of the 20<sup>th</sup> century. However, throughout all stages, 'citizenship' required membership which was and is a national one. Concepts such as equality and solidarity are not unlimited, but to be understood alongside the original restriction of policies to members of the nation.

"Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed" (Marshall 1992 (1950), p. 18).

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<sup>38</sup> The generalisations elaborated in this short description do by no means full justice to the contemporary organisation of welfare in the two cases: where distinction according to typologies is increasingly blurred, as for example illustrated by the Labour Market Fund contributions introduced in Denmark 1994 and universally granted and tax-financed family benefits in Germany. The organising principles of the two welfare models have, however, proven remarkably persistent, demonstrating continuity for more than a century.

The status as citizen has been a traditional requirement for social entitlements. Another condition is expressed by *the principle of territoriality*. Traditionally, social benefits and services of the welfare state have been confined within its own territorial borders (Eichenhofer 2001, pp. 55-56; Mossialos et al. 2001). Social responsibilities were not meant to extend beyond these. Generally, social legislation in both Denmark and Germany remain based on the territorial principle and the application of welfare has therefore a clearly defined spatial reach (Haverkate & Huster 1999, p. 115).<sup>39</sup> In a 'globalised' world, the territorial principle still finds its justification. Social benefits and services are designed to fulfil domestic policy aims and correspond to domestic living conditions and costs (Tegtmeier 1990, p. 29; Clever 1992, p. 300). Above all, the principle serves as an effective national instrument of control. Among other factors, it is a means to ensure budgetary control, control that the intended policy is actually pursued, and that the quality of supplied services and facilitate capacity planning in for example the health sector is guaranteed (Martinsen 2004, pp. 246-247).

The traditional requirement for entitlement to welfare protection in *Denmark* has been Danish citizenship. The nationality clause is maintained in parts of the social legislation. This applies to the law on social pension, whereas for benefits regarding illness and maternity, habitual residence is required.<sup>40</sup> However, in complying with European and international obligations, national law makes an exception to its own nationality clause. If not a Danish citizen, years of residence in Denmark or the periods of reference, i.e., the periods in which the applicant has been covered by Danish legislation, are taken into account (Banke & Borker Rasmussen 1998, p. 14). The main rule regulating Danish social policy today is period of residence. Although residence appears to be a non-discriminatory criteria, it clearly favours citizens when long-term residence is required to receive a full benefit, for example, in the case of pension benefits. The emphasis on territoriality in the residence-based welfare state is strong. As a general rule, one has to reside in Denmark to receive social benefits (Ketscher 1998, p. 261; Den Social Sikringsstyrelse, Hæfte 1, 1997, p. 28).

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<sup>39</sup> Altmaier defines the territorial principle in a German context, writing: "Zum einen umschreibt das Territorialitätsprinzip die Tatsache, dass staatliche Hoheitsgewalt nur innerhalb des eigenen Staatsgebiets ausgeübt werden darf, der räumliche Bereich der Anwendung des deutschen Sozialversicherungsrechts sich somit in der Regel auf das Deutsche Hoheitsgebiet beschränkt. Es handelt sich hierbei um eine Regel des Allgemeinen Völkerrechts, die nicht nur auf den Bereich des Sozialrechts Anwendung findet" (Altmaier 1995, p. 73, emphasis added).

<sup>40</sup> See Law on Social Pension § 2 (Lov om Social Pension) and Laws on Health Insurance (Sygesikringsloven) § 1 and Hospital Treatment (Sygehusloven) § 5.

Denmark has traditionally made legal differentiation between Danes and foreigners, thus operating with two welfare delineations, i.e., that of nationality and that of territoriality. The post-war social security code in *Germany* has not drawn distinctions between Germans and foreigners, but delineated rights through the link to the German labour market or, if unemployed, through habitual residence (Willms 1990, p. 58, Haverkate & Huster 1999, p. 116). The territorial principle for social policy in Germany is concretised in the “Sozialgesetzbuch” IV, § 3, settling the personal and spatial application of German social insurance law.<sup>41</sup> The principle of *lex loci laboris* comes before residence in Germany, which means that if a person works in Germany, but lives abroad, that person will still be entitled to certain social benefits in Germany. If the person lives in Germany, but works abroad, he/she will be covered by the social legislation of the state where the work is performed. It is only when a person resides in Germany but is unemployed that one can be covered by German social insurance without a position of employment (Schaaf 1999, p. 275).

The table below compares the different organising and demarcating principles of the Danish and German welfare state.

**Table 1: Organising principles of and boundaries for welfare**

	<b>Denmark</b>	<b>Germany</b>
<b>Earning of rights</b>	Citizenship or residence Lex Loci Domicili	Labour market related contributions Lex Loci Laboris
<b>Demarcation of welfare</b>	Principle of social citizenship Principle of territoriality	Market citizen Principle of territoriality
<b>Financing</b>	Taxation	Income, earning related contributions
<b>Aim</b>	Exemplified by pension; guarantee the basic income of citizens in the old age	Exemplified by pension; maintenance of living standard
<b>Redistribution</b>	Primarily interpersonal	Primarily intertemporal

<sup>41</sup> The general expression of the German principle of Lex Loci Laboris and territoriality is found in Sozialgesetzbuch IV, § 3, and reads: ”**Personlicher und räumlicher Geltungsbereich.** Die Vorschriften über die Versicherungspflicht und die Versicherungsberechtigung gelten,

1. soweit sie eine Beschäftigung oder eine selbständige Tätigkeit voraussetzen, für alle Personen, die im Geltungsbereich dieses Gesetzbuchs beschäftigt sind oder selbständig tätig sind,
1. soweit sie eine Beschäftigung oder eine selbstständige Tätigkeit nicht voraussetzen, für alle Personen, die ihren Wohnsitz oder gewöhnlichen Aufenthalt im Geltungsbereich dieses Gesetzbuchs haben”.

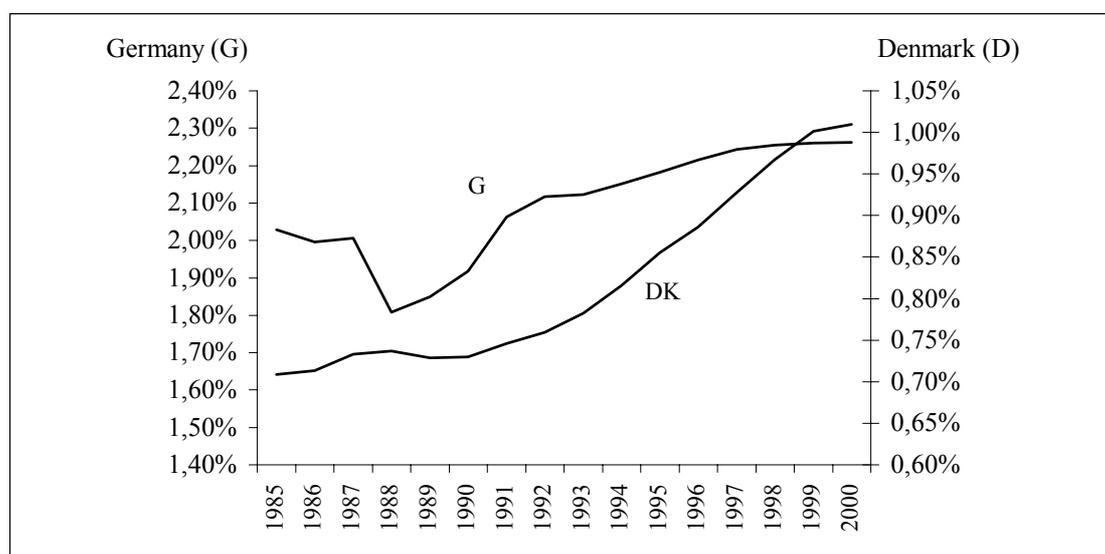
### 3.2: EU Immigration as de Facto Adaptive Pressure

The hypothesis of ‘welfare tourism’ seems to be based on the assumption that persons are willing to leave their state of origin in order to gain more security in social terms. The institutionalisation of intra-European social security rights, as has been depicted above, should therefore already have caused a considerable increase in persons willing to move with the prospect of a greater level of social security in sight. Furthermore, the hypothesis of ‘welfare tourism’ assumes that people will speculate in welfare to such an extent that it may endanger ‘social sovereignty’ by forcing states to make welfare schemes more individualistic and less attractive. In the context of Danish residence-based social security rights, the ‘welfare tourism’ theorem should be even easier to demonstrate, since one does not have to contribute to secure entitlement. However, the statistical data below point to the opposite conclusion.

Eurostat data on EU-immigration to Denmark provides us with numerical insight on how many persons from other member states have taken up residence in Denmark between 1985 and 2000.<sup>42</sup> The figures tell us that in absolute figures and as a percentage of the population, EU-immigration to Denmark remains low, compared with intra-European migration in general. Whereas intra-European migration in general between 1985 and 1998 was between 1.5 and 1.6% of the entire Community population, Denmark only hosted 0.71% to 1.01% EU immigrants as a percentage of the Danish population between 1985 to 2000.

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<sup>42</sup> See “European Social Statistics – Migration”, 2002 edition, Eurostat.

**Graph 1: EU-immigration as a % of the total population to Denmark and Germany 1985-2000**

The graph above depicts a relative higher EU-immigration to Germany than to Denmark. In 1985, Germany hosted 2.03% EU-immigrants of the total population. EU-related immigration had increased to 2.26% in 2000. Although higher than average in the EU and although more than twice as high as EU-related immigration to Denmark, it could be argued that the number of EU-immigrants in Germany is low compared with immigrants from third countries.<sup>43</sup>

The graph clarifies that, from a comparative point of view, EU-immigration to Denmark remained low until 2000. On a North-South divide, both Denmark and Germany represent richer northern member states, which for this reason alone, is held to attract immigrants. The aggregated data does not distinguish between the various personal categories under Regulation 1408 and it is therefore not possible, on basis of the data provided, to estimate how many citizens from other member states benefit - and in which way - from the social security systems of their new member state of residence. However, on the basis alone of the low number of EU-immigrants, the hypothesis of ‘welfare tourism’ should be refuted. Contemporary migration figures do not support the notion that there should be a de facto adaptive pressure on the Danish and German welfare state. Furthermore, should there be any such thing as ‘welfare tourism’, the statistical data do not support the hypothesis that the residence-based welfare state in particular should be challenged from the

<sup>43</sup> In 2000, third country nationals residing in Germany and Denmark respectively made up 6.68% and 3.86% of the populations (“European Social Statistics – Migration”, 2002 edition, Eurostat).

Community's free movement of persons and cross-border welfare. On the contrary, the data above point to a higher *de facto* migratory pressure on the insurance based welfare state than on the residence-based system. Should the residence-based welfare state face a relatively higher adaptational pressure, it must be on an institutional or symbolic level.

We will now consider the actual domestic institutional impact of the process of European social security integration. The following section will through examples compare the impact on the residence-based welfare state with the insurance-based one.

#### **4: Domestic Impact of Intra-European Social Security**

In general, the study of European integration foremost rivals on whether and how supranational integration occurs. Integration theories generally seem to expect that when institutionalisation takes place, it implies a corresponding policy change at the national level. In addition, it seems to be expected that when the scope of integration increases, it will produce a greater uniformity in national policies (Dimitrova & Steuenberg 2000, p. 202). Neo-functionalism, intergovernmentalism as well as most of their modified variants focus on how and why member states engage in European decision-making, but do not discuss what impact a decision-making result may have on national policies (Börzel & Risse 2000). Moreover, the theoretical dispute concerning member states' capacity to control the scope and direction of European integration does not consider their ability to control how EU policies are implemented into national legislation. When it comes to the political impact of jurisprudence, most work has focused on the influence of the European Court of Justice's decisions on EU policies, but has ignored how litigation influences national policies (Alter 2000, pp. 507-508). Generally, integration theories focus on explaining the institutionalisation dynamics of the emerging European polity itself, but have largely avoided research on the domestic impact of that same dynamic.

When studying the specific process of institutionalising intra-European social security rights, it becomes clear that concrete rights to cross border welfare are the result of a multi-layered process. First, the Commission together with the rotating presidencies have formulated proactive strategies and new initiatives. Second, member states have responded differently to the ongoing negotiation process in the Council. Due to the procedural rule of unanimity, individual positions have indeed been decisive for the outcome of negotiations. Third, certain self-sustaining processes between the

European Court of Justice and national courts have clarified and extended the effective meaning of Regulation 1408's provisions. Fourth, and finally, national implementation of supranational political and judicial decision-making has transposed abstract rights into concrete enforceable ones. The last layer decides the domestic impact and effective reach of supranational institutionalisation.

In the following, concrete examples of domestic impact on Danish and German welfare institutions will be depicted.<sup>44</sup> Due to the extensive scope of institutionalisation, the examples are merely illustrative and far from a systematic research of impact. It does, however, draw the general picture that impact varies according to national institutions in place; national re-interpretations of the impact of supranational decision-making; and the willingness of national courts to make reference to the ECJ and thus enforce Community law. Such variations are likely to lead to a variable impact of Community law on national policies.

The first section below focuses on the case of *Denmark*. It depicts Danish implementation of European political and judicial decision-making for social pension in brief and for health care in more detail. The second section concerns the case of *Germany*. It demonstrates how Germany and Denmark have responded very differently to supranational institutionalisation, the former questioning the scope of the Community institution through preliminary references.<sup>45</sup> Examples of the impact thereof on German welfare institutions are delineated.

#### **4.1: Danish Response – Implementation of Political and Judicial Decision-making**

One of the key characteristics that has defined both the Danish debate on and position towards intra-European social security rights has been the belief prevalent in political circles in 'welfare tourism' and thus a rather defensive approach towards further integration. However, another key

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<sup>44</sup> These examples are taken from the systematic study of domestic impact of Regulation 1408/71, which has been carried out in relation to the author's Ph.D. thesis on the Danish and German welfare institutions of statutory pension; public health care; long term care and family benefits (Martinsen 2004). The research of domestic impact has been based on qualitative interviews with relevant civil servants, governmental notes, parliamentary debates and questions to individual ministers regarding Regulation 1408/71 or the principles of free movement, decisions from the Danish Social Appeal Authority, case-law from the ECJ considering German legislation and administrative practices on the matter, articles in newspapers and secondary material in form of academic writing.

<sup>45</sup> I.e., through the process laid down by the Treaty's article 234 (ex. art. 177).

characteristic in the Danish response towards institutionalisation has apparently been implementation to the letter. Denmark stands out among its counterparts for being a member state with only one preliminary reference to the European Court of Justice regarding Regulation 1408.<sup>46</sup> Furthermore, Denmark has had no infringement procedures enacted against it on the basis of Regulation 1408/71 or its Treaty basis.

Denmark thus seems to have concentrated its action on the political scene, using the tool of unanimity, but has subsequently accepted and implemented the political decision to the extent that no judicial epilogue has been necessary. Regarding the implementation of institutionalised cross border social security rights, Denmark lives up to its reputation as the complying member state (Rasmussen 1988). However, adaptation has not been passive, neutral or always immediate. In its implementation of political decision-making, Denmark has amended national law both in order to meet its Community obligations as well as in order to limit its effects. Since Denmark has had only one minor preliminary ruling before the ECJ on behalf of Regulation 1408/71, its implementation of judicial decision-making exemplifies how member states other than the referring one subsequently interpret the general premises of an individual lawsuit and admits to the ‘*ultra partes*’ (beyond the parties) effect of a judgement.

When Denmark joined the European Community in 1973, it had to make a fundamental change to its national law on *social pension*. Adopting the *acquis communautaire* on intra-European social security meant that Denmark, by the implementation of the principle of equal treatment, had to waive the Danish citizenship (‘*indfødsret*’) requirement for the personal scope of Regulation 1408/71, as well as having to allow for the exportation of social benefits (Sakslin 2000, p. 24; Den Sociale Sikringsstyrelse 1997, hæfte 1, p. 26). Danish citizenship and residence in Denmark were and are the two general conditions for entitlement to pension benefits. Adopting the *acquis* thus meant that Denmark could no longer specifically favour its own citizens, but had to grant equal access to its most costly social security scheme to EC nationals covered by Regulation 1408, nor could it exert spatial control over the consumption of benefits. The immediate adoption to the

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<sup>46</sup> Case C-428/92 *Deutsche Angestellten-Krankenkasse v Lærerstandens Brandforsikring G/S*, 2 June 1994, ECR 1994, Page I-2259. A preliminary ruling which did not question the core of the Regulation, such as its personal or material scope, exportability or equal treatment, but instead addressed the application of 1408’s article 93 (1). Regulation 1408/71’s article 93 (1) concerns “Rights of institutions responsible for benefits against liable third parties”.

*acquis* meant both the Danish principle of social citizenship and the principle of territoriality were overruled. Whereas Denmark initially only had to see ‘social citizenship’ extended to a limited range of migrant workers, the gradual extension of the Community’s principle of equal treatment and Regulation 1408’s personal scope made it increasingly difficult for national policy to ‘favour’ its nationals.

With regard to the policy field of *health care*, the judicial decision-making of the European Court of Justice has led to Danish policy reform. The 28 April 1998 became the date where the ECJ gave its two landmark rulings, C-120/95 *Decker* and C-158/96 *Kohll*. It was also the date from which it was irrevocably clear that the free movement principles of goods and services *did* influence the policy field of health care. In Denmark, the judgements contradicted the Danish perception at the time that internal market rules did not impact on health benefits and services. The rulings thus raised a long line of questions regarding their scope and impact on national authorisation policies<sup>47</sup> (Interview, Danish Ministry of Health, 3 April 2001). Against this background, it was deemed politically expedient to set up an inter-ministerial working group to analyse the reach of the judgements and their eventual consequences for Danish health policy. The working group came out with a report<sup>48</sup> on the consequences of the rulings, on which basis national policy was subsequently amended.

In its report, the working group admitted that the *Decker/Kohll* rulings implied general premises. For this reason their scope went beyond the individual lawsuits and also had implications for health systems other than just Luxembourg and health goods and services other than just those of a pair of spectacles and dental treatment (Danish Report on the *Decker/Kohll* rulings 1999, p. 22). The Danish report, however, revised its interpretation of ‘service.’ For a service to be a service according to the meaning of the Treaty’s Article 50 (ex. Article 60) there had to be an element of remuneration:

“It is the view of the working group that if, on the other hand, the treatment had been taken care of by the *public hospital sector*, the Treaty’s Article 49 would not have applied. The reason is that Article 50 defines services as *services normally carried out in return for remuneration [...]Characteristic for a service is thus that a service*

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<sup>47</sup> Authorisation policies lay down that the national health care system only reimburses the costs of a non-acute treatment carried out abroad if that treatment has been authorised beforehand.

<sup>48</sup> The report came out September 1999, entitled “Consequences of The European Court of Justice rulings in the *Decker/Kohll* cases – statement by the working group”.

*provider offers a service in return for remuneration*” (Danish Report on the *Decker/Kohll* rulings 1999, p. 23, own translation, emphasis added).

The Danish (re)interpretation of the ‘service’ concept meant that the large majority of Danish health care services fell outside the definition, since they are provided as benefits in kind, free of charge and thus with no direct remuneration. Denmark admitted the *Decker & Kohll* procedure to have a discernible impact, but the national definition of what constitutes a service within the meaning of the Treaty allowed for the exception of the whole public hospital sector as well as all types of non-hospital care provided free of charge.<sup>49</sup>

However, the interpretations of the working group marked a decisive break with the traditional national reasoning, namely in admitting that the internal market principles – under certain conditions – applied equally to health care services. This decisive break meant that health services, for which the insured personally paid one part and the competent institution the other, were judged to fall under the service concept of the EC Treaty. The conclusions in the report led to a policy-reform, which went into effect 1 July 2000 and allowed certain services to be purchased abroad with subsequent fixed reimbursement from the relevant Danish institutions. The policy-reform allowed dental assistance, general and specialist medical treatment for persons insured under group 2<sup>50</sup>, physiotherapy and chiropractic treatments to be purchased abroad.<sup>51</sup>

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<sup>49</sup> Based on its conclusions, the working group stated that services under the Danish Hospital Act were not affected by the EC obligations on free movement of services, nor were a long line of other health care services provided free of charge: The Dental Care Act (concerning primarily dental care for children under 18 years of age); the Act on preventive Health Care for Children and Young People; the Act on Free Vaccination against Certain Diseases; the Act on Home Nursing Schemes; the Act on Prenatal Care and Maternity Care; the Act on Sterilisation and Castration; the Act on Induced Abortion (Danish Report on the *Decker/Kohll* rulings 1999, p. 27).

<sup>50</sup> Denmark has two categories of health coverage. The insured person chooses if he wants to belong to group 1, under which he is entitled to free medical care, but only from the assigned doctor or from a specialist assigned by the generalist. If the person wants to belong to group 2, he chooses doctor and specialist freely, but has to pay a part of the costs himself. Group 1 is the most popular choice. Only about 1,6% of the residents in Denmark are insured under group 2 (Interview, the Danish Ministry of Health, 3 April 2001; Danish Report on the *Decker/Kohll* cases 1999, p. 37).

<sup>51</sup> The policy-reform entered into force by law no. 467 of 31 May 2000 and BEK no. 536 of 15 June 2000. The policy reform was followed up by an informative note from the Danish Ministry of Health of 1 January 2001, describing the new entitlements; “Har du fået Behandling mv. i Udlandet? Måske kan du få Tilskud fra Sygesikringen”. The policy-reform affected the services of:

- Dental assistance, except certain preventive services and certain services to the 18-25 years old.
- General medical treatment of persons covered under group 2.
- Specialist medical treatment of persons covered under group 2.
- Physiotherapy, except for certain types of physiotherapy free of charge provided to disabled persons.
- Chiropractic treatment.

In the subsequent case C-157/99 *Geraets-Smits and Peerbooms*, the European Court went one decisive step further in clarifying the applicability of the internal market rules to health care policies. Denmark was among the intervening governments which delivered an opinion in the case. The Danish opinion restated the conclusions of the *Decker/Kohll* report (Interview, Danish Ministry of Health, 3 April 2001). The argument was that due to the absence of remuneration, hospital treatment did not constitute a service within the meaning of the Treaty's Article 50 (Report for the Hearing, pp. 76-77).<sup>52</sup> Beyond making this point, Denmark argued that another precondition for a service to be Treaty related was that the service provider must do so with a view to making a profit (Report for the Hearing, p. 78).<sup>53</sup>

The Court, however, overturned these national assessments and stretched the notion of 'remuneration' in the Treaty's Article 50 to also cover indirect payments such as those transferred by social security funds to cover health care costs (Hatzopoulos 2002, p. 693). On the basis of this partially revised definition of services, most health care services, including hospital care provided free of charge, came to constitute services within the meaning of the Treaty and were therefore not exempted from the rules of freedom to provide services.<sup>54</sup> However, in the same ruling the Court found that national authorisation policies may be justified under certain circumstances. The individual lawsuit of *Geraets-Smits and Peerbooms* was therefore not likely to cause any immediate changes to national legislation.

The ruling has, however, had an indirect impact on Danish policy. Danish patients have since 1 July 2002 had a right to treatment outside the contracted public hospitals if these cannot provide the necessary treatment within two months. The intention of the policy reform was to bring down the waiting lists and ensure the patient a certain freedom of choice, in case the public health supply was insufficient. By this health policy reform, Denmark institutionalised an obligation to refer patients to non-contracted health care providers, if public care could not be provided within the specific time limit of two months. The ECJ's judicial decision-making in *Geraets-Smits and Peerbooms* had

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<sup>52</sup> The member states here relied on the previous case-law 263/86 *Humbel*, para 17-19 and C-159/90 *Grogan*, para 18.

<sup>53</sup> That point of view relied on the cases 293/83 *Gravier* & C-109/92 *Wirth*.

<sup>54</sup> Hatzopoulos has argued that the judgement may be seen as a partial revision of the judgement in case 263/86 *Humbel*, due to the stretched notion of 'remuneration' (Hatzopoulos 2002, p. 693).

beforehand modified the national policy-formulation, by stating that the principle of non-discrimination meant that once a treatment cannot be provided by the contracted national provider, the member state must not favour a nationally established, non-contracted, i.e., private, provider over a provider in another member state. In the remarks proposing the national policy-reform, its relation with EC-law stood out clear:

The European Court of Justice has in a judgement dated 12 July 2001 (C-157/99) taken a stand on certain EU judicial questions regarding hospital treatment. The Court has stated that hospitalisation is part of the EC-Treaty's provisions on free movement of services. The need of planning and cost-containment can, however, justify certain restrictions in access to treatment paid by the public health service or health insurance. Such rules shall, however, be objective, proportional and non-discriminatory. Supposedly, that implies that when access to publicly paid treatment is given to 'independent' hospitals outside public control and planning, as is the case in the present legislative proposal, there has to be given access on an equal footing with hospitals in other EU member states. The legislative proposal is in conformity herewith (Legislative proposal L 64, proposed 29 January 2002. Adopted 19 March 2002. Own translation).

Furthermore, an impact of the more recent *Müller-Fauré & Van Riet* judgement should be expected. The Court's reasoning in this later litigation answers some of the national confusions and questions raised in the wake of the *Decker/Kohll* procedure, the national policy reform in this regard, and the *Smits-Peerbooms* ruling. On the one hand, the *Müller-Fauré & Van Riet* case rejects the idea that judicial precedent should have institutionalised a free hospital choice within Europe, as has been suggested in academic circles as well as in the press (Ketcher 2002; Jyllands-Posten 26 May, 2002; Information 27 May 2002). On the other hand, with the cluster of judgements regarding national health service and Community law in hand, it can be provisionally concluded that:

- The fundamental principle of freedom to provide services apply to all health care systems, including those based on benefits in kind. The Danish residence-based, public health care system, providing benefits in kind and financed out of taxes is thus not exempted from the Court's conclusions.
- There need not be an element of remuneration or profit for a service to be a health care service within the meaning of the Treaty. Thus, it is clear that the restrictive application of the *Decker/Kohll* procedure as laid down in the Danish report and the subsequent policy reform, is no longer in line with Community obligations.
- The *Decker/Kohll* procedure applies in general to non-hospital provision of health care.

Hereby the conclusion of the *Müller-Fauré & Van Riet* case is a serious blow to member states' refusal to reimburse costs for non-hospital care provided in another member state. The Council has recently refused to codify the development by abolishing the principle of prior authorisation for non-hospital care.<sup>55</sup> However, the subsequent communication from the Commission<sup>56</sup> and the directive proposal on services<sup>57</sup> confirm the supranational point of view, which interprets that for non-hospital care the Treaty's principle on free movement for services takes precedence over national authorisation policies. In the Danish case, this means that the conclusions of the *Decker/Kohl* report and the national change of law will have to be revised, and the list of health care services which can be purchased in another member state and subsequently reimbursed should be extended. However, now that the Council has to adopt another common position on the matter, Denmark can hardly be expected to respond only on the basis of judicial decision-making. Whereas the contours of an internal market for non-hospital care has been clearly drawn out by judicial activism, its specific shape and impact will have to be voiced politically.

#### **4.2: German Response – Domestic Impacts through Preliminary References**

When comparing the Danish and German responses, it can be seen that the two countries differ most markedly in their record of referring preliminary questions to the European Court of Justice. In contrast to Denmark, Germany has tested and questioned the scope and content of Regulation 1408/71 by preliminary references, and thus from time to time been forced to admit rights due to a direct legal injunction.

Germany's response in the political arena also provides contrast to the Danish case. Germany has generally been in favour of integration and supported the Commission's proposals to extend the personal and material scope of the Regulation. The German government thus supported the extension of the regulatory scope to the third country nationals and non-actives (Interviews, Deutsche Verbindungsstelle, 18 September 2001; German Federal Ministry for Labour and Social Affairs, 17 September 2001). On the other hand, the German government refused that the *Decker/Kohl* case-law had effects on the German health insurance system and national

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<sup>55</sup> Council's common position no. 18/2004, 26 January 2004. See footnote 22 above.

<sup>56</sup> COM (2004) 301, 20 April 2004. See footnote 19 above.

<sup>57</sup> COM (2004) 2, 5 March 2004. See footnote 20 above.

authorisation policies on the argument that that the decisions applied only to health care systems reimbursing the costs of treatment<sup>58</sup> (BMG Pressemitteilung, 5 June 1998; Berg 1999; Mrozynski 1999; Kötter 2000). This national re-interpretation of the case-law premises contrasts sharply with the Danish one.

The German preliminary reference record, however, leaves the impression that the institutionalisation of intra-European social security rights have been a rather controversial matter for Germany. In total, there have been 338 judgements between 1971 and 2002 in which reference was made to Regulation 1408.<sup>59</sup> Out of these 338 judgements, 85 were preliminary references by German national courts and one judgement was an infringement procedure against Germany. 25% of all the case-law regarding Regulation 1408/71 concerned Germany. Germany thus holds the second largest number of preliminary references and infringements procedures of all member states between 1971 and 2002 and is outdone only by Belgium with 32.5%.

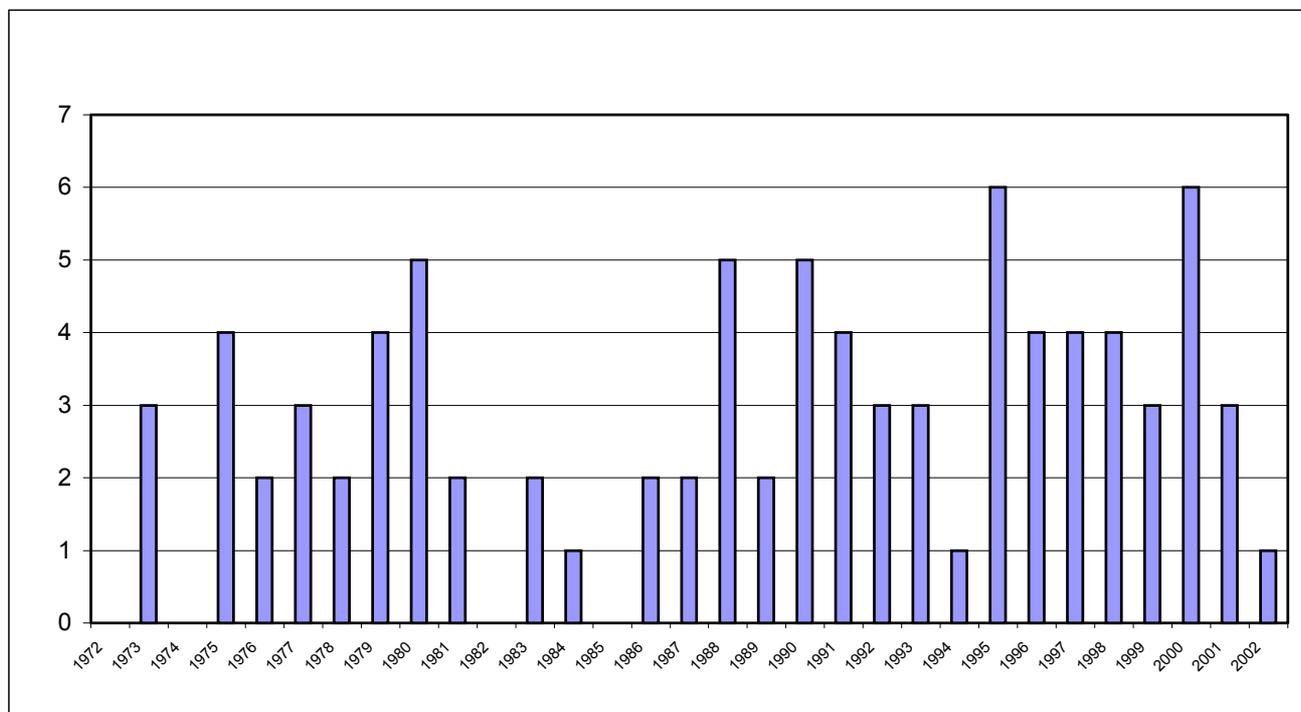
German national courts have taken a most active part in questioning and enhancing the scope, impact and effectiveness of EC law. Over the three decades in which Regulation 1408 has been in force, German national courts have persistently questioned the scope and content of the Regulation, as well as the consistency between national policies and European obligations. Migrants and German national courts have played a vital role in enhancing the effectiveness of EC law and generating concrete intra-European social security rights, as Graph 2 illustrates below:

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<sup>58</sup> As does Luxembourg, Belgium and France.

<sup>59</sup> I.e., according to a CELEX analysis, carried out in relation to the author's PhD, of preliminary references and infringement procedures on the basis of Regulation 1408/71 between 1971 – 2002. In general, the analysis shows significant variations in the number of cases raised against the individual member states.

**Graph 2: German Preliminary References and Infringement Procedures Referring to Regulation 1408/71**



The German preliminary reference record regarding Regulation 1408/71 refutes the idea that Germany, due to its ‘fit’ between contribution-based social insurance and the logic of Regulation 1408, should have “fewer conflicts with European obligations related to social security”, as suggested by Conant (Conant 2001, pp. 112-113). On the contrary, the activism of German national courts have extended the specific impact of Regulation 1408 on German welfare institutions. As in the case of de facto migration, discussed in Section 3.2 above, German preliminary reference patterns suggest that Europeanisation exerts a relatively stronger adaptive pressure and domestic impact on the insurance-based welfare state.

The large number of preliminary references should, however, not be interpreted as successive integrative steps, where judicial conclusions overrule politics and the European Court of Justice is the quintessence of the motor of integration. In the specific field of social security, it is a matter of record that the Court in a long line of cases has concluded that the member states are competent to decide the conditions governing the rights or obligations to be affiliated in a national social security

scheme, as long as these conditions are in accordance with Community law. Therefore, dispute resolutions do not always cause deeper integration, far from it. At least in the field of social security, judicial activism may in fact confirm national rules and practices, thus taking a reactive stance and confirming the status quo.

However, that being said, litigation against Germany contains some of the most important cases in the history of European coordination of social security rights, such as C-10/90 *Masgio*<sup>60</sup>, C-45/90 *Paletta*<sup>61</sup>, C-245/94 & C-312/94 *Hoever & Zachow*<sup>62</sup>, C-131/96 *Romero*<sup>63</sup>, C-160/96 *Molenaar*<sup>64</sup>, C-85/96 *Sala*<sup>65</sup>. They were all ruled in favour of the migrant, and some of the cases questioned fundamental aspects of German law and its organising principles. These cases furthermore enhanced the general scope of intra-European social security law. The ECJ's social security litigation against Germany therefore likewise refutes the restated theoretical assumption that the Court should act cautiously towards the more powerful member states or when strong national preferences are adversely affected by the decision (Garrett 1992; Garrett 1995; Garrett, Keleman & Schultz 1998). In social security matters, the Court has overtly decided against expressed political preferences of the member states in general and certainly against the more powerful among them.

Thus the case-law of the Court has directly influenced the organising principles of German welfare institutions. In the case of *Paletta*, the Court overruled the German government's point of view that a migrant worker and his family falling ill outside German territory were not entitled to German cash sickness benefits, even though the German employer seriously disputed the evidence that the migrant worker and his entire family were in fact sick. In the combined cases of *Hoever & Zachow*, the Court ruled that the German 'child-rearing allowance' constituted a family benefit within the

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<sup>60</sup> Case C-10/90, 7 March 1991. Maria *Masgio* v Bundesknappschaft. ECR 1991, page I-1119.

<sup>61</sup> Case C-45/90 Brennet AG v Vittorio *Paletta*, 3. June 1992, ECR 1992, page I-3423.

<sup>62</sup> Joined cases C-245/94 and C-312/94, 10. October 1996. Ingrid *Hoever* and Iris *Zachow* v Land Nordrhein-Westfalen. ECR 1996, page I-4895.

<sup>63</sup> Case C-131/96, 25 June 1997. Carlos Mora *Romero* v Landesversicherungsanstalt Rheinprovinz. ECR 1997, page I-3659.

<sup>64</sup> Case C-160/96, 5. March 1998. Manfred *Molenaar* and Barbara Fath-Molenaar v Allgemeine Ortskrankenkasse Baden-Württemberg. ECR 1998, p. I-880.

<sup>65</sup> Case C-85/96, 12 May 1998. Maria Martinez *Sala* v Freistaat Bayern. ECR 1998, page I-2691.

meaning of Regulation 1408/71, and that family members of the migrant worker were equally entitled to the benefit. Furthermore, the Court overruled the national principle of territoriality, and thereby extended the benefit beyond German borders. The case of *Sala* likewise addressed the German child-rearing allowance. Here the Court decided that an EU citizen, lawfully residing in another member state, can rely on the Treaty's equal treatment provision in all situations covered by the material scope of Community law (O'Leary 1999, p. 74, Langer 2000, p. 46). The Court overruled the condition as formulated in German law that only foreigners with a residence permit to stay in Germany are entitled to child-rearing allowance. In the case of *Molenaar*, the Court again ruled the German principle of territoriality to be against Community law. The *Molenaar* case concerned the German benefit for long term care. Although the benefit according to German law could only be paid out to beneficiaries residing in Germany, the Court set aside the national residence clause and concluded that as a benefit in cash, German long term care is exportable to other member states. The Court overruled that the national benefit constituted a 'benefit-in-kind substitute', a 'sachleistung surrogat', as held by the German government, and thus found the territorial limitation of the benefit contrary to Community law (Haverkate & Huster 1999; Zuleeg 1998).

In several cases, the ECJ has overruled the territoriality of the insurance-based welfare state and challenged conditions formulated in national law, defining who has a right to German welfare. Over the decades, impact of EC law has become much more visible in national policies. When national policies have been constructed so as to evade Community obligations, the national courts and the European Court have subsequently brought it into line. Whereas the member state still possesses the competence to formulate national welfare policies, it is increasingly clear that the obligation to do so in line with Community law indeed constitutes the boundary of welfare autonomy.

### **5: Concluding Remarks**

The principles of European coordination of social security and those of the national welfare states overtly contradict one another, the former erasing the traditional boundaries of the latter. Because it directly challenges the principles of social citizenship and territoriality of welfare states, it is no wonder that the coordination framework has had considerable domestic impact ascribed to it.

It is clear from the institutionalisation process and its domestic impact depicted above that the effectiveness of Community law, enhanced through political and judicial decision-making, increasingly influences national social policy formulation and thus welfare autonomy. As recently as 15 years ago, it was far from the general praxis to consider EC law when reforming national social policies, whereas the relation between the two regulatory levels are today examined in detail when new social initiatives are taken nationally (Interview, the Danish Permanent Representation, 18 December, 2002).

The institutionalisation process and its domestic impact depicted above demonstrates that welfare policies are not only under European pressure but also forced to change in order to comply with Community law and policy. However, the study of impact also demonstrates that cause and effect do not relate straightforwardly (Goetz 2001). Cross border social security rights impact differently across European welfare states.

The findings of this paper demonstrate that impact varies according to national institutions in place. From a strictly institutional point of view, European coordination of social security entitlements may exert a stronger adaptive pressure on the residence-based model than on its insurance-based counterpart, since social security rights are not contribution-related, are not granted according to the principle of *lex loci laboris*, and since the model has traditionally relied on the principle of social citizenship. However, the adaptive pressure, constituted by the fit/misfit between national institutions and European decision-making, seems unlikely to predict the actual extent of domestic impact on national welfare policies. In between other intervening variables become decisive such as *de facto* immigration and national response, be it political, legal or administrative.

The comparison of EU immigration to Denmark and Germany, carried out above, refutes the proposition that the residence-based welfare state should face a more intense adaptive pressure from European institutionalisation. In contrast to *de jure* assumptions, *de facto* developments substantiate the assumption, contrasting that of 'welfare tourism', that the residence-based welfare state is far from the obvious destination for EU immigrants. Furthermore, the comparison of domestic impact demonstrates that national re-interpretations of the content and premises of EU decision-making are decisive for the impact that such decision-making actually achieves. In the reactive phase of decision-making, national actors thus enjoy a high degree of discretion, and at least in the

short/medium term, national implementation constitutes a ‘second stronghold of national control’ (From & Stava 1993). In addition, impact proves to vary according to the willingness of national courts to refer EU points of law to the ECJ and thus enforce Community law nationally. Such variations in domestic political, legal or administrative response cause a variable impact of political and judicial decision-making in the EU. Whereas national welfare policies increasingly need to adapt to European social security integration, such adaptation is heavily influenced by national institutions in place and different responses for which reason it is more correct to characterise the process of change as ‘diverging adaptation’ to the same cause than ‘convergence’ as a result of that cause.

In the short to medium run, this finding essentially questions the uniformity of European law. In the long run, and as the effectiveness and scope of a specific set of European rules increase, a more uniform compliance with European obligations must be expected. Domestic responses may thus come to be more alike. The different characteristics and principles of national institutions will, however, still hinder converging welfare policies. At least until the European citizens become as mobile as the European Union wants them to be.<sup>66</sup>

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<sup>66</sup> See “The social situation in the European Union – 2002, Eurostat”.

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