

It remains unclear how much leeway member states have to restrict EU migrants' access to benefits

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The issue of 'benefit tourism' has become a hot topic in several EU states, with a number of countries calling for tighter restrictions on the access of EU citizens to certain social benefits.

Michael Blauburger and **Susanne K. Schmidt** write on reforms pursued in Austria, Germany and the UK. They note that while the legal basis for restricting access to benefits remains contested in many cases, the European Court of Justice has appeared to acknowledge political sensitivities around the issue in its recent case law.



David Cameron's [main policy demands](#) as he pursues a planned renegotiation of the UK's EU membership terms concern internal EU migration, and the ways the UK can restrict EU citizens' access to welfare benefits. Having traditionally supported enlargement of the EU, the enlarged EU now serves as an argument to cut back on integration. With the opening of labour markets in 2014 for Bulgarians and Romanians (EU-2 citizens) several of the old member states began to raise concerns about alleged benefit abuse, leading to a [joint letter](#) by Germany, Austria, the Netherlands and the UK.



In this article, we draw on a more elaborate [analysis](#) of how these countries have tried to restrict EU citizens' access to social benefits at the domestic level and briefly assess current discussions at the EU level. As the discussion below illustrates, the debate is actually less about rights' abuses, and more generally about cutting back the rights of those EU citizens who are not workers and/or self-sufficient. While any political step in this direction is heavily constrained by EU Treaty law, the Court itself seems to acknowledge political sensitivities in its recent case law.

EU free movement and benefit tourism: is there really a problem?

Underlying the debate over alleged benefit tourism is a confusing array of contradictory figures and economic arguments on the "[welfare magnet hypothesis](#)". While most economists agree that Western European economies are dependent on continuous migration for their well-being, the precise gains and losses of intra-EU migration are [contested](#). Much depends, of course, on the extent of unskilled versus skilled migration, but the loss of skilled labour for Eastern Europe's less developed economies should not be overlooked.

As contested as the economic assessment of intra-EU migration is, the legal situation is no less complex. Different groups of EU migrants have to be distinguished and Treaty law, secondary legislation and the case law of the ECJ are all relevant in determining EU citizens' cross-border access to social benefits. Workers (and the self-employed) enjoy full and equal treatment. Jobseekers' right of residence and their access to social benefits may be restricted under certain conditions. And economically inactive EU citizens can only legally reside in another member state for more than three months and up to five years if they have "sufficient resources". After five years, they enjoy permanent residence.

What might seem straightforward rules at first sight, however, have become the [basis](#) for the ECJ's "most ambitious and tantalising line of case law in recent memory", increasingly challenging member states' autonomy to regulate access to social benefits and moving beyond the political compromise of the citizenship directive. The term "[worker](#)" is interpreted broadly by the Court, covering persons working part-time and not meeting the needs of their subsistence.

Jobseekers' right of residence may not be terminated as long as they have "[genuine chances of being engaged](#)" and

they must not be excluded from benefits “intended to facilitate access to employment”, unless there is no “[real link between the claimant and the geographic employment market](#)”. Economically inactive EU citizens without sufficient resources must not be automatically expelled as the Court demands a “[certain degree of financial solidarity](#)” and authorities are required to assess the individual situation of EU citizens on a [case-by-case basis](#).

Nevertheless, in response to their joint letter, [Commissioner Reding](#) repelled member states’ call for EU action against “benefit tourism” as populist, arguing that Community law left them all means to control access to their welfare systems. In addition, a [Commission report](#) showed that only a very small share of EU migrants are economically inactive and receive welfare benefits.



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National restrictions: Germany

How have some of the joint letters’ signatories – Germany, Austria, and the UK – tried to restrict EU citizens’ access to social benefits so far? In Germany, reform discussions started in 2013, when the Association of German Cities published a [position paper](#) about regionally clustered problems with intra-EU migration. As a response, a [report](#) by the ministries responsible for the implementation of the citizenship directive assembled detailed information and resulted in a [reform](#) in December 2014.

It contains measures against abuse of social entitlements such as requiring tax numbers when paying out childcare, or combatting bogus self-employment. EU jobseekers’ right of residence of six months will be controlled more strictly, and re-entry bans are imposed on those having committed benefit fraud. This is a highly symbolic change as it is neither clear how it can be implemented, nor [whether it conforms to EU law](#), reserving re-entry bans to persons endangering the public order. Germany excludes (newly arrived) EU-citizens from its SGB II basic provision benefits (“Hartz IV”) that covers fundamental subsistence needs and facilitates employment. It was therefore unnecessary to debate further restrictions.

The legality under EU law is in heavy dispute, with several cases having been handed to the ECJ by German social courts. Recently, the [ECJ decided](#) that Germany can restrict EU citizens’ access to Hartz IV if they never intended to work. Further pending cases concern the exclusion of newly arrived jobseekers and previous workers with a link to the German labour market from these benefits. Depending on how the ECJ decides, the political discussion in Germany may pick up. Unaffected from these pending judgments are Hartz IV payments, which are paid as in-work benefits, indicating lower wages or few working hours, and which are received to a disproportionately high degree by [EU-2 citizens](#) (92,000 out of 583,000 EU-2 citizens living in Germany receive Hartz IV).

Austria

Facing strong right-wing populists (FPÖ) and being geographically exposed to migration from Central and Eastern Europe, Austria not only pressured for long transitional periods regarding the free movement of workers in the context of EU Eastern enlargement, but also exploited its domestic opportunities to restrict EU citizens’ access to non-contributory benefits. Austria’s minister of labour and social affairs, Rudolf Hundstorfer, commented in January 2014 that “Europe could have learned from Austria” in that regard.

If EU citizens want to settle in Austria for more than three months, they need to register and provide comprehensive

evidence of sufficient economic resources and health insurance coverage. A recent [citizenship case](#) concerned a German pensioner who had been refused a supplementary pension after settling in Austria. The ECJ ruled that such a general exclusion of EU foreigners from social benefits was incompatible with EU law as a case-by-case assessment was needed. What looks as a facilitation for EU citizens at first sight, however, has changed little in substance.

Now, EU citizens may receive supplementary pensions as long as they have not been explicitly declared unlawful residents. By applying for non-contributory benefits like the supplementary pension, however, they risk losing their legal residence due to insufficient economic resources. In addition to these already restrictive rules, recent electoral victories for right-wing populists at the regional level have revived the Austrian debate about alleged “benefit tourism” and led to [calls from the governing conservative party](#) to impose additional restrictions, e.g. by reducing or cancelling family benefits for non-residents.

UK

In the UK, the political discussion is much more heated and it has seen the most encompassing [set of reforms](#), restricting access to various social benefits and tightening the burden of proof for EU citizens. The “right to reside” test requires stricter evidence from EU citizens and is currently being [challenged by the Commission](#) at the ECJ. Jobseekers’ allowance is only paid after three months of stay, and is lost along with the right of residence after six months if EU migrants cannot produce “compelling evidence” of attempting to find employment. Housing benefits are also no longer paid to jobseekers.

EU citizens only qualify as workers if they can prove earnings of £150 per week, which corresponds to 24 hours a week at the National Minimum Wage. Otherwise an individual assessment is done. After six months those not working to a sufficient degree face the threat of losing their right of residence. The government has also barred EU jobseekers from claiming the newly introduced [universal credit](#). Arguably, the UK is moving its regime of non-contributory benefits towards the German example: merging basic provision and jobseekers allowance may make it easier to argue that this benefit constitutes “social assistance” and to exclude jobseekers under EU law.

European reform options

At the EU level, the feasibility of Cameron’s demands depends largely on whether they can be achieved through secondary legislation or Treaty reform, while the greatest effects might actually result from a partial re-interpretation of the case law by the ECJ itself.

As regards *secondary legislation*, the Commission is calling upon member states to engage in a “[brainstorming without any taboos](#)” in the “Reflection Forum” on the coordination of social security systems, and various actors have already signaled their willingness to discuss potential restrictions, including Commission President [Juncker](#), German chancellor [Merkel](#) and Austrian minister of foreign affairs [Kurz](#). One option might be the reduction of child and family benefits to the level of their actual country of residence or, more restrictively, the entire exclusion of family members living abroad from these kinds of benefits. Yet, such an exclusion, [some argue](#), easily infringes Treaty rules by indirectly discriminating against EU workers.

Other proposals are even more questionable: [waiting periods](#) before EU workers can claim in-work benefits would [arguably](#) go against the free movement and non-discrimination of workers enshrined in Article 45 TFEU. Additional grounds for banning EU citizens from re-entering a member state after their expulsion could be included in the Citizenship Directive 2004/38, but the ECJ might still find such a restriction [disproportionate](#). As a consequence, most of Cameron’s proposals so far would require [Treaty change](#). In his immigration speech, Cameron admitted this much, but feigned optimism – so far, [other EU governments’ responses](#) suggest otherwise.

Ironically, therefore, the greatest impulse regarding EU citizens’ (un)restricted access to non-contributory benefits might come from the ECJ itself, “[fine-tuning](#)” its own citizenship jurisprudence. Recent case law has already been

interpreted as indicating “that the CJEU’s judges... read the morning papers”, reaffirming member states’ authority to restrict access to benefits for [economically inactive EU citizens](#). Interestingly, the Commission had [originally argued](#) for further expanding EU citizens’ rights in this case, but [welcomed](#) the Court’s restrictive interpretation afterwards.

The two other pending cases concerning German Hartz IV might result in a further push back: according to the General Advocate’s opinions, these benefits – partly aiming at facilitating access to the labour market, but covering subsistence being their “predominant function” – may be automatically denied to [newly arrived jobseekers](#) for the first three months and, after an individual assessment, possibly also to [former workers](#) who have lost employment.

By allowing for a larger differentiation between the rights of economically active and inactive citizens, the ECJ would bow to member states’ preferences for keeping control over their welfare states. Courts, the experience with broadening EU citizenships rights emphasises, are essentially passive actors with “[no influence over either the sword or the purse](#)”.

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