

# Welfare migration? Free movement of EU citizens and access to social benefits

Research and Politics  
October-December 2014: 1–7  
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DOI: 10.1177/2053168014563879  
rap.sagepub.com  


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## Abstract

This article analyzes the political impact of the European Court of Justice's (ECJ) case law concerning the free movement of EU citizens and their cross-border access to social benefits. Public debates about 'welfare migration' or 'social tourism' often fluctuate between populist hysteria and outright denial, but they obscure the real political and legal issues at stake: that ECJ jurisprudence incrementally broadens EU citizens' opportunities to claim social benefits abroad while narrowing member states' scope to regulate and restrict access to national welfare systems. We argue that legal uncertainty challenges national administrations in terms of workload and rule-of-law standards, while domestic legislative reforms increasingly shift the burden of legal uncertainty to EU migrants by raising evidentiary requirements and threatening economically inactive EU citizens with expulsion. We illustrate this argument first with a brief overview of the EU's legal framework, highlighting the ambiguity of core concepts from the Court's case law, and then with empirical evidence from the UK, Germany and Austria, analyzing similar domestic responses to the ECJ's jurisprudence. We conclude that EU citizenship law, while promising to build the union from below on the basis of equal legal entitlements, may, in fact, risk rousing further nationalism and decrease solidarity across the union.

## Keywords

Welfare migration, European Court of Justice, EU citizenship, Europeanization

## Introduction

Allegations of 'welfare migration' or 'social tourism' have been contentiously debated across the European Union (EU). In May 2013, the ministers of interior of four EU member states – Austria, Germany, the Netherlands and the UK – complained about the 'fraud and systematic abuse in connection with the freedom of movement'. When British Prime Minister David Cameron announced restrictions on EU foreigners' access to social benefits in the UK, EU Commissioner Andor warned that he 'risks presenting the UK as a nasty country'.<sup>1</sup> In this vein, the governing Bavarian conservatives (CSU) in Germany were accused of campaigning on the right fringe of the political spectrum with their slogan 'Wer betrügt, der fliegt' ('Who lies, flies'), and 'Sozialtourismus' ('social tourism') was selected as the negative German buzzword of the year. Commissioner Reding, in contrast, argued that EU law provides sufficient safeguards against abuse, and member states were themselves at fault: 'As you know, social security is not harmonized at EU

level, each and every Member State decide [sic] on its own social security and assistance rules. Each and every Member State also decide [sic] under which conditions it grants access to this or that benefit to non-nationals.'<sup>2</sup>

This article seeks to move beyond populist hysteria about 'social tourism' without denying the real challenges that ECJ case law on the free movement of EU citizens, and on their access to social benefits, poses for EU member states. The welfare system serves an important legitimating function for states. The underlying idea of a social contract and welfare services that are either contributory or tax-financed emphasizes the principles of reciprocity and solidarity. This legitimating function explains why the EU's member state

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governments strive to keep strong national ties to their welfare systems and speak out against European harmonization of welfare policies. A general opening of these systems to all EU citizens risks undermining their financial validity. Why, then, are member states willing to engage in difficult debates about social tourism, rather than designing their systems in a way that is abuse-proof as Commissioner Reding calls for?

In fact, member states face considerable difficulty in restricting their welfare-state services to nationals. Non-discrimination against EU citizens has become an important principle of EU treaties. Member states have taken care to restrict the potential for abuse when they adopt legislation coordinating welfare-state services that facilitate the free movement of workers – disallowing, for example, the export of special non-contributory benefits, which are tax-financed. However, the Court of Justice has repeatedly interfered with this legislation, making sure to avoid discrimination against EU nationals. As non-contributory social benefits cannot be exported, member states have to grant them to all EU citizens residing in their state (Martinsen and Falkner, 2011: 138). Some scholars see the Court as pioneering a more social Europe by strengthening the social rights of EU citizens (Caporaso and Tarrow, 2009: 595, 612). But other scholars claim that this expansion of individual rights undermines the functioning of national welfare systems and thereby reinforces, rather than compensates for, the EU's alleged liberal bias towards individual market freedoms (Höpner and Schäfer, 2012: 448; Scharpf, 2012: 132).

We argue that the interaction of EU legislation and Court re-interpretation (cf. Martinsen and Falkner, 2011) results in significant legal uncertainty. The next section briefly outlines the EU's legal framework regarding EU citizens' access to social benefits and highlights the ambiguity of core concepts in the Court's case law. Subsequently, we discuss domestic political responses in the face of legal uncertainty. Legal uncertainty poses a challenge for member states' administrations in terms of workload and rule-of-law procedures. Domestic legislative reforms shift this uncertainty to EU citizens by raising the burden of proof required for these citizens to successfully claim social benefits. This argument is illustrated with empirical evidence from the UK, Germany and Austria. The final section concludes.

## **The EU legal framework: ambiguous principles and case-by-case assessment**

European rules on free movement and cross-border access to social welfare have evolved significantly over time. Whereas 'welfare migration' was hardly an issue under the original free movement of workers, it has become more salient due to the incremental judicial extension of equal treatment to all EU citizens. Our analysis highlights the ambiguity of the Court's case law on the free movement of EU citizens and their cross-border access to social benefits, which leaves

considerable room for interpretation by the national authorities charged with applying it on a case-by-case basis.

Originally, the free movement of persons was largely restricted to workers and self-employed persons, and only those groups could claim equal treatment with national citizens regarding social rights (Wollenschläger, 2011: 3–4). Regulations 1612/68<sup>3</sup> (now 491/2011) and 1408/71 (now 883/2004) contain detailed rules on the co-ordination of national welfare systems.

ECJ jurisprudence incrementally broadened the cross-border access to national welfare systems in two main ways. First, rulings extended equal treatment to forms of state support that had previously been reserved for national citizens, such as non-contributory benefits. Second, the Court expanded the group of entitled persons by including workers' families and by broadening the definition of economic activity to include those earning too little to be self-sufficient. Following the introduction of EU citizenship with the Treaty of Maastricht, many privileges previously linked to a person's legal status as a worker or self-employed were incrementally extended to all EU citizens. Member states codified the Court's jurisprudence in the Citizenship Directive 2004/38 (see Wasserfallen, 2010), but case law keeps evolving.

Today, a highly complex set of European rules – Treaty law, secondary legislation and the case law of the ECJ – governs EU citizens' cross-border access to social benefits. A comprehensive overview of the EU legal framework is beyond the scope of this article (see Pennings, 2012). Instead, we present only some of the most basic distinctions and definitions from ECJ case law to demonstrate the great legal ambiguity involved and to highlight the Court's insistence on complex case-by-case assessments by national authorities. Although all EU citizens enjoy the basic rights to move freely and to be treated equally in the EU, a crucial distinction is still being made between different groups of EU citizens according to their status as workers or self-employed persons, or as jobseekers or economically inactive citizens.

Workers (and self-employed persons) enjoy the most encompassing right to equal treatment in their country of employment (or establishment), including access to social benefits from their first day of employment. According to the Court's case law, the term 'worker' has to be interpreted broadly, i.e. anybody in 'pursuit of effective and genuine activities' is a worker in EU legal terms, if activities are not 'on such a small scale as to be regarded as purely marginal and ancillary' (Case C-53/81 Levin, No. 17). As a result, the status as a worker cannot simply be denied due to a low remuneration or a short period of employment, but only on the basis of 'an overall assessment of the employment relationship ... by the national authorities' (Case C-22/08 Vatsouras, No. 30; cf. Barnard, 2013: 276).

Jobseekers can move freely in the EU, but member states may limit their right of residence to a period of six months.

This time limit must not be imposed if a jobseeker can show ‘that he is continuing to seek employment and that he has genuine chances of being engaged’ (Case C-292/89 Antonissen, No. 21). Regarding state support to facilitate labour market access, jobseekers may not be excluded, if ‘a real link between the job-seeker and the labour market of that State [exists]. ...It is for the competent national authorities and, where appropriate, the national courts...to establish the existence of a real link with the labour market’ (Case C-22/08 Vatsouras, No. 38-41). As to other social benefits, which do not primarily aim at facilitating labour market access, the Court has yet to decide whether member states may impose restrictions for EU jobseekers in general legislation, or only after individual assessments (Case C-67/14 Alimanovic).

Finally, economically inactive EU citizens, such as pensioners, long-term unemployed persons, tourists or students, are free to move and reside in the EU for a period of three months. Beyond this period, they have to have ‘sufficient resources...not to become a burden on the social assistance system of the host Member state’ (Article 7 of the Citizenship Directive 2004/38). This provision was designed by member states to restrict EU foreigners’ access to national welfare systems, but the Court has qualified it in various regards. Already, before the adoption of the Directive, the Court had ruled that member states had to acknowledge a ‘certain degree of financial solidarity’ with EU foreigners, who could only lose their right of residence after becoming an ‘unreasonable burden’ (Case C-184/99 Grzelczyk, No. 44). Further rulings specified that financial solidarity with EU foreigners could be made conditional on ‘a certain degree of integration into the society of that State’ (Case C-209/03 Bidar, No. 57). Importantly, however, any decision about what constitutes a sufficient degree of integration or an unreasonable burden must be taken by ‘the competent authorities of the host Member State’ based on ‘an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the...individual situation of the person concerned’ (Case C-140/12, Brey, No. 77).

In sum, two general patterns characterize the Court’s case law on the free movement of EU citizens and their cross-border access to social benefits. First, the case law revolves around concepts such as ‘genuine activities’, ‘real link’ or ‘unreasonable burden’, which leave considerable room for interpretation. Second, national authorities are required to apply these ambiguous concepts on a case-by-case basis, while any general restriction of EU foreigners’ access to social benefits is very likely to be challenged in Court. The next section addresses the domestic impact of this case law.

## Political responses in the face of legal uncertainty

The political consequences of legal uncertainty are disputed in the literature on the domestic impact of ECJ

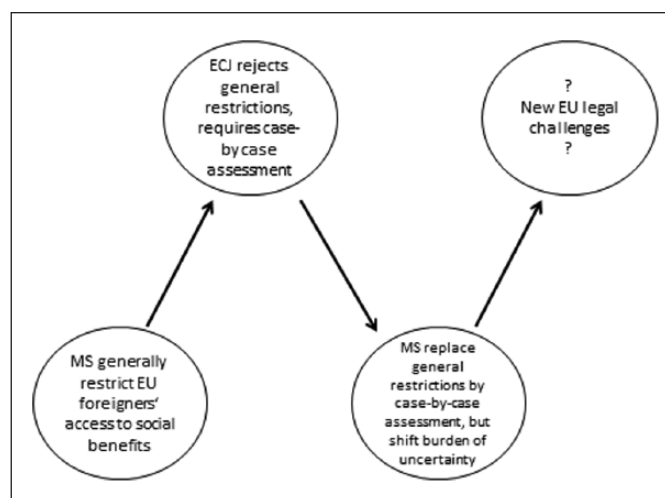
jurisprudence. On the one hand, ambiguous case law provides loopholes for domestic policy-makers and enables them to avoid encompassing reform: ‘Uncertainties that arise from indeterminate judicial principles dissuade general policy responses’ (Conant, 2002: 70). On the other hand, ambiguous case law provides many opportunities for interested litigants to pursue their interests in the EU’s multi-level system: ‘The higher the legal uncertainty arising from a Treaty rule and its interpretation, the more opportunities it offers for domestic actors to turn to the European courts in order to press for Europeanization’ (Schmidt, 2008: 304). Domestic policy-makers may prefer to engage in systematic reform in order to anticipate further legal challenges and unpredictable rulings, and to avoid high costs of successful litigation (Blauberger, 2014: 460).

As we will demonstrate, in the context of the free movement of EU citizens and cross-border access to social benefits, member states aim to minimize the Court’s domestic impact, but they cannot do so by restrictively applying or even ignoring the case law. Instead, to achieve this goal and to re-establish legal certainty from the point of view of national administrations, national legislatures have to engage in encompassing reforms. We analyze this pattern of political responses in two steps, beginning with national administrations before turning to domestic legislatures.

First, extending EU citizens’ cross-border access to social benefits is mainly a burden for national *administrations*. Operating under the rule of law, they have to respect the ECJ’s consistent call for case-by-case assessments instead of general rules, combined with vague EU legal concepts and assessment criteria, when granting or refusing social benefits to EU foreigners. Even though the full extent of ‘welfare migration’ in the EU is highly politicized and contested, factual evidence suggests a clear rise of social benefit claims by economically inactive and job-seeking EU citizens in recent years (European Commission, 2013: 81–84). Rising case numbers increase both expenditure for social benefits and administrative workload. Thus, as the German government argues in an on-going ECJ proceeding concerning the general exclusion of economically inactive EU citizens from certain benefits in Germany:

As a matter of principle, national legislatures...are entitled to regulate a great number of cases in an abstract, general way and on this basis classifying decisions are taken. ...individual assessments in mass procedures...would simply not be feasible in terms of administrative workload (Case C-333/13, Dano, written observation of the German government, No. 81–82; author’s translation).

Political inaction or minimalist responses to the Court’s ambiguous citizenship jurisprudence are unsatisfactory from the perspective of national administrations, as they do not alleviate either the potential for legal challenges or the other costs of legal uncertainty.



**Figure 1.** The interplay of ECJ case law and member state (MS) restrictions to social benefits.  
Source: own composition.

Second, while it is difficult for domestic *legislatures* to generally restrict EU foreigners' access to national welfare systems, they are able to partly shift the burden of legal uncertainty from national administrations to EU migrants. Legislative changes can increase the burden of proof for EU citizens who want to claim social benefits, e.g. regarding proof of their chances of finding employment or of their financial self-sufficiency. Moreover, these reforms can raise the stakes for EU migrants in the event of an unsuccessful application for social benefits abroad, by threatening the loss of residence rights. Coupling strict evidentiary requirements with the risk of losing their residence status may deter EU migrants from applying for social benefits in the first place. The next section analyzes in greater detail how different EU member states reacted to the Court's jurisprudence along similar lines. The general dynamic of ECJ requirements and domestic reforms is summarized in Figure 1.

## Empirical evidence from the UK, Germany and Austria

The remainder of this article briefly presents empirical evidence from three countries which are often regarded as most likely targets of welfare migration, and which were faced with several ECJ judgments regarding EU citizens' access to tax-financed 'special non-contributory benefits' in recent years: the United Kingdom, Germany and Austria. Despite different traditions of judicial review, which is strong in Germany and Austria and weak in the UK, there are striking similarities in their overall reform strategies, which mainly differ with regard to their timing and to the concrete benefits affected.

### United Kingdom

In the United Kingdom, the heated debate on welfare migration resulted in the most encompassing set of

reforms among the three cases we analyze here. In a contribution to the *Financial Times* in November 2013, Prime Minister David Cameron criticized European rules on the free movement of persons and announced domestic reforms to restrict EU foreigners' access to social benefits.<sup>4</sup> The changes enacted so far concern various social benefits such as jobseekers' allowance, housing benefits, child benefits and child tax credits (for a detailed overview, see Kennedy, 2014). It is not at all clear whether the UK is permitted to impose these restrictions under EU law (Guild, 2013). The aim is to introduce 'stronger, more robust' standards of proof regarding EU foreigners' rights to reside and to receive social benefits in the UK (Kennedy, 2014: 6). Typically, the newly introduced standards combine general, demanding thresholds with in-depth individual assessments. While general thresholds are meant to reduce administrative costs, EU migrants carry the main burden of proof during individual assessments.

To begin with, only 'habitual residents' can claim social benefits in the UK. The applicable 'habitual residence test' has been amended in such a way that 'migrants will have to answer more individually-tailored questions, provide more detailed answers and submit more evidence, before they will be allowed to make a claim'.<sup>5</sup> Only after three months of stay may jobseekers be considered as habitual residents who are eligible for jobseekers' allowance and child benefits. After six months, EU foreigners have to provide 'compelling evidence' that they are likely to find employment – otherwise, they lose their jobseekers' allowance, and their right of residence.<sup>6</sup> Moreover, the jobseeker status no longer entitles someone to housing benefits, which are restricted to workers, the definition of which has been made 'more robust' (Kennedy, 2014: 14) as well. To qualify as workers, EU migrants either have to 'show that for the last three months they have been earning...150 £ a week – equivalent to working 24 hours a week at National



Minimum Wage’<sup>7</sup> or they will be subject to an individual assessment that their work is ‘genuine and effective’ – despite their low income.

In sum, these measures shift the burden of legal uncertainty to EU migrants. In addition to greater evidentiary requirements, migrants face a stronger threat of losing their right of residence after six months. Future reforms might even include a temporary re-entry ban for those who have lost their right of residence (Guild, 2013: 3). Again, EU law is unlikely to allow this, given that member states may ban the entry of EU citizens only when they are considered a severe danger to public order.

## Germany

The German response to potential welfare migration is still under legislative debate, but it follows a similar regulatory pattern. One of the main issues animating the debate is the restricted access of EU foreigners to so-called ‘basic provision’ benefits (*‘Grundsicherung für Arbeitssuchende’*, often named ‘Hartz IV’ after their inventor), which are meant to cover fundamental subsistence needs and to facilitate employment. As with British jobseekers’ allowance, German basic provision benefits are considered ‘special non-contributory benefits’ under EU law and, therefore, are only granted to citizens residing in Germany. EU foreigners who move to Germany for the sole reason of seeking employment or to obtain social benefits are generally denied access (§7 of the German Social Security Code, *‘SBG II’*). In contrast, EU citizens self-employed in Germany may apply for basic provision benefits to top up low revenues.

Related to the exclusion of newly-resident EU citizens from social benefits the association of German cities and towns warned in early 2013 that low-qualified migrants without sufficient financial means and health insurance, in particular from Romania and Bulgaria, were becoming an increasing burden for several municipalities. Domestic reforms were required (Deutscher Städtetag, 2013). As a follow-up, several parliamentary hearings<sup>8</sup> dealt with the issue, and a committee of state secretaries was established to explore reform options dealing with ‘Legal issues and challenges concerning the social benefit claims of EU citizens’ (Deutsche Bundesregierung, 2014). In parallel to the political debate, several legal disputes emerged concerning the general exclusion of EU jobseekers (Case C-67/14 Alimanovic) and of economically inactive EU citizens (Case C-333/13 Dano) from basic provision benefits, and whether their exclusion was compatible with the EU legal requirement of individual case-by-case assessments. While the two preliminary references are still pending, some German social courts have decided in favour of EU migrants’ claims,<sup>9</sup> while others have decided against them.

Part of the discussion is about child benefits, which parents receive from their member state of work, and otherwise of their habitual residence. EU migrants immediately gain access to German child benefits; those working in

Germany with children in their home state also qualify (Cases C-611 and 612/10 Hudzinski and Wawrzyniak). Given the size of the benefits (184 €/month for the first two children, 190 € for the third, 215 € for all others) these can serve as an economic incentive when compared to the median income in Bulgaria of 273 € and in Romania of 176 € (Eurostat, 2014). About one tenth of children (66,261) receiving German child benefits (660,000) live outside Germany.<sup>10</sup>

Although details of the reforms remain to be negotiated, their general thrust will likely consist of raising the burden of proof for EU citizens claiming social benefits and of increasing their risk in the event of an unsuccessful claim (Deutsche Bundesregierung, 2014: 86–93). Stricter evidentiary requirements are considered for child benefits. The residence right of jobseekers will be limited to six months and those who want to stay in Germany longer will carry the burden of proof regarding their chances of finding employment.<sup>11</sup> As in the UK, re-entry bans for EU citizens who have lost their residency right in Germany due to social benefit abuses are part of the legislative debate. In sum, the envisaged reform will also shift the burden of uncertainty to EU migrants. It is unclear whether a re-entry ban for EU citizens and a six-month limit for the lawful residence of EU jobseekers are compatible with EU law.<sup>12</sup>

## Austria

Finally, the Austrian (non-)response to the Court’s recent decisions on citizenship adds an additional, interesting facet to our analysis. Austrian legislation anticipated the Court’s case law and the restrictive reforms of other EU member states several years ago. In the midst of the British and German reform debates, Austria’s minister of labour and social affairs, Rudolf Hundstorfer, commented in January 2014: ‘Europe could have learned from Austria... Austria has exploited the opportunities offered by EU law to clearly restrict the access to the welfare system already some time ago.’<sup>13</sup>

Once again, Austria’s restrictive rules combine a high burden of proof for EU citizens claiming social benefits with the risk of losing their residence right. ‘Special non-contributory benefits’, such as supplementary pensions (*‘Ausgleichszulage’*), are only granted to beneficiaries residing in Austria. EU foreigners, however, can only become lawful residents in Austria if they prove to have ‘sufficient resources to support themselves and the members of their families so as not to be obliged to have recourse to social assistance benefits or the compensatory supplement during their period of residence’ (§51.2 of the Austrian Settlement and Residence Act, *‘Niederlassungs- und Aufenthaltsgesetz’*). The latter provision referring to the supplementary pension was introduced in 2011 specifically to deter potential welfare migrants (Felten, 2012: 2). In practice, EU citizens who want to settle in Austria for more than three months need to register, which requires comprehensive evidence of sufficient

economic resources and health insurance coverage. As a result, applying for Austrian special non-contributory benefits as an EU foreigner entails the risk of losing the right of residence due to insufficient economic resources (European Commission, 2013: 154).

The above-mentioned legislation led to one of the most recent citizenship cases at the ECJ (Case C-140/12, Brey). A German pensioner had been refused the supplementary pension after settling in Austria. The ECJ ruled that a general exclusion of EU foreigners from this social benefit was incompatible with EU law, which required a case-by-case assessment. The ruling did not result in a legislative reform – only in slightly adjusted administrative practices. Now, EU foreigners residing in Austria may receive supplementary pensions as long as they have not been explicitly declared unlawful residents.<sup>14</sup> At first sight, it has become easier for EU foreigners to receive supplementary pensions in Austria, but only at a potentially high price: a successful application for special non-contributory benefits may lead to the withdrawal of legal residence due to insufficient economic resources. Although the loss of legal residence has to be established through an individual assessment, this prospect still deters EU foreigners from applying for supplementary pensions in Austria in the first place.

## Conclusion

The progressive widening of the EU combined with growing economic heterogeneity increasingly clashes with its simultaneous deepening, which in the case of citizenship and social rights is predominantly a court-driven process. Labour mobility still faces significant hurdles, but incentives for mobility cannot simply lie in the greater welfare benefits offered by other member states as this risks the financial viability of national welfare systems and the legitimacy of the EU enterprise at the same time. The judicial-legislative shaping of social rights results in legal uncertainty on the part of member states and EU citizens as to the precise reach of equal treatment of EU citizens and nationals. Our analysis revealed similar responses from the UK, Germany and Austria, aiming at restricting EU citizens' cross-border access to social benefits. Future work will include the Netherlands and Denmark,<sup>15</sup> allowing us to assess, for instance, whether the more reluctant use of the preliminary procedure in Denmark leads to less pressure on the welfare state (cf. Wind, 2010: 1046).

The question of non-discriminatory access of EU citizens to national welfare systems is thus a difficult political one. EU citizenship law, while promising to build the union from below on the basis of equal legal entitlements, may, in fact, risk rousing further nationalism and decrease solidarity across the union. The welfare state relies on reciprocity, and court-driven rights cannot legitimate entitlements, which require legislative decisions (Sieberer, 2006: 1309–1310). While the Euro crisis preoccupies the current EU agenda, the debate of welfare tourism and the contested

responses of member states illustrate that similarly challenging issues lie ahead in this area.

## Declaration of conflicting interest

The authors declare that there is no conflict of interest.

## Funding

Part of this research was funded by the DFG in the CRC 597, project A6.

## Supplementary material

The online appendix is available at: <http://rap.sagepub.com/content/by/supplemental-data>

## Notes

1. 'Migration plan risks UK being seen as nasty country, says EU commissioner', *The Guardian*, 27 November 2013.
2. Speech of Commissioner Reding in the Council of Justice and Home Affairs, 5 December 2013; available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-1025\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-1025_en.htm).
3. The denomination of EU regulations (as well as ECJ judgments) is composed of two numbers, the second of which indicates the year of legislative adoption (or, respectively, of ECJ case registration).
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8. Bundestag-Drucksachen 17/13322 of 26 April 2013 and 18/223 of 20 December 2013.
9. Sozialgericht Dortmund, 22 January 2014, Az.: S 19 AS 5107/13 ER.
10. 'Regierung spürt Kindergeld-Missbrauch nach', *Frankfurter Allgemeine Zeitung*, 25 March 2014.
11. See Bundestags-Drucksache 18/1436, answer to question 6b, page 6.
12. See Bundestag-Drucksache 18/1436, page 2.
13. 'Barrieren gegen den Missbrauch', *Kleine Zeitung*, 8 January 2014.
14. Oberster Gerichtshof der Republik Österreich, 17 December 2013, 10 ObS 152/13w, No. 9.1–9.3.
15. In the project TransJudFare, financed by Norface from 2015–2017, together with Dorte Martinsen and Gareth Davies.

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