The trilemma of EU social benefits law: Seeing the wood and the trees

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# Introduction

The law on the cross-border access to social benefits makes a forbidding impression. It spans a number of complex, overlapping and dynamic legal frameworks: the abstruse Regulation 883/2004 on the coordination of social security systems; the open-textured Treaty provisions on free movement and EU citizenship; their partial codification in the Citizenship Directive, the Patient Mobility Directive and Regulation 492/2011; and often labyrinthine domestic welfare law.[[2]](#footnote-1) This article is an attempt to see the wood through the trees. Much as the distinctiveness of the doctrinal frameworks deserves respect, it should not blind us to their commonalities. While neither the ECJ nor commentators think in silos, this article goes one step further by asking what unites those legal frameworks. I argue that, because they share regulatory tools and values, it makes sense to talk of what could be called “EU social benefits law”.

A question central to that law and this article is whether the State of origin, the State of destination, and/or the migrant should bear the consequences when a social risk such as unemployment or poverty materializes. The four basic answers—the tools of EU social benefits law—can be illustrated by imagining variations on the *Dano* judgment, in which an economically inactive mother who had moved from Romania to Germany was left without benefits.[[3]](#footnote-2) She did not receive Romanian benefits, and the ECJ allowed Germany to reject her claim for minimum subsistence benefits until she establishes a right to reside under the Citizenship Directive. Alternatively, Ms Dano could have been supported by Romania as long as she is barred from German benefits—effectively both States would use the same waiting period. Or she could have been entitled to German benefits and excluded from Romanian benefits as soon as she moved. Finally, she could have drawn partial benefits from both States. These are the four basic tools available to rule-makers regulating the cross-border access to any social benefit: a waiting period in the State of destination only; a waiting period in the State of origin and the State of destination; an instant transition from the former to the latter; and partial benefits from both.[[4]](#footnote-3)

What should guide rule-makers choosing between those regulatory tools? That depends on what they seek to achieve. I do not propose to present an inventory of the goals of EU social benefits law, but rather to highlight three values. First, a person’s social protection should relate to his or her integration. For instance, waiting periods are often defended on the grounds that newcomers are insufficiently integrated in the State of destination to immediately lay claim on its social benefits. Second, a migrant should have access to social protection *somewhere* at all times—while migration might entail a shift from one welfare system to another, no migrant should fall between two stools, as Ms Dano did. Several tools can ensure continuous social protection. The last, most mysterious value will be referred to as harmony. Some tools bring the laws of two or more Member States to bear on a single case. The resulting imbroglio may well lead to migrants receiving or contributing too little or too much. Harmony is most effectively maintained by avoiding the involvement of several legal orders. One reason for singling out these values lies in their importance for the coordination of any social benefit—much like the tools, they are threads that run through the fabric of EU social benefits law.

Another reason is that their relationship is fraught. It is impossible to regulate the rights and duties of Ms Dano—or, for that matter, anyone—such as to make social protection continuous, link it to integration, *and* secure harmony. A trilemma afflicts EU social benefits law: each tool can achieve two values, but not three.

EU social benefits law, then, is best seen as a patchwork of variants on four regulatory tools affecting three values. The trilemma goes some way towards explaining why the EU legislature and the ECJ have experimented with all tools: they are unwilling to drop one value altogether and prefer to pursue different pairs of values for different benefits and beneficiaries. The tools and values help to justify some rules and criticize others. It is far from irrelevant whether a rule realizes continuous protection, whether it safeguards harmony, whether it aptly links integration to social protection, and what its alternatives are. Yet to my knowledge no study comments on all three values or juxtaposes one solution to its three alternatives. A sharper understanding of the commonalities of EU social benefits law can enrich more granular analyses, though it cannot replace them. Context matters. Whether a particular version of a tool is desirable, depends on the people and benefits it covers, the many goals and interests it engages, and so on. There is no one-size-fits-all solution to the challenge of coordinating the cross-border access to social benefits. This article lays out the options and identifies some of their strengths and weaknesses. The most fashionable tool, used e.g. in *Dano*, is the most questionable. Both States increasingly wash their hands of some migrants—the State of origin shirks responsibility as soon as a person moves, while the State of destination imposes a waiting period.

I will begin by showing why it is important to connect social protection to integration, plug gaps in social protection, and maintain harmony (Sections 2–4). Drawing on various parts of EU social benefits law, I will illustrate that rule-makers take these values seriously. The second half of the article will examine the tools in the light of the values and demonstrate the trilemma. Section 5 will analyze the options for timing the transition from one welfare system to another: should access to benefits be delayed, and, if so, how? In Section 6, I will briefly discuss how the State of origin and the State of destination can simultaneously offer partial social protection. I will then argue that the type of waiting period employed in *Dano* is overrated (Section 7), before concluding.

# The integration–protection nexus

The first value traversing EU social benefits law concerns integration. Other things being equal, a person’s social protection in a State should bear a relation to his or her integration there. Integration takes many guises in EU law, depending on the context.[[5]](#footnote-4) In this article, it is shorthand for the connections between a citizen and a State. The questions addressed in this Section are why integration matters to social protection (2.1), and how EU law connects them (2.2).

## As a value

The integration–protection nexus can be grounded in justice. Each State expresses, through its welfare system, a certain vision of what is just. It singles out events (e.g. illness or unemployment) and choices (e.g. studying or raising a family) that warrant public support. Which version of social justice should define someone’s life chances? It would be wrong to subject him or her to the welfare system of a State with which he or she has no ties whatsoever. Neither is it just to bar someone from the welfare system of the State he or she has never left. This suggests a link between the centre of gravity of people’s life and their social protection.

This linkage draws support from ethical accounts of the redistributive rights of migrants such as Carens’ theory of social membership, which seeks to set a floor of moral rights for migrants. While many rights should be available to all those present on a particular territory, welfare rights can morally be reserved to members of society.[[6]](#footnote-5) Essentially, his theory is that “living within the territorial boundaries of a state makes one a member of society, that this social membership gives rise to moral claims in relation to the political community, and that these claims deepen over time.”[[7]](#footnote-6) Similar positions are defended in political theory.[[8]](#footnote-7)

The broad intuitive appeal of the integration–protection nexus also stems from the fact that the main arguments against extending social protection to migrants are blunted when directed at well-integrated claimants.

EU migrants are commonly thought to receive more in benefits than they contribute in taxes,[[9]](#footnote-8) even though the opposite is generally true.[[10]](#footnote-9) There are calls for rejecting claims unless the applicant has personally contributed to the upkeep of the welfare state. The persuasiveness of this financial argument depends on integration. The more a person is integrated, the likelier that his or her past contributions and taxes mitigate or even neutralize the burden his or her claim puts on public finances. More fundamentally, whether a burden is reasonable depends on the claimant’s integration. “The greater the level of integration attained by the Union citizen in the host Member State, the less important are the Member States’ financial interests.”[[11]](#footnote-10) The integration–protection nexus speaks to issues of fair burden-sharing that so much occupy political minds.

In the same vein, the belief that migrants are attracted by “magnetic” welfare systems is widespread. If social protection is withheld until claimants have demonstrated a certain level of integration, the argument loses much of its already dubious[[12]](#footnote-11) plausibility.[[13]](#footnote-12) As the ECJ acknowledges, a five-year waiting period “makes it possible, in the context of economically inactive Union citizens, to avoid the risk of ‘study grant forum shopping’”.[[14]](#footnote-13)

Solidarity is commonly characterized as bounded—the in-group is reluctant to share with the out-group. This engenders fears that free movement erodes support for the welfare state.[[15]](#footnote-14) Since integrated migrants tend to be regarded as members of the in-group, foregrounding the nexus could reduce these anxieties as well as wider worries that the pressures free movement exerts on States of destination could lead to welfare state retrenchment.[[16]](#footnote-15) Finally, Brexit illustrates the risk that dissatisfaction with the EU’s perceived generosity towards migrants feeds into disenchantment with free movement and the European project as a whole.

The agreement on the desirability of a link between integration and social protection does not stretch to the details. There is little consensus as to what level of integration is necessary before social protection is extended or how integration is best measured. A range of views fits under the broad umbrella of the nexus.[[17]](#footnote-16) At one end of the spectrum are demanding visions that set a high threshold of integration for social protection. States may require that the applicant’s life has been, is, and likely will remain entirely centred in its society and labour market. The emphasis on the past translates into lengthy waiting periods. More lenient versions of the integration–protection nexus require less integration and recognize that it can be demonstrated in a number of ways. But “[n]obody would say that a one-day employment is sufficient integration.”[[18]](#footnote-17) Even the most lenient view of the nexus is not indifferent to the claimant’s past. Rules entitling migrants to full social protection days or weeks after they first set foot in a State deviate from the integration–protection nexus.

In sum, it is desirable for protection to relate to integration, other things being equal. The integration–protection nexus could be misconstrued as an apologist for welfare chauvinism—“the idea that native citizens are unwilling to grant social rights to foreigners”.[[19]](#footnote-18) While it supports the exclusion of migrants from the welfare systems of States with which they are not or tenuously connected, it calls for their inclusion in the systems of States with which they have meaningful connections.

Low integration should not necessarily result in low or no protection, as reasons including a commitment to continuous protection and harmony can outweigh the integration–protection nexus. For instance, few would deny that people should have access to urgent healthcare in whichever Member State they happen to be, regardless of their integration.[[20]](#footnote-19) As one value among others, the integration–protection nexus advises against, but does not prevent, social protection being based on very little integration. Neither does it necessarily result in migrants being left without benefits.[[21]](#footnote-20)

## In EU law

The integration–protection nexus permeates EU social benefits law. In domestic law, migrants must typically reside and/or work on the national territory for a certain time before they can claim benefits.[[22]](#footnote-21) Although EU law is markedly more inclusive than national law, it still bases social protection on integration. It never permits citizens to claim the benefits of a State with which they are not at all connected.

Regulation 883/2004 loosens the integration requirements of national law to the greatest extent. Nonetheless, it aims “to determine the Member State that [EU citizens] are *in fact* most closely connected with.”[[23]](#footnote-22) The *lex loci domicilii* subjects an economically inactive citizen to the legislation of the State where he habitually resides,[[24]](#footnote-23) which is “where the habitual centre of his interests is […] situated.”[[25]](#footnote-24) The other major conflict rule of Regulation 883/2004, the *lex loci laboris*, subjects people to the social security laws of the State in which they currently work.[[26]](#footnote-25) It often identifies the centre of their professional interests, which usually coincides with the centre of gravity of their life. The *lex loci laboris* however strains or even displaces the integration–protection nexus when it bases full protection on a brief economic activity. That is the case where a person claims benefits soon after starting work, even though in order to retain them he or she will generally need to continue working (under the *lex loci laboris*) or residing (under the *lex loci domicilii*) in the State in question.

The integration–protection nexus can also be seen outside the context of Regulation 883/2004. The Treaty freedoms, Regulation 492/2011 and the Citizenship Directive draw a double link between integration and social protection. First, they reserve the right to equal treatment to those who have a certain connection to the State in question. Workers’ equal treatment rights are based on their “real and genuine”[[27]](#footnote-26) activities on its territory. In order to be entitled to equal treatment, non-workers must rely on weaker economic connections (work-seeking,[[28]](#footnote-27) past work,[[29]](#footnote-28) or family links with workers[[30]](#footnote-29)) or on social ties evidenced mostly by lawful residence over time.[[31]](#footnote-30) The Citizenship Directive “provides for three successive levels of integration of a Union citizen in the host Member State”, depending largely on length of residence, and attaches different levels of welfare protection to each.[[32]](#footnote-31) A measure of integration is needed, not only to have a right to equal treatment, but also to defeat attempts to justify *prima facie* discriminatory or non-discriminatory obstacles to free movement. In respect of workers and inactive EU citizens alike, the ECJ has recognized “the Member States’ power […] to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages”.[[33]](#footnote-32) Worker status goes a long way towards reaching that threshold:

“according to settled case-law, the fact that migrant and frontier workers have participated in the labour market of a Member State creates, in principle, a sufficient link of integration with the society of that State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages”.[[34]](#footnote-33)

Economically inactive EU citizens must demonstrate their integration credentials on the basis of other proxies. Durational residence is central to that exercise: “the existence of a certain degree of integration may be regarded as established by a finding that the [claimant] has resided in the host Member State for a certain length of time.”[[35]](#footnote-34) A sufficient connection to its society may also be found “where the student is a national of the State concerned and was educated there for a significant period or on account of other factors such as, in particular, his family, employment, language skills or the existence of other social and economic factors.”[[36]](#footnote-35) In order to qualify for benefits, even those who are entitled to equal treatment might need to wait until they have forged a real or genuine link with the host State. In summary,

“[t]he closer the bond between the individual claimant and the Member State, the more secure will be the claimant’s right to reside within the territory, free from the fear of expulsion on economic or financial grounds; and the more extensive his or her right to equal treatment within the host society, as regards welfare and other social benefits.”[[37]](#footnote-36)

Regardless of whether they derive from national law, Regulation 883/2004, Regulation 492/2011, the Citizenship Directive, or the Treaty, all cross-border benefit claims are affected by the integration of the applicant.

In Sections 5, 6 and 7, I will discuss the ability of each regulatory tool to embody the integration–protection nexus. Rules giving newcomers instant or quick access to the social benefits of the State of destination stand accused of downplaying the importance of integration. In the proposals to amend Regulation 883/2004 they currently negotiate, the Commission, the European Parliament and the Council heavily rely on waiting periods to coordinate unemployment benefits and regulate the position of posted workers.[[38]](#footnote-37) Delaying social protection aligns with popular views[[39]](#footnote-38) and enjoys a measure of academic support from disciplines including sociology,[[40]](#footnote-39) public finance[[41]](#footnote-40) and political theory.[[42]](#footnote-41) I will argue that too much is made of waiting periods in the State of destination, because they serve the integration–protection nexus less well than two other tools and they interrupt social protection.

# Continuous social protection

## As a value

A second value that guides rule-makers is continuous social protection. It does not presuppose constant receipt of benefits. Rather, it exists where one State pays full benefits; where several States grant adequate partial benefits; and where benefit claims are rejected on grounds entirely unrelated to migration.[[43]](#footnote-42) Put simply, old-age pensions should not be granted to the young, but neither should they be refused to the elderly because of their nationality or place of residence. Social protection would not be continuous should it be more costly for migrants than for sedentary persons, because their contribution duties or other duties (e.g. jobseeking) are inflated.

The case for continuous protection is easily made. Other things being equal, people should have access to social protection somewhere. Retirees should receive pensions. Migrants might switch from one welfare system to another, but allowing them to fall between two stools would weaken the social justice principles immanent in welfare systems, such as protecting people against social risks. Migrants’ capacity to lead a good life would be bereft of public support. Exclusion from certain welfare benefits, such as minimum subsistence benefits and healthcare, even threatens “the capacity of citizens to live their lives with at least a minimum of autonomy and dignity”.[[44]](#footnote-43) More broadly, if social protection is discontinued, social risks that all interested States consider to be public would be privatized. The burden they entail would be born, not by the welfare state, but by their victims. Finally, continuous social protection promotes fundamental rights. In addition to social rights, it imbues EU citizenship with meaning, facilitates the right to free movement, and realizes equality between migrants and non-migrants.

Integration is often put on a pedestal. While accepting that ranking values in the abstract is a perilous exercise, I generally favour continuous social protection over the integration–protection nexus and harmony, in no small part because of the profoundly disruptive impact on people’s lives that (the prospect of) a lack of social protection has.[[45]](#footnote-44)

## In EU law

The EU legislator’s commitment to continuous social protection is evident from the measures it took to neutralize migration-related disqualification grounds. Nationality discrimination and residence conditions are banned by Articles 4 and 7 Regulation 883/2004. Under its Article 6, a State conditioning benefits on past work, insurance or residence ought to aggregate—i.e. take into account—foreign periods of work, insurance or residence. Waiting periods can be set, but they affect sedentary persons as much as migrants. Article 5 Regulation 883/2004 requires a Member State to treat facts or events occurring abroad as if they took place on its own territory. The ECJ goes to great lengths to plug gaps in social protection.[[46]](#footnote-45) It

“has repeatedly held that the aim of Article 45 TFEU would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage European Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom”.[[47]](#footnote-46)

As regards benefits other than social security, the equal treatment and free movement provisions of primary and secondary law are the principal means to avoid gaps in social protection. None of this is to say that continuous social protection is guaranteed to all, as some migrants fail to clear the obstacles that EU law[[48]](#footnote-47) and national practices[[49]](#footnote-48) place in their way.

It is often assumed that there must be a trade-off between continuous social protection and the integration–protection nexus: to take integration seriously is to interrupt the social protection of migrants with poor integration credentials, and to make social protection continuous is to lower integration thresholds. Sections 5 and 6 will show this dilemma to be partly false: two of the three tools that can ensure continuous social protection also serve the integration–protection nexus.

# Harmony

The last value is seen most clearly when disturbed. Harmony suffers when several legal orders are relevant, because they apply consecutively (4.1) or simultaneously (4.3), or because a person is outside the State whose laws apply (4.2). The fundamental problem is that, while the interpretation and application of rules is harmonious within a single legal order, rules are hard to interpret and apply when combined with rules from another legal order. The involvement of several legal orders may generate frictions that distort the outcome of cases. I will argue that attempts to restore harmony come at a cost—literally, as they tax administrative capacity, and figuratively, in that they undermine legal certainty among other things. There is therefore a clear interest in maintaining harmony by avoiding the engagement of more than one legal order. While a number of disharmonies have been commented upon in the literature,[[50]](#footnote-49) harmony is very rarely studied as a broader phenomenon.[[51]](#footnote-50) This Section will identify three causes of disharmonies. It will close with an attempt to flesh out the conceptual basis of harmony by building on private international law (4.4).

## Consecutive application

It would be absurd for everyone to permanently remain affiliated to the welfare schemes of their State of birth, regardless of their movements. If the integration–protection nexus is not to be stretched to breaking point, migration must often be accompanied by a shift in welfare system.

This transfer is liable to generate disharmonies, because welfare states take an interest in claimants’ past. A State may for instance require two years of work. If its legislation applied throughout that period, it simply needs to ascertain whether the claimant lawfully worked at the time. Should he or she have spent part of that period working abroad, affiliated to foreign welfare schemes, a State faces difficult decisions.

First, it could decide to ignore all foreign periods and deny newcomers benefits, even though they might have worked abroad—impeding the free movement of persons.[[52]](#footnote-51)

Alternatively, a State could accept all foreign periods, regardless of what they relate to. A period of study or unemployment might then count as a period of work.[[53]](#footnote-52) While migrant-friendly, indiscriminately taking into account all periods would be problematic. The ECJ (over)stated that “compelling Member States to treat [periods during which workers participated in certain …] schemes *automatically* as equivalent would in effect deprive them of their competence in the field of social protection.”[[54]](#footnote-53)

From a blind equation of foreign and domestic periods, it is only a small step to waive the period requirement altogether for migrants. This would treat them more favourably than national workers and exacerbate the loss in competence.

A last option would be to equate foreign periods if they are equivalent to the required periods—like is treated alike. This approach, prescribed by Articles 5 and 6 Regulation 883/2004, has great merits in reconciling social competence with equal treatment,[[55]](#footnote-54) but often necessitates “a comparative examination […] on a case-by-case basis”.[[56]](#footnote-55) In order to establish equivalence, the institutions of the competent State have to determine whether the person worked at the time in accordance with the relevant foreign law; and whether the period is equivalent to their own period. They must apply foreign law and compare it to their own.[[57]](#footnote-56) This labour-intensive exercise involves considerable administrative expense, which acquires heightened relevance in times of austerity. It is susceptible to error due to a lack of resources and expertise.

Work periods are part of a broader group of prior conditions—conditions that ought to be fulfilled before the benefit claim—that raise disharmonies by bringing legal orders into contact. While reasoning in terms of equivalence mostly yields satisfactory results, it would be simpler to avoid foreign law becoming relevant. Disharmonies can be prevented by removing their first cause: the consecutive application of several legal orders.[[58]](#footnote-57) Ideally, conflict rules would not switch the applicable legislation every time a person crosses a border.

EU law has at best a mixed record in this respect. Most conflict rules of Regulation 883/2004 promptly respond to movement. Under the *lex loci laboris*, the day a person takes up work in another Member State is the day he or she becomes subject to its legislation.[[59]](#footnote-58) The EU legislator’s wish to curb the excesses of that rule by countering avoidable switches in the applicable legislation is evident from the posting rule.[[60]](#footnote-59) Without that rule, service providers performing a short stint abroad would be subject to the legislation of their State of establishment, before fleetingly transferring to the laws of the other State, and finally reverting to the first laws. Each switch could result in disharmonies if the prior conditions of one State relate to a time when its legislation was inapplicable. By anchoring such service providers to the social security system of their State of establishment even when they temporarily work abroad, the posting rule averts those disharmonies. Harmony thus contributes to justifying the posting rule.

## Absence

The *Naruschawicus* case illustrates that harmony is also diminished when a person is abroad.[[61]](#footnote-60) The predecessor of Regulation 883/2004 allowed some jobseekers to claim the unemployment benefits of a State in which they did not reside.[[62]](#footnote-61) The Belgian institutions had to decide whether to grant unemployment benefits to Ms Naruschawicus, whom they considered not to be available to the Belgian labour market because she resided in Germany.[[63]](#footnote-62) Essentially, they could (i) waive or relax their jobseeking requirement; (ii) equate jobseeking in Germany to jobseeking in Belgium under certain conditions; or (iii) insist on full availability to the Belgian labour market.[[64]](#footnote-63)

None of the options are entirely satisfactory. A waiver or relaxation would lead Belgium to grant unemployment benefits to persons who do not seek work—demonstrably, sufficiently, or at all. It would undermine unemployment schemes and treat migrants more favourably than sedentary persons. In order to take into account jobseeking abroad, Belgium would have to regularly send inspectors to the place of residence of the claimant, which is impracticable; or to trust foreign employment services to monitor jobseeking efforts, which is implausible.[[65]](#footnote-64) The final option—to ignore jobseeking efforts abroad—would at best inconvenience unemployed persons, who might have to travel far and often, and at worst strip them of benefits, even though they worked in Belgium and contributed to the Belgian unemployment schemes.

No such hard choices would need to be made had Ms Naruschawicus received German benefits or resided in Belgium. The difficulties arose because she was outside the State responsible for her benefits.

This type of disharmony is liable to arise whenever a State must verify whether a person who is abroad complies with contemporaneous conditions. What requirements ought to be fulfilled during the payment of the benefit? Eligibility always depends on the existence of the social risk: if unemployment, ill health or poverty come to an end, so will related benefits. Other factors that influence entitlements, such as the claimant’s family situation, also need periodic verification. Benefits are increasingly activated, in that the beneficiary has obligations to act during the payment of the benefit. Jobseekers and persons with disabilities in particular are expected to participate in programmes facilitating their return to the labour market. Each contemporaneous condition has the potential of generating a disharmony when the claimant is abroad. Such requirements represent a significant challenge, because of their prevalence in domestic welfare law[[66]](#footnote-65) in combination with the State’s duties to export benefits and to take into account foreign facts.[[67]](#footnote-66)

To prevent this disharmony, people are best governed by the legislation of the State where they are at any given time. The two main conflict rules of Regulation 883/2004 largely, if incompletely, conform to this ideal. The *lex loci laboris* subjects workers to the legislation of the State where they currently work (even though they may reside elsewhere); the *lex loci domicilii* subjects economically inactive persons to the laws of the State where they habitually reside (even though they may stay elsewhere). Neither rule subjects all persons to the laws of the State where they are on a particular day.

## Simultaneous application

Finally, harmony is dented where more than one legal order applies simultaneously. Imagine that the responsibility to pay unemployment benefits is split between the two States where a jobseeker has worked. What formula would be used to calculate an appropriate amount? In a different context, Advocate General Warner argued that “what […] constitutes ‘unjustifiable’ duplication of benefits is a matter of opinion. There is no objective standard by which it can be judged”.[[68]](#footnote-67) Would the beneficiary have to seek work in both States? Alternatively, would one State have to take into account jobseeking efforts abroad, and, if so, which? What if one State obliges jobseekers to take part in work placements, which the other considers to end the unemployment and the benefits?

While sophisticated answers to these questions are conceivable,[[69]](#footnote-68) the path of least resistance surely is to avoid the simultaneous application of several legal orders. Regulation 883/2004 and ECJ case law suggest that this lesson has been partly learned. Contributions are never due in more than one State at any given point in time.[[70]](#footnote-69) Benefits are sometimes divided between States, but not without reason.[[71]](#footnote-70) One purpose of the regulation’s conflict rules is “to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue”.[[72]](#footnote-71) This judicial mantra is paraphrased in the fifteenth recital of the preamble to Regulation 883/2004, and elevated to the principle that “[p]ersons to whom this Regulation applies shall be subject to the legislation of a single Member State only.”[[73]](#footnote-72)

## The unity and spatial limits of the legal order

Having illustrated the difficulties that arise when several legal orders bear on a single case, flesh can now be added to the bones of harmony by borrowing and adapting insights from private international law. A legal order is conceived as a self-contained unity.[[74]](#footnote-73) A State regulates interconnected questions in a coherent manner:[[75]](#footnote-74) the solution selected in one domain is conditioned by the choices made in another. Germany for instance grants an early retirement pension to those who have participated in a German part-time work scheme for older employees. The German legislator coordinates its social security law with its labour law. German rules are well adapted to one another.[[76]](#footnote-75) Consequently, the application of law is harmonious, as long as all the relevant law belongs to the same legal order.[[77]](#footnote-76)

Cases with meaningful ties to several States, however, may engage their rules, perturbing the unity of each legal order:

“Le litige international met en mouvement à la fois des règles nationales et des règles de droit étranger. Or si l’application simultanée et l’enchaînement d’une multitude de règles juridiques aboutissent à une solution satisfaisante et harmonieuse en droit interne, il n’est plus ainsi dès que l’on unit les règles internes aux règles de provenance étrangère”.[[78]](#footnote-77)

After a career spanning Germany and Austria, Mr Larcher claimed a German early retirement pension, having taken part in an Austrian part-time work scheme for older employees. How well do German social security law and Austrian labour law combine?

The problem is exacerbated by the fact that almost all welfare law is created in and for a purely domestic context. Disharmonies are often unforeseeable, given that they result from the encounter of domestic and foreign law.[[79]](#footnote-78) Even a zealous and enlightened rule-maker bent on regulating with one eye on transnational cases would struggle to predict let alone satisfactorily resolve more than a fraction of the disharmonies that can arise. German social security law can be combined with the labour law of any country. I would therefore argue that disharmonies are caused by intrinsic features of legal orders—their spatial scope is bounded, and they are conceived as a cohesive whole by rule-makers with limited capacities.

The most structural and effective way to maintain harmony is to preclude more than one legal order from being relevant. Prevention may or may not be better than cure, it certainly is easier. The EU’s (half-conscious) commitment to harmony is apparent from its efforts to base the applicable legislation on presence and to avoid the consecutive or simultaneous application of several legal orders. Disharmonies, however, cannot be rooted out entirely, and, as we shall see, attempts to maximize harmony undermine competing values, in particular continuous social protection and the integration–protection nexus (Sections 5 and 6).

Disharmonies throw up thorny issues. Much as it might be tempting for administrations to disregard foreign law, in so doing they risk contravening EU law and distorting the outcome of a case.[[80]](#footnote-79) Citizens might receive too little or too much, or contribute too little or too much. Disharmonies that are not or poorly dealt with could undermine national or EU goals by affecting social security bodies, who might for instance see their ability to monitor jobseeking curtailed, or migrants, who might see their jobseeking duties doubled. Seeing as the root of disharmonies lies in the involvement of foreign law, most satisfactory solutions involve consulting it with a view to deciding whether to take it into account. This is a resource-intensive process, which is not necessarily performed often and well, even though it is generally mandatory.[[81]](#footnote-80) The relevance of several legal orders creates mess that institutions are ill-equipped to clear, given the pressures they face and the number of seasoned comparatists in their ranks. The imbroglio inflates the costs of administering welfare cases and fits uneasily with the demands of mass administration. Rules are hard to interpret when combined with rules of another legal order. Legal uncertainty ensues. Other things being equal, then, the involvement of more than one legal order is best avoided. We shall see that the four regulatory tools differ in their capacity to prevent disharmonies.

# From the State of origin to the State of destination

EU social benefits law is animated by many values, goals and interests, three of which are foregrounded here. The integration–protection nexus, continuous protection and harmony are worth pursuing, at least other things being equal. That seems to be broadly the position of the EU legislator and the ECJ, judging by their statements and decisions. The three values are internalized by EU institutions, at least partly, instinctively and inchoately. They help to explain rules of EU social benefits law, ranging from the principle that the legislation of a single Member State shall apply[[82]](#footnote-81) to the *lex loci laboris*. The significance of the values goes beyond description and explanation. They can contribute to appraising rules. Whether a rule effects continuous protection, and how it relates to integration and harmony, matters a great deal. And yet, no rule of EU social benefits law has been assessed against all three values.

In the remainder of this article, I will show that the different parts of EU social benefits law share not only values but also regulatory tools. I will first depict each tool as a vehicle for achieving a pair of values, but no more (5.1–5.4). This finding about the relationship between tools and values sheds light on the relationship between values: a trilemma is at work (5.5). I will then give examples of rules incarnating the tools (5.6). Not only the trilemma, but also the Treaty limits what can be done in EU social benefits law (5.7). In Section 6, I will turn to the last tool, plurality, which involves the simultaneous application of the laws of more than one State, such that a migrant’s social protection is effectively spread over several welfare systems.

## Timing the transition

Even in its simplest form, migration entails a series of choices and actions. It begins with a decision to relocate and arrangements made to that end. Then comes the day the person becomes a migrant by crossing the border. In the following weeks and months, she will acquaint herself with her new environment and sink increasingly deep roots. At some point, she might self-identify as a full member of the society and labour market of the State of destination. There will also be a moment when the centre of gravity of her personal or professional life can be said to have moved. Along this timeline, when exactly is social protection to be lost in the State of origin and acquired in the State of destination? The transition into and out of welfare systems ought to be timed precisely.

The first possibility would be for the shift in social protection to concur with the crossing of the border. As a result, the day people move is the day they lose and acquire social protection. The *lex loci laboris* implements that idea, in that workers are subject to the social security system of their State of work from their first till their last day at work.[[83]](#footnote-82)

Such an instant transition seems to have fallen out of favour with rule-makers. Four interior ministers set the tone in a 2013 letter to the Irish Presidency of the Council of the European Union:

“Arrangements at national or EU level that allow those who have only recently arrived in a Member State and have never been employed or paid taxes there to claim the same social security benefits as that Member State’s own citizens are an affront to common sense and ought to be reviewed urgently.”[[84]](#footnote-83)

Waiting periods delay the transition from one welfare system to another. They often create a gap—social protection is lost upon exiting the State of origin, without being acquired upon entering the State of destination. Ms Dano for instance was left without minimum subsistence benefits.

That waiting periods need not result in a gap in social protection is illustrated by the posted worker who overstays the two-year posting period.[[85]](#footnote-84) For the first two years, he or she remains subject to the social security schemes of his or her State of origin, after which he or she segues into the schemes of the State of destination. Such a waiting period might appeal to rule-makers who are wedded to continuous protection.

There are accordingly three tools for organizing the shift from the State of origin to the State of destination: the instant transition, the waiting period in the State of destination only (“the asymmetrical waiting period”), and the waiting period in both States (“the symmetrical waiting period”). Asymmetrical waiting periods have attracted most academic attention.[[86]](#footnote-85) The instant transition is occasionally discussed as the “one-day rule.”[[87]](#footnote-86) Plurality[[88]](#footnote-87) and symmetrical waiting periods[[89]](#footnote-88) are infrequently floated as an alternative to asymmetrical waiting periods, but otherwise neglected. While rules embodying the four regulatory tools have been commented upon, they have yet to be analyzed as distinct phenomena in the light of the three values.

## The asymmetrical waiting period

Asymmetrical waiting periods interrupt social protection, which is lost upon departure and only recovered after a while, it at all.[[90]](#footnote-89)

Their relation to the integration–protection nexus is ambiguous. It is implausible to claim full membership of the solidaristic community of the State of destination on the date of arrival. A well-calibrated waiting period, the duration of which reflects the time necessary to establish meaningful connections and considers the person’s intention to settle, would therefore seem to align with the nexus. From the perspective of the State of origin, however, asymmetrical waiting periods end social protection prematurely, as integration does not vanish the moment a person crosses a border. Ms Dano did not sever all ties with Romania the day she left—yet that is when she presumably lost all Romanian benefits.

While an asymmetrical waiting period could incarnate the integration–protection nexus, albeit suboptimally, the period set in *Dano* is excessively long since it allows States to refuse benefits to migrants who for all intents and purposes are fully integrated. Ms Dano would qualify for German minimum subsistence benefits only when her circumstances change, which could take five years or longer.[[91]](#footnote-90)

We saw that harmony suffers in three scenarios. A first source of disharmony—the simultaneous applicability of two legal orders—is not triggered by asymmetrical waiting periods. Neither is it relevant to symmetrical waiting periods or an instant transition. Second, disharmonies may appear where two legal orders apply consecutively, because the prior conditions of the competent State relate to a period when its legislation was not yet applicable. Such a shift in applicable legislation characterizes asymmetrical waiting periods, but it is near-inevitable. Few would argue that Ms Dano, who left Romania in her early 20s with no reported intention to return, should remain subject to Romanian law for life. I assume that migrants are not highly mobile—for such migrants the effects on harmony of the various options for timing the transition are too complex to be modelled here.[[92]](#footnote-91) With that caveat, the threat to harmony springing from the consecutive application of several laws is not much affected by the existence and features of waiting periods. The third source of disharmony is the presence of the person outside the competent State. Asymmetrical waiting periods do not disturb harmony in that way.

On the whole, then, they are conducive to harmony, but puncture the continuous web of social protection. They are capable of translating the integration–protection nexus into law, although the immediate loss of social protection in the State of origin is very far from ideal. Two values can be combined, but not three.

## The instant transition

An EU legislator minded to plug the gap in social protection could synchronize the legal shift with the crossing of the border. Ms Dano would qualify for German benefits upon entering Germany. While politically unpalatable with regard to citizens in her situation, such an instant transition has many merits. It would be roughly[[93]](#footnote-92) as effective as asymmetrical waiting periods in achieving harmony. Claimants would not generally be present outside the competent State; one law only would apply at any given time; and switches in the applicable legislation are unavoidable up to a point. The main objection to an instant transition is the integration–protection nexus. Ms Dano would lose Romanian benefits immediately, although she is still very strongly connected to Romania, and acquire German benefits when she has only just arrived in Germany. The instant transition accordingly furthers two values.

## The symmetrical waiting period

In academic and policy circles, some criticize the gap in social protection *Dano* creates, while others welcome the fact that social protection is withheld from those who have weak integration credentials.[[94]](#footnote-93) Could a symmetrical waiting period satisfy both camps, reconciling as it does continuous social protection with the integration–protection nexus? After moving, Ms Dano would remain eligible for Romanian benefits as long as she is deprived of German benefits. Social protection, though continuous, might be inadequate inasmuch as Romanian minimum subsistence benefits match Romanian rather than German living standards.[[95]](#footnote-94)

The symmetrical waiting period can serve the integration–protection nexus better than the two tools discussed above. It speaks directly to the intuition that newcomers are not immediately integrated, and contradicts portrayals of migrants as “nomads who, like offshore mutual funds in search of fiscal windfalls, move hither and tither [sic] across the Continent to grow rich on loopholes in social security laws”.[[96]](#footnote-95) Saydé noted that, “by suspending the regulatory benefit sought, [waiting] periods seek to ensure that decisions of Union citizens are underpinned by socioeconomic motives, and not only by a gain-seeking choice of law.”[[97]](#footnote-96) Unlike the asymmetrical waiting period and the instant transition, the symmetrical waiting period recognizes that States remain responsible for those who leave their territory, at least in first instance, because of their past connections. The integration–protection nexus calls for Member States to support their emigrants in difficulties. This would turn the nationality argument that is so readily invoked as an exclusionary shield against foreigners into an inclusionary device in favour of expatriates—or, preferably, emigrants whatever their nationality. “Conceptually, limitations on incoming citizens and generosity for outgoing nationals are two sides of the same coin, if social affiliation – not territorial presence – guides the scope of transnational rights.”[[98]](#footnote-97)

While they might help to allay fears surrounding immigration without depriving migrants of social protection, symmetrical waiting periods come at a considerable cost in terms of harmony. True, they do not result in the simultaneous application of two legal orders, whose consecutive application is often inevitable. What sets symmetrical waiting periods apart is that they require a State to award benefits to a person who has left its territory. Eligibility depends on the continued compliance with contemporaneous conditions. How is Romania to verify whether Ms Dano fulfils her duties after she left its territory? If Romanian benefits are conditional upon participation in labour market activation programmes, should Ms Dano partake in equivalent German programmes? The Romanian institutions would have to investigate those programmes with a view to comparing them to Romanian programmes. This disharmony does not plague the two tools discussed above.

## The trilemma

In sum, there are three major tools for timing the transition from one welfare system to another. All are capable of achieving two values, but not three. The instant transition harms the integration–protection nexus; the asymmetrical waiting period discontinues social protection; and the symmetrical waiting period undermines harmony. This, then, is the trilemma.[[99]](#footnote-98) Along with the tools and the values, it is a thread running through EU social benefits law.

Estimating the effectiveness of tools in attaining values does not only demonstrate the trilemma. It allows to recommend tools to rule-makers on the basis of their normative preferences, and to infer those preferences from the tools they have used. A choice of tool is a choice of values.

The trilemma constrains the EU legislator and the ECJ. Their reliance on all tools, illustrated more amply below, means that they are unable to either wholly abandon or fully commit to one value. Whether by accident or design, they prioritize different values in different contexts. The trilemma at once sharpens and blunts criticism: one can find fault with any rule for running counter at least one value, but with no rule for failing to serve all three values.

To identify the trilemma is not to resolve it. Which regulatory tool one prefers, depends in part on how one ranks the values in the abstract. While I argued that continuous protection generally takes pride of place, ultimately the trade-offs must be made in full knowledge of the features of the benefit and the beneficiary. Other values, objectives and interests animating EU social benefits law also feed into the “ideal” timing of the transition. That body of law is meant to realize equality,[[100]](#footnote-99) facilitate free movement,[[101]](#footnote-100) enable fair competition,[[102]](#footnote-101) respect the integrity of welfare systems,[[103]](#footnote-102) preserve the regulatory autonomy of Member States,[[104]](#footnote-103) support the autonomy of migrants,[[105]](#footnote-104) minimize fraud and error,[[106]](#footnote-105) … Constitutional considerations are at play, given that the regulatory tools calibrate the balance between the State of destination, the State of origin and the citizen. *Dano*, for instance, shifts the risk of poverty from the State of destination to citizens.[[107]](#footnote-106) The posting rule allocates social risks between the State of origin, which remains competent for two years after departure, and the State of destination, which becomes competent at that point.[[108]](#footnote-107)

## Variations on three themes

Rule-makers have experimented with each regulatory tool. The instant transition is embedded in Regulation 883/2004. The *lex loci laboris* switches the applicable law for most social security benefits as soon as a person takes up work in the State of destination, which cannot delay the transition.[[109]](#footnote-108) Article 7(2) Regulation 492/2011 and Article 45 TFEU permit migrant workers to claim social advantages immediately: the State of work can neither demand past residence[[110]](#footnote-109) nor past work[[111]](#footnote-110)—though, as we shall see shortly, change might be afoot. Finally, the Patient Mobility Directive entitles patients to seek some treatments in the Member State of their choice without delay.

Symmetrical waiting periods are housed almost exclusively in Regulation 883/2004. The simplest example is the two-year period for posted workers. The *lex loci domicilii* delays the transition to the social security system of the State of destination until migrants’ habitual centre of interests has moved; in the interim they remain subject to the system of their State of origin.[[112]](#footnote-111) Other symmetrical waiting periods are benefit-specific. Article 57 Regulation 883/2004 provides that migrants in principle do not acquire the old-age pensions, survivors’ pensions and some invalidity pensions of a State until they have been insured or resident there for a year, while ensuring that shorter periods of insurance or residence yield pension rights in other Member States. More generally, the coordination of such pensions amalgamates symmetrical waiting periods with plurality.[[113]](#footnote-112) Lastly, the EU legislator is contemplating attaching such periods to unemployment benefits.[[114]](#footnote-113)

In domestic law, leavers tend to lose social protection immediately, while newcomers are made to wait, sometimes indefinitely. The fondness of national lawmakers for asymmetrical waiting periods is indulged in parts of EU law. The Citizenship Directive is largely built around them: the residence rights, equal treatment rights and welfare rights of non-workers in the host State consolidate over time. Member States can withhold (i) social assistance[[115]](#footnote-114) and even some pure social security benefits[[116]](#footnote-115) from economically inactive EU citizens until their right to reside is secure; (ii) social assistance from jobseekers until they acquire a stronger status such as that of worker or permanent resident;[[117]](#footnote-116) and (iii) maintenance aid until the student becomes a worker, a family member of a worker, or a permanent resident.[[118]](#footnote-117) The ECJ strengthened these asymmetrical waiting periods by insulating them from challenge under primary law, by neutering the principle of proportionality, and by defining “social assistance” broadly.

Even the more migrant-friendly “real link” case law mostly results in asymmetrical waiting periods, as the State of destination may refuse benefits until the person has established a real link with its society or labour market, which tends to be time-consuming.[[119]](#footnote-118) The gap in social protection may be shortened if the State of origin is brought to maintain benefits after departure because the real links of the claimant fade rather than ending overnight.[[120]](#footnote-119) The increased social responsibilities of the State of origin help “the migrant to move closer to the point at which he or she can instead claim to be assimilated into the welfare system of the host state.”[[121]](#footnote-120) If the gap is bridged, the waiting period is symmetrical.

In three recent cases concerning the access of the children of migrant workers to the study finance of Luxembourg, where their parents worked but no family member resided, the ECJ allowed asymmetrical waiting periods to make inroads in the free movement of workers. Luxembourg sought to increase the proportion of its population that is highly educated by offering grants and loans to its residents, even if they study abroad. The ECJ found this residence condition to be indirectly discriminatory in *Giersch*. While its aim was legitimate, it went beyond what is necessary, as other elements could establish “the existence of a reasonable probability that the recipients of that aid will return to settle in Luxembourg and make themselves available to the labour market of that Member State”.[[122]](#footnote-121) The ECJ suggested that “the financial aid could be made conditional on the frontier worker, the parent of the student who does not reside in Luxembourg, having worked in that Member State for a certain minimum period of time.”[[123]](#footnote-122) Luxembourg reacted by opening its study finance to non-resident students, provided that one of their parents has worked in Luxembourg for a continuous period of five years. In *Bragança Linares Verruga*, the ECJ considered this waiting period to be appropriate, as it establishes a sufficient “connection on the part of those workers to Luxembourg society and a reasonable probability that the student will return to Luxembourg after completing his studies.”[[124]](#footnote-123) It was however disproportionate, because the student’s parents had worked over five years in Luxembourg, albeit with short interruptions. By the time *Aubriet* was heard, the Luxembourg legislation had again been modified: the parent should have worked five years in the seven years preceding the claim. Mr Aubriet’s father had worked in Luxembourg for over 17 years, but only two of these fell in the seven-year reference period. The ECJ did not question the necessity of the five-year waiting period. Instead, it focused entirely on whether the reference period was necessary to increase the number of highly educated Luxembourg residents. Straying from its usual approach, the ECJ did not require Luxembourg to look into the circumstances of the case to establish whether other ties bind the worker to its society:

“[t]he principle of non-discrimination and the principle of proportionality cannot be interpreted as requiring such an assessment on a case-by-case basis by a public authority responsible for a standardised mass procedure.”[[125]](#footnote-124)

Nonetheless, the seven-year reference period was disproportionate as it “is not sufficient to make full assessment of the significance of that cross-border worker’s connections with the Luxembourg labour market”.[[126]](#footnote-125) The three rulings show that the ECJ now treats five-year waiting periods with a degree of deference[[127]](#footnote-126) at least for non-resident, economically inactive students, whose parents are non-resident workers and who study outside the State whose study finance they claim. While it remains to be seen how far this leniency extends, especially as it is rare for claimants to be so tenuously linked to the State of work, it is striking that asymmetrical waiting periods are gaining a foothold in the free movement of workers, from which they were once categorically banned.[[128]](#footnote-127)

Finally, had the referendum gone the other way, the New Settlement for the United Kingdom within the European Union would have introduced asymmetrical waiting periods for migrant workers rather than their children. An emergency brake would have enabled 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.”[[129]](#footnote-128)

EU institutions accordingly time the transition between the State of origin and the State of destination differently depending on the benefit and beneficiary. It will be seen that the rules of EU social benefits law that cannot be framed as variations on these three highly stylised tools are instances of the fourth tool, plurality (Section 6).

## An obstacle to free movement?

The EU legislature can choose freely between the tools, as long as it stays within the parameters set by the Treaty. This Section will conclude that the asymmetrical waiting period is at the highest risk of being incompatible with the Treaty.

When it finds a tension between the social security regulations and the Treaty freedoms, the ECJ is traditionally strict.[[130]](#footnote-129) While affording the EU legislature “wide discretion”[[131]](#footnote-130) in the field of social security, the ECJ has not shied away from invalidating its provisions.[[132]](#footnote-131) Teleological interpretation also enables it to steer a Treaty-friendly course, “emasculating”[[133]](#footnote-132) if need be rules of secondary legislation that stand in its way.[[134]](#footnote-133) It is “settled case-law” that “the provisions of Regulation No 1408/71 [now Regulation 883/2004] must be interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers”.[[135]](#footnote-134) The ECJ has further narrowed the gap between the regulation and the Treaty by subjecting national measures straightforwardly implementing the former to a proportionality analysis.[[136]](#footnote-135) Indirectly, through the national measure, it is the regulation that is reviewed and softened.[[137]](#footnote-136) Secondary legislation that is neither invalidated nor emasculated can still be circumvented.[[138]](#footnote-137) The classic example concerns patient mobility. Bypassing the regulation, the ECJ has derived new rights to cross-border health care from the free movement of services.[[139]](#footnote-138)

Using this arsenal, the ECJ has weakened variants on each option for timing the transition laid down in secondary law. The *lex loci domicilii* organized an instant transition for Mr Hendrix—when he relocated from the Netherlands to Belgium, his Dutch benefit for disabled young people came to an end, as competence for such benefits shifted to Belgium. The ECJ cast serious doubt on the proportionality of the Dutch decision to terminate a benefit paid to a Dutch national working in the Netherlands, with which he “has maintained all of his economic and social links”.[[140]](#footnote-139) An instant transition is thus not necessarily immune to the Treaty.

Neither is a symmetrical waiting period. Posted workers remain subject to the social security system of their State of origin and shift to the State of destination should they continue working there beyond the maximum period. In many respects, then, the cases of Mr Hudziński and Mr Wawrzyniak were textbook: posted from Poland to Germany for a number of months, they could draw Polish but not German child benefits.[[141]](#footnote-140) Without questioning the validity of the posting rule, the ECJ deemed its application in this case to be contrary to the free movement of workers. Germany ought to *immediately* award its child benefits, reduced by the amount of the Polish child benefits.

Asymmetrical waiting periods laid down in EU law are doubly exposed, as both the immediate end of the benefits of the State of origin and the delayed start of the benefits of the State of destination can be challenged. The ECJ regularly rules against the home State’s refusal to award maintenance aid to students who study abroad.[[142]](#footnote-141) While recognizing that “it may be legitimate for a Member State […] to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State”, the ECJ considered Ms Morgan and Ms Bucher to be sufficiently integrated because they “were raised in Germany and completed their schooling there.”[[143]](#footnote-142) Given that most adolescents find themselves in the same situation, “[i]f the Court’s reasoning were applied systematically, it could amount to the virtual abolition of territorial restrictions on student financial assistance.”[[144]](#footnote-143) The ECJ has created an escape valve by stressing that “EU law does not impose any obligation on the Member State to provide a system of education or training grants for studies in another Member State”,[[145]](#footnote-144) but it scrutinizes the policies of those Member States that do export their study finance for some students.

The delayed access to the benefits of the State of destination has also been successfully contested. At the root of the *Leyman* case was a provision of Regulation 1408/71 empowering Belgium to set a one-year waiting period. The ECJ neutralized it: Article 39 EC Treaty (now Art. 45 TFEU) requires Belgium to award its invalidity benefit immediately since delay would result in a migrant worker paying contributions on which there is no return, and being therefore disadvantaged in comparison with a sedentary worker.[[146]](#footnote-145)

That the ECJ has on occasion taken issue with all tools does not mean that they are equally vulnerable. Only an instant transition treats newcomers equally to nationals of the State of destination. It also ensures continuous social protection, and it generally serves free movement best. Finally, it aligns well with Article 48 TFEU, which mandates the EU legislature to guarantee “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”.

During a symmetrical waiting period, migrants are treated, not like nationals of the State of destination, but like nationals of the State of origin.[[147]](#footnote-146) While this may be considered to be an inferior kind of equality, the fact that a symmetrical waiting period guarantees continuous protection would help it to pass a test of compliance with the Treaty. Such waiting periods are reasonably conducive to free movement. Some might read Article 48 TFEU as requiring an instant transition. Upon closer inspection, a symmetrical waiting period is compatible with the wording of Article 48 TFEU, seeing as the State of origin aggregates periods until the State of destination takes over that duty. Its spirit is more concerned with continuity of protection than with the speed at which it changes hands. Although the coordination of pensions in Chapter 5 of Regulation 883/2004 relies in part on symmetrical waiting periods, the ECJ considers it, not as a breach of Article 48 TFEU, but almost as an manifestation thereof.[[148]](#footnote-147)

The prospects of asymmetrical waiting periods are least certain, as they treat migrants unlike nationals of either the State of destination or the State of origin, at least in first instance. They make migrants pay for exercising their free movement rights in the currency of social protection. The ECJ has found many asymmetrical waiting periods laid down in national law to be incompatible with the Treaty,[[149]](#footnote-148) but might have softened its stance in recent years. *Dano* and *Alimanovic* energize the directly discriminatory, asymmetrical waiting periods for economically inactive EU citizens and jobseekers laid down in the Citizenship Directive, which *Commission v UK* extends to some pure social security benefits.[[150]](#footnote-149) Not even workers—once unreservedly entitled to “full equality of treatment with nationals from the first day of work in the host Member State”[[151]](#footnote-150)—are always spared asymmetrical waiting periods. In *Bragança Linares Verruga* and *Aubriet*, the ECJ mildly objects only to very rigid five-year periods that either do not allow for a break of two and a half months over almost eight years’ employment[[152]](#footnote-151) or disregard 15 years of work because of a relatively short reference period.[[153]](#footnote-152) It is worth bearing in mind that these were domestic measures, which tend to be scrutinized more closely than secondary EU law.

Be that as it may, the likelihood that a particular solution to the question of transition survives a test against the Treaty unscathed depends on its modalities. Workers have the strongest claim to immediate equal treatment. Not only the measure’s scope, but also its substance may be decisive. It is more likely to pass muster if social protection is continuous. The recipient’s contribution to the funding of the benefit might also be relevant, as the ECJ has made clear its dislike of measures resulting “in the payment of social security contributions on which there is no return”.[[154]](#footnote-153) Whether a specific transition contravenes the Treaty also depends on the objective justification invoked and the evidence presented. Although the EU legislature’s margin of discretion has widened, the compliance of a particular transition with the Treaty is a matter to be painstakingly investigated rather than lightly assumed.[[155]](#footnote-154)

# Either the State of origin or the State of destination?

Three tools were identified by asking when social protection ought to shift. The previous Section—like almost all of the literature[[156]](#footnote-155)—implicitly assumes that social protection ought to be organized in either the State of origin or the State of destination. Neither the instant transition nor waiting periods of any variety entail the *simultaneous* application of several legal orders, let alone overlapping of benefits. This assumption is problematic, as more than one State can be involved at the same time. A fundamental question faced by rule-makers is whether to concentrate social protection on a single State (“unicity”) or rather to spread it over several Member States by applying their laws concurrently, which may lead to the award of several partial benefits (“plurality”).[[157]](#footnote-156) Could plurality offer welcome relief from the trilemma that afflicts unicity?

Split social protection can be continuous, provided the laws of various States are astutely coordinated. Under Regulation 883/2004, retirees whose career spanned four Member States do not receive a full pension from the last State in which they worked.[[158]](#footnote-157) Instead, they receive four partial pensions, the sum of which corresponds to their entire career.[[159]](#footnote-158)

The integration–protection nexus strongly supports plurality. However subtle the measurement of integration and however well-timed the transition from one State to another, there is something inherently uneasy about the subjection of a person to the laws of only one of the States to which he or she is meaningfully connected.[[160]](#footnote-159) The fewer States are tasked with social protection, the more ties are severed. A finer translation of the integration–protection nexus would distribute welfare duties over the States with which migrants are meaningfully connected, in line with their degree of integration. For instance, the amount of each partial pension roughly reflects the time the retiree spent in the State granting it. In general, the integration–protection nexus is better served by plurality than by unicity.

Why then should welfare rights not always be apportioned to the time the claimant spent in a Member State, such that they collectively reconstitute full social protection? The main objection is that plurality is less harmonious than unicity. Harmony suffers when people are subject to the laws of a State in which they are not present, which is near-inevitable when they are subject to several legal orders—no pensioner is ubiquitous.[[161]](#footnote-160) The simultaneous application of multiple bodies of legislation engenders further disharmonies. Each State might levy contributions, impose obligations, and award benefits. The risk of States overpaying, underpaying, overcharging, or undercharging looms large. With considerable administrative effort, this risk is averted for old-age pensions. Only the tightest-knit coordination effectively avoids double burdens and welds partial benefits into the equivalent of a full benefit.[[162]](#footnote-161) Plurality offers no escape from the trilemma, as it too fails to combine three values.

Despite its fraught relationship with harmony, plurality remains uniquely apt to give shape to the integration–protection nexus in a way that could satisfy both the State of destination, which is relieved of some of its burden, and the citizen, who enjoys continuous protection. Contrary to what might then be expected, plurality is conspicuous by its absence in policy and academic debates. When commentators discuss plurality, more often than not they call for it to be replaced by unicity.[[163]](#footnote-162)

This is all the more striking as the ECJ has never limited, but routinely extended, plurality. It found only one form of plurality to be contrary to the Treaty. Each State to whose legislation a pensioner has been subject for over a year is competent for his or her old-age pension. Applying Article 46(3) Regulation 1408/71, a Belgian social security body capped Mr Petroni’s pension, despite the fact that he did not need European law to be entitled to it. The ECJ ruled that that provision was incompatible with Article 51 EEC Treaty (now Art. 48 TFEU) to the extent that it reduced rights acquired under national law alone.[[164]](#footnote-163) In the ECJ’s eyes, the regulation contained too little plurality rather than too much. While the *Petroni* ruling could have been confined to (i) pension rights (ii) that are based exclusively on the national law (iii) of a State designated as competent by the regulation, later case law chipped away at those limitations, injecting further doses of plurality into the coordination of social security benefits.

First, the *Petroni* judgment grew into the *Petroni* principle covering not just pensions but all social security benefits: no entitlement arising purely under the domestic laws of a Member State, leaving aside any provision of primary or secondary EU law, can be corroded by European law.[[165]](#footnote-164)

Second, the *Laterza* ruling stretched *Petroni* to family benefit entitlements that are *not* based on national law only.[[166]](#footnote-165) Under Regulation 1408/71, only Italy, where Mr Laterza resided, should grant a family benefit. The ECJ partially disapplied that rule. Consequently, Belgium, where Mr Laterza had worked in the past, was to supplement the Italian benefit up to the amount of its own family benefit, even though he had no right under Belgian law. The ECJ thus overrode the Council’s choice to concentrate responsibility for family benefits in a single Member State.[[167]](#footnote-166)

Third, *Bosmann* extended *Petroni* to Member States that are *not* competent under the regulation: alongside their rights in the competent State, migrants are entitled to all benefits available solely under the laws any other Member State.[[168]](#footnote-167) In *Hudziński and Wawrzyniak*, the ECJ went even further by obliging a non-competent State to grant benefits that were not based on its national law only.[[169]](#footnote-168)

Each of these controversial rulings broadens the pool of Member States that might have duties for a single person at a given time. The ECJ has strengthened plurality through invalidation (*Petroni*) and replaced unicity by plurality through interpretation (*Laterza*, *Bosmann*, and *Hudziński and Wawrzyniak*). The common denominator of those cases is that the Treaty demands plurality.[[170]](#footnote-169) The warm welcome plurality has found in Luxembourg is hardly unexpected. When carefully wrought, it entails partial equal treatment in both States resulting in continuous social protection and a reasonably supportive environment for free movement.

While plurality mostly governs social security, it occasionally applies to other benefits. Migrant workers and their children might for instance be able to claim social advantages such as study finance in the State of work and the State of residence on the basis of the Treaty, the Citizenship Directive, and Regulation 492/2011. Member States can take measures against such accidental overlapping.[[171]](#footnote-170)

# The regrettable rise of the asymmetrical waiting period

Most examples of asymmetrical waiting periods scattered throughout this article are recent. Since 2014, the ECJ energizes the Citizenship Directive’s waiting periods for the social assistance claims of economically inactive EU citizens and jobseekers.[[172]](#footnote-171) In the lead-up to the 2016 UK referendum, the emergency brake was negotiated and the ECJ enabled Member States to condition some pure social security benefits on the claimant having a right to reside.[[173]](#footnote-172) Barely a couple of months have passed since the ECJ confirmed that long waiting periods for some children of migrant workers are appropriate.[[174]](#footnote-173) The trend is clear, but unfortunate.

I insisted above that the choice between the tools ought to be made in context. Yet, even in the abstract, the asymmetrical waiting period rests on shaky normative ground compared to the other tools—at least in the light of the values foregrounded here. While it maintains harmony,[[175]](#footnote-174) it is alone in depriving migrants of social protection, a value to which I attached special significance. The integration–protection nexus is much less of a saving grace than might be thought. Where plurality or symmetrical waiting periods are deployed, every “unit” of integration can bring about an increment in social protection. By contrast, the asymmetrical waiting period entirely disregards integration in the State of origin, making it the penultimate choice for the integration–protection nexus. It wields integration primarily as an instrument of exclusion. Properly understood, however, the inclusionary and exclusionary dimensions of the nexus are two sides of the same coin.[[176]](#footnote-175) It is inconsistent to allow the State of destination to fixate on the past connections of the claimant and the State of origin to ignore them altogether.

Whereas all other tools rest on two values, including continuous social protection, the asymmetrical waiting period only serves one value optimally. Besides, it is more vulnerable to challenge under the Treaty than its alternatives, in no small part because it interrupts social protection. The instant transition is disparaged as “an affront to common sense”,[[177]](#footnote-176) but it is the asymmetrical waiting period that leaves most to be desired when tested against the three values and the Treaty. Member States dissatisfied with such periods need not wait for a European intervention. There is nothing stopping them from exporting full or partial benefits to persons (not just their nationals) who have left their territory, but do not yet (fully) qualify for benefits in the State of destination.[[178]](#footnote-177) In so doing, they would narrow or even close the gap in social protection. The exported benefits might enable citizens to demonstrate that they have sufficient resources to vest a right to reside in the State of destination, which could facilitate their access to its benefits.[[179]](#footnote-178)

# Conclusion

This article sought to answer four questions: (i) what are some of the main means of EU social benefits law; (ii) what are some of its main ends; (iii) how do the means relate to the ends; (iv) and how do the ends relate to one another?

The toolbox of EU social benefits law seems well stocked—it contains implements to suit many needs, but no silver bullet.[[180]](#footnote-179) If they are chiefly concerned, as is fashionable, about integration, rule-makers are spoilt for choice. They might opt for asymmetrical waiting periods, which would also preserve harmony, albeit at the price of discontinuing social protection and neglecting integration in the State of origin. Plurality and symmetrical waiting periods should also appeal, seeing as they both combine the integration–protection nexus with continuous protection. A rule-maker prepared to forsake high integration thresholds in order to realize continuous protection and harmony would be well advised to select an instant transition.

It is unfortunate that the tool most often advertised as a silver bullet—the asymmetrical waiting period—should in fact be resting on the shallowest legal and normative foundations. Despite the ECJ’s increasing leniency, it remains more exposed to challenge under primary law than its alternatives. While it serves harmony well, all other tools are preferable from the perspective of continuous protection, and two other tools embody the integration–protection nexus more realistically. In academic and political discourse, asymmetrical waiting periods are often presented as the ultimate incarnation of the integration–protection nexus. Though often ignored, symmetrical waiting periods and plurality are more effective to that end, since they reward integration in the State of origin with social protection. They show that it is possible to safeguard continuous protection while tightening its link to integration. Those taking a dim view of the instant transition need not accept a gap in social protection.

Of all values the integration–protection nexus might be the most visible. One may disagree on how much integration is required for social protection and on how integration is to be measured, but it is hard to conceive of integration and social protection as unrelated.

Harmony deserves a place in the sun in analyses of EU social benefits law. It is disturbed when several legal orders bear on a case. The resulting snarl can be untangled on a case-by-case basis. Doing so often presupposes a study in comparative law with the appendant administrative expense and risk of miscarriage of justice. Member States and the EU have an interest in preventing disharmonies from arising. Plurality is best avoided, as are symmetrical waiting periods. The instant transition and the asymmetrical waiting period are generally most conducive to harmony.[[181]](#footnote-180) In final analysis, disharmonies are the product of the unity of legal orders, their limited international scope, and the inevitable short-sightedness of rule-makers.

Ideally, people would be protected against social risks, which could have devastating effects on their lives, at all times. Migration might entail a shift from one system to another, but the transition should be seamless. In theory, continuous social protection can be guaranteed by an instant transition, by a symmetrical waiting period and by plurality. The latter two tools generate disharmonies, which could imperil continuous protection in practice. The reason is that disharmonies that are not resolved well might endanger the rights of citizens or augment their liabilities; that good solutions presuppose that administrations take into account foreign law; and that that is a delicate task carrying a significant risk of poor execution. Choosing a tool that scores low on harmony might accordingly expose continuous protection to some threats. A risk-averse devotee of continuous protection might therefore be drawn to an instant transition. This would moreover secure adequate benefit levels—symmetrical waiting periods and plurality can equip a German resident with (mostly) Romanian minimum subsistence benefits. If, on the contrary, continuous protection is dropped as a regulatory objective, the need for legal orders to be well adapted is less pressing, as the disharmonies that negatively affect migrants are unproblematic. A rule-maker unconcerned about continuous protection only need worry about disharmonies that inflate the liabilities of its institutions or deflate their revenues.

Our enthusiast of continuous protection might however have reservations about the instant transition for economically inactive EU citizens, at least as long as the Citizenship Directive and its interpretation are unchanged. That directive bases their equal treatment rights on their right to reside,[[182]](#footnote-181) which itself depends on having “sufficient resources for themselves and their family members not to become a burden on the social assistance system of the *host* Member State”.[[183]](#footnote-182) Benefits exported by the home State, be it under a symmetrical waiting period or plurality, help EU citizens establish a right to reside by funding them.[[184]](#footnote-183) By putting the entire burden on the host State, an instant transition could jeopardize residence rights, equal treatment rights, and continuous protection. If that risk materializes, citizens would face an asymmetrical waiting period in disguise.

This article opened with the observation that the law on the access to social benefits consists of a collection of interlinked legal frameworks. Examples of cross-pollination abound: *Dano* and *Commission v UK* stand at the confluence of the Treaty, the Citizenship Directive and Regulation 883/2004; *Bosmann* and *Hudziński and Wawrzyniak* are the product of that regulation and the Treaty; and the Patient Mobility Directive cannot be isolated from the free movement of services. But these frameworks share more than just contact points. Three threads run through the patchwork of disparate provisions and cases that make up EU social benefits law: the tools, the values and the trilemma. They are always relevant to the challenge of coordinating the cross-border access to any social benefit. From a more distant vantage point, we can see the wood through the trees.

Each value tells us something about what EU social benefits law does, why certain choices were made, and how judicious they are. EU institutions internalize the values, albeit incompletely and in part instinctively. Each value is also a piece in the normative puzzle. It would be no great exaggeration to state that the evaluation of many rules of EU social benefits law would not be quite complete without considering whether they secure continuous protection and how they relate to integration and harmony. Accordingly, each value has a descriptive, explanatory, and normative dimension. So does the trilemma. It enables us to grasp why all the regulatory tools discussed are used in EU law: the EU legislature clearly finds itself unable to drop one value in general, and instead prioritizes different pairs of values depending on the context. That no value is pursued fully should not surprise, as doing so would jeopardise at least one of the other two values. This help us to make sense of the EU legislator and the ECJ’s practices. EU social benefits law emerges in a new light inasmuch as many of its rules can be seen as variations on four regulatory tools. Familiarity with the contents of the toolbox permits to picture the alternatives to rules, which, alongside the knowledge that each rule runs against at least one value, focalizes criticism. At the same time, the finding that no course of action can achieve all three values contributes to legitimizing rules by tempering expectations. Rules would ideally be drafted in full knowledge of their alternatives and their effects on the values.

The values enrich the debate on the access of migrants to welfare benefits, which tends to be locked into a series of overlapping oppositions. EU social benefits law is often presented as pitting the (mobile) individual against the (immobile) collective; migrants against welfare states; transnational solidarity against national solidarity; opening against closure; or free movement against national regulatory autonomy.[[185]](#footnote-184) Such familiar divisions certainly have their place, but they do not exhaust the normative universe of EU social benefits law, and some of the values nuance them. For instance, while unresolved disharmonies are to the substantive advantage of administrations or migrants depending on the case, preventing disharmonies from arising brings a procedural advantage to both: institutions are spared a foray into foreign law, the outcome of which would be uncertain and worrying for migrants.

The choices between the various regulatory tools not only impact the values, but also raise constitutional issues. Some tools might offend free movement rights. All engage the relationship between the State of origin and the State of destination. They should interest those who have strong preferences for home State regulation or host State regulation.[[186]](#footnote-185) Increased reliance on waiting periods chips away at the dominance of host State regulation in matters of welfare—quite possibly to the host State’s delight. A broader point could be made building on Nic Shuibhne’s timely argument that the EU and its Member States should co-own free movement:

“Free movement is a shared competence, yet the Member States are too often portrayed as passive or even destructive actors (without much complaint on their part)—as valiant defenders of national priorities against ever more excessive obligations inflicted by the demands of free movement. It is time that Member States instead demonstrated leadership as active and constructive architects of the legal framework.”[[187]](#footnote-186)

Perhaps responsibility ought to be shared not only vertically between the EU and the Member States, but also horizontally between interested Member States. This strengthens the case for plurality and symmetrical waiting periods.

Be that as it may, the core conclusion of this article is that the four regulatory tools show what the EU legislator can do, and the trilemma what it cannot. It might be fitting to conclude this piece by drawing attention to its limitations. Having argued that there is no escape from the trilemma, I do not put forward a one-size-fits-all solution. The choice between the three values—and between the regulatory tools that embody them—is best made in context. It is only by looking at discrete sets of rules and the many values, objectives and interests they engage that one can meaningfully deliberate whether, for instance, a particular symmetrical waiting period is preferable to a particular type of plurality. The toolbox helps to translate preferences into policies; there is nothing particularly disturbing about different tools being used in different settings. It might be that the trilemma is more susceptible to “uneasy compromise […] than definitive resolution”.[[188]](#footnote-187)

1. An earlier version of this paper was presented at the 2018 CML Rev. conference. I am very grateful to the participants, the anonymous reviewers and Charlotte O’Brien for their comments. The usual disclaimer applies. [↑](#endnote-ref-1)
2. Regulation 883/2004 on the coordination of social security systems, O.J. 2004, L 166/1; Directive 2004/38 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 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96, O.J. 2004, L 158/77 (“the Citizenship Directive”); Directive 2011/24 on the application of patients’ rights in cross-border healthcare, O.J. 2011, L 88/45 (“the Patient Mobility Directive”); Regulation 492/2011 on freedom of movement for workers within the Union, O.J. 2011, L 141/1. [↑](#footnote-ref-1)
3. Case C-333/13, *Dano v Jobcenter Leipzig*, EU:C:2014:2358. [↑](#footnote-ref-2)
4. It is neither assumed that a migrant is a national of the State of origin nor that he or she is not a national of the State of destination. When I make these assumptions, I use the language of “home State” and “host State”. [↑](#footnote-ref-3)
5. See e.g. Verschueren (Ed.), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia, 2016). [↑](#footnote-ref-4)
6. Carens, *The Ethics of Immigration* (OUP, 2013), 92–100. [↑](#footnote-ref-5)
7. Ibid., 158. [↑](#footnote-ref-6)
8. Bellamy and Lacey, "Balancing the rights and duties of European and national citizens: A demoicratic approach", (2018), Journal of European Public Policy, 1403–1421; de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP, 2015); Sangiovanni, "Solidarity in the European Union", (2013), Oxford Journal of Legal Studies, 213–241, 234–240. [↑](#footnote-ref-7)
9. E.g. European Social Survey 2008, reported in Dustmann and Frattini, "The Fiscal Effects of Immigration to the UK", (2014), The Economic Journal, F593–F643, F593. [↑](#footnote-ref-8)
10. E.g. Dustmann and Frattini, op. cit. *supra* note 8; Martinsen and Pons Rotger, "The fiscal impact of EU immigration on the tax-financed welfare state: Testing the ‘welfare burden’ thesis", (2017), European Union Politics, 620–639. [↑](#footnote-ref-9)
11. Opinion of A.G. Trstenjak in Case C-325/09, *Secretary of State for Work and Pensions v Dias*, EU:C:2011:498, para 79. [↑](#footnote-ref-10)
12. E.g. Martinsen and Werner, "No welfare magnets – free movement and cross-border welfare in Germany and Denmark compared", (2019), Journal of European Public Policy, 637–655. [↑](#footnote-ref-11)
13. See Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart Publishing, 2014), 114–117. [↑](#footnote-ref-12)
14. Case C-238/15, *Bragança Linares Verruga v Ministre de l’Enseignement supérieur et de la Recherche*, EU:C:2016:949, para 67. See also e.g. Case 39/86, *Lair v Universität Hannover*, EU:C:1988:322, para 43. [↑](#footnote-ref-13)
15. Cappelen and Peters, "Diversity and welfare state legitimacy in Europe. The challenge of intra-EU migration", (2018), Journal of European Public Policy, 1336–1356. [↑](#footnote-ref-14)
16. E.g. Höpner and Schäfer, "Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting", (2012), International Organization, 429–455, 445–448; Menéndez, "European Citizenship after *Martínez Sala* and *Baumbast*: Has European Law Become More Human but Less Social?" in Maduro and Azoulai (Ed.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010), 391–393. A rare empirical study finds little evidence that free movement causes welfare state retrenchment in two Member States deemed especially vulnerable (Kramer, Thierry and van Hooren, "Responding to free movement: quarantining mobile union citizens in European welfare states", (2018), Journal of European Public Policy, 1501–1521). [↑](#footnote-ref-15)
17. Cf Thym’s “integration model” and “residence model” (Thym, "The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens", (2015), CML Rev., 17–50, 33–39). [↑](#footnote-ref-16)
18. Fuchs, de Cortázar, Kahil and Pöltl, "Assessment of the impact of amendments to the EU social security coordination rules on aggregation of periods or salaries for unemployment benefits", (FreSsco Analytical Report 2015), <https://ec.europa.eu/social/BlobServlet?docId=16958&langId=en>, 7. See also Spaventa, "Citizenship: Reallocating Welfare Responsibilities to the State of Origin" in Koutrakos, Shuibhne and Syrpis (Ed.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing, 2016), 38–39. [↑](#footnote-ref-17)
19. Cappelen and Peters, "The impact of intra-EU migration on welfare chauvinism", (2018), Journal of Public Policy, 389–417, 390. [↑](#footnote-ref-18)
20. Art. 19 Regulation 883/2004. [↑](#footnote-ref-19)
21. See below, Sections 5.4 and 6. [↑](#footnote-ref-20)
22. Missoc database <https://www.missoc.org/missoc-database/>. [↑](#footnote-ref-21)
23. Opinion of A.G. Wahl in Case C‑477/17, *Raad van bestuur van de Sociale Verzekeringsbank v Balandin*, EU:C:2019:60, para 63, emphasis in the original, approved in much less sweeping terms in the ECJ’s judgment, para 36. In the same vein, see Jorens, Spiegel, Fillon and Strban, "Key challenges for the social security coordination Regulations in the perspective of 2020", (trESS Think Tank Report 2013), <http://www.tress-network.org/tress2012/EUROPEAN%20RESOURCES/EUROPEANREPORT/trESSIII\_ThinkTank%20Report%202013.pdf>, 56. [↑](#footnote-ref-22)
24. Art. 11(3)(e) Regulation 883/2004. [↑](#footnote-ref-23)
25. E.g. Case 76/76, *di Paolo v Office national de l'emploi*, EU:C:1977:32, para 17. See further Art. 11 Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004, O.J. 2009, L 284/1. [↑](#footnote-ref-24)
26. Art. 11(3)(a) Regulation 883/2004. [↑](#footnote-ref-25)
27. E.g. Case C-456/02, *Trojani v Centre public d'aide sociale de Bruxelles*, EU:C:2004:488, para 15. [↑](#footnote-ref-26)
28. Art. 7(3)(b)-(c) and Art. 14(4)(b) Citizenship Directive. [↑](#footnote-ref-27)
29. Art. 7(3) Citizenship Directive. [↑](#footnote-ref-28)
30. Art. 7(1)(d)-(2) Citizenship Directive. [↑](#footnote-ref-29)
31. Art. 16 and Art. 24 Citizenship Directive. [↑](#footnote-ref-30)
32. Opinion of A.G. Trstenjak in Case C-325/09, *Dias*, paras. 77–78. [↑](#footnote-ref-31)
33. Case C-542/09, *Commission v the Netherlands (study finance)*, EU:C:2012:346, para 63; for economically inactive EU citizens, see e.g. Case C-209/03, *The Queen, on the application of Bidar v London Borough of Ealing*, EU:C:2005:169, para 57. [↑](#footnote-ref-32)
34. Case C-238/15, *Bragança Linares Verruga*, para 49. [↑](#footnote-ref-33)
35. Case C-209/03, *Bidar*, para 59. [↑](#footnote-ref-34)
36. Case C-523/11 and C-585/11, *Prinz v Region Hannover and Seeberger v Studentenwerk Heidelberg*, EU:C:2013:524, para 38. [↑](#footnote-ref-35)
37. Dougan, "Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?" in Barnard and Odudu (Ed.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), 134, references omitted. [↑](#footnote-ref-36)
38. In March 2019, an agreement reached in trilogue (hereinafter “the draft Regulation”) was defeated in the Council, after which the Parliament refrained from voting (General Secretariat of the Council, Proposal for a Regulation 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 final compromise text with a view to agreement (7698/19 Add 1 Rev 1, 25 March 2019)). Trilogues resumed in September 2019. [↑](#footnote-ref-37)
39. European Social Survey 2008, op. cit. *supra* note 8; Reeskens and van Oorschot, "Disentangling the ‘New Liberal Dilemma’: On the relation between general welfare redistribution preferences and welfare chauvinism", (2012), International Journal of Comparative Sociology, 120–139. [↑](#footnote-ref-38)
40. E.g. Reeskens and van Oorschot, op. cit. *supra* note 38, 132–133. [↑](#footnote-ref-39)
41. E.g. Richter, "Delayed Integration of Mobile Labor: A Principle for Coordinating Taxation, Social Security, and Social Assistance" in Cnossen and Sinn (Ed.), *Public Finance and Public Policy in the New Century* (MIT Press, 2003), 514–515; Sinn, "EU enlargement and the future of the welfare state", (2002), Scottish Journal of Political Economy, 104–115, 111–114; Weichenrieder and Busch, "Delayed integration as a possible remedy for the race to the bottom", (2007), Journal of Urban Economics, 565–575. [↑](#footnote-ref-40)
42. E.g. Bellamy and Lacey, op. cit. *supra* note 7, 1416–1417; Carens, op. cit. *supra* note 5, 118–122, 280–282; de Witte, op. cit. *supra* note 7; Sangiovanni, op. cit. *supra* note 7, 238–240. [↑](#footnote-ref-41)
43. If that is the case, it does not matter whether another State (e.g. where the person resides) denies benefits on migration-related grounds (e.g. the fact that he or she works abroad). [↑](#footnote-ref-42)
44. De Witte, op. cit. *supra* note 7, 139. [↑](#footnote-ref-43)
45. Sources valuing continuous protection include Opinion of A.G. Sharpston in Joined Cases C-95/18 and C-96/18, *Sociale Verzekeringsbank v van den Berg and Giesen*, EU:C:2019:252, paras. 24–25, 38–39; Cornelissen, *De Europese Verordeningen inzake Sociale Zekerheid: Europese Coördinatie van Arbeidsongeschiktheids- en Weduwenverzekeringen* (Kluwer, 1984); Hoogenboom, "Mind the Gap: Mobile Students and their Access to Study Grants and Loans in the EU", (2015), MJ, 96–119; O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing, 2017). [↑](#footnote-ref-44)
46. E.g. Case C‑679/16, *A*, EU:C:2018:601; Case C‑134/18, *Vester v Rijksinstituut voor ziekte- en invaliditeitsverzekering*, EU:C:2019:212. [↑](#footnote-ref-45)
47. Case C‑134/18, *Vester*, para 33. [↑](#footnote-ref-46)
48. See e.g. the cases referenced in notes 114–117. [↑](#footnote-ref-47)
49. E.g. O'Brien, op. cit. *supra* note 44. [↑](#footnote-ref-48)
50. In particular disharmonies found in the intersection between social security law on the one hand, and, on the other, labour law (e.g. Houwerzijl and Pennings, "Conflict(erende) regels in het socialezekerheids- en het arbeidsrecht" in Van Regenmortel, Verschueren and Vervliet (Ed.), *Sociale zekerheid in het Europa van de markt en de burgers: enkele actuele thema's* (die Keure, 2007)) or tax law (Spiegel, Daxkobler, Strban and van der Mei, "The relationship between social security coordination and taxation law", (FreSsco Analytical Report 2015), <http://ec.europa.eu/social/BlobServlet?docId=13534&langId=en>). [↑](#footnote-ref-49)
51. The most accomplished analysis is found in Eichenhofer, *Internationales Sozialrecht und Internationales Privatrecht* (Nomos Verlagsgesellschaft, 1987), where harmony is used to explore the interface between social security law and private law. [↑](#footnote-ref-50)
52. E.g. Case C-443/93, *Vougioukas v Idryma Koinonikon Asfalisseon*, EU:C:1995:394; Case C-137/04, *Rockler v Försäkringskassan*, EU:C:2006:106; Case C-185/04, *Öberg v Försäkringskassan, länskontoret Stockholm*, EU:C:2006:107. [↑](#footnote-ref-51)
53. It is assumed that both States require work. [↑](#footnote-ref-52)
54. Case C-523/13, *Larcher v Deutsche Rentenversicherung Bayern Süd*, EU:C:2014:2458, para 51, emphasis added. [↑](#footnote-ref-53)
55. Ibid., para 56. [↑](#footnote-ref-54)
56. Ibid., para 59. [↑](#footnote-ref-55)
57. In some circumstances, equivalence can be presumed (e.g. Art. 6 Regulation 883/2004). [↑](#footnote-ref-56)
58. Conflict rules that are less responsive to movement minimize such disharmonies, but engender others (see below, Section 4.2). [↑](#footnote-ref-57)
59. Art. 11(3)(a) Regulation 883/2004. [↑](#footnote-ref-58)
60. Art. 12 Regulation 883/2004. [↑](#footnote-ref-59)
61. Case C-308/94, *Office National de l'Emploi v Naruschawicus*, EU:C:1996:28. [↑](#footnote-ref-60)
62. Art. 71(1)(b)(i) Regulation 1408/71 on the application of social security schemes to employed persons
and their families moving within the Community, O.J. 1971, L 149/2. [↑](#footnote-ref-61)
63. She travelled to the Belgian unemployment office in order to undergo its checks. [↑](#footnote-ref-62)
64. In the event, they opted for the latter and refused the benefit, only to be overruled by the ECJ, which softened the availability requirement (Case C-308/94, *Naruschawicus*, paras. 23–27). [↑](#footnote-ref-63)
65. See Cornelissen, "The new EU coordination system for workers who become unemployed", (2007), EJSS, 187–219, 209. [↑](#footnote-ref-64)
66. Missoc database <https://www.missoc.org/missoc-database/>. [↑](#footnote-ref-65)
67. Art. 5 and Art. 7 Regulation 883/2004. [↑](#footnote-ref-66)
68. Opinion of A.G. Warner in Case 62/76, *Strehl v Nationaal Pensioenfonds voor Mijnwerkers*, EU:C:1977:18, at 223. [↑](#footnote-ref-67)
69. E.g. Chapters 5 and 8 Regulation 883/2004. [↑](#footnote-ref-68)
70. Art. 11(1) Regulation 883/2004; see also Art. 30 Regulation 883/2004. [↑](#footnote-ref-69)
71. See below, Section 6. [↑](#footnote-ref-70)
72. E.g. Case C-2/89, *Bestuur van de Sociale Verzekeringsbank v Kits van Heijningen*, EU:C:1990:183, para 12; Case C-451/17, *‘Walltopia’ v Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite — Veliko Tarnovo*, EU:C:2018:861, para 41. [↑](#footnote-ref-71)
73. Art. 11(1) Regulation 883/2004. [↑](#footnote-ref-72)
74. Von Schwind, "Von der Zersplitterung des Privatrechts durch das internationale Privatrecht und ihrer Bekämpfung", (1958), Rabels Zeitschrift für ausländisches und internationales Privatrecht, 449–465, 456–457. [↑](#footnote-ref-73)
75. Bureau and Muir Watt, *Droit international privé: Tome I, Partie générale* (Presses Universitaires de France, 2007), 472. [↑](#footnote-ref-74)
76. Ferid, *Internationales Privatrecht: Ein Leitfaden für Studium und Praxis* (Schweitzer, 1975), 99; Kegel, *Internationales Privatrecht* 7th edn (Beck, 1995), 260. [↑](#footnote-ref-75)
77. Looschelders, *Die Anpassung im Internationalen Privatrecht: Zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinander harmonierenden Rechtsordnungen* (Müller, 1995), 7. [↑](#footnote-ref-76)
78. “The international dispute involves domestic as well as foreign rules. While the simultaneous application of a multitude of domestic rules leads to a satisfactory and harmonious solution, that is not the case when domestic rules are combined with foreign rules” (Meierhof, cited in Cansacchi, "Le choix et l'adaptation de la règle étrangère dans le conflit de lois" in Académie de droit international de La Haye (Ed.), *Recueil des cours 1953-II, Tome 83* (Sijthoff, 1955), 112, own translation). [↑](#footnote-ref-77)
79. Cansacchi, op. cit. *supra* note 77, 112, 116–117. [↑](#footnote-ref-78)
80. In *Larcher*, the ECJ found that the Austrian schemes were similar to the German schemes and ought to be treated as equal. It wrote that “the outright exclusion from consideration, for the purposes of assessing entitlement to the German national retirement pension, of participation in a part-time work scheme for older employees in another Member State reflects failure to have regard to the fact that such a scheme in that other Member State may pursue identical or similar objectives to those of German law, in accordance with rules which are also identical or similar to those under German law, and that, accordingly, the application of that scheme is likely to attain, in the same way, the legitimate objective or objectives in question” (Case C-523/13, *Larcher*, para 42). [↑](#footnote-ref-79)
81. Art. 5 Regulation 883/2004; Case C-165/91, *van Munster v Rijksdienst voor Pensioenen*, EU:C:1994:359; Case C-290/00, *Duchon v Pensionsversicherungsanstalt der Angestellten*, EU:C:2002:234; Case C-3/08, *Leyman v Institut national d'assurance maladie-invalidité*, EU:C:2009:595; Case C-523/13, *Larcher*. [↑](#footnote-ref-80)
82. Art. 11(1) Regulation 883/2004. [↑](#footnote-ref-81)
83. Art. 11(3)(a) Regulation 883/2004. [↑](#footnote-ref-82)
84. Joint letter of four ministers representing the Austrian, German, Dutch and British governments, sent to the Council Presidency in April 2013, <http://docs.dpaq.de/3604-130415\_letter\_to\_presidency\_final\_1\_2.pdf>, 3. [↑](#footnote-ref-83)
85. Art. 12 Regulation 883/2004. [↑](#footnote-ref-84)
86. Recent examples include Barnard and Fraser Butlin, "Free movement vs. fair movement: Brexit and managed migration", (2018), CML Rev., 203–226; Nic Shuibhne, "Reconnecting free movement of workers and equal treatment in an unequal Europe", (2018), EL Rev., 477–510; O'Brien, op. cit. *supra* note 44; Reynolds, "(De)constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment?" in Thym (Ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing, 2017); Sangiovanni, "Non-discrimination, in-work benefits, and free movement in the EU", (2017), European Journal of Political Theory, 143–163. [↑](#footnote-ref-85)
87. E.g. Fuchs, de Cortázar, Kahil and Pöltl, op. cit. *supra* note 17, 18 a.f. [↑](#footnote-ref-86)
88. Van der Mei, "Coordination of student financial aid systems: Free movement of students or free movement of workers?" in Pennings and Vonk (Ed.), *Research Handbook on European Social Security Law* (Elgar, 2015). See also Jorens, Lhernould, Fillon, Roberts and Spiegel, "Towards a new framework for applicable legislation: New forms of mobility, coordination principles and rules of conflict", (trESS Think Tank Report 2008), <http://www.tress-network.org/tress2012/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank\_Mobility.pdf>, 27–29. [↑](#footnote-ref-87)
89. Fuchs, de Cortázar, Kahil and Pöltl, op. cit. *supra* note 17, 32 a.f.; Verschueren, "EU migrants and destitution: The ambiguous EU objectives" in Pennings and Vonk (Ed.), *Research Handbook on European Social Security Law* (Elgar, 2015), 438. [↑](#footnote-ref-88)
90. Another type of asymmetrical waiting period would involve the State of origin maintaining social protection till after the person left its territory, but not until social protection starts in the State of destination. Yet another possibility is for the State of origin to maintain social protection till after the migrant acquires it in the State of destination. This configuration entails the simultaneous application of two legal orders and is therefore best regarded as a (rather exceptional) instance of plurality. [↑](#footnote-ref-89)
91. After five years of continuous lawful residence, an EU citizen has the right of permanent residence, which comes with full equal treatment rights (Art. 16 Citizenship Directive). The requirement of lawfulness means that periods of dependency can reset the clock. For criticism, see e.g. Nic Shuibhne, "Limits rising, duties ascending: The changing legal shape of Union citizenship", (2015), CML Rev., 889–937, 932–934. [↑](#footnote-ref-90)
92. If Ms Dano were to frequently move back and forth between Romania and Germany, an instant transition would result in a flickering applicable legislation. A waiting period providing that she would only shift out of the Romanian system if she spent two consecutive years abroad would stabilize the applicable legislation, limiting the number of disharmonies arising from the consecutive application of different legal orders. That waiting period, however, would engender disharmonies due to Ms Dano’s absence from Romania while Romanian law applies—disharmonies that would have been avoided by an instant transition. Whether a delayed or instant transition is most harmonious for highly mobile persons depends on its modalities, the contemporaneous and prior conditions, and mobility patterns. [↑](#footnote-ref-91)
93. See previous note. [↑](#footnote-ref-92)
94. See e.g. Neergaard, "Europe and the Welfare State—Friends, Foes, or . . .?", (2016), YEL, 341–381, 372–379. [↑](#footnote-ref-93)
95. See Bruzelius, Reinprecht and Seeleib-Kaiser, "Stratified Social Rights Limiting EU Citizenship", (2017), JCMS, 1239–1253. [↑](#footnote-ref-94)
96. Forde, "The Vertical Conflict of Social Security Laws in the European Court", (1980), LIEI, 23–57, 31. [↑](#footnote-ref-95)
97. Saydé, op. cit. *supra* note 12, 114. [↑](#footnote-ref-96)
98. Thym, op. cit. *supra* note 16, 38. In the same vein, see Dougan, op. cit. *supra* note 36, 135. [↑](#footnote-ref-97)
99. The trilemma does not imply that improvements can never be made on all three counts. To take a fanciful example, a rule subjecting a person to a different, randomly allocated Member State every day can be replaced by a rule that would serve each value better. [↑](#footnote-ref-98)
100. “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 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]” (Case C-10/90, *Masgio v Bundesknappschaft*, EU:C:1991:107, para 13). [↑](#footnote-ref-99)
101. “[T]he provisions of Regulation No 1408/71 [now Regulation 883/2004] must be interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers” (Case C-137/11, *Partena v Les Tartes de Chaumont-Gistoux*, EU:C:2012:593, para 46). [↑](#footnote-ref-100)
102. E.g. Pennings, "Co-ordination of social security on the basis of the State-of-employment principle: Time for an alternative?", (2005), CML Rev., 67–89, 69, 86. [↑](#footnote-ref-101)
103. E.g. Opinion of A.G. Sharpston in Joined Cases C-95/18 and C-96/18, *van den Berg and Giesen*, para 42; de Witte, op. cit. *supra* note 7. [↑](#footnote-ref-102)
104. “EU law does not detract from the power of the Member States to organise their own social security systems” (Case C-137/11, *Partena*, para 59). [↑](#footnote-ref-103)
105. E.g. de Witte, op. cit. *supra* note 7. [↑](#footnote-ref-104)
106. E.g. Art. 2(3)–(7) of the draft Regulation; Decision H5 of the Administrative Commission concerning cooperation on combating fraud and error within the framework of Regulation 883/2004 and Regulation 987/2009, O.J. 2010, C 149/5. [↑](#footnote-ref-105)
107. The risk shifts to their State of origin should they qualify for its benefits, either because they return there or because that State exports benefits. See also Spaventa, op. cit. *supra* note 17. [↑](#footnote-ref-106)
108. Art. 12 Regulation 883/2004. [↑](#footnote-ref-107)
109. Art. 4–6 Regulation 883/2004. [↑](#footnote-ref-108)
110. Case C-111/91, *Commission v Luxembourg (childbirth and maternity allowances)*, EU:C:1993:92. [↑](#footnote-ref-109)
111. Case 39/86, *Lair*, para 42. [↑](#footnote-ref-110)
112. Art. 11 Regulation 987/2009. If, having become subject to the laws of the State of destination, citizens fail to qualify for social protection there because they lack a right to equal treatment, the waiting period becomes asymmetrical. The *lex loci domicilii* operates an instant transition for people with strong pre-existing ties to the State of destination and a firm intention to settle there, because their habitual centre of interests is relocated upon arrival (Case C-90/97, *Swaddling v Adjudication Officer*, EU:C:1999:96, para 30). [↑](#footnote-ref-111)
113. Chapter 5 Regulation 883/2004. [↑](#footnote-ref-112)
114. Art. 1(19), Art. 1(21) and Art. 1(22) of the draft Regulation. [↑](#footnote-ref-113)
115. Art. 24(1) Citizenship Directive; Case C-333/13, *Dano*. [↑](#footnote-ref-114)
116. Case C-308/14, *Commission v United Kingdom (child benefit)*, EU:C:2016:436. [↑](#footnote-ref-115)
117. Art. 24(2) Citizenship Directive; Case C-67/14, *Jobcenter Berlin Neukölln v Alimanovic*, EU:C:2015:597. [↑](#footnote-ref-116)
118. Art. 24(2) Citizenship Directive; Case C-158/07, *Förster v Hoofddirectie van de Informatie Beheer Groep*, EU:C:2008:630. [↑](#footnote-ref-117)
119. E.g. Case C-138/02, *Collins v Secretary of State for Work and Pensions*, EU:C:2004:172, para 72; Case C-209/03, *Bidar*, para 59. [↑](#footnote-ref-118)
120. E.g. Case C-11/06 and C-12/06, *Morgan v Bezirksregierung Köln and Bucher v Landrat des Kreises Düren* EU:C:2007:626; Case C-503/09, *Stewart v Secretary of State for Work and Pensions*, EU:C:2011:500. [↑](#footnote-ref-119)
121. Dougan, op. cit. *supra* note 36, 134. [↑](#footnote-ref-120)
122. Case C-20/12, *Giersch v État du Grand-Duché de Luxembourg*, EU:C:2013:411, para 77. [↑](#footnote-ref-121)
123. Ibid., para 80. [↑](#footnote-ref-122)
124. Case C-238/15, *Bragança Linares Verruga*, para 58. [↑](#footnote-ref-123)
125. Case C-410/18, *Aubriet v Ministre de l'Enseignement supérieur et de la Recherche*, EU:C:2019:582, para 42. [↑](#footnote-ref-124)
126. Ibid., para 45. [↑](#footnote-ref-125)
127. In the same vein, see Jacqueson, "Any news from Luxembourg? On student aid, frontier workers and stepchildren: *Bragança Linares Verruga* and *Depesme*", (2018), CML Rev., 901–922, 913–915. [↑](#footnote-ref-126)
128. See above, notes 109 and 110. [↑](#footnote-ref-127)
129. 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, 23. [↑](#footnote-ref-128)
130. For an overview, see Verschueren, "The EU social security co-ordination system: A close interplay between the EU legislature and judiciary" in Syrpis (Ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012); Dougan, op. cit. *supra* note 36, 136 a.f. [↑](#footnote-ref-129)
131. E.g. Case C-443/93, *Vougioukas*, para 35; Case C-443/11, *Jeltes v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, EU:C:2013:224, para 40. [↑](#footnote-ref-130)
132. Case 24/75, *Petroni v Office national des pensions pour travailleurs salariés, Bruxelles*, EU:C:1975:129; Case 41/84, *Pinna v Caisse d'allocations familiales de la Savoie*, EU:C:1986:1; Case 20/85, *Roviello v Landesversicherungsanstalt Schwaben*, EU:C:1988:283; Case C-290/00, *Duchon*; Case C-396/05, C-419/05 and C-450/05, *Habelt, Möser and Wachter v Deutsche Rentenversicherung Bund*, EU:C:2007:810. [↑](#footnote-ref-131)
133. See Davies, "Legislative control of the European Court of Justice", (2014), CML Rev., 1579–1607, 1598–1602. [↑](#footnote-ref-132)
134. E.g. Case C-3/08, *Leyman*. [↑](#footnote-ref-133)
135. Case C-611/10 and C-612/10, *Hudziński v Agentur für Arbeit Wesel - Familienkasse and Wawrzyniak v Agentur für Arbeit Mönchengladbach - Familienkasse*, EU:C:2012:339, para 53. [↑](#footnote-ref-134)
136. E.g. Case C-406/04, *De Cuyper v Office national de l'emploi*, EU:C:2006:491; Case C-287/05, *Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*, EU:C:2007:494; Case C-228/07, *Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, EU:C:2008:494; Opinion of A.G. Sharpston in Joined Cases C-95/18 and C-96/18, *van den Berg and Giesen*; see also Dougan, op. cit. *supra* note 36, 144–147. Prime opportunities for indirect review were missed in the cases referenced in notes 114–117. [↑](#footnote-ref-135)
137. Dougan, "The constitutional dimension to the case law on Union citizenship", (2006), EL Rev., 613–641, 621. [↑](#footnote-ref-136)
138. See further Davies, op. cit. *supra* note 132, 1602–1605. [↑](#footnote-ref-137)
139. Case C-158/96, *Kohll v Union des caisses de maladie*, EU:C:1998:171. [↑](#footnote-ref-138)
140. Case C-287/05, *Hendrix*, para 58. [↑](#footnote-ref-139)
141. Case C-611/10 and C-612/10, *Hudziński and Wawrzyniak*. [↑](#footnote-ref-140)
142. E.g. Case C-11/06 and C-12/06, *Morgan and Bucher*; Case C-523/11 and C-585/11, *Prinz and Seeberger*; Case C-359/13, *Martens v Minister van Onderwijs, Cultuur en Wetenschap*, EU:C:2015:118. [↑](#footnote-ref-141)
143. Case C-11/06 and C-12/06, *Morgan and Bucher*, paras. 43, 45. [↑](#footnote-ref-142)
144. Dougan, "Cross-border educational mobility and the exportation of student financial assistance", (2008), EL Rev., 723–738, 735. [↑](#footnote-ref-143)
145. Case C-220/12, *Thiele Meneses v Region Hannover*, EU:C:2013:683, para 25. [↑](#footnote-ref-144)
146. Case C-3/08, *Leyman*, para 50 and dispositif. [↑](#footnote-ref-145)
147. On those two types of equality, see Saydé, "One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law", (2010–2011), CYELS, 365–413, 387–388. [↑](#footnote-ref-146)
148. See Case C-165/91, *van Munster*, para 29; Case C-443/93, *Vougioukas*; Case C-244/97, *Rijksdienst voor Pensioenen v Lustig*, EU:C:1998:619. [↑](#footnote-ref-147)
149. E.g. Case 39/86, *Lair*; Case C-137/04, *Rockler*; Case C-185/04, *Öberg*; Case C-3/08, *Leyman*; Case C‑134/18, *Vester*. [↑](#footnote-ref-148)
150. Case C-333/13, *Dano*; Case C-67/14, *Alimanovic*; Case C-308/14, *Commission v United Kingdom (child benefit)*. The ECJ implausibly maintained that they are indirectly discriminatory (Case C-308/14, *Commission v United Kingdom (child benefit)*, paras. 76–79; O'Brien, "The ECJ sacrifices EU citizenship in vain: *Commission* v. *United Kingdom*", (2017), CML Rev., 209–243, 225–227). [↑](#footnote-ref-149)
151. Opinion of A.G. Wathelet in Case C-238/15, *Bragança Linares Verruga*, para 35. [↑](#footnote-ref-150)
152. Case C-238/15, *Bragança Linares Verruga*. [↑](#footnote-ref-151)
153. Case C-410/18, *Aubriet*. [↑](#footnote-ref-152)
154. E.g. Case C-466/15, *Adrien v Premier ministre*, EU:C:2016:749, para 27. See also Case C-238/15, *Bragança Linares Verruga*, para 50. [↑](#footnote-ref-153)
155. For such analyses, see e.g. Fuchs, de Cortázar, Kahil and Pöltl, op. cit. *supra* note 17, 24–32; Nic Shuibhne, op. cit. *supra* note 85, 480–487, 491–496; Reynolds, op. cit. *supra* note 85, 60–75. [↑](#footnote-ref-154)
156. Exceptions are listed in note 87. [↑](#footnote-ref-155)
157. For the present purposes, I focus on the simultaneous application of two or more laws with a view to deciding whether to award the same social benefit to the same person for the same period. Two legal orders can also apply to different facets of the same benefit (e.g. the Patient Mobility Directive allows patients to obtain health care in one State at the expense of another) or to different but related benefits (e.g. the “classic” old-age pension of one State and the minimum old-age pension of another). [↑](#footnote-ref-156)
158. Chapter 5 Regulation 883/2004. [↑](#footnote-ref-157)
159. “[T]he non-migrant worker acquires the entirety of his pension entitlements under a single body of legislation, whereas the migrant worker acquires them in sections corresponding to successive periods of work completed in different Member States under different legislative systems. In such situations, Article [48] of the Treaty aims to create, by coordination rather than by harmonization, a unified career, for social security purposes, for the migrant worker” (Case C-165/91, *van Munster*, para 29). [↑](#footnote-ref-158)
160. For a similar sentiment in private international law, see Juenger, "General course on private international law" in Académie de droit international de La Haye (Ed.), *Recueil des cours 1985-IV, Tome 193* (Martinus Nijhoff, 1986), 256–257. [↑](#footnote-ref-159)
161. See above, Section 4.2. [↑](#footnote-ref-160)
162. See above, Section 4.3. [↑](#footnote-ref-161)
163. E.g. Hoogenboom, op. cit. *supra* note 44, 119; van Ooik, "Export van studiefinanciering in de EU", (2008), Nederlands tijdschrift voor Europees recht, 125–129, 128–129. Exceptions are listed in note 87. [↑](#footnote-ref-162)
164. Case 24/75, *Petroni*. [↑](#footnote-ref-163)
165. See Rennuy, "The emergence of a parallel system of social security coordination", (2013), CML Rev., 1221–1266, 1227–1229. [↑](#footnote-ref-164)
166. Case 733/79, *Caisse de compensation des allocations familiales des régions de Charleroi et de Namur v Laterza*, EU:C:1980:156. [↑](#footnote-ref-165)
167. See further Chapter 8 Regulation 883/2004. [↑](#footnote-ref-166)
168. Case C-352/06, *Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen*, EU:C:2008:290. [↑](#footnote-ref-167)
169. Case C-611/10 and C-612/10, *Hudziński and Wawrzyniak*. See Rennuy, op. cit. *supra* note 164. [↑](#footnote-ref-168)
170. The ECJ accepted that the Council replaced plurality by unicity in Case C-20/96, *Snares v Adjudication Officer*, EU:C:1997:518. [↑](#footnote-ref-169)
171. Case C-20/12, *Giersch*, para 79. [↑](#footnote-ref-170)
172. Case C-333/13, *Dano*; Case C-67/14, *Alimanovic*; Case C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v García-Nieto*, EU:C:2016:114. [↑](#footnote-ref-171)
173. 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, 23; Case C-308/14, *Commission v United Kingdom (child benefit)*. [↑](#footnote-ref-172)
174. Case C-410/18, *Aubriet*. [↑](#footnote-ref-173)
175. No legal order is disturbed because little law is applied during that period. [↑](#footnote-ref-174)
176. See above, note 97. [↑](#footnote-ref-175)
177. Joint letter of four ministers representing the Austrian, German, Dutch and British governments, op. cit *supra* note 83, 3. [↑](#footnote-ref-176)
178. Even if Regulation 883/2004 provides otherwise: Case C-352/06, *Bosmann*. [↑](#footnote-ref-177)
179. Art. 7(1)(b) and Art. 24(1) Citizenship Directive. [↑](#footnote-ref-178)
180. The tools can be varied and even combined—for instance an instant transition in the welfare rights of migrants might be accompanied by a reimbursement mechanism based on plurality. [↑](#footnote-ref-179)
181. This might be different for an instant transition affecting highly mobile citizens. See above, note 91. [↑](#footnote-ref-180)
182. Art. 24(1) Citizenship Directive; Case C-333/13, *Dano*. [↑](#footnote-ref-181)
183. Art. 7(1)(b) Citizenship Directive, emphasis added. [↑](#footnote-ref-182)
184. Van Overmeiren, Eichenhofer and Verschueren, "Social security coverage of non-active persons moving to another Member State", (trESS Analytical Study 2011), <http://www.tress-network.org/tress2012/EUROPEAN%20RESOURCES/EUROPEANREPORT/TRESS\_AnalyticalReport-NonActives\_FINAL.pdf>, 42–43. [↑](#footnote-ref-183)
185. E.g. de Witte, op. cit. *supra* note 7; Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (OUP, 2005); Menéndez, op. cit. *supra* note 15, 392–393; Paju, *The European Union and Social Security Law* (Hart Publishing, 2017). [↑](#footnote-ref-184)
186. For excellent analysis of those types of regulation with some comments on social security, see Saydé, op. cit. *supra* note 146, in particular 385–391 and 408–410. In the context of posting, see Van Hoek, "Re-embedding the transnational employment relationship: A tale about the limitations of (EU) law?", (2018), CML Rev., 449–487. [↑](#footnote-ref-185)
187. Nic Shuibhne, op. cit. *supra* note 85, 479. [↑](#footnote-ref-186)
188. Duff, "Philosophy and 'The Life of the Law'", (2009), Journal of Applied Philosophy, 245–258, 249. [↑](#footnote-ref-187)