10. The general principles of Regulation 883/2004 and their outer limits

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I. INTRODUCTION

This chapter seeks to trace the outer limits of the general principles of EU social security law while sketching a rough outline of a research agenda. If general principles such as non-discrimination or export tell us something about the nature of EU social security law, then their outer limits should be especially revelatory, as that is where they are most uncertain and most chafe against competing goals, values and interests.

I look at some of these borderlines through descriptive, normative and institutional lenses. Descriptively, the outer limits of the general principles are where there is most room for disagreement as to what the law is. In the words of HLA Hart, rules have 'a core of settled meaning' beyond which lies a 'penumbra of uncertainty';[2] this chapter takes the reader on a journey through this penumbra. Normatively, the outer limits are where there is most room for disagreement as to what the law should be. The descriptive and normative outer limits are often related: uncertain areas may well be controversial. Such liminal spaces moreover raise institutional questions: who gets to decide what the law means and whether it needs reform? This chapter therefore homes in on topics that in many cases combine a measure of uncertainty, normative tension and socio-economic relevance.

Another aim is to demonstrate that the principle of non-discrimination on grounds of nationality and three other general principles can be evaluated by reference to a largely common set of goals, values and interests. Instead of covering all general principles, I select four with a view to showing their interconnections.[3] In particular, I argue that the principles of assimilation, aggregation and export can be seen as the progeny of the principle of non-discrimination.

This chapter begins with a brief introduction to EU social security law, placing the general principles in their regulatory and normative context (Section II). For the principles of non-discrimination (Section III), assimilation (Section IV), aggregation (Section V) and export (Section VI), each section identifies the *raison d'être* and the core, before moving to descriptively and normatively difficult terrain.

[1] Many thanks to the participants at the Groningen workshop, and especially Dion Kramer and Grega Strban, for their comments on an earlier version of this chapter.

[2] HLA Hart, *The Concept of Law* (Oxford University Press 1961/1994), 134, 144.

[3] For discussion of other general principles, see e.g. Y Jorens and F Van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11(1/2) *European Journal of Social Security* 47. I should specify that I use the word 'principle' in its conventional, rather than jurisprudential, sense: the four principles have been labelled as such by the CJEU and legal scholarship.

II. THE REGULATORY AND NORMATIVE CONTEXT

Broadly speaking, EU social security law provides answers to two questions. First, it determines which Member State's social security law applies and therefore governs a person's social security rights and duties. Second, it shapes how that law ought to be applied to determine whether a person is entitled to benefits and owes social security contributions. That is where the general principles discussed in this chapter operate: they do not identify, but rather modify, the applicable law. The principle of non-discrimination, for instance, requires that nationality conditions be waived.

A central theme of this chapter is that the general principles affect the many tensions that traverse EU social security law. By lifting barriers that migrants face when seeking to access benefits, the four principles favour the mobile individual (possibly at the detriment of the immobile collective/the welfare state); they embody transnational solidarity (possibly at the detriment of national solidarity); and they bolster free movement (possibly at the detriment of national regulatory autonomy). Whether those detrimental effects actually materialise can be hard to establish and goes beyond the scope of this contribution. For present purposes, the key point is that the extent to which the general principles tilt the balance between these competing considerations depends on the principles' breadth and depth. This underpins my focus on outer limits.

That said, an evaluation in the round cannot be limited to analysing how the general principles do and should affect the above dichotomies. A multifactorial approach bringing in a wider array of goals, values and interests is called for. Some overarching values are almost invariably engaged when evaluating migrants' access to benefits: the integration–protection nexus (ensuring that a person's social protection by a State reflects their connections with it), continuous social protection (preventing gaps in eligibility resulting from migration), adequate social protection (striving for appropriate benefit levels) and harmony (avoiding intractable complications due to the fact that more than one legal order shapes migrants' legal position).[4] Which other goals, values and interests are engaged, depends on the matter at hand. This chapter identifies normative issues without settling them, for lack of space rather than views. The goal is more to explore some of the outer limits of the principles than to pinpoint where they lie or should lie.

III. THE PRINCIPLE OF NON-DISCRIMINATION

Without protection against nationality discrimination, non-nationals could systematically be denied social protection and subjected to additional contribution duties. By guaranteeing continuous and adequate social protection, the principle of non-discrimination on grounds of nationality helps migrants, furthers free movement and manifests transnational solidarity. It is the linchpin of EU social security coordination. In the CJEU's words:

> The general prohibition of discrimination on grounds of nationality enshrined in Article 7 of the Treaty [now Art. 18 TFEU] is implemented and given specific expression, as regards workers, by

[4] See N Rennuy, 'The trilemma of EU social benefits law: Seeing the wood and the trees' (2019) 56(5) *Common Market Law Review* 1549.

> Articles 48 to 51 of the Treaty [now Art. 45 to 48 TFEU] and by the measures adopted by the Community institutions on the basis thereof, in particular by Regulation No 1408/71 [now Regulation 883/2004].[5]

Art. 4 Regulation 883/2004,[6] headed '[e]quality of treatment', reads:

> Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

I discuss three of the outer limits of that provision. Its breadth has been expanded and contracted by other prohibitions on nationality discrimination (Section III.i). Its depth is determined by how much room there is for objective justification (Section III.ii). I close this section by discussing the extent to which social security case law has moved beyond discrimination, in line with general internal market case law (Section III.iii).

III.i Norm Overlap

The principle of non-discrimination is laid down not only in Art. 4 Regulation 883/2004, but also in the Treaties, Art. 24 Directive 2004/38 and Art. 7 Regulation 492/2011.[7] This set of potentially overlapping norms[8] creates a complex landscape whenever their application to a particular case would lead to a different outcome. Their test is alike if not identical: essentially, they all prohibit the same direct and indirect discrimination subject to at least similar objective justifications.[9] Their scope, however, differs, meaning that it matters which norm is given precedence.

The outer limits of Art. 4 Regulation 883/2004 have effectively been stretched by other prohibitions on nationality discrimination. Art. 4 only applies within the scope of Regulation

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[5] Case C-10/90, *Masgio v Bundesknappschaft*, EU:C:1991:107, [13]; Case C-302/02, *Criminal proceedings against Effing*, EU:C:2005:36, [50].

[6] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.

[7] Directive 2004/38/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) 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 [2004] OJ L 158/77; Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

[8] Norms overlap where 'more than one could apply' (E Hancox, 'Judicial approaches to norm overlaps in EU law: A case study on the free movement of workers' (2021) 58(4) *Common Market Law Review* 1057, 1057).

[9] In *Commission v Austria*, the CJEU held that 'Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011 both give concrete expression to the principle of equal treatment in social security matters laid down in Article 45 TFEU. Therefore, those two provisions must, in principle, be interpreted in the same way and in conformity with Article 45 TFEU' (Case C-328/20, *Commission v Austria (indexation)*, EU:C:2022:468, [98]). As discussed below, the prohibition on migration discrimination, the prohibition on non-discriminatory obstacles and the availability of the real link justification constitute at least potential differences.

883/2004. The CJEU has adjudicated cases that fell outside the personal[10] or material[11] scope of the Regulation on the basis of the non-discrimination provisions and free movement rights of the Treaty.[12] Consequently, it has reached conclusions that would have been obtained under Art. 4 Regulation 883/2004, even though that provision was inapplicable. The most famous example is *Martínez Sala*.[13] The CJEU instructed the referring court to determine whether the case fell within the scope of the social security regulations. The CJEU added that, should it fall outside that scope, there would still be a breach of the non-discrimination principle now laid down in Art. 18 TFEU. In such cases, the Treaty is used as a bypass to vest a right that might not have been wanted by the EU legislator. As a result, the conditionality of Art. 4 is circumvented or at least tempered, in the sense that cases falling outside its scope are decided on the basis of complementary rules yielding a similar outcome. This raises the institutional and constitutional question of who should have the final say: the Treaty drafters (whose primary law should not be restricted by secondary law) or the EU legislator (who validly restricted the scope of Art. 4 Regulation 883/2004)? In normative terms, such case law narrows gaps in social protection for migrants, facilitating free movement and transnational solidarity, possibly to the detriment of competing interests.

The opposite phenomenon has also occurred: the CJEU has amplified the conditionality of Art. 4 Regulation 883/2004. Art. 24 Directive 2004/38 protects EU citizens who derive a right to reside from the Directive against nationality discrimination. In the *Dano* line of case law, the CJEU essentially made reliance on Art. 4 Regulation 883/2004 dependent on the possession of a qualifying right to reside either under the Directive or under Regulation 492/2011.[14] In so doing, it read a new condition into Art. 4 Regulation 883/2004—a provision that makes allowances for derogations laid down in the Regulation ('Unless otherwise provided for by this Regulation') but does not mention Directive 2004/38. Constitutionally, it can be queried whether such a narrow focus on one piece of secondary legislation unduly undermines primary law.[15] Normatively, it widens gaps in social protection: *Dano* leaves people without benefits in either their home or their host Member State. The possibly interminable delay

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[10] E.g. Case C-443/93, *Vougioukas v Idryma Koinonikon Asfalisseon*, EU:C:1995:394; Joined cases C-4/95 and C-5/95, *Stöber and Piosa Pereira v Bundesanstalt für Arbeit*, EU:C:1997:44; Case C-85/96, *Martínez Sala v Freistaat Bayern*, EU:C:1998:217; Case C-185/04, *Öberg v Försäkringskassan, länsskontoret Stockholm*, EU:C:2006:107.

[11] E.g. Case C-184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458; Case C-192/05, *Tas-Hagen and Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, EU:C:2006:676.

[12] See M Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?', in C Barnard and O Odudu (ed), *The Outer Limits of European Union Law* (Hart Publishing 2009); H Verschueren, 'The EU social security co-ordination system: A close interplay between the EU legislature and judiciary', in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012); H Verschueren, 'The Relationship between Regulation (EEC) 1612/68 and Regulation (EEC) 1408/71 analysed through ECJ Case Law on Frontier Workers' (2004) 6(1) *European Journal of Social Security* 7.

[13] Case C-85/96, *Martínez Sala*, EU:C:1998:217. Note however Case C-709/20, *CG v The Department for Communities in Northern Ireland*, EU:C:2021:602.

[14] Case C-333/13, *Dano v Jobcenter Leipzig*, EU:C:2014:2358; Case C-308/14, *Commission v United Kingdom (child benefit)*, EU:C:2016:436; Case C-181/19, *Jobcenter Krefeld—Widerspruchsstelle v JD*, EU:C:2020:794; Case C-709/20, *CG*, EU:C:2021:602.

[15] N Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52(4) *Common Market Law Review* 889.

in accessing benefits stretches the integration–protection nexus: strong integration does not necessarily yield any social protection. Descriptively, the relationship between different non-discrimination provisions is neither fully coherent nor fully settled.[16]

III.ii Objective Justification

The justification phase is often the arena in which the compliance of national law with EU law is contested. The CJEU has grappled with the status of economic and administrative arguments.

It regularly states that 'reasons of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty'.[17] In practice, however, this controversial prohibition is less absolute than might seem.[18] The CJEU accepts that 'the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier' to free movement.[19] The CJEU also recognises that

> it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.[20]

In respect of what categories of claimants and benefits can such financial considerations be invoked? What threshold must States reach and what proof must they adduce? The borderline between 'purely economic' and 'also economic' justifications is at once descriptively fuzzy and normatively relevant. It impacts on the interests of individuals and States as well as associated values and goals. The more Member States can invoke objective justifications, the more benefit claims they can reject, exercising their regulatory autonomy to the detriment of free movers and free movement.

The CJEU insists that '[c]onsiderations of an administrative nature cannot justify derogation by a Member State from the rules of Community law'.[21] While administrative considerations as such might weigh too little, the CJEU does accept related arguments. The prevention

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[16] See further E Hancox, 'Judicial approaches to norm overlaps in EU law' (2021) 58(4) *Common Market Law Review* 1057.

[17] E.g. Case C-515/14, *Commission v Cyprus (old-age pensions)*, EU:C:2016:30, [53] and case law cited.

[18] For discussion, see N Nic Shuibhne and M Maci, 'Proving public interest: The growing impact of evidence in free movement case law' (2013) 50(4) *Common Market Law Review* 965, 997–1004; W-H Roth, 'Economic Justifications and the Internal Market', in M Bulterman, L Hencher, A McDonnell and H Sevenster (ed), *Views of European Law from the Mountain—Liber Amicorum Piet Jan Slot* (Kluwer Law International 2009); J Snell, 'Economic Aims as Justification for Restrictions on Free Movement', in A Schrauwen (ed), *Rule of Reason—Rethinking another Classic of European Legal Doctrine* (European Law Publishing 2005).

[19] Case C-158/96, *Kohll v Union des caisses de maladie*, EU:C:1998:171, [41].

[20] Case C-209/03, *The Queen, on the application of Bidar v London Borough of Ealing*, EU:C:2005:169, [56].

[21] E.g. Case C-18/95, *Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland*, EU:C:1999:22, [45].

of fraud and abuse is an objective justification,[22] as is the need to control eligibility conditions.[23] As welfare policies need to be administered, the edges of the prohibition on administrative justifications is another area where the interests of migrants and welfare states can be at loggerheads.

In cases concerning prohibitions on nationality discrimination other than Art. 4 Regulation 883/2004, the CJEU accepts that Member States can justify *prima facie* discrimination on the ground that the claimant lacks a real link with its society or labour market.[24] This can be seen as an emanation of the integration–protection nexus. An open question is whether the competent Member State can do so under Art. 4 Regulation 883/2004. If so, it would broaden the gap in social protection that migrants might experience: some would fail to reach the necessary threshold of integration, as simply being subject to a Member State's social security system would no longer suffice. Institutional implications would also ensue: while the conflict rules of Regulation 883/2004 are set by the EU legislator, the real link is mostly verified on a case-by-case basis by courts and administrators.

As important as the availability of justification grounds is the intensity of the review of the appropriateness and necessity of *prima facie* discriminatory measures. Most striking and perturbing is the CJEU's contorted reasoning in *Commission v UK*, a judgement about economically inactive EU citizens' access to family benefits.[25] It misclassified the disputed requirement as an indirectly discriminatory residence condition rather than a directly discriminatory right-to-reside condition,[26] before examining whether it could be objectively justified. It held that

> the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State.[27]

Having unconvincingly argued that the checks were unsystematic, the CJEU leapt to the conclusion that the requirement of proportionality was met. Faced with a choice between potentially offending British sensibilities in the tense lead-up to the Brexit referendum and departing from core elements of its own case law, the CJEU chose the latter. Especially jarring is its handling of proportionality. The actual question—whether a discriminatory refusal on the basis of a lack of a right to reside is always proportionate—was not directly tackled. Instead, another question—whether checks are proportionate—was answered without engaging with appropriateness or necessity. The contrast with the following paragraph of the almost contemporary ruling in *Commission v Cyprus* is telling:

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[22] E.g. Case C-577/10, *Commission v Belgium (Limosa)*, EU:C:2012:814, [45]; Case C-315/13, *Criminal proceedings against De Clercq*, EU:C:2014:2408, [65].

[23] E.g. Case C-406/04, *De Cuyper v Office national de l'emploi*, EU:C:2006:491, [43]–[47]; Case C-499/06, *Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, EU:C:2008:300, [37].

[24] E.g. Case C-224/98, *D'Hoop v Office national de l'emploi*, EU:C:2002:432, [38]; Case C-499/06, *Nerkowska*, EU:C:2008:300, [37].

[25] Case C-308/14, *Commission v United Kingdom (child benefit)*, EU:C:2016:436.

[26] C O'Brien, 'The ECJ sacrifices EU citizenship in vain: *Commission* v. *United Kingdom*' (2017) 54(1) *Common Market Law Review* 209, 225–227.

[27] Case C-308/14, *Commission v United Kingdom (child benefit)*, EU:C:2016:436, [80].

> The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system.[28]

While *Commission v UK* might not set the tone, its sloppy reasoning does a disservice to the coherence and quality of the case law. That judgement creates gaps in social protection and neutralises provisions of EU law; it shrinks transnational solidarity and expands national regulatory autonomy.

III.iii Beyond Discrimination

Art. 4 Regulation 883/2004 prohibits direct and indirect discrimination on grounds of nationality. It is not entirely clear what role it plays in disputes opposing citizens to their *home* Member State: strictly speaking, a State can discriminate against its own (e.g. returning) nationals, not on grounds of their nationality, but on grounds of having exercised free movement rights.[29] Whether or not Art. 4 Regulation 883/2004 prohibits such discrimination on grounds of migration, the Treaty does:

> National legislation which places some of its nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State thereby gives rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move.[30]

As regards social security, people are shielded, not only from nationality discrimination, but also from migration discrimination. The implications of this additional layer of protection for free movement, continuous social protection and transnational solidarity seem obvious.

To what extent do the Treaty freedoms (rather than Art. 4 Regulation 883/2004) prohibit genuinely non-discriminatory restrictions to free movement in matters of social security? Here lies another outer limit of EU social security law—descriptively disputed and normatively noteworthy. Much is at stake: can migrants challenge the host State's law when its eligibility conditions are stricter than those of the home State or its benefit levels lower? Is the mere fact that the host State's social security system is less generous than that of the home State an obstacle to free movement that ought to be justified?

The CJEU has introduced the rhetoric of obstacles in the sphere of social security through two different routes. It repeatedly held that

> the aim of Articles 48 to 51 of the Treaty [now Art. 45 to 48 TFEU] would not be attained if, as a consequence of the exercise of their right to freedom of movement, migrant workers were to lose the

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[28] Case C-515/14, *Commission v Cyprus (old-age pensions)*, EU:C:2016:30, [54].

[29] See Case C-255/99, *Humer*, EU:C:2002:73, [27]; Case C-302/02, *Effing*, EU:C:2005:36; Case C-399/09, *Landtová v Česká správa socialního zabezpečení*, EU:C:2011:415; Case C-257/10, *Försäkringskassan v Bergström*, EU:C:2011:839 (see also Opinion of A.G. Mazák in that case, [60]).

[30] Case C-522/10, *Reichel-Albert v Deutsche Rentenversicherung Nordbayern*, EU:C:2012:475, [42].

> advantages in the field of social security guaranteed to them by the laws of a single Member State. Such a consequence could deter Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.[31]

A second line of case law imports the tests developed in other fields of the internal market. The Treaty freedoms require the abolition of 'obstacles'[32] or 'restrictions'[33] in the field of social security, even where they apply without regard to nationality.[34] This includes measures that 'could deter',[35] 'might dissuade',[36] or 'might discourage'[37] citizens from exercising their free movement rights. The CJEU even lowered that threshold by bringing in the *Gebhard* formula, labelling measures 'capable of hindering or rendering less attractive'[38] or 'liable to hamper'[39] the exercise of Treaty freedoms as prohibited restrictions.[40] The gamut of the restrictions vocabulary therefore applies to social security.

The tension between national regulatory autonomy and the prohibition of non-discriminatory restrictions to free movement is particularly strong in the social field. Limitations to the eligibility for and amount of benefits are liable to render migration less attractive. At the same time, they are vital to any redistribution system and should be beyond challenge in many circumstances where they are genuinely non-discriminatory. The same is true for social security contributions: in a non-technical sense, having to pay high(er) contributions is capable of rendering free movement less attractive, yet all welfare benefits need funding, and none more so than the generous ones.

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[31] Case C-10/90, *Masgio*, EU:C:1991:107, [18], references omitted; Case C-349/87, *Paraschi v Landesversicherungsanstalt Württemberg*, EU:C:1991:372, [22]; Joined cases C-45/92 and C-46/92, *Lepore and Scamuffa v Office national des pensions*, EU:C:1993:921, [21]; Case C-165/91, *van Munster v Rijksdienst voor Pensioenen*, EU:C:1994:359, [27].

[32] E.g. Case C-18/95, *Terhoeve*, EU:C:1999:22, [36], [39]; Case C-208/07, *von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse*, EU:C:2009:455, [82]; Case C-345/09, *van Delft v College voor zorgverzekeringen*, EU:C:2010:610, [97]; Case C-127/11, *van den Booren v Rijksdienst voor Pensioenen*, EU:C:2013:140, [43]; Case C-589/10, *Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku*, EU:C:2013:303, [68].

[33] Case C-249/04, *Allard v Institut national d'assurances sociales pour travailleurs indépendants*, EU:C:2005:329, [29]–[30]; Case C-406/04, *De Cuyper*, EU:C:2006:491, [39]; Case C-503/09, *Stewart v Secretary of State for Work and Pensions*, EU:C:2011:500, [86].

[34] Case 143/87, *Stanton v Institut national d'assurances sociales pour travailleurs indépendants*, EU:C:1988:378, [8]–[10]; Case C-18/95, *Terhoeve*, EU:C:1999:22, [39]; Case C-208/05, *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit*, EU:C:2007:16, [33]; Case C-103/13, *Somova v Glaven direktor na Stolichno upravlenie 'Sotsialno osiguryavane'*, EU:C:2014:2334, [37].

[35] E.g. Case C-10/90, *Masgio*, EU:C:1991:107, [18].

[36] E.g. Case C-12/93, *Bestuur van de Nieuwe Algemene Bedrijfsvereniging v Drake*, EU:C:1994:336, [22].

[37] E.g. Case C-228/07, *Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, EU:C:2008:494, [43]; Case C-3/08, *Leyman v Institut national d'assurance maladie-invalidité*, EU:C:2009:595, [41].

[38] E.g. Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government*, EU:C:2008:178, [45]; Case C-379/09, *Casteels v British Airways plc*, EU:C:2011:131, [22]; Case C-127/11, *van den Booren*, EU:C:2013:140, [44]; Case C-589/10, *Wencel*, EU:C:2013:303, [69]; Case C-103/13, *Somova*, EU:C:2014:2334, [38].

[39] E.g. Case C-249/04, *Allard*, EU:C:2005:329, [30].

[40] Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

Advocate General Darmon argued that the import of the restrictions test in the social sphere

> encounters, in its turn, inevitable limits to its scope. Thus, it cannot reasonably be maintained that domestic legislation of a Member State, which is not discriminatory, and which provides for higher contributions or lower pensions than does the legislation of another Member State, is incompatible with Article 48 [now Art. 45 TFEU] on the ground that it deters workers from coming to the first State. That article is not to be used as a basis for attempting to bring about by indirect means harmonization which is not provided for by Article 51 [now Art. 48 TFEU].[41]

How can this view be fitted in the edifice of the internal market? Two (mostly compatible) rationalisations could be put forward.

A first viewpoint would be to consider that social security is governed by the principle of non-discrimination on grounds of nationality and migration—and that the language of restrictions has only been used against measures that were in fact discriminatory.[42] Neither the conditionality of social security benefits nor the imposition of contribution duties amounts to discrimination.

Alternatively, certain questions could somehow be extracted from the reach of the restrictions test because they are intrinsic to the functioning of a particular regulatory field. As Advocate General Darmon explained:

> Coordination—the present stage in the approximation of social security systems—can neither mitigate the lack of any common social security system nor, consequently, plaster over the unavoidable differences that exist between the national systems. The level of social protection varies from Member State to Member State and migrant workers cannot, for example, expect to receive the same level of social protection in the host State as in their State of origin.[43]

The CJEU held that certain procedures for selecting athletes for competing in an international tournament are inherent in international sports and therefore do not constitute a restriction on the free movement of services.[44] In the same spirit, could the CJEU see the effect of social security contributions on workers' disposable income and companies' expenditure as inevitable and therefore unobjectionable?[45] Or, more broadly, could it recognise that the impact on migrants' income (through higher social security contributions and lower cash benefits) and expenditure (through lower benefits in kind) is inherent in a system that merely coordinates social security law without harmonising it? That thinking seems to underpin the CJEU's doctrine of neutrality:

> European Union primary law can offer no guarantee to an insured person that moving to another Member State will be neutral in terms of social security [...] since, given the disparities between the Member States' social security schemes and legislation, such a move may be to the advantage of the person concerned in terms of social security, or not, depending on the circumstances.[46]

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[41] Second Opinion of A.G. Darmon in Case C-165/91, *van Munster*, EU:C:1994:263, [19]–[20].

[42] See E Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness and *Deliège*', in C Barnard and O Odudu (ed), *The Outer Limits of European Union Law* (Hart Publishing 2009), 265, 269.

[43] Second Opinion of A.G. Darmon in Case C-165/91, *van Munster*, EU:C:1994:263, [8].

[44] Joined cases C-51/96 and C-191/97, *Deliège v Ligue francophone de judo et disciplines associées and Pacquée*, EU:C:2000:199.

[45] For an argument in that vein focusing on tax and referencing social security contributions, see E Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions', in C Barnard and O Odudu (ed), *The Outer Limits of European Union Law* (Hart Publishing 2009), 267–270.

[46] E.g. Case C-515/14, *Commission v Cyprus (old-age pensions)*, EU:C:2016:30, [40].

Neutrality can be seen as an example of exclusionary rules—defined by T Horsley, as regards the free movement of goods, as

> the judicial devices that the Court has developed and applied in order to manage the scope of Art. 34 TFEU and, ultimately, draw a line between Union and Member State competence for the regulation of the internal market as a shared regulatory space.[47]

Adapting Hosley's idea to our topic, it could be said that neutrality 'operate[s] to remove from the scope of [the] TFEU national measures that, applying the Court's own tests, would *otherwise* have constituted obstacles to intra-EU movement, requiring justification in EU law'.[48]

The CJEU faces the sometimes uneasy task of determining where neutrality ends and the prohibition on restrictions to free movement begins. In so doing, it draws the line between individual and State interests while defining the boundaries of judicial powers over core welfare competencies. Normative, institutional and constitutional strands are interwoven. The broader free movement tests are, the more courts can scrutinise social security law to the benefit of intra-EU migrants. Prohibiting genuinely non-discriminatory restrictions such as low benefits or high contributions would disturb welfare states.

IV. THE PRINCIPLE OF EQUAL TREATMENT OF BENEFITS, INCOME, FACTS OR EVENTS

Out of the outer limits of indirect discrimination grew the principle of equal treatment of benefits, income, facts or events. *Öztürk* illustrates the regulatory problem.[49] The law at stake in that case conferred Austrian early old-age pensions to persons who had received *Austrian* unemployment benefits for 12 of the 15 months preceding their claim. On the basis of the principle of non-discrimination on grounds of nationality, the CJEU held that a person who had drawn German rather than Austrian unemployment benefits could also qualify for Austrian early old-age pensions. The judgement formed part of a growing line of case law that the EU legislator codified in 2004.[50] The Austrian law in *Öztürk* was just one instance of a trend: it is quite common for Member States to replace some benefits with others. In turn, that legislative technique is but one facet of a far bigger phenomenon, referred to as 'territoriality': Member States frequently condition benefits upon facts taking place on their territory (e.g. seeking work locally) or legal concepts being rooted in their legal order (e.g. receiving domestic unemployment benefits). It is apt, therefore, that the EU legislator did not focus on particular instances of this phenomenon, but rather sought to capture it wholesale. Instead of requiring the equal treatment of just unemployment benefits, it introduced the much broader

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[47] T Horsley, 'Unearthing buried treasure: Art. 34 TFEU and the exclusionary rules' (2012) 37(6) *European Law Review* 734, 735.

[48] T Horsley, 'Art. 34 TFEU and the exclusionary rules' (2012) 37(6) *European Law Review* 734, 735, emphasis in the original.

[49] Case C-373/02, *Öztürk v Pensionsversicherungsanstalt der Arbeiter*, EU:C:2004:232.

[50] For the judicial and legislative development, see N Rennuy, 'Assimilation, territoriality and reverse discrimination: A shift in European social security law?' (2011) 1(4) *European Journal of Social Law* 289, 293–297.

principle of equal treatment of benefits, income, facts or events. Often called 'the principle of assimilation of facts',[51] Art. 5 Regulation 883/2004 reads:

> Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:
>
> (a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;
> (b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

A key function of that principle is to help migrants to fulfil eligibility conditions, thus securing their continuous and adequate social protection while strengthening their free movement rights. A 'specific expression' of the principle of non-discrimination,[52] Art. 5 raises novel issues; pivotal are the notion of equivalence (Section IV.i) and the room for objective justification (Section IV.ii).

IV.i Equivalence

In *Öztürk*, the receipt of Austrian unemployment benefits had 'legal effects', opening up entitlement to early old-age pensions. Had Art. 5 Regulation 883/2004 been applicable at the time, a decisive question would have been whether German unemployment benefits were 'equivalent benefits'. The CJEU construed this notion in *Knauer*:

> the concept of 'equivalent benefits' within the meaning of Article 5(a) of that regulation must be interpreted as referring, in essence, to two old-age benefits that are comparable …
>
> As regards the comparability of such old-age benefits, account must be taken of the aim pursued by those benefits and by the legislation which established them.[53]

Descriptively, equivalence is therefore a flexible concept. Discerning equivalence between benefits (or facts or events) presupposes a doctrinally difficult exercise in comparative law. In the final analysis, awarding a benefit is nothing but a decision that a bundle of requirements has been met. To assimilate a German unemployment benefit is to accept that satisfying the set of conditions for receiving that benefit is sufficient to waive the set of conditions for receiving an Austrian unemployment benefit. Some differences between those conditions might cast doubt on the existence of equivalence, but many do not. Austrian social security institutions might be bound to award their early old-age pension even if unemployment benefits are granted with significantly lighter job-seeking duties in Germany than in Austria. Because benefits can be equivalent without being identical, Art. 5 Regulation 883/2004 allows foreign law to seep into domestic social security law.

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[51] E.g. recital 12 in the preamble to Regulation 883/2004.

[52] Joined cases C-398/18 and C-428/18, *Bocero Torrico and Bode v Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social*, EU:C:2019:1050, [39].

[53] Case C-453/14, *Knauer v Landeshauptmann von Vorarlberg*, EU:C:2016:37, [33]–[34].

Institutionally, Art. 5 transfers decision-making powers from rule-makers to rule-interpreters. National legislators typically define the eligibility conditions for their unemployment benefits and, by implication, early old-age pensions. Yet, the decision as to whether foreign unemployment benefits are equivalent to domestic ones lies in the hands of administrators and courts.

Normatively, the more lenient the notion of equivalence, the more the normative balance embodied in foreign law can tilt the balance struck in domestic law.[54] The choice between a strict interpretation of equivalence (closer to near-identity) or a looser interpretation (closer to vague resemblance) influences values, goals and interests. For instance, to accept that foreign unemployment benefits that do not require meaningful job-seeking efforts open entitlement to Austrian early old-age pensions would be beneficial to jobseekers and their free movement rights, but detract from the wish to reserve such pensions to long-term jobseekers with demonstrably little prospect of reintegrating the labour market. Given that free movement is an EU goal whereas social policy is mostly anchored at the national level, such normative tension has constitutional echoes.

IV.ii Objective Justification

Having been analysed as a discrimination case, *Öztürk* included discussion of whether the unequal treatment could be objectively justified. Would that still be the case had it been analysed under Art. 5, which makes no mention of objective justification?

Two recitals in the preamble to Regulation 883/2004—which found their way to the CJEU's case law–hint that this would be the case:

> The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.
>
> In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.[55]

In *Knauer*, the CJEU seemed to accept *the possibility of* objective justification,[56] although the reading of the ruling is complicated by the fact that assimilation was disadvantageous to the persons concerned, as it inflated their contribution burden. In *Bocero Torrico and Bode*, the CJEU, having found that Art. 5(a) Regulation 883/2004 requires assimilation, examined and rejected the objective justification put forward by the Spanish authorities, not under Art. 5, but under Art. 4.[57]

If objective justification is possible in theory, what difference does it make in practice? Broad opportunities for objective justification create room for pursuing goals, values and interests other than free movement, transnational solidarity and the protection of migrants. The justification test allows to balance EU interests (favouring assimilation, at least where it

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[54] In what follows, I assume that assimilation is beneficial to the person rather than the social security institution.

[55] Recitals 9 and 12 in the preamble to Regulation 883/2004; see Case C-769/18, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle v SJ*, EU:C:2020:203, [42], [55].

[56] Case C-453/14, *Knauer*, EU:C:2016:37, [37].

[57] Joined cases C-398/18 and C-428/18, *Bocero Torrico and Bode*, EU:C:2019:1050, [39]–[45].

benefits migrants) against national interests (supporting a safety valve to reject some assimilation) as well as public interests against private interests.

In *Öztürk*, an ill-fated attempt was made to justify non-assimilation on the basis of a social policy goal by characterising the early old-age pension as a social protection and labour market policy measure for jobseekers prospecting the Austrian labour market. The CJEU signalled that it might be more open to countenancing such concerns for unemployment benefits than old-age pensions.[58]

Much as Art. 5 puts high demands on administrations, as we have seen such concerns cannot be cast in the mould of objective justifications: administrative complications are not overriding reasons in the general interest, unless they can be framed as the prevention of error, fraud and abuse.

A moot point is whether the real link could be invoked. Whether by accident or design, the requirement that an applicant has received Austrian unemployment benefits for 12 of the last 15 months tightens their requisite link with Austria: the receipt of Austrian unemployment benefits evidences past work in Austria and probably continuous residence there. Assimilating German unemployment benefits lowers this threshold of integration. Could that be a ground for refusing to treat German unemployment benefits equally to Austrian unemployment benefits? When tested in court, that line of argument will move the needle on the normative and institutional axes discussed above.[59] In any case, the real link can be hard to operationalise. One view might be that Mr Öztürk's link was fatally weakened by time, given that he last worked in Austria 30 years before claiming its early old-age pension. The better view would be that the amount of his pension—proportionate to the five years he had worked in Austria and contributed to its old-age insurance—reflected the strength of his past connection with Austria in a way that is fitting for a benefit focused on the claimant's entire career.

V. THE PRINCIPLE OF AGGREGATION

Some legal concepts are so widespread that the need to treat them equally was apparent well before the introduction of the principle of equal treatment of benefits, income, facts or events. That is true for periods of insurance, (self-)employment and residence, which routinely condition the access to benefits. A Member State can set such waiting periods, but may not ignore periods completed under the law of another Member State. Art. 6 Regulation 883/2004, headed '[a]ggregation of periods', reads:

> Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:
>
> —the acquisition, retention, duration or recovery of the right to benefits,
> —the coverage by legislation,
> or
> —the access to or the exemption from compulsory, optional continued or voluntary insurance,
>
> conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.

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[58] Case C-373/02, *Öztürk*, EU:C:2004:232, [67].

[59] See Section III.ii.

The purpose of the aggregation principle is

> to ensure that exercise of the right, conferred by the Treaty, to freedom of movement does not have the effect of depriving a worker of social security advantages to which he would have been entitled if he had spent his working life in only one Member State.[60]

The principle reconstitutes the dispersed insurance history of migrants. It 'excludes the possibility that, whenever a worker begins a new insurance period in a Member State, he is regarded there as a newly insured person'[61] and therefore denied social protection.

Instead of embarking upon a highly technical analysis of the principle's uncertain edges, I discuss suggestions for reform. There is appetite, in academic and political circles, for (re-) introducing waiting periods that are not subject to aggregation. Such proposals are motivated by welfare chauvinism and/or concern for the integration–protection nexus (other things being equal, social protection should reflect the claimant's connections to the State in question, which it takes time to forge).

Had the referendum yielded a different outcome, the New Settlement for the United Kingdom within the European Union would have allowed some Member States

> to limit the access of newly arriving EU workers to non-contributory in-work benefits for a total period of up to four years from the commencement of employment. The limitation should be graduated, from an initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host Member State.[62]

A similar emphasis on integration is discernible in the latest proposals for amending Regulation 883/2004, though it is combined with a worry about continuous social protection. The latest available document is an agreement reached in trilogue in December 2021 (the 'Second Trilogue') that failed to garner a qualified majority.[63]

While jobseekers can currently claim the unemployment benefits of the State where they worked a single day, the Second Trilogue would have made aggregation subject to a waiting period of one month.[64] The goal was to 'ensure a real link between the unemployed person and the labour market of the Member State providing unemployment benefits' and guarantee that they 'contributed to the financing of the unemployment benefit scheme'.[65]

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[60] Case C-481/93, *Moscato v Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, EU:C:1995:348, [28]; Case C-244/97, *Rijksdienst voor Pensioenen v Lustig*, EU:C:1998:619, [31]; Case C-440/09, *Tomaszewska*, EU:C:2011:114, [30].

[61] Opinion of A.G. Léger in Case C-322/95, *Iurlaro v Istituto nazionale della previdenza sociale*, EU:C:1997:148, [32].

[62] Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, Annex I to the Conclusions of the European Council meeting (18 and 19 February 2016), Brussels, 19 February 2016, EUCO 1/16, 20.

[63] Proposal for a Regulation of the European Parliament and of the Council amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004—Analysis of the compromise text with a view to agreement (15068/21 Add 1).

[64] Art. 1(19) Second Trilogue.

[65] Recital 8a of the Second Trilogue.

The centre of gravity of workers who reside in one country while working in another is hard to pinpoint. The EU legislator[66] and the CJEU[67] have devised complex and changing schemes, whereby some jobseekers receive the unemployment benefits of their State of residence and others those of their last State of work.[68] The Second Trilogue's solution to the conundrum drew on waiting periods. Jobseekers who have completed a period of (depending on circumstances) three to six months of insurance or (self-)employment under the law of their last State of work in the last two years would have fallen under its unemployment benefits schemes.[69] Others would typically have become subject to the social security schemes of their State of residence.[70]

These proposals share means and ends: waiting periods are deployed in order to raise integration thresholds. This goal can be problematised on its own terms, perhaps on the grounds that it downplays meaningful connections. It can also be criticised, not because it distorts the integration–protection nexus, but because it pursues it too single-mindedly and at too high a cost. As I have shown elsewhere, delaying access to benefits either creates a gap in social protection or entails a number of intractable complications.[71] There are also questions as to the constitutional leeway for derogating from aggregation, seeing as the Treaties require the EU legislator to provide for the aggregation of periods.[72] At any rate, the discussion about the desirability of waiting periods directly engages the overlapping oppositions between the interests of migrants and welfare states; between opening and closure; and between transnational solidarity and national solidarity.

VI. THE PRINCIPLE OF EXPORT

The residence conditions that pervade national social security law are routinely waived by EU social security law. Art. 7 Regulation 883/2004, entitled '[w]aiving of residence rules', provides as follows:

> Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.[73]

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[66] Compare art. 71 Regulation 1408/71 to art. 11(3)(c), art. 65 and art. 65a Regulation 883/2004.

[67] E.g. Case 1/85, *Miethe v Bundesanstalt für Arbeit*, EU:C:1986:243; Case C-131/95, *Huijbrechts v Commissie voor de behandeling van administratieve geschillen*, EU:C:1997:147; Case C-443/11, *Jeltes v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, EU:C:2013:224.

[68] For an overview, see R Cornelissen, 'The new EU coordination system for workers who become unemployed' (2007) 9(3) *European Journal of Social Security* 187.

[69] Art. 1(22) Second Trilogue.

[70] Art. 1(22) Second Trilogue and Art. 11(3)(c) Regulation 883/2004.

[71] N Rennuy, 'The trilemma of EU social benefits law' (2019) 56(5) *Common Market Law Review* 1549.

[72] Art. 48(1) TFEU provides that the European Parliament and Council shall ensure 'aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries'.

[73] I focus on benefits in cash. Rules for 'export' of benefits in kind are laid down in respect of sickness benefits, maternity and equivalent paternity benefits, benefits in respect of accidents at work

The principle of export protects intra-EU migrants against gaps in social protection. Of all general principles, export might have generated the most heated normative discussion—especially as regards family benefits, unemployment benefits and special non-contributory cash benefits. The latest limit to be tested was whether exported family benefits can and, if so, should be adjusted to the costs of living in the child's Member State of residence; the CJEU clarified that neither Member States nor the EU legislator can introduce such an indexation mechanism.[74] The converse question has also been asked: does the principle of export result in inadequate social protection, because a benefit exported from a State with low costs of living might be meagre in a State with high costs of living?[75] This section sheds light on a lesser-known issue: is Art. 7 a principle of export or a principle of maintenance of acquired rights?

Art. 7 Regulation 883/2004 waives residence clauses, while Art. 11(3)(e) Regulation 883/2004 subjects economically inactive people to the social security law of their State of residence.[76] This dual status of residence—at once irrelevant as a prohibited criterion and decisive as a connecting factor—gives rise to a question that has yet to reach the CJEU. What happens when an economically inactive benefit recipient moves from the home Member State to the host Member State?[77]

One view would be that only the competent Member State ought to export. As soon as the place of residence shifts from one State to the other, so does the applicable law. Once no longer competent, the home State would become exempt from duties under the Regulation, including the duty to export. The person concerned would be entitled to have benefits exported from the *host* State. This view could be grounded in a textual and systematic interpretation of Regulation 883/2004. Art. 7 opens with the words '[u]nless otherwise provided for by this Regulation', which would include Art. 11(3)(e). The questions of the applicable law and of the entitlement to benefits are treated sequentially and separately: residence is key to identifying the applicable law; only once that law has been identified are its residence clauses waived to determine entitlement to benefits. Art. 7 operates within the limits of the conflict rules.

The competing view is that an *acquired* right to benefits cannot be curtailed on the basis of a change in the place of residence. The conflict rules operate within the limits of Art. 7, which lays down not just a prohibition on residence clauses in the law of the competent Member State, but a principle of maintenance of acquired rights. People who acquired a right under the law of the State that was competent *at the time* (i.e. the home State) cannot be deprived of that right because they move abroad. This interpretation finds some support in the text of Art. 7, which prohibits residence clauses with respect to 'cash benefits payable under the legislation of one or more Member States or under this Regulation'. Not only does the EU legislator

and benefits in respect of occupational diseases (Chapters 1 and 2 of Title III of Regulation 883/2004; Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45). An interesting question is to what extent benefits in kind should be exported in the absence of such provisions.

[74] Case C-328/20, *Commission v Austria (indexation)*, EU:C:2022:468.

[75] C Bruzelius, C Reinprecht and M Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship' (2017) 55(6) *Journal of Common Market Studies* 1239.

[76] The question is also relevant for some economically active persons (see e.g. art. 13 Regulation 883/2004).

[77] The following analysis does not apply to benefits such as old-age pensions and invalidity benefits.

fail to reference the competent Member State, it explicitly envisages the possibility of several Member States exporting, and not just 'under this Regulation'.[78]

Further support for this view can be derived from the predecessor of Art. 7. Art. 10 Regulation 1408/71 used the language of 'acquired' rights. Its purpose was 'to protect the persons concerned against *any* adverse effects that might arise from the transfer of their residence from one Member State to another'.[79] The CJEU came close to describing a principle of maintenance of acquired rights when writing that 'the person concerned retains the right to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State'.[80] That said, there is a risk of reading too much into these statements made about a different provision in a different context: in none of those cases did the problem that occupies us arise.

The main authority on this issue is *Tolley*, in which the CJEU ruled on whether Regulation 1408/71 obliged the United Kingdom to export cash sickness benefits to a person who had permanently moved to Spain.[81] She had definitely ceased all economic activity, but had to be regarded as an employed or self-employed person. The CJEU examined two provisions on the export of sickness benefits.[82] It held that Art. 19 Regulation 1408/71 applies only to persons who, unlike the claimant, already resided in another Member State when applying for benefits. Art. 22(1)(b) Regulation 1408/71, by contrast, applies to a person 'who, having become entitled to benefits chargeable to the competent institution, is authorized by that institution … to transfer his residence to the territory of another Member State'. The competent State for the purpose of that provision (even if no longer competent under Title II of Regulation 1408/71), then, must be whichever State was competent to grant sickness benefits *before* the person took up residence in another Member State. Accordingly, provided authorisation had been granted,[83] Art. 22(1)(b) Regulation 1408/71 embodies a principle of maintenance of acquired rights: it entitles people to keep their acquired right to cash sickness benefits after moving to another Member State. It remains unclear to what extent *Tolley* applies to sickness and

[78] However, note that those words lend themselves to several interpretations, not all of which support this particular view.

[79] Case C-503/09, *Stewart*, EU:C:2011:500, [61], emphasis added; based on earlier statements concerning the free movement of workers more specifically (Case 51/73, *Bestuur der Sociale Verzekeringsbank v Smieja*, EU:C:1973:116, [20]; Case 92/81, *Caracciolo (née Camera) v Institut national d'assurance maladie-invalidité and Union nationale des mutualités socialistes*, EU:C:1982:219, [14]; Case 139/82, *Piscitello v Istituto nazionale della previdenza sociale*, EU:C:1983:126, [15]; Case 284/84, *Spruyt v Bestuur van de Sociale Verzekeringsbank*, EU:C:1986:79, [20]; Case 300/84, *van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen*, EU:C:1986:402, [39]; Joined cases 379, 380, 381/85 and 93/86, *Caisse régionale d'assurance maladie Rhône-Alpes v Giletti, Directeur régional des affaires sanitaires et sociales de Lorraine v Giardini, Caisse régionale d'assurance maladie du Nord-Est v Tampan and Severini v Caisse primaire centrale d'assurance maladie*, EU:C:1987:98, [14]).

[80] Case 92/81, *Caracciolo (née Camera)*, EU:C:1982:219, [14]; Case 300/84, *van Roosmalen*, EU:C:1986:402, [39]; Joined cases 379, 380, 381/85 and 93/86, *Giletti*, EU:C:1987:98, [15]; Case C-503/09, *Stewart*, EU:C:2011:500, [61].

[81] Case C-430/15, *Secretary of State for Work and Pensions v Tolley*, EU:C:2017:74.

[82] Case C-430/15, *Tolley*, EU:C:2017:74, [70]–[93].

[83] This authorisation 'may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment' (art. 22(2) Regulation 1408/71).

other benefits under Regulation 883/2004. Equally uncertain is whether the TFEU requires acquired rights to be maintained.

While it accords with the CJEU's statement that the exceptions to the principle of export should be interpreted narrowly,[84] construing Art. 7 as a principle of maintenance of acquired rights is harder to square with the system of Regulation 883/2004. It allows people to retain benefits from their home State while subject to the law of the host State, so that Art. 7 derogates not only from Art. 11(3)(e) but also from the principle that they 'shall be subject to the legislation of a single Member State only'.[85] The counterargument would be that Regulation 883/2004 defines the 'competent Member State' as the Member State in which is located the 'competent institution', which in turn is defined as, among others, 'the institution with which the person concerned is insured *at the time of the application for benefit*'.[86]

Regardless of the hermeneutic merits of the two readings of Art. 7, what would be their normative implications? The narrow view—only the competent Member State must export—heightens the risk of a gap in social protection: their economic inactivity may prevent people from accessing the host State's schemes targeting (self-)employed persons[87] and even its schemes open to all residents, given the implications of Directive 2004/38 outlined above. The broad view—the principle of maintenance of acquired rights—prolongs the responsibility of the formerly competent Member State. In so doing, it makes it less likely that the person concerned would lack either social protection or sufficient resources to establish a right to reside under Art. 7(1)(b) Directive 2004/38. In short, it strengthens free movement, social citizenship and transnational solidarity.

VII. CONCLUSION

This chapter sought to demonstrate how four of the main general principles of EU social security law raise descriptive, normative and institutional questions. The broader and deeper the principles, the more they favour migrants, foster transnational solidarity and enable free movement—possibly to the detriment of competing interests. All four principles loosen the integration–protection nexus and facilitate continuous social protection; conversely, their conditions, derogations and other limits have the opposite effects.

That they affect a largely common set of goals, values and interests is hardly surprising, considering that the four principles are intertwined. The principle of non-discrimination is best seen as a parent principle, from which the other three are derived. Indeed, the CJEU has inferred duties to assimilate,[88] aggregate[89] and export[90] from the principle of non-discrimination. To recognise this lineage is not to deny that the three principles have a life of their own. In fact, the ways in which they deviate from the principle of non-discrimination reveal their

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[84] Case C-215/99, *Jauch v Pensionsversicherungsanstalt der Arbeiter*, EU:C:2001:139, [21].

[85] Art. 11(1) Regulation 883/2004.

[86] Art. 1(s) and art. 1(q)(i) Regulation 883/2004, emphasis added; see also Case C-430/15, *Tolley*, EU:C:2017:74, [81]–[82].

[87] Art. 5 and 6 Regulation 883/2004 could allow them to rely on past economic activity abroad.

[88] E.g. Case C-523/13, *Larcher v Deutsche Rentenversicherung Bayern Süd*, EU:C:2014:2458.

[89] E.g. Case C-111/91, *Commission v Luxembourg (childbirth and maternity allowances)*, EU:C:1993:92.

[90] E.g. Joined cases C-4/95 and C-5/95, *Stöber and Piosa Pereira*, EU:C:1997:44.

raison d'être. The point of creating a separate principle is to obtain a different outcome in some cases.

This chapter's other objective was to give some intimations of worthy research topics and approaches. It sought to identify promising lines of inquiry, both discrete issues and transversal themes common to several general principles. It aimed for that cocktail prized by legal academics, combining a measure of descriptive uncertainty, normative tension and socio-economic relevance.

I take the liberty to close this chapter with some remarks on EU social security law research. How to move beyond description, notwithstanding the sometimes bewildering technicality of the subject? How to push explanation and evaluation beyond discussing clarity and practicability, or locating the law on an axis going from unfettered national regulatory autonomy to 'the greatest possible freedom of movement for migrant workers'?[91] While there is no one-size-fits-all approach and a handful of paragraphs cannot do justice to such questions, a couple of personal penchants and thoughts.

Some sophisticated evaluative criteria such as adequate social protection could find wider application. They often have an explanatory potential: goals and values internalised by EU institutions or national bodies contribute to explaining their rules and decisions.

It pays to draw on neighbouring areas of the law. Despite some improvement, the dialogue between the social security coordination literature and the EU citizenship literature remains too timid and tepid. In many instances, the access to social security benefits and to other benefits raise similar questions receiving comparable answers. It then makes sense to think about 'EU social benefits law', which, as the name suggests, covers all social benefits, whether social security or not.[92]

Fields of law beyond free movement can further the understanding and evaluation of EU social benefits law. Especially fruitful in my experience are private international law and EU administrative law. Much like Regulation 883/2004, private international law revolves around conflict rules and one of its mechanisms, substitution, is nothing but the principle of assimilation by another name.[93] EU social benefits law can also be framed as part of EU administrative law.[94]

The explanatory and evaluative concepts need not be legal: the analysis of EU social benefits law can profit from and add to disciplines such as economics (e.g. regulatory competition) and political science (e.g. the role of the CJEU or Europeanisation), sociology (e.g. welfare

[91] E.g. Case C-515/14, *Commission v Cyprus (old-age pensions)*, EU:C:2016:30, [34].

[92] For my initial plea, see N Rennuy, 'The trilemma of EU social benefits law' (2019) 56(5) *Common Market Law Review* 1549.

[93] For studies straddling both fields, see e.g. E Eichenhofer, *Internationales Sozialrecht und Internationales Privatrecht* (Nomos Verlagsgesellschaft 1987); N Rennuy, 'Posted Workers, Judges and Smokescreens: Narrowing the Gap in Judicial Control' (2022) 47(4) *European Law Review* 463; AAH Van Hoek, 'Re-embedding the transnational employment relationship: A tale about the limitations of (EU) law?' (2018) 55(2) *Common Market Law Review* 449.

[94] See N Rennuy, 'Posting of workers: Enforcement, compliance, and reform' (2020) 22(2) *European Journal of Social Security* 212; H Wenander, 'A Network of Social Security Bodies—European Administrative Cooperation under Regulation (EC) No 883/2004' (2013) 6(1) *Review of European Administrative Law* 39.

chauvinism) and ethnography (e.g. to study the law in practice), philosophy (e.g. redistributive justice) and social policy (e.g. vulnerability).[95]

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[95] See e.g. M Blauberger, A Heindlmaier, D Kramer, DS Martinsen, JS Thierry, A Schenk and B Werner, 'ECJ Judges read the morning papers: Explaining the turnaround of European citizenship jurisprudence' (2018) 25(10) *Journal of European Public Policy* 1422; F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015); DS Martinsen, 'The Europeanization of Welfare—The Domestic Impact of Intra-European Social Security' (2005) 43(5) *Journal of Common Market Studies* 1027; C O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017); N Rennuy, 'Shopping for social security law in the EU' (2021) 58(1) *Common Market Law Review* 13.

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