2) Member states have been reluctant to strengthen the EU social dimension. The European Court of Justice has at various instances fostered Europeanization of this area. Discuss this statement with reference to a European Court of Justice ruling in the field of free movement of labour or services. Frame your analysis using at least one of the integration theories covered in class.
**Introduction**
While labour and social policy objectives are prominent in the documents of the European Union (EU), the policy instruments to reach these objectives are lacking from the supranational level of the EU policy framework (Badinger et al, 2016). The EU member states (MS) are hesitant to push forward the EU social dimension\(^1\). However, it has been argued that European Court of Justice (ECJ) has come to the fore in advancing EU integration through judicial policy-making even in these areas where MS have sought to defend their autonomy (Martinsen, 2011).

The purpose of this paper is to address to what extent the ECJ is an engine of integration furthering the EU social dimension. In order to do so, the paper conducts an analysis of the ECJ *Metock* ruling along with a discussion framed by two integration theories, rational choice institutionalism (RCI) and incomplete contracting theory (ICT). These theories are relevant to use as they offer insights into how institutions, through their institutional design, can themselves drive changes and affect the integration process. Hence, the research question of the paper: *To what extent is the ECJ fostering Europeanization in the field of social policy?*

In order to investigate the question, the paper is divided into six parts: First, the paper introduces relevant terms and concepts, and then assesses the theories of RCI and ICT. Third, the paper analyses an ECJ ruling in the field of free movement of labour, the *Metock* case, as well as the impacts of this ruling in Denmark. Fourth, the paper discusses whether and how the ECJ fosters Europeanization in the area of social policy by use of RCI and subsequently ICT. Lastly, the paper puts forward a short refutation for further reflection, along with a conclusion of its findings.

**Concepts and terms**
The following paragraphs will introduce terms and concepts used to assess to what extent the ECJ is fostering Europeanization: First, a definition of Europeanization, and then a presentation of the EU social dimension and the role of the ECJ.

Europeanization refers to the impact of the EU on member states (Seidelmeier, 2012). Rather than being a defined theory or a concept, Europeanization is a research area and, as Ladrech (2010, p. 2) puts it: “Europeanization is (...) understood as the change within a member state whose motivating logic is tied to a EU policy or

\(^1\) The paper will use the terms social dimension and social policy interchangeably referring to welfare policies, i.e. health care, gender equality, education, labour market and immigration (Martinsen, 2011).
decision-making process”. When defining Europeanization, this paper puts emphasis on Europeanization as the direct impact on national policies.

In the field of social policy, the EU does not enjoy exclusive competence (Johnson et al, 2016). Instead, the EU social dimension falls within the competence of MS and policies are dealt with through the Open Method of Coordination, which is an intergovernmental manner of creating ‘soft’ law mechanisms (EUR-Lex, Open method of coordination, n.d.). Thus, on the face of it, the MS of the EU control the area of social policy. While the European Social Charter dates back to 1961 and a reference to the Charter of Fundamental Rights was included in the Treaty of Lisbon making it legally binding, there is no European welfare law and no direct taxes or contributions (Johnson et al, 2016). Though EU structural funds exist, they are practically insignificant next to social spending in the MS, which is roughly a hundred times larger (Badinger et al, 2016). The European welfare state does appear to be national and the resistance by MS to undergo loss of autonomy is a great obstacle to a EU social dimension (Wallace et al, 2005).

However, the completion of the single market inevitably affects the domain of social policy. While it was assumed that the initiatives created to guarantee the free movement of goods, services, workers and capital could be separated from social policy issues, which would remain in the authority of MS, it has proven untenable – evidence suggests that one can no longer speak of a neat divide between national ‘social issues’ and supranational ‘market issues’ (Wallace et al, 2005). What has emerged instead is a loss of legal authority and de facto regulatory capacity of MS in social policy. Although national welfare states are still the main institutions of European social policy, the process of EU integration has brought about an increasingly restrictive multi-tiered web of public policy where law and court are the driving forces (Wallace et al, 2005).

As the judicial body of the EU, the ECJ’s principal aim is to ensure that Community legislation and the treaties are respected. Most cases brought before the ECJ are preliminary rulings in which the ECJ makes a binding decision on the application and interpretation of EU law (Johnson et al, 2016). The ECJ can only rule on matters that fall within EU competence, as stated in the treaties (Johnson et al, 2016). However, since its foundation, the ECJ has established important principles of EU law through a series of key rulings such as: the supremacy of Community law over national law; the direct effect of EU law in national legal orders as well as the proportionality principle, which states that EU action must be constrained to what is required to achieve the
objectives of the Treaties (EUR-Lex: Proportionality principle, n.d.). As we will see, the principle of proportionality is a key tool for the ECJ when considering whether national conditions and administrative actions constitute barriers to the purposes of the EU. By installing these principles, the ECJ has gone further in clarifying the rule and role of law than what had specifically been laid down in the treaties (Wallace et al, 2005).

Theories
In this section, the theories of rational choice institutionalism (RCI) and incomplete contracting theory (ICT) is presented as they provide the frame for discussing the ECJ’s role in EU social policy.

Theories of institutionalism are generally built around one rather banal claim, namely that ‘institutions matter’ (Rosamond, 2000). In particular, institutions are important because of the ways in which institutional design influence political outcomes. In relation to the EU, institutionalists may put attention to distinctive features of the EU and the process of integration; in this paper the focus is on the ECJ. The majority of institutionalists accept the intergovernmentalist claim about the continuing primacy of MS and then focus on how institutions influence policy outcomes (Rosamond, 2000).

In the field of EU integration, rational choice institutionalism (RCI) seeks to answer two questions: 1) why member states delegate power to supranational agents and 2) how institutions, through their institutional design, can themselves drive changes and affect the integration process (Wallace et al, 2005). In RCI, it is assumed that actors are driven by the rational pursuit of self-interest, and in response to the 1st question, supranational institutions (agents) are created by MS (principals) because they see the benefits of delegating power since it provides credibility to policy making as well as implementation and reduces so-called ‘transaction costs’, i.e. inefficiencies and risks involved when negotiations take place between actors (Rosamond, 2000, p. 116). Principal agent models of delegation hold that agents have interests that differ from those of their principals. As Kiewiet et al (1991, p. 5) puts it: “Agents behave opportunistically pursuing their own interests subject only to the constraints imposed by their relationship with the principal.” Thus, in relation to the 2nd question, these supranational agents, such as the ECJ, will themselves seek to maximize their own utility through ‘shirking’, where the agent acts according to its own rather than the principal’s interests resulting in ‘agency loss’ for the principal (Pollack, 2003). According to Pollack (2003) most theories assume that the supranational bodies of the
EU have pursued a common goal: furthering integration. Promoting integration is their way of maximizing utility.

The theory of RCI can be complemented by incomplete contracting theory (ICT). When applied to European integration, this theory focuses on the incompleteness of contracts, specifically the EU treaties. According to ICT, the incomplete contracts can be seen as the result of both procedural incompleteness and strategic incompleteness. The former arises due to constrained rationality and transaction costs involving uncertainty, negotiation and enforcement; the latter both due to transaction costs and the option of renegotiating in the future (Cooley et al, 2009). Due to the incompleteness of the EU treaties, the EU integration process can be considered as a case of incomplete contracting with transfers to supranational bodies (Cooley et al, 2009). This incompleteness makes it possible for supranational institutions to extend their own influence by filling the gaps in the treaties.

**ECJ ruling in the field of social policy**

In the subsequent paragraphs, the ECJ’s role in Europeanization of the EU social dimension will be analysed and afterwards discussed in the frame of RCI and ICT. To do so, the paper will draw on a ruling by the ECJ concerning the free movement of labour, the *Metock* case, and look at the impacts of this ruling in Denmark.

As already touched upon, MS are reluctant to further the EU social dimension and the EU lacks a social policy framework. Yet, we see considerable augmentations in ECJ rulings in social policy. Social policy is now in the ‘major league’ for demand of ECJ decisions (with a second place to agriculture) and the Commission has taken various MS violations of the treaties regarding social policy to court (Wallace et al, 2005).

In order to assess whether the ECJ fosters Europeanization the paper will now include an ECJ ruling concerning the free movement of labour. Incorporated in Article 45 TFEU (Treaty on the Functioning of the European Union), the freedom to work anywhere is a fundamental right for EU citizens (Johnson et al, 2016). However, the area of immigration policies have become increasingly restrictive in terms of MS control, in particular with regards to the family rights of those European workers who have exercised their free movement rights (Martinsen, 2011). But as the example below will show, the ECJ progressively challenges this area of national domination.

In 2008, the ECJ made a judgment regarding the residence rights of a third-country national who is married to an EU citizen exercising their right of free movement,
namely the Metock ruling. Lansbergen (2009) describes the background of the Metock case as concerning Mr Metock, a Cameroon national, who travelled from Cameroon to Ireland to be reunited with his partner, a UK national living and working in Ireland, with whom he was married shortly after arriving. Mr Metock then applied for residence in Ireland given his rights under EU law as the spouse of a EU citizen, who was exercising her Community right to free movement. However, the Irish authorities rejected his application by referring to Irish immigration law that conditions the right of residence of third-country family members upon lawful residence in another EU country. Upon appeal of that judgment, the High Court of Ireland subsequently took the case to the ECJ to decide whether the condition made by the Irish Immigration Regulations was legal under Community law. The preliminary ruling concerned the interpretation of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the MS and on the 25th of July, the ECJ announced its judgement in a joint hearing with four similar cases: The Metock ruling prohibited MS from applying a condition of prior lawful residence in another MS to family members of EU citizens wishing to utilize rights of residence derived from EU law (EUR-Lex: Judgment of the Court, n.d.; Lansbergen, 2009).

The Metock judgement is a ground-breaking case as the ECJ established primacy to the Community right of residence for non-EU national family members over the application of national immigration law. It opposes prevailing restrictive immigration policies of the respective MS in the EU concerning family unification, and, given the controversy surrounding immigration policies, the European member states’ reactions have not been without dispute (Martinsen, 2011).

This paragraph seeks to illustrate the direct effects of this ruling for national immigration law, as well as the de facto implications in order to determine whether the ECJ ruling has fostered Europeanization in the field of social policy. In Denmark, the national immigration law is among the most restrictive in the EU (Lansbergen, 2009), and the Danish administrative practice has often rather freely interpreted when and how EU citizens using their right to free movement could benefit from the EU rules (Martinsen, 2011). However, Denmark has been forced to change its immigration conditions considerably because of the ECJ’s line of case-law in the field and as result of Metock: “A family member, including a foreign spouse/permanent cohabitant, is not required to have had previous lawful residence in the EU/EEA Member State” (Danish Immigration Service, n.d.). Thus, there is indeed strong evidence suggesting ‘judicial Europeanization’ of Danish immigration policies.
There is evidence of a *de facto* effect as well. In 2009, the amount of individuals who were permitted family unification with reference to EU rules had increased about three times compared to 2008 (Martinsen, 2011).

By applying the principle of proportionality, the ECJ considered whether the MS administrative actions and conditions could be seen as obstacles to the purposes of the EU. The principle is a means to judicial policy-making and Europeanization, since the ECJ can declare the MS administrative practices and policies ‘disproportionate’ or unjustifiable in relation to EU principles (Martinsen, 2011). As Tridimas (2006) states, the principle has traditionally been significant in the area of economic law, but the ECJ has increasingly applied it more generally. The analysis of the *Metock* ruling and the national consequences concerning immigration policies illustrates how the ECJ intervenes and furthers both judicial policy-making and Europeanization in the field of social policy; a policy domain of tight national control.

**ECJ and RCI**

As seen above, the ECJ has stretched Community competences in the field of social policy. This will now be discussed within the framework of RCI.

Broadly speaking, the RCI approach appears both to have been theoretically innovative and empirically successful in the political studies of the EU (Wallace et al, 2005). Moreover, it is argued that RCI is most powerful within an area where 1) the interests of individual decisions are significant (making estimation of expected utility worthy), 2) information is to a large extent available (making estimation of expected utility possible) and 3) the rules of the game are clear-cut (Wallace et al, 2005). According to Wallace et al (2005) all of these features are to be found in the EU, suggesting that RCI is useful when describing EU politics. In the following, RCI is used to clarify how and why the ECJ fosters Europeanization.

RCI seeks to explain *why* principals delegate power to supranational bodies. In the case of the ECJ, this can be answered by use of the principal-agent model: the MS established the ECJ to solve problems of gaps in the treaties and make it credible for MS to commit to EU obligations. Thus, as rational principals, MS accepted the jurisprudence of the ECJ, even when rulings went against them (Wallace et al, 2005). Some argue that the ECJ as an agent is bound to follow the will of the MS in the EU (Garrett, 1992). However, other RCI scholars argue that the ECJ is powerful, far more autonomous and not easily sanctioned (Wallace et al, 2005). This paper is keen to follow the latter view since what we have seen in the case of *Metock* is that the ECJ is
fostering Europeanization in a field where MS are reluctant. It can be argued that we do see severe ‘agency losses’ in terms of MS having to change their national immigration policies against their will. And according to RCI these agency losses are indeed likely to occur since agents are assumed to be rational, unitary competence-maximizers, who behave opportunistically to pursue own preferences. In the case of ECJ, this means furthering integration.

Moreover, RCI seeks to answer a second question of how the behaviour of the supranational agents promotes further integration in the EU (Wallace et al, 2005). In general, the ECJ has an institutional self-interest in fostering more EU integration and alleging a core role for itself in the governance of the EU (Micklitz et al, 2016). The multi-tiered structure of the EU implies that it is hard for the MS to reach the agreement by unanimity required to obstruct the ECJ when it expands the bounds of EU law beyond their expectations and preferences. By making use of this situation – often referred to as the ‘joint decision trap’ – the ECJ is able to make extensive interpretations of EU law and can thereby rule against objections from MS (Micklitz et al, 2016). As Metock shows, this is also the case in the field of social policy. The ECJ uses its jurisdiction and supremacy over national law to rule on matters traditionally in MS control. Applied to RCI, this can be considered as shirking, where the ECJ as the agent takes advantage of the situation to pursue its own preferences, i.e. maximize its own utility, by promoting further integration.

**ECJ and ICT**

Now, the paper will extend the discussion by applying the theory of ICT because it extends the explanation of how supranational shirking takes place. According to Cooley et al (2009), the incomplete contracting process in the EU has been institutionalized and reversing ECJ decisions are more costly for the MS than moving forward. The incompleteness of the EU treaties makes it possible for the EU institutions to expand their own competences by filling the gaps in the treaties, and in general, the ECJ has actively played a role in fostering an extensive interpretation of the capacity of procedural rights in EU law (Micklitz et al, 2016). In the case of Metock, it can be argued that this is what the ECJ did. By use of the proportionality principle, the ECJ took advantage of the room for interpretation in its rulings and successfully opposed the will of the MS to further its own interests; fostering Europeanization. The ECJ has advanced jurisprudence on other issues in the social policy domain as well, e.g. workplace health and gender equity, which surely was not anticipated by the MS (Wallace et al, 2005). And since it requires unanimous
agreement to overturn ECJ rulings, the incomplete contracts do certainly appear beneficial for the ECJ.

In view of the arguments above, it seems clear that the ECJ is an engine of integration. In the case put forward in this paper – a case with clear MS preferences and strong disagreement between principal and agent – the ECJ was able to influence policy outcomes, which counter-factually would not have been implemented by the MS had the ECJ not intervened. The ECJ enjoys remarkable discretion to pursue its aim of furthering EU integration and does indeed foster Europeanization of the EU social dimension.

That having been said, it is important to include the limits to ECJ’s discretion, even in constitutional interpretation. The ECJ is constrained by administrative and oversight mechanisms. The MS have the ability to impose treaty amendments in order to constrain the effects of a judgment, and the ECJ is after all bound to respect the collective preferences of the MS (Pollack, 2003). The ECJ is an engine of integration but within the limits if its institutional design. The starting point is the MS, who in the periodic intergovernmental sessions have continually proved that they can easily act as their own ‘motors of integration’ with little or no supranational involvement (Pollack, 2003). Thus, the ECJ can only foster Europeanization of the social dimension to a certain extent.

In addition, the MS only delegate power in so far as it serves their own interests. Actually, they seem to be ‘drawing back’: The 19th of February 2016, the European Council reached a new agreement for United Kingdom (UK) in the EU (coming into force on the 24th of June if the UK stays). In the area of social benefits and free movement, this settlement established a new safeguard that permits the MS to restrict the access to in-work benefits for EU workers using their right of free movement. The access to the benefits can be limited for a period of up to four years from the beginning of employment with gradually increasing access (ec.europa.eu, n.d.). This is a striking example of how the MSs are the principal actors in the EU project.

**Conclusion**

The purpose of this paper was to address to what extent the ECJ is fostering Europeanization of the EU social dimension. To do so, the ECJ Metock judgment and its de facto implications have been analysed and discussed by using the framework of two integration theories, RCI and ICT. Based on this, the paper has argued that the ECJ has a profound effect on the EU integration process within the area of social
policy. The ECJ seeks to pursue its general integrational agenda – even when this means going against the will of MS. However, the ECJ as an engine of integration is constrained by its institutional design. After all, the MS are the principal actors and the ECJ is bound to respect their collective preferences. Accordingly, the paper concludes that the ECJ fosters Europeanization in the field of social policy to a certain extent.

For further reflection, one could wonder whether the ECJ actually is maximizing its own interests when ruling against MS preferences. On the face of it, it seems like the ECJ is successfully furthering integration, but as seen in the case of the UK, this might lead to MS opting out and thereby disintegrating. Perhaps, the ECJ would get closer at fulfilling its aim by taking into account its principals’ preferences? In any case, answering that question is not within the scope of this paper.
References


