Skatteudvalget 2013-14
SAU Alm.del endeligt svar på spørgsmål 336
Offentligt (02)

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Telefonnotat.Engelske erfaringer	23 U	08-10-2010

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nk: 32

Fra: Marianne Busk Bouraima
Sendt: 4. oktober 2010 14:03
Til: Christina Faurby Birck
Emne: VS: Som aftalt
Vedhæftede filer: SKMBT_60010100412510.pdf

Kære Christina

Et forslag der måske kan dæmme op for de situationer, hvor folk er i god tro, og vi derfor ikke kan kræve tilbagebetaling.

Mvh
Marianne

-----Oprindelig meddelelse-----
Fra: Marion Greve [mailto:BB17@okf.kk.dk]
Sendt: 4. oktober 2010 13:57
Til: Marianne Busk Bouraima
Emne: Som aftalt

Hej Marianne.

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Nu kan I jo se på det.

Jeg har ikke nærlæst resten af punkterne.

Med venlig hilsen

Marionn Synne Greve

Københavns Borgerservice

Center for børneydelser og boligstøtte

Postboks 995

2400 København NV

tlf.: 33 17 50 27

Meddelelse om udbetaling af børnefamilieydelse
(Bopælskommune)

SKAT

Københavns Kommune
Postbox 995
2400 København NV

FEB. 10

Personnummer

DEN SKATTEFRI BØRNEFAMILIEYDELSE FOR 2010:

PERSONNUMMER	NAVN	KVARTAL:	JAN.	APR.	JULI	OKT.
						3251

I ALT PR. KVARTAL:	KR:	12672	5809	5809	5809

BELØBET VIL VÆRE TIL DISPOSITION DEN 05. I UDBETALINGSMÅNEDEN PÅ DERES NEMKONTO.

Eventuel henvendelse om udbetalingen bedes foretaget til:

Københavns Kommune TLF. 33 66 33 66

Børnefamilieydelsen bliver udbetalt kvartalsvis via din NemKonto. Beløbet er til disposition den 20. januar, den 20. april, den 20. juli og den 20. oktober.

Børnefamilieydelse udbetales ikke fra barnets fødsel/adoption, men først fra begyndelsen af det efterfølgende kvartal.
Udbetalingen stopper den dag barnet fylder 18 år, dvs. at der det sidste kvartal kun bliver udbetalt en forholdsmæssig andel af kvartalets ydelse (til og med fødselsdagen).

Betingelser
1. Barnet må ikke være fyldt 18 år.
2. Barnet skal som hovedregel bo her i landet. Der er dog særlige regler for EU-landene og visse andre lande.
3. Barnet må ikke være gift.
4. Barnet må ikke være anbragt uden for hjemmet - f.eks. på døgninstitution.
5. Barnet må ikke være forsørget af offentlige midler. Dette kan f.eks. være, hvis det offentlige udbetaler plejeløn eller på anden måde direkte yder et beløb, der dækker den væsentligste del af udgifterne ved forsørgelsen. Retten til at modtage børnefamilieydelse opretholdes dog, selv om hjemmet modtager kontanthjælp efter bistandsloven.
6. Mindst én af dem, der har forældremyndigheden over barnet eller har taget barnet i pleje med henblik på adoption, skal være fuldt skattepligtig i Danmark. Personer, der har fast bopæl her i landet, er fuldt skattepligtige. Der er særlige regler for EU-landene og visse andre lande.
7. Kommunalbestyrelsen ikke for det pågældende kvartal har truffet afgørelse om manglende efterlevelse af et forældrepålæg efter lov om social service §41 a stk.6.

Alle syv betingelser skal være opfyldt ved starten af det kvartal, ydelsen udbetales for. Hvis betingelserne ikke er opfyldt, bortfalder retten til ydelsen i hele det pågældende kvartal.
Hvis barnet er på efterskole eller lignende, vil ydelsen fortsat blive udbetalt til den, der plejer at få ydelsen udbetalt. Det er dog en forudsætning, at hjemmet selv afholder udgifterne til efterskolen.

Hvis betingelserne for at modtage ydelsen ikke er opfyldt, skal beløbet tilbagebetales. Sker dette ikke, vil beløbet blive inddrevet af restanceinddrivelsesmyndigheden.

Med venlig hilsen

SKAT

CSC BY50E 20061114

397174
okt 33

Meddelelse om udbetaling af børnefamilieydelse
(Bopælskommune)

SKAT

Københavns Kommune
Postbox 995
2400 København NV

FEB. 10

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PERSONNUMMER	NAVN	KVARTAL:	JAN.	APR.	JULI	OKT.
			3362			3251
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Med venlig hilsen

SKAT

CSC BYS05 20061114

SJ20110307122220816 [DOR397175]

Fra: Marianne Busk Bouraima
Sendt: 4. oktober 2010 14:03
Til: Christina Faurby Birck
Emne: VS: Som aftalt
Vedhæftede filer: SKMBT_60010100412510.pdf

docId: http://147.29.70.41/kcap10p/DOK397166
SJ: 1

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Marianne

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Center for børneydelser og boligstøtte

Posthoks 995

2400 København NV

tlf.: 33 17 50 27

397256
act 28
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Fra: Christina Faurby Birck

Sendt: 6. oktober 2010 14:56

Til: 'BB17@okf.kk.dk'; 'Carsten Brank'

Cc: Marianne Busk Bouraima; Klaus Kristensen

Emne: Blanket til ansøgning om børnefamilieydelse

Kære Frank, Pia og Marion

I rejste som en lille – men alligevel vigtig ting, at ansøgningsskemaet til børnefamilieydelsen ikke var tilgængelig på SKATs hjemmeside, hvilket betød, at I printede og pr. post sendte skemaet til borgere, som retter henvendelse til jer. Oldnordisk og ressourcetungt, den er vi med påJ

Nu har vi tjekket SKATs hjemmeside og Borger.dk, og ansøgningsskemaet er faktisk tilgængeligt.

Hvis I går ind på SKATs hjemmeside under faneblad Borger, vælger "familie, unge og uddannelse", derefter vælger "børn", derefter vælger "Hvor meget får jeg i børnefamilieydelse" og klikker under "mere information", så kommer man ind til selve Pjecen om børnefamilieydelse. I pjecen er der desuden et elektronisk link til ansøgningsskemaet.

Den hurtige genvej er at trykke på mit link her:

http://www.skat.dk/SKAT.aspx?oId=133789&vId=203437&i=5#i133789

Tilsvarende kan ansøgningsskemaet findes på Borger.dk ved at søge på Børnefamilieydelse. Under informationen om ydelsen er der et link, som hedder: Ansøg om udbetaling af børnecheck (børnefamilieydelse). Efter valg af kommune kommer man til følgende site med blanketten:

https://www.borger.dk/Selvbetjening/Sider/fakta.aspx?sbid=19221

Så der skulle således være rige muligheder for at hjælpe telefoniske henvendelser hen til en selvbetjeningsløsning.

Vi vil tillige rette henvendelse til de ansvarlige for pjecen mhp. at få korrigeret oplysningen om socialforvaltningen og få det rettet til Kommunens Borgerservice.

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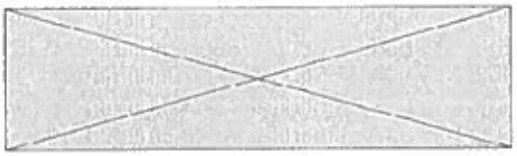

Jura og Samfundsøkonomi - Person

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Officielle emails pskper@skat.dk

Nicolai Eigtveds Gade 28, 1402 København K

Telefon: (+45) 33 92 33 92

Fax: (+45) 33 14 91 05

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akt 29
a

Fra: Christina Faurby Birck

Sendt: 6. oktober 2010 16:11

Til: Christina Faurby Birck; BB17@okf.kk.dk; Carsten Brank

Cc: Marianne Busk Bouraima; Klaus Kristensen

Emne: Solidarisk hæftelse

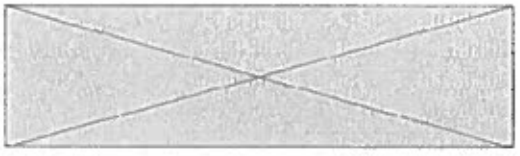
Kære Frank, Pia og Marion

Til spørgsmålet om solidarisk hæftelse for tilbagebetalingskrav for uberettiget modtagne ydelser vil jeg henvise til følgende principielle afgørelse B-1-07 fra Ankestyrelsen – der kan således rejses krav mod faderen, hvis han er den eneste i landet og en række andre forhold i øvrigt er opfyldt. Vi vil overveje om der er behov for yderligere præcisering af spørgsmålet.

Afgørelsen ses her: http://www.ast.dk/afgoerelser/principafgoerelser/

Med venlig hilsen

Christina Faurby Birck



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Til: 'BB17@okf.kk.dk'; 'Carsten Brank'
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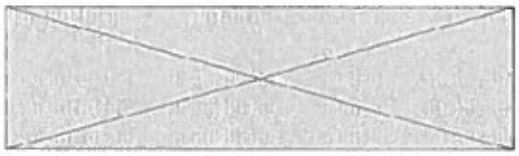
Christina Faurby Birck



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akt 26
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Fra: Christina Faurby Birck

Sendt: 7. oktober 2010 15:44

Til: 'Ina Elgaard Jensen'

Cc: Marianne Busk Bouraima; Søren Schou; Klaus Kristensen; Maria Eun Hansen

Emne: Mulighed for dobbeltudbetaling med ny forordning - spørgsmål til undlændinge, som starter som selvstændige

Kære Ina,

Endnu et par spørgsmål, som muligvis bør føre til lovgivning:

1. Mulighed for dobbeltudbetaling som følge af ny forordning

Åbenrå Kommune har ringet ang. tilbagebetalingskrav i en konkret sag, som er principiel for dem, for de kommer til – som grænsegængerland – at se mange af dem i fremtiden. Efter det oplyste er det en konsekvens af, at den nye forordning trådte i kraft, at bilaterale aftaler med blandt andet Tyskland og Holland nu er bortfaldet. I disse aftaler fremgik det, at hvis et barn flyttede fra DK til Holland/tyskland i løbet af en kvartals periode, ville Tyskland/Holland først starte deres månedsudbetalinger ved den danske kvartalsperiodes udløb. På den måde blev det sikret, at der ikke skete en "dobbeltudbetaling" til barnet for en given periode.

Den konkrete sag, som viser problemet med den nye forordning og at aftalerne er bortfaldet, er som følger:

Barnet bor hos mor. Den 20 april udbetaler kommunen børnefamilieydelse til moderen for april kvartal (april, maj og juni).

Den 26. April flytter barnet til Tyskland til sin far, som bor og arbejder i Tyskland. I Tyskland er ydelsen (Kindergeld) månedsbaseret, så faren får ydelse udbetalt for maj og juni. Efter den gamle aftale ville udbetalingen først være sket med virkning fra 1.7. Nu sker udbetalingen allerede fra maj, da faren opfylder betingelserne her.

Spørgsmålet er nu:

Kan de kræve tilbagebetaling af moren? Hertil er det min opfattelse, at svaret bør være nej. For moren opfyldte betingelserne pr. 1. April og var således i god tro ved modtagelsen af pengene pr. 20. April.

Men det betyder jo, at der i to måneder er betalt dobbelt ydelse til barnet. Er der noget i forordningen, som tager højde for denne problemstilling – eller har forordningen skabt en mulighed for dobbeltydelser i korte tidsintervaller? Jeg håber, at vi kan blive enige om, at hvis det er korrekt, at der kan ske dobbeltudbetaling, så bør vi handle, og det er endnu et argument for en overgang til en månedsbaseret ydelse.

Hvad siger du?

2: Udlændinge som starter som selvstændige i DK

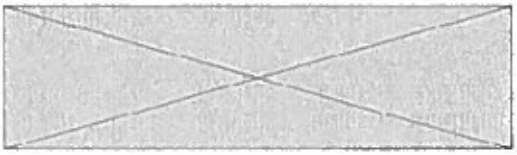
Det fremgår af bekendtgørelse om personer, der ikke er fuldt skattepligtige, at betingelsen om skattepligt efter § 2, stk. 1, nr. 1, i lov om en børnefamilieydelse gælder ikke for personer, der efter EF-forordning nr. 1408/71, afsnit II, er omfattet af dansk lovgivning om social sikring under ophold i en anden EØS-medlemsstat. Betingelsen gælder heller ikke for personer, der efter overenskomster med andre stater er omfattet af dansk lovgivning om social sikring under ophold i en anden stat.

Det får os til at spørge: Hvilke krav stilles der til udlændinge, som starter som selvstændige i DK, for at kunne blive omfattet af dansk lovgivning om social sikring. Det er jo først når et skatteår er gået, at det er muligt at se, hvorvidt den pågældende har indkomst eller ej. Hvordan gør man det? Har vi et problem?

Jeg håber, at du kan give et hurtigt svar på især 1)eren. Vi skal til møde med ministeren i morgen angående vores fællespapir – og hvis vi har et problem i 1)eren taler det som sagt for, at vi gør ydelsen månedsbaseret.

Med venlig hilsen

Christina Faurby Birck



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Fax: (+45) 33 14 91 05

Christina Faurby Birck

Fra: Christina Faurby Birck
Sendt: 14. oktober 2010 08:23
Til: Ina Elgaard Jensen
Emne: SV: Mere til cover - månedsbaseret ydelse

Svar akt-26

docId: http://147.29.70.41/kcap10p/DOK400133
SJ: -1

Hej Ina,

Jeg fik ikke noteret dit direkte nummer på andet end et løst papir – som jeg ikke længere kan finde på mit skrivebord. Vil du ringe. Jeg skal lige forstå nedenstående☺ + jeg har et spørgsmål til krav om arbejdstid.

Du har flere gange skrevet at praksis med arbejdstidskravet på 9 timer fra den tidligere forordning er videreført. I svaret af 23.9. på spørgsmål 1 til Europaudvalget af 27. August 2010 af Per Clausen læser jeg/vi det som om, at beskæftigelsesministeren bekræfter, at der ikke længere er krav til arbejdsperiodens længde.

Med venlig hilsen

Christina Faurby Birck

SKATTEMINISTERIET

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Sendt: 14. oktober 2010 08:05
Til: Christina Faurby Birck
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Emne: SV: Mere til cover - månedsbaseret ydelse

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Undskyld, at jeg overså denne.

Den problemstilling, der nævnes, er nok især et sønderjysk problem, fordi vi indtil 1. maj har haft en speciel aftale aftale med Tyskland og Nederlandene om, at vi i forhold til disse lande anvender kvartalsvise afregninger.

I forhold til en række andre lande (CZ, LT, PL og SK) har vi haft aftaler om månedsvise afregninger.

I forhold til alle andre lande – herunder Sverige – har der været en gældende regel om afregninger fra dag 1, dvs. fra den dag en person er begyndt eller ophørt med at være under dansk lovgivning.

Det er et led i forenklingen med de ny regler, at der ikke længere kan indgås aftaler med andre lande om andre afregningsperioder, og at der altid sker et skifte af ansvarligt land for udbetaling af ydelser ved udgangen af en måned. Dette taler naturligvis for, at vi tilpasser vores lovgivning hertil.

Med hensyn til tilbagebetaling (fra borgeren) er det de nationale regler, der gælder, dem kender jeg ikke. På EU-plan er det efter min mening forudsat, at man kan anmode det land, der ved et månedsskifter overtager ansvaret for udbetaling af en ydelse, om at få refunderet ydelser udbetalt for en periode, hvor det er det ny land, der er ansvarligt. I de standarddokumenter, der bliver udviklet til informationsudveksling, er der da også taget højde herfor, således at der er mulighed for at anmode en udenlandsk institution om refusion på et standarddokument.

Hilsen Ina

Med venlig hilsen

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Emne: Mere til cover - månedsbaseret ydelse

Kære Ina,

Jeg fik aldrig svar på 1)eren (nedenfor) – og det slår mig, at hvis vi har et problem, som endnu mere taler for omlægning til en månedsbaseret ydelse – så bør det med i coveret under beskrivelsen af månedsbaseret ydelse. Er du enig i, at der er et problem? Og i så fald hvad kan vi skrive? (superkort) Jeg har jo bare fakta fra en sagsbehandler ved grænsen.

Med venlig hilsen

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Emne: Mulighed for dobbeltudbetaling med ny forordning - spørgsmål til undlændinge, som starter som selvstændige

Kære Ina,

Endnu et par spørgsmål, som muligvis bør føre til lovgivning:

1. Mulighed for dobbeltudbetaling som følge af ny forordning
Åbenrå Kommune har ringet ang. tilbagebetalingskrav i en konkret sag, som er principiel for dem, for de kommer til – som grænsegængerland – at se mange af dem i fremtiden. Efter det oplyste er det en konsekvens af, at den nye forordning trådte i kraft, at bilaterale aftaler med blandt andet Tyskland og Holland nu er bortfaldet. I disse aftaler fremgik det, at hvis et barn flyttede fra DK til Holland/tyskland I løbet af en kvartals periode, ville Tyskland/Holland først starte deres månedsudbetalinger ved den danske kvartalsperiodes udløb. På den måde blev det sikret, at der ikke skete en "dobbeltudbetaling" til barnet for en given periode.

Den konkrete sag, som viser problemet med den nye forordning og at aftalerne er bortfaldet, er som følger:

Barnet bor hos mor. Den 20 april udbetaler kommunen børnefamilieydelse til moderen for april kvartal (april, maj og juni).
Den 26. April flytter barnet til Tyskland til sin far, som bor og arbejder i Tyskland. I Tyskland er ydelsen (Kindergeld) månedsbaseret, så faren får ydelse udbetalt for maj og juni. Efter den gamle aftale ville udbetalingen først være sket med virkning fra 1.7. Nu sker udbetalingen allerede fra maj, da faren opfylder betingelserne her.

Spørgsmålet er nu:

Kan de kræve tilbagebetaling af moren? Hertil er det min opfattelse, at svaret bør være nej. For moren opfyldte betingelserne pr. 1. April og var således i god tro ved modtagelsen af pengene pr. 20. April.

Men det betyder jo, at der i to måneder er betalt dobbelt ydelse til barnet. Er der noget i forordningen, som tager højde for denne problemstilling – eller har forordningen skabt en mulighed for dobbeltydelser i korte tidsintervaller? Jeg håber, at vi kan blive enige om, at hvis det er korrekt, at der kan ske dobbeltudbetaling, så bør vi handle, og det er endnu et argument for en overgang til en månedsbaseret ydelse.

Hvad siger du?

2: Udlændinge som starter som selvstændige i DK
Det fremgår af bekendtgørelse om personer, der ikke er fuldt skattepligtige, at betingelsen om skattepligt efter § 2, stk. 1, nr. 1, i lov om en børnefamilieydelse gælder ikke for personer, der efter EF-forordning nr. 1408/71, afsnit II, er omfattet af dansk lovgivning om social sikring under ophold i en anden EØS-medlemsstat. Betingelsen gælder heller ikke for personer, der efter overenskomster med andre stater er omfattet af dansk lovgivning om social sikring under ophold i en anden stat.

Det får os til at spørge: Hvilke krav stilles der til udlændinge, som starter som selvstændige i DK, for at kunne blive omfattet af dansk lovgivning om social sikring. Det er jo først når et skatteår er gået, at det er muligt at se, hvorvidt den pågældende har indkomst eller ej. Hvordan gør man det? Har vi et problem?

Jeg håber, at du kan give et hurtigt svar på især 1)eren. Vi skal til møde med ministeren i morgen angående vores fællespapir – og hvis vi har et problem i 1)eren taler det som sagt for, at vi gør ydelsen månedsbaseret.

Med venlig hilsen

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Judicial Policy-making and Europeanization – Limiting National Control and Administrative Discretion through the Principle of Proportionality

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Abstract

Judicial policy-making is having an increasing impact on political domains traditionally guarded by national sovereignty. This paper examines how the European judiciary has expanded Community competences into the policy domains of welfare and immigration, followed by subsequent Europeanization, against the preferences of the member governments. It finds that the principle of proportionality constitutes a most powerful means for the European Court to strike the balance between supranational principles and national policy conditions and administrative discretion. Whereas the Court has previously been cautious to apply the principle beyond economic law, it no longer steps that reluctantly but limits the inner core of national control in a wider set of

policy fields, i.e. the capacity of the national executive to detail, condition and administer national policies in almost all domains.

1. Introduction

Judicial policy-making is having an increasing impact on political domains traditionally severely guarded by national sovereignty such as immigration policy, healthcare, the labour market and minimum welfare benefits. The European Court of Justice (ECJ) has a long and well-known history as an integrative motor of the European Community, hereby conditioning and limiting national competences. It has long been a key institution for drawing and redefining the boundaries of the supranational and national communities. In this respect, the recent expansion of Community scope by means of judicial interpretation is not a new phenomenon. Rather, it merely confirms a Court which is neither politically restrained nor displaying signs of self-restraint, continuing instead to bring supranational competences into what national politicians and bureaucracies thought their exclusive domain. However, the puzzle still remains *how* the ECJ manages to intervene in policy areas where political control and administrative discretion at first sight remain tight national ones and political preferences to keep it that way are indeed explicit and relatively fixed – even often literally substantiated by Community secondary law. This paper thus examines *how* the ECJ has expanded Community competences into policy domains of constituted national boundaries and tight national control.

The *how* question may be especially relevant to scholars of political science and public administration, interested in judicial *policy-making* and its effects *beyond* the Court rooms. Many such scholars will question the de facto effects of judicial policy-making, pointing to the arsenal of

conditional and restrictive means that national executives have at their disposal to hinder unwanted Europeanization. Only when such restrictive means set out in national laws and administrative practices can be overcome, we may speak of 'judicial Europeanization', defined as a de facto national effect caused by the judicial policy-making of the ECJ. The argument of this article is that also in the policy fields of welfare and immigration, the interpretations of the ECJ cause judicial policy-making, or policy creation, which reaches beyond the Court room and therefore even in these areas of high political salience we find judicial Europeanization. The analysis below demonstrates that the principle of proportionality as a general principle of Community law is a powerful instrument applied by the Court when extending Community competences, among other aspects because it quite effectively targets the conditional and restrictive means in national rules and practices set to hinder the impact of EU regulation.

By applying the principle of proportionality, the judiciary possesses a powerful means through which to de facto enhance the scope of Community competences (De Búrca, 1993). By ruling national policies and administrative practices 'disproportionate', the ECJ has a strong principle through which supranational powers can be enhanced. It has an instrument that it can apply in rather ad hoc manner, finding national measures unjustifiable, even though they are literally inserted as legitimate means in the secondary legislation of the Community. A proportionality assessment of the personal situation of the claimant may overrule what national executives thought were national conditions compatible with Community law (Spaventa 2008, p. 40). Although the principle of proportionality is designed to find the right balance between justified national conditions and EU principles, that balance is often stroke in favour of the latter.

On a more general account, the compliance with ECJ rulings have been said to be 'contained' (Conant 2002). Member states are not automatically giving in to EU imperatives where they want to guard their sovereignty. Furthermore, Court decisions clearly give more room for interpretation when national executives are to implement the supranational case law than when implementing secondary legislation (Wasserfallen 2010). Welfare and immigration policies are indeed policy areas where member states have jealously guarded their autonomy to define who are to be members of the national communities. In practice this is done by the executive inserting various conditions in national rules which have to be fulfilled to enter the national community and allowing a high level of discretion when exerting these. Thresholds which have to be overcome to realise European rights and their discretionary execution are likely to hinder the effective reach of Europe. However, by means of the expansive interpretation of European citizenship and the principle of proportionality, the ECJ evaluates the justifiability of these conditions. It thus evaluates on what may be regarded as the inner core of national control; the power to detail, condition and administer national policies.

The paper analyses two domains in which national control has remained strong but faces severe challenges. The first analysis concerns the area of welfare and examines how the ECJ increasingly questions the justifiability of national conditions in order to earn the right to minimum social benefits and how the national level has responded by filtering the eligibility for social provisions through national residence clauses, as exemplified by the case of the United Kingdom. The second analysis examines national immigration policies and family unification rights and analyses the Court's review of discriminatory national policies and administrative discretion. In addition, the impact of judicial policy making beyond the courtroom is examined with Denmark as illustrative case. The two policy areas share the same point of reference against which rights are generated and

boundaries redrawn, namely European citizenship and a person's right to reside freely within the EU.

2.1. Enhancing Competences, Redrawing Boundaries

Judicial policy-making by the ECJ has become known in almost all policy areas. The term may be defined in the same way as 'judicial activism', understood as the process whereby juridification expands and differentiates into new regulatory domains (Blichner and Molander, 2008, p. 42). This understanding implies a subsequent consequential process whereby the boundaries of national competences and autonomy are redrawn – and eventually pushed back. It is also a process in which the domain of 'political' policy-making is pushed back and/or conditioned by 'non-political' forces (Scharpf, 2001; 2009). It thus affects the scope condition of politics.

Questioning the effects of judicial policy-making cannot therefore be assessed as a power shift at the supranational level alone; between the forces of 'law' and 'politics' in the EU. It implies a consequential logic too. Both political and administrative responses at the national levels must be taken into account in order to assess the true impact of judicial integration. Implementation and Europeanization research would hypothesise that it may well be that subsequent national responses to judicial interpretations compensate, differentiate or neutralise unwanted extensions of supranational competences (Pressman and Wildavsky, 1973; Radaelli, 2003; Falkner *et al.*, 2005). The likelihood of such resistance is expected to be bigger when it comes to case-law compared to secondary law (Wasserfallen 2010), as the general implication of individual cases are often unclear and the discretionary span how to implement them are wider. Thus the need to comply becomes vaguer or more diffuse.

The inherent tensions between the regulatory competence of the EU and the administrative powers of the Member States (Maas, 2009, p. 279) may initially amputate the effective reach of judicial integration. In the daily practices of executing EU norms and rules, national sovereignty may be guarded by an intact inner core of national control, through which member states maintain the power to condition and administer access to their communities. However, the analysis below points out that judicial interpretations increasingly addresses this inner core, confronting the various thresholds that member states set up to hinder unwanted Europeanization.

European citizenship is a powerful demonstration of the creative abilities of the European Court, but also how it is met at the national level. The European Court has been the primary institution to add meaning to the rather empty concept of Union citizenship. Through expansive interpretations on the free movement rights of the citizenry, the Court has elevated supranational citizenship from its embryonic stage (Jacobs 2007; Olsen, 2008) to one of the Community's most important principles (Wind, 2009a). Granting the free movement principles and the principle of non-discrimination fundamental or constitutive status in the Community order has developed and extended the rights enjoyed by Community nationals when moving from one Member State to another. EU citizenship initially may appear to remove the authority of the member governments to privilege their own citizens, undoubtedly 'a hallmark of national sovereignty' (Maas, 2009, p. 268).

However, Member States are not simply accepting such intervention out of their respect for the rule of law; while supranational rights are enhanced in the courtroom, national control is intensified through alternative – often more discrete – means (Conant, 2002). People might formally be treated equally, but the adoption and administration of various conditions for eligibility create de facto

discriminatory effects. Thresholds are many and high to enter the national community of a host member state.

The European Court's use of the principle of proportionality and assessments of administrative practices become central in this respect, as they directly challenge such thresholds and confronts powerful remains of national control.

2.2 The Principle of Proportionality: Setting Limits on Policy Execution

The principle of proportionality is known as a principle of judicial assessment in both national and Community law. Both Community actions and national measures may be reviewed by the ECJ in the light of the principle. When assessing proportionality, a form of balancing inquiry is carried out by the Court. In this balancing act, the Court examines the weight and justifiability of policy means and ends, often in the light of fundamental Community aims such as the internal market and the constitutive free movement principles. A proportionality test will normally contain three steps, evaluating; 1) the *suitability* of the measure to achieve its stated aim. 2) whether the measure was *necessary* to achieve this aim, and 3) whether the measure imposes a burden on the individual, *too excessive* in the light of the desired aim, i.e. a criteria of *reasonableness* (Craig and De Búrca 2008, p. 545).

The principle has developed into one of the general principles in Community law, however, traditionally particularly important in the field of economic law (Tridimas, 2006, p. 137). According to Tridimas, the test of proportionality has traditionally been applied to agricultural law, external trade, charge-imposing measures, penalties and sanctions (Tridimas, 2006, p. 138). Moreover, earlier Court assessments suggested a more restrained judiciary, less willing to apply the principle

against national measures if the national policy reviewed was of a sensitive nature or for example considered national interests and competence such as social policy objectives (De Búrca, 1993, p. 114). The Court no longer seems to step that reluctantly. As pointed out by legal scholars (Tridimas, 2006, p. 138; Hailbronner 2005; Spaventa 2008) and as will be demonstrated below, the principle has recently been applied to new areas of Community regulation in rather aggressive manner such as healthcare, labour market regulation, welfare and immigration policy. Proportionality assessments have become more pervasive and its 'personalized' and/or ad hoc application "brings about a qualitative change in the expansion of judicial review of national rules" (Spaventa 2008, p. 40). The principle therefore constitutes a contemporary elastic and powerful means for the judiciary to expand EU competences and review national measures, since it is addable to new situations and new regulatory domains without further justification. It constitutes a flexible tool of judicial review.

The principle requires that action must be proportionate to its objective and is founded on the idea that the individual must be protected against the state. The principle addresses both the supranational and the national level of policy execution. It may be used to challenge Community action, but can also be invoked to challenge national measures in the light of Community law. Jacobs has found that the ECJ has applied a double standard when invoking proportionality, being more tolerant when it reviews Community measures, but less so when it comes to national ones (Jacobs 1999, p. 21). The principle gives a general point of reference to evaluate national measures and provides extended opportunity for the European judiciary to intervene in the domain of the national legislatures and administrations. It can of course not be disaggregated from the other interpretative issues that the Court considers in the case at hand, and below we will see it tightly coupled to Union citizenship and the free movement of European citizens. A national measure which contradicts the fundamental provisions of the Treaty is incompatible with Community law

unless it is necessary to achieve a legitimate aim. Such legitimate necessity could include the need to protect the national budget balance, the social security system, public health or public security. By reviewing national measures against the principle of proportionality, the Court has a position from which to assess the justifiability and reasonableness of national policies and administration in the light of the supreme Community legal order. This means that the principle may work in two ways; the Court may find that national measures are necessary, are proportionate in the light of what it tries to protect, but it may also review national means and ends as disproportionate. However, the Court's interpretation seems to result mainly in the latter, challenging national measures and becoming more intensive in its review over time (Jacobs 1999; Spaventa 2008; Craig and De Búrca 2008, p. 550).

In the light of the principle, national authorities are obliged to prove that policies are 'suitable' and 'necessary' if they constitute obstacles to the larger aim of the Community polity. The principle places limitations on both the substance of national policies and on the procedures for how such policies are executed. It evaluates social, economic and political choices (Jacobs 1999) as well as the attached administrative procedures. The reviewable power of the Court generates its own asymmetry. While the tests of suitability and necessity likely give full value to the European freedoms, countervailing national arguments have greater difficulties proving that contradictory measures are necessary and acceptable (Scharpf, 2009, p. 195).

Due both to its substantive and procedural content, the Court's use of the principle addresses the inner core of national control, i.e. the power to detail, condition and administer national policies. It constitutes a strong supranational prism through which legislative and administrative actions are reviewed (de Búrca, 1993, p. 108) and often perceived by legal scholars to be 'the most far-reaching

ground for review, the most potent weapon in the arsenal of a public law judge' (Tridimas, 2006, p. 140) and the 'magic key', the 'most important yardstick for determining the manner and extent of restrictions of rights granted by law' (Hailbronner, 2005, pp. 1253-1254).

The principle accentuates central dilemmas in the interplay between law and politics as seen in more recent judicial interventions in national policy-making. In the field of healthcare, national means of control have been put to test by the ECJ. In a line of case-law, the Court has found that national measures fail the test of proportionality when the national executive is unable to justify and prove that the condition of prior authorisation in order to be treated at a hospital in another Member State is a suitable and necessary instrument of control.[1] The principle has subsequently been inserted by the Commission in the proposal for a patient rights directive and will - if adopted - come to guide and reason the administrative decisions that will be taken in the future and constitute grounds for further judicial review (Martinsen, 2009). As will also be demonstrated below, the principle's insertion in secondary legislation gives the Court further ground upon which to extend or intensify its application both against Community actions and national policy execution. The principle has also been invoked in the line of case-law considering minimum wages, collective actions and bargaining, where the Court found that the national actions taken were not sufficiently evidenced, not proved necessary, and were therefore disproportionate in the light of Community law.[2]

[1] For the proportionality principle in the patient rights case-law, see paras. 75, 82 of the C-157/99, *Smits-Peerbooms* [2001], ECR I-5473; paras. 68, 83 of the C-385/99, *Müller-Faure and Van Riet* [2003], ECR I-4509, and paras. 106, 114 of the C-372/04, *Watts* [2006], ECR I-4325.

[2] See Case C-438/05, Viking, 11 December 2007, para 46; Case C-341/05, Laval, 18 December 2007, para 94; Case C-346/06, Rüffert, 3 April 2008, paras 40-42 and Case C-319/06, Commission vs. Luxembourg, 19 June 2008, paras 51-53.

In the below, the Court's scrutiny of the proportionality of national conditions and restrictions will be examined in terms of welfare minimum benefits and immigration policy; two policy areas traditionally guarded by strong means of national control.

3.1 EU citizenship rights vs. national residence clauses

The development of Union citizenship is an important Community steppingstone from which traditional means of national control are increasingly challenged. Such challenge is clear in relation to the national competence to reserve social benefits to the national Community. Minimum social benefits and student benefits have traditionally been reserved for national citizens or granted through a filter of considerable national conditions but are increasingly interpreted in the light of Union citizenship – and of proportionality (Spaventa 2008).

The power of European citizenship rights when coupled with proportionality becomes apparent in the cases concerning students as well as those concerning the rights of jobseekers. The Court's conclusions in *Grzelczyk*, which addressed the Belgian minimex, extended access to social assistance on the basis of European citizenship with reference to the fundamental status of Union citizenship (Jacobs 2007; Wasserfallen 2010).[3]

The case of *Trojani*[4] followed suit. Here, the Court considered the proportionate exertion of the conditions inserted in the relevant residence directive[5]. Although the residence directive

[3] Case C-184/99, *Grzelczyk*, 20 September 2001.

[4] Case C-456/02, *Trojani*, 21 November 2002.

[5] Article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence.

conditioned residence rights on the person having sufficient resources as well as being covered by a sickness insurance, the Court stated that the national authorities must consider the individual situation in the light of what is proportionate (paras. 34 and 46 of C-456/02, Trojani). The national exercise of limits and conditions to Community rights must comply with 'personalized' assessment of the principle of proportionality (Spaventa 2008; para. 46 of C-456/02 Trojani). In this way the autonomy to exert conditions, although stated as a legitimate national means in secondary Community legislation, becomes subjugate to a ECJ measure of what is justifiable in the personalized situation. The same was emphasised in *Baumbast*[6], where the Court found it disproportionate to refuse a residence permit to Mr Baumbast on the grounds that he was not covered by sufficient sickness insurance in the UK (paras. 91-94 of C-413/99, Baumbast; Jacobs 2007).[7] Although the national rules evaluated had correctly implemented the condition set out in Community secondary law, i.e. Directive 90/364, the way the condition was exercised in the personal situation of Mr Baumbast was found disproportionate (Spaventa 2008, p. 40).

The Court's cluster of case-law cannot, however, be interpreted as a linear expansion of free movement rights. *Collins*[8] could be regarded as a setback in this regard (Wind, 2009a, p. 261). However, the case leaves room for a more ambiguous interpretation of the question of the scope and limits of the welfare rights of those moving within the Community. *Collins* concerned the UK income-based jobseeker's allowance. In the case, the Court clarified that it *might* be regarded as justifiable for a Member State to base entitlement to a benefit, such as income-based jobseeker's allowance, on the condition that the applicant had remained in the host Member State for a

[6] Case C-413/99, *Baumbast*, 17 September 2002.

[7] Also the later case of Bidar continued to enhanve the residence rights to those without 'genuine link with the economic market', Case C-209/03, *Bidar*, 15 March 2005.

[8] Case C-138/02, *Collins*, 23 March 2004.

sufficient period so as to establish a genuine link with the employment market. However, the Court also emphasised that when requiring a period of past residence,

'the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State' (para. 72 of the judgement).

The process of defining and clarifying the boundaries of and conditions for entering the national social Communities continues. The Community legislature has also contributed to this process, albeit with considerable scope for the judiciary to interpret the actual meaning of the legislative text in the future. In the legislative hurry prior to the 2004 enlargement, the Council adopted directive 2004/38/EC[9] on 29 April 2004, i.e. two days before the ten new Member States entered the Community. The new residence directive implies a considerable extension of cross-border welfare rights. The Directive eliminates the obligation for EU citizens to obtain a residence permit and introduces a permanent right of residence after five years of continuous residence. Furthermore, it restricts the scope for national authorities to refuse or terminate the residence of EU citizens. Concerning expulsion, it is interesting that article 27 (2) of the Directive incorporates the principle of proportionality. The insertion of the principle in the legislative text substantiates that proportionality reviews will further limit the discretionary scope of the national executive in the future. Article 27 (2) lays down that;

'Measures taken on grounds of public policy or public security *shall comply with the principle of proportionality* and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

[9] Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Official Journal of the European Union L158 of 30 April 2004).

Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted' (Article 27 (2) of Directive 2004/38. Emphasis added).

Finally, the Directive sets out that entitlement to social assistance in another Member State in the future will depend on the residence status of the EU citizens rather than on the more discretionary conditions set out in the previous residence directives and national legislation. A person who has resided for less than five years in another Member State will now enjoy the right of residence as long as they do not become an 'unreasonable burden' on the host country's social assistance system and are covered by sickness insurance in that country. Proving that an EU citizen is an 'unreasonable burden' on the social system may be difficult for the Member State when, as demonstrated in the cluster of case-law cited above, recourse to social assistance in itself is not sufficient reason and not proportionate.

3.2 The justifiability of national residence tests

Regarding the proportionality and justifiability of national residence tests in the light of enhanced free movement and citizenship rights, the line of case-law suggests that residence clauses are increasingly being challenged. *Collins*, referred to above, illustrates this challenge. In terms of national legislation, the case concerns the UK habitual residence test, which was introduced in the UK in 1994. The test applies to income-based jobseeker's allowance, income support and the pension credit, and means that one must be accredited as 'habitual resident' in order to be entitled to these social rights. The habitual residence test was first challenged in *Swaddling* and its application found to be incompatible with Community law.[10] In *Swaddling*, the Court concluded that a person who had exercised the right to free movement, established habitual residence in another Member

[10] Case C-90/97, *Swaddling*, 25 February 1999.

State and then returned to their Member State of origin, in this case the UK, could not have their entitlement to income support made dependent on passing the habitual residence test. The habitual residence test was reformed in response to *Swaddling* by reducing the period of habitual residence enquiries from five to two years (Roberts, 2004).

Despite this move to comply with Community law, the UK habitual residence test continues to be contested. Union citizens and non-governmental organisations have argued that the burden of satisfying the test falls unequally on EU citizens in comparison with UK nationals. National regulations do not define 'habitual residence', and the applicable rules to satisfy the test appear complicated. Before the ECJ started to question the justifiability of the test, the discretionary scope to decide whether one satisfied the test was entirely left to the national administration. Among other factors, the criteria include where a person normally lives, where they expect to live in the future, the length of time spent abroad, and the ties with the country of origin (www.disabilityalliance.org/f46.htm). *Collins* refocuses attention on the habitual residence test. Albeit in a rather ambiguous manner, the case casts doubt on the compatibility between the residence test and community law. On the one hand, the Court states that Union citizenship does not preclude national legislators from making entitlement to income-based jobseeker's allowance conditional on satisfying a residence requirement. On the other hand, the Court emphasises that in order to be justified in Community law, the habitual residence test must be based upon objective criteria which are independent of the nationality of the person concerned and that free movement has been exercised. The reflections of the Court place the legal rights of the EU citizen in focus and limit the discretionary space of the national authority. Again, the principle of proportionality is invoked:

> 'However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be *proportionate it cannot go beyond what is necessary in order to attain that objective.*

> More specifically, its *application by the national authorities* must rest on *clear criteria known in advance* and provision must be made for the possibility of a means of *redress of a judicial nature*. In any event, if compliance with the requirement demands a period of residence, the *period must not exceed what is necessary* in order for the national authorities to be able to *satisfy themselves that the person concerned is genuinely seeking work* in the employment market of the host Member State' (C-138/02, Collins, para. 72. Emphases added).

Although the Court does not rule out the test, it makes clear that by not being subject to legislative definition, it does not appear to be based on criteria sufficiently known in advance (Report by the Social Security Advisory Committee, 2004, p. 17).

New questions regarding the habitual residence test have been raised. In the context of enlargement, the UK habitual residence test has been reinforced[11], and in addition to being 'habitually resident', claimants must now also prove that they have 'a right to reside' by satisfying that they have the sufficient economic resources not to become a burden on the social security system. According to the UK government, the underlying purpose of the amendment has been to 'safeguard the UK's social security system from exploitation by people who wish to come to the UK not to work but to live off benefits' (Report by the Social Security Advisory Committee, 2004, p. 3). This tightening of the habitual residence test has been criticised for going against the parallel development of Union citizenship and thus incompatible with the current state of EC law. It is argued that a new test has added complexity to rules whose application was already unclear, lacks transparency as well as a comprehensive legal definition (Report by the Social Security Advisory Committee, 2004). As with 'habitual resident', 'self sufficiency' is a difficult concept to apply in practice and may be difficult for an individual to prove should transparent and objective criteria be lacking. Nevertheless, the administrative practices of national authorities, deciding entry or exit as well as the social rights of

[11] By the Social Security (Habitual Residence) Amendment Regulations 2004, Statutory Instrument 2004. no. 1232.

the applicant, must pass the proportionality test written into Community legislation and reviewed by the ECJ. The inner core of national control is increasingly addressed, also in regard to the national welfare communities.

4.1 Immigration Policies: A Policy Domain of National Control?

One of the public policy areas in which national control has become increasingly tight is in the immigration policies of the respective EU Member States. Whether as a response to public opinion or economic recession, policies have been targeted to select between immigrants and hinder unwanted immigration. Despite the development towards a common European immigration policy, the administrative reality of national policies is by and large nationally controlled (Guiraudon and Lahav, 2000; Guiraudon, 2003). The immigration policies in the EU Member States filter the entry and residence rights of third-country nationals through a wide web of conditions and administrative discretion to such an extent that the policy domain has long been one in which national sovereignty seems to remain intact. Asylum seekers have long been met by strict national considerations[12], and in response to the current economic downturn, national governments impose much tougher entry requirements on third-country foreign workers or even pay existing migrants to return home. It has also become much more difficult to have temporary work permits renewed (Bauer, Lofstrom and Zimmermann, 2000; the Economist, July 1, 2009).

Policies and administrative practices on family unification concretely demonstrate the reinforced national control of EU Member States. When immigration policies became stricter in response to

[12] Bauer, Lofstrom and Zimmerman mark 1992 as a turning point after which European countries made the immigration of asylum seekers and refugees more restrictive.