Analytical Report 2016

The principle of assimilation of facts

FreSsco
FREE MOVEMENT OF WORKERS and SOCIAL SECURITY COORDINATION

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Directorate-General for Employment, Social Affairs and Inclusion
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FreSsco - Free movement of workers and Social security coordination

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EXECUTIVE SUMMARY

The following report shows the history of the assimilation of facts in the European law on the coordination of social security systems as a principle and a legal provision. It describes the rationale behind this rule, illustrates its content and gives an overview of the case law both in a chronological and a systematic order. Furthermore, it elucidates the proportionality principle and examines the interrelation of the assimilation of facts provision with other comparable rules. It analyses the relationship with Article 6 of Regulation (EC) No 883/2004 on the aggregation of insurance periods and the equal treatment clause in Article 7(2) of Regulation (EC) No 492/2011, and it shows the interrelations of these rules with Article 5 of the Regulation. In addition, it addresses special questions in the context of this rule: what constitutes similarities and differences, facts and consequences? Emphasis is put on outlining the relations between Article 5 of the Regulation and specific provisions on the assimilation of facts dispersed in the basic Regulation and the implementing Regulation. The report shows the central function the assimilation of facts plays in the context of social security coordination and illustrates the benefits stemming from this technique in order to safeguard social security rights in transnational contents and dimensions.

Within the European legal framework on the coordination of social security systems of the Member States, the principle of assimilation of facts plays an important role. Whenever the national law of the competent State makes social security rights or commitments dependent on factual circumstances, it usually stipulates that these provisions only cover circumstances which happen within the territory of that State; circumstances which happen abroad are regularly not covered. As a consequence such provisions could be indirectly discriminatory or can create obstacles to free movement for all Union citizens. The assimilation of facts is a legal instrument which extends the territorial scope of Member States' social security legislation to circumstances which happen outside of that State. Thus, the application of this principle allows interpreting provisions in the legislation of the Member States in conformity with Union law; indirect discrimination and obstacles to free movement can be avoided. The acquisition of social security rights for migrants who are entitled to make use of their fundamental freedoms granted by the Treaty on the Functioning of the European Union (TFEU) can be safeguarded.

Long before the adoption of Regulation (EC) No 883/2004, the Court of Justice of the European Union (CJEU) referred to assimilation aspects in a number of judgments. The CJEU based its findings directly on primary law, mainly on the right to freedom of movement for workers, on provisions of secondary law, in particular the prohibition of indirect discrimination under Article 3(1) of Regulation (EEC) No 1408/1971, or on a combination of both. When the new Regulation was enacted, a general principle was established in Article 5 of Regulation (EC) No 883/2004. This provision comprises two different rules: letter (a) provides for the assimilation of social security benefits and other income; letter (b) concerns the assimilation of certain facts and events. This provision is unprecedented. According to Recital No 9 of the Regulation the principle now enshrined in Article 5 must be developed while observing the substance and spirit of the legal rulings of the CJEU under the old Regulations. Nevertheless, the interpretation of Article 5 is difficult and raises a number of questions. Given that the situations in the institutions' daily practice are manifold, there is no hard and fast rule on how to apply this provision. However, some important guidelines can be found in the case law of the CJEU.

While systematically refusing assimilation is not permitted, as this would be a violation of equal treatment, neither is it required to assimilate automatically, because this would deprive the national legislatures of their competence in the field of social protection. Assimilation must respect both aspects: national legislatures must retain competence to determine the conditions for granting social security benefits, while at the same time equal treatment must be ensured. The only way to do this is to identify the legitimate

objectives of the national legislation and to asses if this objective can also be achieved under the terms of the legislation of another State. Usually, the same objective can be achieved by various means. It cannot be required that provisions in national legislations are identical, because this is probably never the case and would deprive the assimilation principle of all practical effects.

The same criteria apply for the assimilation of benefits: it is not necessary that the essential features of the benefits are identical; a certain kind of similarity is sufficient. Otherwise benefits from different Member States could probably never be assimilated. Benefits are similar in terms of Article 5(a) if they pursue the same aim. Differences which have no decisive influence on the aim pursued are irrelevant. The basic evaluations of these rulings are consistent with the objectives of Article 5 and other basic principles of Union law. In the question whether income acquired in other Member States must be assimilated by the competent Member State, the CJEU seems to have chosen a kind of middle course by stating that income from other Member States does not need to be taken directly into account, but a fictitious income that would have been earned in the competent Member State on the basis of a comparable insurance career in that State. This could be interpreted as being a modified application of Article 5(a) or as a case of Article 5(b), focusing on the assimilation of the insurance career.

According to Recitals 10 to 12 the application of the principle of assimilation of facts should be limited by various aspects.

Recital 10 states that the principle of Article 5 should *"not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State"*. While Article 6 provides for the aggregation of periods in other Member States without questioning their legal quality, Article 5 compels to assimilate certain facts in other Member States only if those facts are comparable, taking into account the criteria as developed by the legislature and the CJEU. The delimitation of these Articles has been reflected in Decision H6 by the Administrative Commission. The delimitation seems to be relatively clear in a first step: Article 6 applies when the national legislation requires the completion of a certain number of periods which meet the definitions under Article 1 (t), (u) or (v) of the Regulation. In cases where the national legislation requires certain facts or events that are linked to a period of time, but do not meet these definitions, Article 5 can apply. However, if the national legislation of the competent State requires a period to be linked to certain facts, Article 5 could apply and the periods concerned be excluded from aggregation if they are not linked to comparable facts. Again there is no fast and easy rule how to apply this provision in the second step of aggregation. It must be applied on a case-by-case basis, taking into account the scope and the limits of Article 5 as developed by the CJEU. The overriding aspects are that the competence of the national legislation to define the conditions for entitlement to benefits must be respected while indirect discriminations of EU nationals should be avoided.

According to Recital 11, Article 5 can in no way render another Member State competent or its legislation applicable. This rule finds its justification in the core of the assimilation of facts operation addressed to the legislature of the competent State. Assimilating facts requires that the competent State is determined beforehand. Therefore, applying the assimilation of facts rule on circumstances which determine the competent State – like residence, workplace or home base – would counteract the exclusive function of the provisions to determine the applicable law. Circumstances which are relevant for the determination of the competent State are exempt from assimilation. While the assimilation of facts rule is inclusive, the provisions on applicable legislation are exclusive.

Recital No 12 refers to the principle of proportionality: care must be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period. Proportionality is not a goal in itself but a tool for achieving a result that respects different interests that are in conflict, in particular European and Member States'

interests. In this regard, proportionality looks for a balance or modulation to avoid, in the event of the unlimited and unbridled application of this principle, excessive or unreasonable results. Proportionality only allows solutions in concrete and individual situations, taking into account the case law of the CJEU, in particular with regard to the ban on indirect discrimination and possible justification of respective national measures. Article 4 of Regulation (EC) No 883/2004 is the central provision for preventing direct or indirect discrimination of persons to whom that Regulation applies. According to the case law a restriction of free movement can be justified, with regard to EU law, if it is based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions. A measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain it. According to Recital No 12 this principle can also limit the material scope of Article 5.

Nothing seems to exclude that the method as used by the CJEU under the old Regulation also applies under Regulation (EC) No 883/2004. It follows that, firstly, an indirect discrimination test under Article 4 is carried out and, if indirect discrimination is confirmed, it must be examined whether that discrimination can be justified by applying the principle of proportionality. If no justification is possible, Article 5 could apply. The existence of a situation of indirect discrimination is virtually the precondition for Article 5 to apply, which can only intervene into the scope of a national provision if otherwise that provision would violate Union law. It therefore seems coherent that the adoption of Article 5 has not altered the basic interplay between indirect discrimination, including possible justifications due to proportionality, and the application of the assimilation principle. Furthermore, there is no convincing argument to assume that it was the intention of the European legislature to render strict the principle of equal treatment only in cases where Article 5 applies, while in other cases of indirect discrimination justifications are still possible if the national measure is proportional. As the legislature stated in Recital No 9 that the principle of assimilation of facts should be adopted explicitly and developed, while observing the substance and spirit of legal rulings under the old Regulation, it should not be assumed that the legislature wanted to change and weaken the legal validity of national provisions in the framework of Union law, by merely adopting a specific Article on assimilation of facts and no longer dealing with this aspect within the material scope of the general provision on equal treatment. Only the further development of these Articles in the case law of the CJEU can give rise to different conclusions.

Regulation (EC) No 492/2011 on freedom of movement for workers within the Union (former Regulation (EEC) No 1612/1968) does not contain a provision comparable to Article 5 of Regulation (EC) No 883/2004. Nevertheless, the principle of assimilation of facts plays an important role in this Regulation as well, because assimilation is a general principle in EU legislation. A thorough analysis of both instruments shows that the assimilation principle in both legal frameworks follows the same criteria. Given that both regimes intend in particular to safeguard the freedom of movement for migrant workers, the similarities between those measures are so strong that it seems to be reasonable that the concept of indirect discrimination is interpreted in the same way. Any assumption that the concepts differ cannot sustain a closer examination.

Next to Article 5 of Regulation (EC) No 883/2004 there are a number of specific provisions in the Regulation and the implementing Regulation which provide for the assimilation of benefits, income or facts or explicitly stipulate that assimilation does not take place, either to avoid unjustified or excessive results or in order to protect the migrant worker from too strict an application of certain provisions which could entail negative results. Drawing clear conclusions on the material scope of Article 5 from such specific provisions is difficult, as usually the European legislature gives no explanation why it adopted the provision concerned. It is in many cases impossible to state with absolute certainty whether a specific provision was adopted only for clarification and is in principle redundant or whether the existence of this provision delimits the material scope

of Article 5. Furthermore, the legislature is aware that Article 5 is not in its hands alone but is the subject of interpretation by the CJEU and by national courts, authorities and institutions.

However, national concepts should be differentiated from European concepts: the task of Article 5 is to extend the material scope of national provisions to facts that happened in other Member States. Beyond this territorial aspect, the content of national provisions remains unchanged and is determined by the national legislature, the competence of whom to determine its social policy is strictly respected. It follows that specific provisions in the Regulations could be a mere clarification of Article 5 only if that provision applies under the condition that the national legislation contains a respective provision, like in Article 37(1) of Regulation (EC) No 882/2004. Legal institutions like competence under Title II seem to go beyond such a mere extension of the scope of national provisions, as the Regulation not only defines the competent State but also determines the character and the limits of that European competence. Thus, it should rather be considered to be a European concept than only a modification of national concepts.

Another aspect is that Article 5 and the assimilation principle only stipulate that where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State, if those facts can be considered to be *similar*, taking into account the criteria which the CJEU has developed. Thus, Article 5 usually allows and necessitates a comparative assessment. European provisions which prescribe with legal authority that certain facts must be considered to be identical even if a comparative assessment could lead to different conclusions, seem to go beyond the scope of Article 5.

Particular caution seems to be justified to derive the territorial extension of procedural provisions directly from Article 5, given that the principle of national procedural autonomy which has been developed in the case law of the CJEU and which may lead to the conclusion that national procedural provisions are in principle outside of the material scope of the Regulation and not covered by Article 5. Thus, provisions like Article 81 of Regulation (EC) No 883/2004 seem to go beyond a mere clarification of what would be the content of Article 5.

Many provisions in the Regulations contain assimilation aspects which could not be derived from Article 5 because they do not comply with the basic concept of that provision. However, conclusions about whether a certain provision that complies with that concept is only a clarification of Article 5 or goes beyond its scope, are rarely free of doubt.

1. INTRODUCTION

1.1. The assimilation of facts[1] as a backbone of coordination

Article 48 of the Treaty on the Functioning of the EU (TFEU) obliges the EU legislature to adopt rules on the coordination of the social security systems of the Member States. The European Parliament and the Council have accomplished that obligation by adopting Regulations which are directly applicable in all Member States. These Regulations safeguard in cross-border cases that migrants and their family members do not suffer disadvantages due to the fact that they have availed themselves of their fundamental rights under the TFEU, in particular the right to free movement of workers and Union citizens.

The coordination of social security was one of the first legislative initiatives the EEC undertook. In 1958, with Regulations (EEC) No 3 and (EEC) No 4/1958[2] the first legal frameworks on coordination were established. In 1972 these Regulations were replaced by Regulations (EEC) No 1408/1971 and (EEC) No 574/1972.[3] These provisions to a large extent lost their legal importance when on 1 May 2010 Regulations (EC) No 883/2004 and (EC) No 987/2009 came into force, replacing the previous Regulations.[4] Thus, since 1958 three generations of European law have been relevant for social security coordination.

In this legal arrangement the **assimilation of facts** has played a crucial role from the beginning of the coordination regime onwards. It obliges the competent institution, when determining whether an applicant meets the requirements for a social security benefit or commitment, to take into account relevant facts or events giving rise to such benefits or obligations not only when they are verified within the competent State, but also when they became effective in another Member State. Therefore, facts or events that give rise to benefits or commitments must be recognised when they took place outside of the territorial scope of the competent Member State's legislation if certain requirements are fulfilled. This rule guarantees the equality of treatment of all beneficiaries, the safeguarding of which is a fundamental aim of European law on the coordination of social security.

Since the very beginning assimilation of facts has been a backbone of coordination together with other generally acknowledged principles of coordination: equal treatment of EU nationals, export of benefits in cash, aggregation of insurance periods, mutual provision of benefits in kind and administrative cooperation. To prevent disadvantages in international social security careers and to safeguard the social security rights acquired under the laws of various Member States often depends on whether the assimilation of facts takes place. So, each generation of coordination law contained – as a key feature and topic – numerous rules on assimilation. These rules may be laid down for special situations or are derived from the general principle of equal treatment or from Article 5 of Regulation (EC) No 883/2004.

1.2. Assimilation of facts before Regulation (EC) No 883/2004 was adopted

Long before the adoption of Article 5 of Regulation (EC) No 883/2004, the Court of Justice of the European Union (CJEU) referred in a number of judgments to assimilation

[1] Whenever in this report the term 'assimilation of facts' is used, it also concerns the assimilation of benefits and income unless it is clear from the context that only facts and events in the narrow sense are referred to.

[2] Official Journal of the EEC No 30, p. 562.

[3] Official Journal of the EEC 1971 L 149/2; Official Journal of the EEC L 74/1.

[4] Notwithstanding Article 90 of Regulation (EC) No 883/2004.

aspects, many of which contained elements that might give hints for the interpretation of that Article under the current legal framework. As the CJEU clearly stated in *Knauer*:[5]

> *"As regards the objective of Article 5(a) of Regulation No 883/2004, it is clear from recital 9 of the Regulation that the EU legislature sought to include in the Regulation the principle,* ***deriving from the case-law****, of equal treatment of benefits, income and facts,* ***in order that that principle might be developed in keeping with the substance and spirit of the Court's rulings****."*[6]

As a provision comparable to Article 5 did not exist under Regulations (EEC) No 3 and No 1408/1971, the CJEU based its findings directly on **primary law**, mainly on the right to the freedom of movement of workers, on provisions of **secondary law**, in particular the prohibition of indirect discrimination under Article 3(1) of Regulation (EEC) No 1408/1971, or on a combination of both. Depending on the situations in the individual cases also other legal bases were used. By imposing on the institutions the obligation to assimilate facts in other Member States a violation of European law could be avoided.

The CJEU has regularly pointed out that, although **Article 51 EC** leaves in being differences between the social security systems of the Member States and hence in the rights of the people working there, it is also settled that the aim of **Articles 48 to 51 EC** would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a Member State; such a consequence might discourage EU workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. That consequence may arise if the national legislature defines the conditions for the acquisition or retention of the right to benefits in such a way that they can in fact be fulfilled only by nationals of the Member State concerned or if it defines the conditions for loss or suspension of the right in such a way that they can in fact be more easily satisfied by nationals of other Member States than by those of the State of the competent institution.[7]

According to the CJEU **Article 48(2) EC** provides that freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Furthermore, under **Article 3(1) of Regulation (EEC) No 1408/1971** and subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits as the nationals of that State. Those provisions must be interpreted in the light of their objective, namely to contribute, particularly in the field of social security, to the establishment of the **greatest possible freedom of movement for migrant workers**, which is one of the foundations of the Union. In that regard, **Articles 48 to 51 EC** and the EU legislation adopted in implementation thereof, in particular Regulation (EEC) No 1408/1971, were intended to prevent a worker who, by exercising his or her right of free movement, has been employed in more than one Member State **from being placed in a worse position than a worker who has completed his or her entire career in only one Member State**.[8] Conditions imposed by national law must be regarded as **indirectly discriminatory** where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers, or where there is a risk that they may operate to the particular detriment of the latter.[9]

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[5] judgment in *Knauer*, C-453/14, EU:C:2016:37.

[6] judgment in *Knauer*, EU:C:2016:37, paragraph 31.

[7] judgment in *Paraschi*, C-349/87, EU:C:1991:372, paragraphs 22 and 23.

[8] judgment in *Masgio*, C-10/90, EU:C:1991:107, paragraphs 16 and 17.

[9] judgment in *Klöppel*, C-507/06, EU:C:2008:110.

The CJEU also held that **Article 48 EC** implements a fundamental principle contained in **Article 3(c) EC**, under which the activities of the EU are to include the abolition, as between Member States, of **obstacles to freedom of movement for persons**. The Treaty provisions relating to freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.[10] In that context, nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order to pursue an economic activity. Provisions which preclude or deter a national of a Member State from leaving his or her country of origin in order to exercise his or her right to freedom of movement therefore constitute an **obstacle to that freedom even if they apply without regard to the nationality of the workers concerned**. In such a situation it is therefore **unnecessary to consider whether there is indirect discrimination** on grounds of nationality.[11]

Nevertheless, the CJEU has always confirmed that the system put in place by Regulation (EEC) No 1408/1971 is merely a system of coordination, concerning, *inter alia*, the determination of the legislation applicable to employed and self-employed persons who make use, in various circumstances, of their right to freedom of movement and that **it is inherent in such a system that the conditions to which entitlement to a benefit is subject differ depending on the Member State**. However, when laying down those conditions, Members States must ensure the equal treatment of all workers occupied on their territory as effectively as possible and not penalise workers who exercise their right to freedom of movement.[12]

It will be shown how the CJEU used assimilation criteria in a number of judgments in order to safeguard the rights as mentioned above.

1.3. Assimilation of facts in Regulation (EC) No 883/2004 – legal sources and questions of inquiry

In Regulation (EC) No 883/2004 – as the most recent legislation on social security coordination – a general principle on the assimilation of facts was laid down in Article 5. It reads:

> *"Article 5*
>
> *Equal treatment of benefits, income, facts or events*
>
> *Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:*
>
> *(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;*
>
> *(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory."*

[10] judgment in *Klöppel*, EU:C:2008:110, paragraph 36.

[11] judgment in *Terhoeve*, C-18/95, EU:C:1999:22, paragraphs 38-40.

[12] judgment in Larcher, C-523/13, EU:C:2014:2458.

With regard to this rule, four recitals, mentioned as preliminary observations in number 9 to 12 of the Regulation, are also relevant for its interpretation. They read:

"(9) The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.

(10) However, the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods.

(11) The assimilation of facts or events occurring in a Member State can in no way render another Member State competent or its legislation applicable.

(12) In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period."

Article 5 of Regulation (EC) No 883/2004 was implemented in order to simplify the coordination rules. This was a basic aim that the new Regulation generally intended to bring about as part of the "Simpler Legislation for the Internal Market (SLIM)"[13] initiative. Article 5 replaced a series of specific assimilation of facts rules, which Regulation (EEC) No 1408/1971 contained in a plethora of its articles: *cf*. Articles 9a(2), 10a(3), 23(3), 56, 57(2) and (3), 65(1) and (2), and 68(2). However, under the new Regulation this replacement was neither a total replacement, nor did it encompass all other assimilation of fact rules. Also in the new regulation some specific assimilation of facts rules still exist, above all Articles 40(3), 53-55, 67 and 81 and Article 44 of Regulation (EC) No 987/2009.

Therefore, the new coordination regime of the Regulation raises, in particular, three questions with regard to the assimilation of facts:

- What constitutes assimilation of facts as a legal principle of coordination in social security?
- What are the limits and boundaries of Article 5 of Regulation (EC) No 883/2004? Are there new aspects compared to the assimilation of facts as an element of indirect discrimination under the preceding case law of the CJEU?
- How is the relation to be determined between Article 5 of Regulation (EC) No 883/2004 and the series of special assimilation of facts rules in the new Regulation and its implementing Regulation?

These are three of the questions which will, *inter alia*, hereinafter be examined.

[13] Simpler Legislation for the Internal Market (SLIM): a Pilot Project. Communication from the Commission to the Council and the European Parliament. COM (96) 204 final, 8 May 1996.

2. ASSIMILATION OF FACTS AS A GENERAL PRINCIPLE

2.1. What constitutes Article 5 of Regulation (EC) No 883/2004?

2.1.1. The content and limits of Article 5 of Regulation (EC) No 883/2004 – transition from rules to principles

According to Recital 9 of Regulation (EC) No 883/2004 assimilation of facts was considered as a principle of social security coordination law already before the new Regulation was adopted. As this recital furthermore states, it stems from a series of CJEU rulings. Therefore, it is to be outlined what the principle is all about: how can its content be described and which limits are set? Furthermore, the case law of the CJEU in which this principle was developed shall be elaborated upon (see 2.2.).

Whereas in previous generations of coordination rules the assimilation of facts was enshrined in numerous rules and deduced from the principle of indirect discrimination, Article 5 of Regulation (EC) No 883/2004 laid down the assimilation of facts as a general principle. The difference became evident as Article 5 of the Regulation was integrated in Title I, which contains all general principles of coordination. One of the crucial questions is whether the assimilation of facts requirement has changed its content, when it replaced a number of specific rules for specific cases and was transferred from being an element of indirect discrimination to a principle in Article 5, which assumes general importance for all dimensions of coordination law. This transformation could have altered the legal requirements and aspects under which assimilation must take place. Instead of being an element of the ban on indirect discrimination a general, global and rather vague principle was established, which gives rise to the question if and to what extent legal clarity has actually been improved.

Under Article 5(b) the principle is not to be understood as a universal, global or general one, because it is regarded as a principle of treating **certain** facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable. Thus, assimilation of facts is not extended to all facts or events, but limited to certain (some) facts or events.

According to **Recitals 10 to 12** the application of the principle of assimilation of facts should be limited by various aspects. **Recital 10** states that the principle of Article 5 should *"not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State"*. This issue will be analysed under 2.4.

Recital 11 states that the *"assimilation of facts or events occurring in a Member State can in no way render another Member State competent or its legislation applicable."* This means that the provisions on applicable legislation – established in Articles 11 to 16 of the Regulation – are not to be submitted to the assimilation of facts principle, as enshrined in Article 5. It follows that facts or events (employment, self-employment or residence) which become relevant in the context of applicable legislation are, in this context, exempt from the assimilation of facts, as they constitute a genuine link which determines the competence of a Member State in the context of coordination to the exclusion of all other Member States. These rules are strict; they do not allow any widening as to their prerequisites. With regard to the Member States' competence to enact social security law (Article 153(4) TFEU) and the function of the Regulation to delineate the borderlines between the competences of the Member States, the application of the assimilation principle would deprive these conflict rules of their legal function. Whereas Article 5 provides for treating facts alike, irrespective of where they happen, the provisions on applicable legislation imply that certain facts (employment, self-employment, residence) lead to the application of only one law. Therefore, both rules cannot apply at the same time: the assimilation of facts rule is inclusive, whereas rules

on the applicable legislation are exclusive. It follows that the principle of assimilation of facts is limited to facts and events which constitute a requirement for a right or commitment under the substantive social security law of the competent State.[14] The assimilation of facts principle is only to be applied after the competent State was determined by the rules on applicable legislation and by no means determines competence under Title II of the Regulation.

2.1.2. Article 5 of Regulation (EC) No 883/2004 – a multifaceted provision

Article 5 of Regulation (EC) No 883/2004 relates to various situations and encompasses two rules: It states under (a) that if *"under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State"*. This provision is followed by (b), which stipulates that if *"under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory"*. While the provision under (a) refers to legal effects of social security benefits and other income, the provision under (b) assumes a more general character by referring to certain facts and events. The core of these facts or events are circumstances which are requirements for giving rise to social rights or commitments – e.g. to pay contributions – under the legislation of the competent Member State.

Here the further difficulty arises on how to distinguish between **facts and events**. Do the terms "facts" and "events" have an identical meaning or should one differentiate between the two concepts and if so, what do the terms mean? The text does not give a clear answer to these questions. Seen from the function of the assimilation of facts principle it is clear that these concepts describe circumstances which are open for proof and give access to social rights and commitments. These circumstances can be mere facts: illness, pregnancy, age, but also legal (= institutional) facts, e.g. being a spouse or child, being engaged in military or civil service or exercising reduced work under the pre-retirement scheme of a Member State. All these circumstances are to be conceived as facts, as it is possible to verify whether they do happen or not. At the same time, those facts quite often describe a social risk or a social status which comes into being and, hence, can come to an end. In the light of these observations it seems more convincing to assume that the term "fact and event" stands for an identical concept – a *hendiadys* – one meaning which is expressed by two words. It describes all the factual prerequisites which are relevant to bring about both social rights and social commitments.

"This is nothing more than the theory of the mutual recognition or equivalence of situations".[15]

The full spectrum of potential meanings of this 'facts-and-events criterion' becomes more understandable and easier to grasp when looking into the numerous examples to be found in the CJEU case law on assimilation of facts in social security coordination. Under these circumstances Article 5 of the Regulation provides for different rules for different types of facts and events as it is, hence, not to be understood as just a general principle when used to tackle specific legal questions. From the latter perspective this principle – while articulated clearly, but nevertheless very abstractly – has a series of different dimensions, which makes it very complex, differentiated and difficult to be elaborated as to its practical consequences.

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[14] *R. Schuler, in M. Fuchs and R. Cornelissen, EU Social Security Coordination Law, 2015, No 2, 4 and 5.*

[15] *Y. Jorens (ed.), S. Roberts (ed.), C. Garcia de Cortazar, B. Spiegel and G. Strban, Analysis of selected concepts of the regulatory framework and practical consequences on the social security coordination, trESS Think Tank Report 2010, Project DGEMPL/E/3 - VC/2009/1325,* p.6.

2.2. An overview of assimilation of facts in case law

2.2.1. Introduction

According to Recital No 9 of Regulation (EC) No 883/2004, the principle of equal treatment of benefits, income and facts should be adopted explicitly and developed while observing the substance and spirit of preceding legal rulings of the CJEU. The following table provides an overview of the judgments that seem to be relevant for the interpretation of Article 5 of the Regulation. Although the list is quite extensive other judgments may be added. A summary of all listed judgments is provided subsequently.

Case	Assimilation of	Legal basis in primary and secondary law
C-4/66, *Hagenbeek*	Insurance periods	Articles 48 to 51 EC
C-14/67, *Welchner*	Insurance periods	Articles 48 to 51 EC
C-20/75, *d'Amico*	Unemployment in another Member State	Article 45 of Regulation (EEC) No 1408/1971
C-41/77, *Warry*	- Insurance periods - Claim for benefit	Article 51 EC, "general scheme of Regulation (EEC) No 1408/1971"
C-1/78, *Kenny*	Imprisonment (for loss of rights)	Articles 7 and 48 EC, Article 3 (1) of Regulation (EEC) No 1408/1971
C-237/78, *Toia*	Nationality of children for "allowance for women with children"	Article 3 of Regulation (EEC) No 1408/1971 (indirect discrimination)
C-110/79, *Coonan*	Insurance periods	Article 3 of Regulation (EEC) No 1408/1971
C-284/84, *Spruyt*	Insurance periods	principle of the freedom of movement of persons and in particular Article 51 EC
C-20/85, *Roviello*	Insurable activities (qualification for determining incapacity for work)	Article 48 EC

C-154/87, *Wolf*	Income from another Member State for exemption of insurance	Articles 48 and 52 EC
C-349/87, *Paraschi*	Receipt of benefits for prolongation of reference period for pensions	Articles 48 (2) and 51 EC
C-33/88, *Allué and Coonan*	duration of employment relationship between universities and foreign language assistants	Article 48 (2) EC
C-228/88, *Bronzino*	Being registered as unemployed (family members)	Article 73 of Regulation (EEC) No 1408/1971
C-10/90, *Masgio*	Receipt of accident pension for the purposes of overlapping rules	Articles 48 to 51 EC, Article 3 (1) of Regulation (EEC) No 1408/1971
C-27/91, *Le Manoir*	National education system (with regard to trainees; calculation basis for contributions)	Article 48 EC and Article 7 (2) of Regulation (EEC) No 1612/1968
C-28/92, *Leguaye-Neelsen*	Entering public administration of competent Member State (for right to reimbursement of contributions)	Article 3 of Regulation (EEC) No 1408/1971
C-45/92 and C-46/92, *Lepore and Scamuffa*	Employment in competent Member State, when invalidity occurred	Articles 48 to 51 EC
C-146/93, *McLachlan*	Insurance periods of another Member State not taken into account for calculation of old-age pension	system under Regulation (EEC) No 1408/1971
C-321/93, *Imbernon Martinez*	Residence of spouse for entitlement to family benefits (social security legislation refers to tax legislation)	Article 73 of Regulation (EEC) No 1408/1971
C-278/94, *EC v Belgium*	Establishment for secondary education in another Member State	Article 48 EC, Regulation (EEC) No 1612/1968
C-18/95, *Terhoeve*	Higher social security contributions when residence is transferred in course of a year	Articles 48 and 3(c) EC

C-322/95, *Iurlaro*	Extension of reference period because this is provided for in the legislation of another Member State	Articles 48 to 51 of the Treaty, Article 9a of Regulation (EEC) No 1408/1971 and Article 15(l)(f)(ii) of Regulation (EEC) No 574/72
C-266/95, *Merino* Garcia	Residence of children for entitlement to family benefits	Article 48(2) EC
C-131/96, *Mora Romero*	Military service in competent Member State for extended entitlement to orphans pension	Article 3(1) of Regulation (EEC) No 1408/1971
C-135/99, *Elsen*	Child-raising in another Member State	Article 48 and 8a EC
C-277/99, *Kaske*	1-day-rule for entitlement to unemployment benefits does not apply for persons who have been residing for 15 years in that State	Article 48 EC
C-128/00, *Kauer*	Child-raising in another Member State	Articles 8a, 48 and 52 EC
C-290/00, *Duchon*	Accident at work when insured in the competent Member State for waiving of waiting period to invalidity pension	Articles 48(2) and 51 EC
C-373/02, *Öztürk*	Receipt of unemployment benefit during qualifying period for old-age pension	Article 3(1) of Decision No 3/80 EC/Turkey
C-137/04, *Rockler*	periods in Joint Sickness Insurance Scheme of EC for entitlement to parental benefit in Member State	Article 39 EC
C-258/04, *Ioannidis*	Establishment for secondary education in another Member State	Article 39 EC
C-406/04, *de Cuyper*	Residence as requirement for a special unemployment benefit	Article 18 EC

C-332/05, *Celozzi*	Residence of spouse in other Member State leads to less favourable tax class, which leads to lower sick pay	Article 3 (1) of Regulation (EEC) No 1408/1971
C-507/06, *Klöppel*	Drawing of child-raising allowance by father for extension of entitlement	Article 3 (1) of Regulation (EEC) No 1408/1971
C-269/07, *EC v Germany*	- Full liability to income tax in competent State for entitlement to savings pension bonus; - use for purchase of a dwelling in the competent Member State only; - Obligation to pay back the bonus, when full tax liability ends	Article 39 EC and Article 7 of Regulation (EEC) No 1612/1968; Articles 12 and 18 EC
C-257/10, *Bergström*	Income in CH with income in SE. But: no direct assimilation but fictitious insurance career in SE	Article 3 (1) of Regulation (EEC) No 1408/1971
C-522/10, *Reichel-Albert*	Child-raising in another Member State	Article 21 TFEU
C-523/13, *Larcher*	Participation in a part-time work scheme for entitlement to pension	Article 3(1) of Regulation (EEC) No 1408/1971
C-453/14, *Knauer*	First-pillar pension from AT and second-pillar pension from LI for the purposes of collecting contribution under AT legislation (competent State Article 23 of Regulation (EC) No 883/2004)	Article 5(a) of Regulation (EC) No 883/2004
C-284/15, ONEm	Entitlement to unemployment benefits only in the State where the last contribution was paid	Article 67(3) of Regulation (EC) No 1408/1971 and Article 48 TFEU

The history of the case law on assimilation of facts as a principle and a legal provision was driven and inspired by the rationale to make this rule a backbone of the coordination of social security rights and duties in general. In this respect it is built upon the same footing as other leading principles of EU coordination law. The plethora of judgments demonstrates what a wide range of applications the assimilation of facts rule can assume. The whole reasoning about the assimilation of facts rule is that external facts or legal circumstances have the same impact on social security rights and commitments as internal circumstances.

2.2.2. Overview of the case law

A frequent issue in the case law of the CJEU concerned the **assimilation of insurance periods** in another Member State with those in the competent Member State for the entitlement to benefits.

Probably the first relevant judgment was the case ***Hagenbeek***.[16] The question of the national court referred to the case of a worker who, after having been subject to the Dutch social security system, **was affiliated to the social security system of another Member State** at the time when the Widow and Orphans Act (*Algemene Weduwen- en wezenwet – AWW*) entered into force in the Netherlands. The *AWW* would still have applied to him, if he had not become a migrant worker. Dutch legislation provided that insurance periods completed in the Netherlands before 1 October 1959 were assimilated to insurance periods completed in pursuance of the *AWW*. The CJEU pointed to **Articles 48 to 51 EC** and held that the Dutch institution was obliged to assimilate also the payment of premiums under the legislation of another Member State.

The case ***Welchner***[17] concerned a provision of German law under which, for the purpose of calculating an invalidity pension, periods of military service and of captivity were taken into consideration in favour of the person concerned as ‘‘substitute periods’’ (*Ersatzzeiten*). The question was whether contributions paid under the legislation of another Member State of the EEC must be assimilated to contributions paid under German legislation. The CJEU denied assimilation by invoking the principle that it is the competence of the national legislature to determine insurance periods. The reference to national legislation sets forth very clearly the principle that Regulation No 3, insofar as it takes “assimilated periods” into account, intends neither to modify nor supplement national law, provided that the latter observes the provisions of **Articles 48 to 51 EC**. In particular, the phrase “in so far as they are regarded as being equivalent” showed for the CJEU that the regulation also referred to the conditions under which national law regards a given period as being equivalent to insurance periods properly so-called.[18]

The **case *Coonan***[19] *has been* ***overruled*** by later case law and is interesting for the earlier understanding of the CJEU. UK legislation provided that, if a worker continued to be employed beyond pensionable age, he or she was entitled to cash sickness benefits only if he or she would have been entitled to a particular kind of retirement pension under national legislation in the event of his or her ceasing to work. Since that entitlement to a retirement pension could derive only from affiliation to a national social security scheme it necessarily followed that a person, whether of United Kingdom or foreign nationality, who, before reaching pensionable age, had never completed qualifying periods in that Member State or who had completed only an insufficient number of qualifying periods in that State to be entitled to a retirement pension, did not fulfil that condition. That situation could be remedied only if affiliation in another Member State before pensionable age in the United Kingdom were treated as equivalent to affiliation in the latter Member State. The CJEU saw no problem of indirect discrimination under **Article 3 (1) of Regulation (EC) No 1408/1971** and held that if national legislation makes affiliation to a social security scheme or to a particular branch under that scheme conditional in certain circumstances on prior affiliation by the person concerned to the national social security scheme, the Regulation did not compel Member States to treat as equivalent insurance periods completed in another Member State and those which were completed previously on national territory.[20]

[16] judgment in *Hagenbeek*, C-4/66, EU:C:1966:43.

[17] judgment in *Welchner*, C-14/67, EU :C:1967:48.

[18] judgment in *Welchner*, EU:C:1967:48, p. 337.

[19] judgment in *Coonan*, C-110/79, EU:C:1980:112

[20] judgment in *Coonan*, EU:C:1980:112, paragraph 13

In the very complex case ***Spruyt***[21] the CJEU ruled that the **principle of the freedom of movement of persons** and in particular **Article 51 EC** requires that periods before 1 January 1957 during which a married woman, who did not satisfy the conditions permitting her to have such periods treated as periods of insurance, resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, she pursued an activity as an employed person in the Netherlands for an employer established in that country, must be considered as periods of insurance completed in application of the Netherlands legislation on general old-age insurance.[22]

The case ***Duchon***:[23] can be considered to be a ***key case*** for the assimilation of facts which led to the adoption of Article 5 Regulation (EC) No 883/2004. Under Austrian law, employed persons are entitled to an occupational disability pension if they satisfy the general condition of having completed the qualifying period during the reference period. However, the qualifying period required is waived when the circumstances giving rise to the acquisition of the right to a pension are the result of an accident at work or occupational disease suffered by a person **covered by compulsory insurance under the pension insurance scheme under an Austrian federal law**. Mr Duchon, an Austrian national, was the victim of an industrial accident while he was working as a trainee in Germany. Since that date, he had been in receipt of an industrial accident benefit from the competent German authorities. The application by Mr Duchon for an Austrian occupational disability pension was rejected on the grounds that the qualifying period required was not waived because, at the time when the industrial accident occurred, Mr Duchon **was not insured in Austria but in Germany**. The CJEU ruled that **Article 48(2) EC** must be interpreted as precluding such a national provision. The CJEU did not refer to Article 3 of Regulation (EC) No 1408/1971.[24] It declared Article 9a of Regulation (EC) No 1408/1971 invalid insofar as it expressly excluded the possibility of taking into account, for the purposes of prolongation of the reference period under the legislation of a Member State, periods during which industrial accident benefits have been paid under the legislation of another Member State.[25] The question if the industrial accident itself could be assimilated with an industrial accident that occurred in Austria was not discussed by the CJEU.

The situation of Ms ***Rockler***[26] concerned insurance periods which were completed under a scheme that was not covered by the Regulation as she was consecutively employed in Sweden and by the Commission of the European Communities. The Swedish social insurance office refused to pay Ms Rockler a parental benefit in relation to a daily sickness benefit, on the grounds that she was not insured under the national sickness insurance scheme for benefits above the guaranteed amount for at least 240 consecutive days immediately before the due date of the birth of her child and that she had not completed any insurance period under the legislation of another Member State. The CJEU held that an official of the European Communities has the status of a migrant worker and that therefore **Article 48 EC** must be interpreted as meaning that the working period during which a worker was affiliated to the Joint Sickness Insurance Scheme of the European Communities must be taken into account for entitlement to the benefit under Swedish legislation. Provisions which preclude or deter a national of a Member State from leaving his or her country of origin to exercise his or her right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the worker concerned. National legislation which does not take into account, for the calculation of the amount of a parental benefit, periods of employment completed under the Joint Sickness Insurance Scheme of the European Communities is

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[21] judgment in *Spruyt*, C-284/84, EU:C:1986:79

[22] judgment in *Spruyt*, EU:C:1986:79, paragraph 28

[23] judgment in *Duchon*, C-290/00, EU:C:2002:234.

[24] The CJEU only referred to Article 94 of Regulation (EEC) No 1408/1971, as Mr Duchon's accident at work happened before Austria's accession to the European Community.

[25] judgment in *Duchon*, C-290/00, EU:C:2002:234, paragraphs 38 and 39.

[26] judgment in *Rockler*, C-137/04, EU:C:2006:106.

likely to dissuade citizens of a Member State from working within an institution of the European Union situated in another Member State, since, by accepting employment with such an institution, they lose the right to benefit under the national sickness insurance scheme from family benefits to which they would have been entitled had they not accepted that employment.[27] As the reasoning of the CJEU is directly derived from the Treaty, this case can be considered to be a case of aggregation or of assimilation.

Two cases specifically concerned **unemployment in another Member State**.

The well-known case of Mr ***d'Amico***[28] is ***overruled*** by later case law. The CJEU held that when national legislation makes the early acquisition of the right to retirement benefits conditional upon the person concerned having been unemployed for a certain time, as well as upon the completion of a period of membership of a social insurance scheme, and when therefore the length of this period of unemployment is not intended to be included in the period of membership required or to be used in the calculation of the benefit, but constitutes a **separate additional condition**, it does not follow from the provisions of the Regulations that EU law requires the fact that the person concerned is registered as unemployed in another Member State to be taken into consideration in such a case.

In another case, Mr ***Bronzino***,[29] an Italian national, was refused a child benefit in respect of his three children who were residing in Italy and were registered there as persons seeking employment. The refusal was based on the fact that Mr Bronzino's children were not at the disposal of the employment office as unemployed persons in Germany, which was a condition for the grant of the allowance in respect of dependent children who are unemployed. The CJEU held that a condition of entitlement to certain family benefits whereby a worker's child must be registered with the employment office of the Member State providing the benefits, a condition which can be fulfilled only if the child resides within the territory of that State, comes within the scope of **Article 73 of Regulation (EC) No 1408/1971** (Article 67 of Regulation (EC) No 883/2004) and must therefore be considered to be fulfilled where the child is registered with the employment office of the Member State in which he resides. Any other decision could deter EU workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.[30]

The case ***Kenny***[31] is the only case where **assimilation for the loss of rights** was at stake. It is of particular importance for the question if assimilation to the detriment of the person concerned is an automatic result of Article 5 or if this is only an option for the competent Member State which must be laid down in national legislation. It was unclear whether the British competent institution must treat **imprisonment or detention in legal custody** in another Member State as equivalent to imprisonment or detention in legal custody in Great Britain, which would have disqualified the worker concerned in part or in whole from receiving cash sickness benefits. The CJEU stated that it is for the national legislation to lay down the conditions for the acquisition, retention, loss or suspension of the right to social security benefits as long as those conditions apply without discrimination. **Articles 7 and 48 EC and Article 3 (1) of Regulation (EC) No 1408/1971** did **not prohibit** – **though they did not require** – the treatment by the institutions of Member States of corresponding facts occurring in another Member State as equivalent to facts which, if they occur on the national territory, constitute a ground **for the loss or suspension of the right to cash benefits**. The decision on this matter is for the national authorities, provided that it applies without regard to nationality and that those facts are not described in such a way that they lead in fact to discrimination against nationals of the other Member States.

[27] judgment in *Rockler*, EU:C:2006:106, paragraph 19.

[28] Judgment in *d'Amico*, C-20/75, EU:C:1975:101.

[29] judgment in *Bronzino*, C-228/88, EU:C:1990:85; see also judgment in *Gatto*, C-12/89, EU:C:1990:89.

[30] judgment in *Bronzino*, C-228/88, EU:C:1990:85, paragraph 12.

[31] judgment in *Kenny*, C-1/78, EU:C:1978:140.

According to this ruling assimilation is in principle only allowed and not an obligation where this is to the detriment of the migrant worker. Consequently, any assimilation with a negative impact for the migrant worker would have to be laid down in national provisions. However, this does not seem to be the practice in many Member States who directly apply Article 5 also for the purpose of suspending or cutting rights. It is doubtful if this principle also applies under Regulation (EC) No 883/2004.

A number of cases concerned the assimilation of the **receipt of benefits or income** in another than the competent state.

The case ***Paraschi***[32]: under German law the reference period for entitlement to pensions in respect of reduced capacity for work could be prolonged by periods of sickness or unemployment, provided that the person concerned was entitled to the payment of benefits. The application of those rules to migrant workers in Germany gave rise to a number of problems concerning the comparability and similarity of the benefits paid under German law (which were capable of prolonging the reference period) and the benefits paid under the law of another Member State (which, according to the German insurance institutions, could not prolong the reference period).[33] The CJEU held that these provisions were not compatible with **Articles 48 to 51 EC**.[34]

The case of **Mrs *Masgio***[35] concerned **German overlapping rules** which provided for more advantageous provisions if both benefits to be taken into account (old-age pension and accident insurance benefit) were paid by a German institution than if one of them was paid by another State. The CJEU called to mind that according to **Article 48(2) EC** and **Article 3(1) of Regulation (EC) No 1408/1971** such legislation was liable to constitute an obstacle to freedom of movement for workers.[36]

In a peculiar ***key case***, referring to the rights derived from EU Association Agreements, Mr ***Öztürk***,[37] a Turkish national, had for several years been working in Austria and then in Germany. For 18 months he was unemployed in Germany and received an unemployment benefit from the local Employment Office. The Austrian legislation provided for an early old-age pension in cases of long-term unemployment. This pension accrued provided that the person insured had received unemployment benefits during the qualifying period and that the person insured had, by the qualifying date, paid at least 180 compulsory monthly old-age insurance contributions. On the grounds that, during the 15 months immediately preceding the qualifying date Mr Öztürk **had not received unemployment benefits in Austria but in Germany**, the Austrian pension fund refused to grant him an early old-age pension in the event of unemployment. The CJEU recognised a covert form of discrimination in violation of **Article 3(1) of Decision No 3/80** (which is based on Article 3(1) of Regulation (EC) No 1408/1071).

Ms ***Klöppel***[38] and Mr Kraler, who were at the time residing in Germany with their newborn daughter, received child-raising allowance paid in Germany, with the allowance actually having being drawn by Mr Kraler for the period of one year. Later the family established themselves in Austria, where Mr Kraler resumed his professional activity. From that date onwards Ms Klöppel received childcare allowance in Austria. Her application for the payment of that allowance to be extended was rejected by a decision of the Austrian institution. This refusal was based on a provision in the Austrian legislation which stipulates that, where only one parent claims childcare allowance, it is to be paid for a maximum of 30 months following the birth of the child concerned, but that, if the second parent also claims Austrian childcare allowance, the right to that

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[32] judgment in *Paraschi*, C-349/87, EU:C:1991:372.

[33] judgment in *Paraschi* EU:C:1991:372, paragraphs 4 and 6.

[34] judgment in *Paraschi* EU:C:1991:372, paragraphs 22 and 23.

[35] judgment in *Masgio*, C-10/90, EU:C:1991:107.

[36] judgment in *Masgio*, EU:C:1991:107, paragraph 19.

[37] judgment in *Öztürk*, C-373/02, EU:C:2004:232.

[38] judgment in *Klöppel*, C-507/06, EU:C:2008:110.

allowance can be granted for 36 months, with both parents taking turns to draw that allowance. However, Mr Kraler's drawing of the child-raising allowance in Germany was not taken into account. The CJEU held that the refusal to take into account, for the purposes of granting Ms Klöppel the Austrian childcare allowance, the period during which her partner received a comparable benefit in Germany was considered to be indirectly discriminatory under **Article 3(1) of Regulation (EEC) No 1408/1971**.[39]

The case ***Bergström***[40] is a ***key case*** for the question if and how foreign income must be assimilated for the purpose of the calculation of benefits and will be discussed in 3.3.

The case ***Knauer***[41] is a ***key case*** for the interpretation of the assimilation principle and Article 5 (a) of Regulation (EC) No 883/2004 and will be discussed in 3.1. and 3.2.

There are some interesting cases where the **assimilation of residence in another Member** State with that in the competent Member State was the relevant issue. As these cases were not about the export of benefits, residence could be subject to Article 5 and not to Article 7.

In the case ***Imbernon Martinez***[42] the CJEU held that **Article 73 of Regulation (EEC) No 1408/1971** (Article 67 of Regulation (EC) No 883/2004) is to be interpreted as meaning that where under the tax legislation of a Member State to which that State's social legislation refers, entitlement to and the amount of benefits for dependent children is **linked to residence in the national territory of the worker's spouse** (not the children), that condition must be regarded as fulfilled if the spouse resides in the territory of another Member State. For the purposes of the entitlement to and the calculation of the benefit in question **all the relevant tax legislation must be applied as if the spouse resided in the Member State providing the benefits.**[43]

In the ***Terhoeve*** case[44] the national court essentially asked whether Articles 7 and 48 of the Treaty or Article 7(2) of Regulation (EC) No 1612/1968 preclude a Member State from levying, on a worker who has transferred his or her residence in the course of a year from one Member State to another in order to take up employment there, higher social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in the Member State in question, where the former worker is not also entitled to additional social benefits. The CJEU pointed to **Articles 48 and Article 3(c) EC** and the abolition of **obstacles to freedom of movement for persons**.[45] A national of a Member State could be deterred from leaving the Member State in which he or she resides in order to pursue an activity as an employed person in the territory of another Member State if he or she were required to pay higher social contributions than if he or she continued to reside in the same Member State throughout the year, without thereby being entitled to additional social benefits such as to compensate for that increase. It was therefore unnecessary to consider whether there was indirect discrimination on grounds of nationality.[46]

Mr *Merino Garcia*[47] had been refused entitlement to German family allowances for his children residing in Spain, whereas German law allowed such benefits to be granted to anyone who had his or her domicile or habitual residence in Germany, provided that also

[39] judgment in *Klöppel*, EU:C:2008:110, paragraphs 18, 19.

[40] judgment in *Bergström*, C-257/10, EU:C:2011:839.

[41] judgment in *Knauer*, C-453/14, EU:C:2016:37.

[42] judgment in *Imbernon Martinez*, C-321/93, EU:C:1995:306.

[43] judgment in *Imbernon Martinez*, EU:C:1995:306, paragraph 30.

[44] judgment in *Terhoeve*, C-18/95, EU:C:1999:22.

[45] judgment in *Terhoeve*, EU:C:1999:22, paragraph 36.

[46] judgment in *Terhoeve*, EU:C:1999:22, paragraph 38-40.

[47] judgment in *Merino Garcia*, C-266/95, EU:C:1997:292.

his or her dependent children were domiciled or habitually resided in Germany. By pointing to the prohibition of covert forms of discrimination the CJEU held that **Article 48(2) EC** must be interpreted as precluding the application of national legislation which results in an employed person whose children are resident in another Member State being refused family benefits in respect of full calendar months falling within an extended period of unpaid leave, where employed persons whose children are resident in the Member State concerned are entitled to such benefits.[48]

The case of Mr ***de Cuyper***[49] can be considered to be a ***key case*** for the aspect of proportionality. It dealt with the question whether **Articles 17 and 18 EC** preclude a provision of national law which makes entitlement to an allowance granted to unemployed persons aged over 50 who are exempt from the requirement to register as jobseekers conditional on actual residence in the Member State concerned. The CJEU held that freedom of movement and residence, conferred on every citizen of the Union by Article 18 EC, does not preclude a residence clause, because the effectiveness of monitoring arrangements is to a large extent dependent on the fact that the monitoring is unexpected and carried out on the spot, which justifies the introduction of arrangements that are more restrictive than those imposed for monitoring in respect of other benefits.

The **case *Celozzi***:[50] Under German law the amount of daily sick pay varied according to the net wages received, which were themselves determined by the tax class stated on the worker's tax card. As a matter of administrative practice, a migrant worker, whose spouse often continues to reside in the Member State of origin, was automatically placed in a tax class which was unfavourable to him, namely a tax class applicable to workers who are married but permanently separated from their spouses, instead of, like national workers, having allocated to him the more favourable tax class which was applicable to married workers living with spouses who were not in paid employment. A correction of the tax class was possible but depended on a number of formal requirements to be undertaken by the applicant. Furthermore, German case law precluded, in the great majority of cases, a retroactive amendment**.** The CJEU held that this legal framework and administrative practice was covert discrimination under **Article 3(1) of Regulation (EEC) No 1408/1971**.

The case ***EC v Germany***:[51] under German law taxpayers who are fully liable to income tax in Germany were entitled to a savings pension bonus. The beneficiary of the bonus could directly use at least €10,000 of the capital built up under a savings pension contract for the purchase or construction of an owner-occupied dwelling in Germany or of a flat in the national territory. If the beneficiary was no longer domiciled or habitually resident in Germany and was therefore no longer fully liable to tax, the beneficiary must reimburse the bonus. The CJEU held that the grant of the savings pension bonus is a social advantage generally granted to workers on the basis of their objective status as workers. According to settled case law, cross-border workers may rely on the provisions of **Article 7 of Regulation (EEC) No 1612/1968** on the same basis as any other worker to whom that Article applies. In the present case the grant of the savings pension bonus was conditional on full liability to German tax. Natural persons are fully liable to German tax if they have their domicile or habitual residence in Germany or make a request to that effect and satisfy the strict conditions laid down in that provision. The workers concerned were cross-border workers whose income was taxed exclusively in their State of residence pursuant to bilateral conventions to prevent double taxation concluded by Germany. Consequently, those workers did not have the possibility of being treated in the same way as fully liable taxpayers. In those circumstances, the requirement of being fully liable to German tax amounted to a residence requirement. This constituted an infringement of **Article 39 EC** and **Article 7(2) of Regulation**

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[48] judgment in *Merino Garcia*, EU:C:1997:292, paragraphs 33, 34.

[49] judgment in *de Cuyper*, C-406/04, EU:C:2006:491.

[50] judgment in *Celozzi*, C-332/05, EU:C:2007:35.

[51] judgment in EC v Germany, C-269/07, EU:C:2009:527.

(EEC) No 1612/1968 (indirect discrimination on the basis of nationality).[52] The CJEU also stated that the aim of ensuring an adequate supply of housing and assuming that such an aim constitutes an overriding reason in the public interest, the requirement that the dwelling to be acquired or constructed must be situated in Germany from any perspective goes beyond what is necessary to achieve the desired objective, since that objective could be just as easily attained if cross-border workers continue to establish their residence in another Member State rather than in Germany.[53] Furthermore, the CJEU held that the obligation to reimburse the savings pension bonus on termination of liability to unlimited taxation infringed **Article 39 EC** and **Article 7(2) of Regulation (EEC) No 1612/1968** as well as **Articles 12 EC** and **18 EC**. The obligation to reimburse dissuades citizens of the European Union regardless of their nationality, including German nationals, from transferring their residence to another Member State.[54]

Cases where the **performance of a gainful activity** in a State other than the competent State was under scrutiny:

The case of Mr ***Roviello*** (**C-20/85**)[55] is very interesting as it dealt with assimilating economic professions under the legislation of different Member States. An Italian national had worked as a tiler in Italy. In Germany his application for an occupational invalidity pension was rejected because he had no qualification as a tiler under German law. He could not therefore be regarded as a skilled worker but only as a semi-skilled worker. Annex VI to Regulation (EC) No 1408/1971 stipulated that for the purpose of the said legislation account shall be taken only of **insurable activities under German legislation**. Remarkably at that time there was unanimous agreement in the Council to restrict assimilation in this regard. The CJEU observed that although the criterion laid down in the entry applied independently of the nationality of the worker it concerned essentially migrant workers coming from other Member States who have been employed successively in those States and in Germany. The European provisions in Annex VI combined with those of the German legislation worked to the disadvantage of certain migrant workers who have obtained in another Member State a qualification higher than that which they have in Germany, who are unable to obtain recognition of that qualification and may therefore find themselves refused a pension to which they would have been entitled if that entry had not been adopted. The fact that other migrant workers, in other circumstances, may derive an advantage from that entry can neither eliminate nor compensate for that discrimination. The entry was declared void because it could not guarantee the equal treatment required by **Article 48 EC**. Unlike the Council, the CJEU did not accept practical difficulties when carrying out the assimilation for justifying the restriction of assimilation.

Mr ***Wolf***[56] had been employed in the Federal Republic of Germany and requested an exemption from paying the social security contributions for self-employed persons under Belgian law. Under that legislation a self-employed person was not liable to pay contributions if his or her income earned in that capacity did not reach a certain threshold and if, in addition to that activity, he or she habitually pursued, by way of principal occupation, another occupational activity. The CJEU held that **Articles 48 and 52 EC** must be interpreted as meaning that a Member State may not refuse to exempt self-employed persons working within its territory from the contributions provided for under the national legislation on social security for self-employed persons on the ground that the **employment** which is capable of giving entitlement to such exemption is **pursued within the territory of another Member State**.

[52] judgment in *EC v Germany*, EU:C:2009:527, paragraph 56.

[53] judgment in *EC v Germany*, EU:C:2009:527, paragraph 82.

[54] judgment in *EC v Germany*, EU:C:2009:527, paragraph 92.

[55] judgment in *Roviello*, C-20/85, EU:C:1988:283

[56] judgment in *Wolf*, C-154/87, EU:C:1988:379.

In the **case C-45/92 and C-46/92, *Lepore and Scamuffa***, the CJEU referred to **Articles 48 to 51 EC** and stated that it is incompatible with EU law for migrant workers to be precluded from relying for the calculation of their old-age pension on national legislation treating periods of invalidity as periods of active employment on the sole ground that, when they became incapable of work, they were employed, not in the Member State in question, but in another Member State.

Three cases, ***Elsen***[57], ***Kauer***[58]and ***Reichel-Albert***[59], concerned **child-raising *in another than the competent Member State***. They will be discussed in 4.1.

Some cases were linked to the **assimilation of nationality**. While under Article 4 of Regulation (EC) No 883/2004 nationality must be disregarded, there are also situations where the nationality of another Member State must be assimilated.

The case ***Toia***[60] dealt with a condition for entitlement to the allowance for women with children provided for by the French Social Security Code. Mrs Toia was an Italian mother who resided with her seven children in France, five of whom were of Italian nationality. For those children she was refused the allowance because French legislation conferred entitlement to the allowance in question on the condition that also **the children are of French nationality** at the date on which the entitlement arises. While the nationality condition for the mother was disregarded as discrimination on the grounds of nationality, the nationality condition for the children was considered to apply. The CJEU held that the decision not to rely on the fact that the mother did not have French nationality was condition concerning the children's nationality was to be regarded as indirect discrimination of the mother under **Article 3 of Regulation (EC) No 1408/1971**.[61] At first sight it may be confusing why this case is mentioned under the aspect of assimilation of facts because – as a rule – a nationality condition must be **disregarded** by applying the prohibition of direct discrimination under e.g. Article 3 of that Regulation and not assimilated; consequently, in this case the Italian nationality of the mother was not assimilated with French nationality, but the condition was simply disregarded. However, it must be noted that Regulation (EEC) No 1408/1971 applied only to workers, i.e. to the mother, and not to her children. Therefore, the nationality of the children can be considered a fact covered by one of the various aspects of the assimilation principle and an indirect discrimination of the mother.

The case ***Allué and Coonan***[62] dealt with a provision of national law which imposed a limit on the duration of the employment relationship between universities and foreign-language assistants where there was in principle no such limit for other workers. The CJEU held that this was to be considered as covert discrimination which could not be justified and was therefore precluded by **Article 48(2) EC**.

The case ***Kaske***[63] concerned the Austrian legislation on unemployment benefits, which provided that the 1-day rule under Article 61(2) of Regulation (EC) No 883/2004 did not apply if the unemployed person has resided or habitually stayed in Austria for a total of at least 15 years before his or her last employment abroad. In this case a minimum period of employment in Austria before making the claim for unemployment benefit was not required. The CJEU held that this advantage was to the detriment of Austrian nationals who exercised their right to freedom of movement and of most nationals of other Member States. Such a provision must therefore be regarded as a restriction on the right to freedom of movement and as indirectly discriminating on grounds of nationality. National law may contain more favourable rules than EU law provided that they comply

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[57] judgment in *Elsen*, C-135/99, EU:C:2000:647.

[58] judgment in *Kauer*, C-128/00, EU:C:2002:82.

[59] judgment in *Reichel-Albert*, C-522/10, EU:C:2012:475.

[60] judgment in *Toia*, C-237/78, EU:C:1979:197.

[61] judgment in *Toia*, EU:C:1979:197, paragraphs 13 and 14.

[62] judgment in Allué and Coonan, C-33/88, EU:C:1989:222.

[63] judgment in *Kaske*, C-277/99, EU:C:2002:74.

with the principles of EU law. A rule in a Member State which, for the purposes of the criteria for entitlement to unemployment benefits, favours workers who spent 15 years in that Member State before their last employment abroad is incompatible with **Article 48 EC**.

A significant number of rulings dealt with the assimilation of **facts that are determined by the institutional environment and legislation** in another Member State.

In the case ***Le Manoir***,[64] French legislation stipulated that employers who provide vocational training to trainees **coming under the French national education system** could be subject to the payment of lower social security contributions. As Le Manoir, a technical college in Ireland, was not entitled to benefit from these provisions as regarded a trainee who came under the Irish national education system, the French institution demanded the payment of higher contributions without any additional entitlement to benefits. The CJEU pointed out that such provisions, although formally addressed to employers, in reality concerned trainee workers. The fact that employers were required to pay different employers' social security contributions depending on the category of trainee worker in question affected the possibilities of some of those workers to have access to a traineeship.[65] It was a case of indirect discrimination and incompatible with **Article 48 EC** and **Article 7 (2) of Regulation (EEC) No 1612/1968.**

Two cases concerned the eligibility for the grant of Belgian unemployment benefits, known as 'tideover allowances', to young people who had just completed their studies and were seeking their first employment: In ***EC v Belgium***[66] the CJEU declared that Belgium failed to fulfil its obligations under **Article 48 EC** and **Article 7 of Regulation (EEC) No 1612/1968,** as it required that dependent children of migrant workers of the EU residing in Belgium had completed their secondary education in an establishment subsidised or approved by the Belgian State or by one of its Communities in order to be eligible for tideover allowances. Also the application of Mr ***Ioannidis***,[67] a Greek citizen, was rejected on the grounds that he had not completed his secondary education at an educational establishment in Belgium. The CJEU held that it is contrary to **Article 39 EC** for a Member State to refuse to grant a tideover allowance to a national of another Member State seeking his or her first employment who is not the dependent child of a migrant worker residing in the Member State granting the allowance, on the sole ground that he or she has completed his or her secondary education in another Member State.

The case ***Mora Romero***:[68] under German legislation the orphan's benefit is granted to the recipient until the age of 25 if he or she is at school or undergoing vocational training. However, payment thereof is suspended for the period for which the recipient is called up for **military service**. For the purposes of such suspension, military service in another Member State is assimilated to military service in the German armed forces. If the education or vocational training being received by the recipient of the benefit is interrupted as a result of the time served by him or her in the armed forces, the benefit is paid for a further period equal to the duration of the military service. However, according to German case law, payment for that additional period is available only for orphans who have completed their **military service under German legislation**, and therefore not for Mr Mora Romero for the duration of his military service in the Spanish army. The CJEU held that under **Article 3(1) of Regulation (EEC) No 1408/1971** Germany is required to assimilate military service in another Member State to military service under its own legislation. It is interesting that in this case the German institution

[64] judgment in *Le Manoir*, C-27/91, EU:C:1991:441.

[65] judgment in *Le Manoir*, EU:C:1991:441, paragraph 9.

[66] judgment in *EC v Belgium*, C-278/94, EU:C:1996:321.

[67] judgment in *Ioannidis*, C-258/04, EU:C:2005:559.

[68] judgment in *Mora Romero*, C-131/96, EU:C:1997:317.

assimilated the military service in Spain for the suspension of the benefit but refused to do so with regard to the extension of the payment.

The case ***Larcher***[69] is a ***key case*** for the interpretation of the assimilation principle and Article 5 of Regulation (EC) No 883/2004 and will be discussed in 3.1. and 3.2.

In a few cases the CJEU stressed that the **involvement of two different legislations** can mean that assimilation is not due because the national legislator does not need to take into account every possibly implication in other social security schemes. Furthermore, the obligation to assimilate facts in other Member States does not mean that the **rules of the Regulation are invalid** or that the competent State is obliged to **apply the legislation of another State**.

The **case *Leguaye-Neelsen***[70]: Under the German legislation, persons who ceased to be subject to compulsory insurance in Germany without having acquired the right to a pension in the future did not have any right to reimbursement of the compulsory contributions paid, but they were allowed to continue to pay voluntarily into the German scheme in order to acquire the right to a pension in the future. This rule applied regardless of the employee's nationality. However, German legislation withheld the right to make voluntary contributions from employees who, after paying compulsory insurance contributions for less than 60 months, entered the German public administration. In order to make up, in those circumstances, for the loss of entitlement to a pension in the future, these persons were granted the right to reimbursement of the contributions paid. The situation of such employees who, in the same circumstances, entered the public administration of another Member State was different, since the latter, unlike the former, enjoyed the right to pay voluntary contributions in Germany and therefore had no right to reimbursement. The CJEU stated that rules of that kind must be appraised in relation to **Article 3 of Regulation (EEC) No 1408/1971** and held that the special rules applicable to persons who entered the German public administration were intended to avoid duplication of insurance. However, the German legislature was not required to take account of situations where insurance was duplicated as a result of the simultaneous application of its own social security system and of a special social security scheme existing in another Member State, and there was nothing to prevent the German legislature from making persons subject to the scheme which was in general applicable to persons who cease to be subject to compulsory insurance.[71] It is important to bear in mind that at that time Regulation (EEC) No 1408/1971 did not apply to special schemes for civil servants. This case would probably be decided differently under Regulation (EC) No 883/2004.

In another case, Mr ***McLachlan***[72] complained that – on the one hand – his periods of insurance completed in the United Kingdom were taken into account in France in order to exclude him from the class of unemployed persons receiving benefits, and – on the other hand – that he was paid only a reduced old-age pension, his pension entitlement being calculated on the basis of the quarterly periods completed in France only, without taking into account those completed in the United Kingdom. He considered that the principle of equal treatment necessitates a choice between two solutions: either to take into account the quarterly periods completed in the United Kingdom and to pay him a pension at the full rate, or else to take into account only the quarterly periods completed in France, and accordingly find that he did not fulfil the conditions for old-age insurance and refer him back to benefits under unemployment insurance. The CJEU pointed out that it is **inherent in the system under Regulation (EC) No 1408/1971** that periods of insurance completed in another Member State are taken into account in determining the rate of the old-age pension, but are disregarded in calculating its amount. The Regulation allows different schemes to continue to exist, creating different claims on different

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[69] judgment in *Larcher*, C-523/13, EU:C:2014:2458.

[70] judgment in *Leguaye-Neelsen*, C-28/92, EU:C:1993:942.

[71] judgment in *Leguaye-Neelsen*, C-28/92, EU:C:1993:942, paragraph 16.

[72] judgment in *McLachlan*, C-146/93, EU:C:1994:282.

institutions against which the claimant possesses direct rights. Each State pays the benefits which correspond to the periods completed under its legislation. This system does not infringe the principle of non-discrimination under **Article 3 of that Regulation**.[73]

The question asked in the case of Mr ***Iurlaro***[74] was whether the extension of the reference period as provided for under German legislation did also apply for entitlement to an Italian pension, if periods were taken into account during which Mr Iurlaro had drawn German unemployment benefits. The CJEU held that **Articles 48 to 51 EC**, **Article 9a of Regulation (EEC) No 1408/1971** and **Article 15(l)(f)(ii) of Regulation (EEC) No 574/72** must not be interpreted as requiring a Member State to extend the reference period which is laid down by its legislation for determining the minimum insurance requirement for the grant of an invalidity benefit by a period equivalent to the periods of unemployment spent by the person concerned under the legislation of another Member State *which, unlike in the former Member State, allows such an extension if the periods of unemployment are spent on national territory*.[75] The requirements for applying **Article 9a of Regulation (EEC) No 1408/1971** were not satisfied. This provision solely concerned a situation where a Member State's legislation which makes entitlement to a benefit conditional upon completion of a minimum period of insurance during a reference period *itself* allows for the extension of that period by periods during which certain benefits, and in particular unemployment benefits, were granted under the legislation of another Member State.[76]

However, the CJEU additionally held that national legislation which takes into account for the purposes of acquisition of entitlement to invalidity allowance only such periods of insurance against unemployment that were completed on national territory, to the exclusion of similar periods completed in the territory of other Member States, infringes those provisions of the Treaty. Furthermore, **Articles 48 to 51 EC** do not preclude the legislation of a Member State, such as the Italian legislation, from limiting to a period of six months the taking into account, for the purposes of granting an invalidity benefit, of periods of unemployment spent in another Member State, where such limitation is applicable also to cases where those periods are spent in the Member State of the competent institution.[77]

In the case ***ONEm***[78] the CJEU ruled that **Article 67(3) of Regulation No 1408/71** must be interpreted as not precluding a Member State from refusing to aggregate periods of employment necessary to qualify for an unemployment benefit to supplement income from part-time employment, where that employment was not preceded by any period of insurance or of employment in that Member State. **Article 48 TFEU** does not prohibit the EU legislature from attaching conditions to the rights and advantages which it accords in order to ensure the freedom of movement for workers enshrined in Article 45 TFEU or from determining the limits thereto. Moreover, the Council of the European Union made proper use of its discretion in attaching such conditions, inter alia, to Article 67(3) of Regulation No 1408/71, which is designed to encourage unemployed persons to seek work in the Member State where they last paid unemployment insurance contributions, and to make that State bear the burden of providing the unemployment benefits.

The very old case ***Warry***[79] is the only case that concerns **procedural provisions**, because in this case the CJEU also decided about the impact a claim for benefits in one

[73] judgment in *McLachlan*, EU:C:1994:282, paragraph 37.

[74] judgment in *Iurlaro*, C-322/95, EU:C:1997:410.

[75] judgment in *Iurlaro*, EU:C:1997:410, paragraph 25.

[76] judgment in *Iurlaro*, EU:C:1997:410, paragraph 17.

[77] judgment in *Iurlaro*, EU:C:1997:410, paragraph 32.

[78] judgment in *ONEm*, C-284/15, EU:C: 2016:220.

[79] judgment in *Warry*, C-41/77, EU:C:1977:177.

Member State can have in other States. The British legislation in force at the relevant time provided that in order to gain entitlement to a sickness benefit a claimant had to have paid contributions over a certain period and to have made a claim for the benefit within a certain period following the materialisation of the risk. Mr Warry had neither paid contributions in Great Britain nor had he submitted a claim. Even if he had paid contributions and submitted a claim, the payment would have been suspended during the whole period during which he was absent from Great Britain, which would have rendered a claim purposeless. The CJEU held that although Article 36 of Regulation (EEC) No 574/72, which provided that a claim for benefits sent to the institution of one Member State shall automatically involve the concurrent award of benefits under the legislation of all the Member States in question whose conditions the claimant satisfies, does not apply to sickness benefits, it would be contrary to the aim of **Article 51 EC** and to the **general scheme of Regulation No 1408/1971** that a worker who has submitted a claim for an invalidity benefit in accordance with that provision should have his claim refused on the ground that, at an earlier stage, he had not submitted a claim for a sickness benefit to the competent institution of another Member State. It should be noted that the reasoning of the CJEU referred to a provision in the implementing Regulation already providing for some assimilation of claims and to the "general scheme of the Regulation", and extended this European rule to other claims not explicitly covered. It therefore seems questionable whether the assimilation principle applies directly to national procedural rules and whether provisions like Article 50(1) of Regulation (EC) No 883/2004 can be considered to be only a clarification of what would apply under Article 5 anyway. This will be assessed in depth in Chapter IV.

2.3. Proportionality (Recital 12) as a restriction of the assimilation principle and the avoidance of unjustified results

2.3.1. Introduction

The initial proposal by the European Commission (EC) for a new coordination Regulation included the assimilation of facts, benefits and income merely as a development of the principle of equal treatment. In fact, the assimilation provision was, for the EC, an aspect of Article 4 of Regulation (EC) No 883/2004 (equal treatment). However, the Union legislature, at the request of the European Parliament, proceeded to approve a new Article 5 of Regulation (EC) No 883/04 (assimilation of facts, income and benefits), giving naturalisation to a new principle that although directly emanating from the principle of equal treatment has acquired autonomy and power of its own.

Maybe the legislature considered, and with reason, that this principle could constitute a Pandora's box with unpredictable effects. Consequently, it adopted a number of reservations or limits that, as a firewall, could avoid its possible invasion of other fields and principles of Regulation (EC) No 883/2004 or could lead to a number of unwanted effects with disproportionate consequences.

The principle of assimilation can by no means be considered an absolute principle. In this sense, this statement – valid, in general, for all juridical principles – is even more valid in this case. In this regard it is noted that, for instance, the principle of equal treatment or the principle of maintenance of acquired rights or maintenance of rights in the course of acquisition, have their own exceptions, controls and limits (e.g. concerning Regulation (EC) No 883/2004: the non-exportability of special non-contributory benefits, no aggregation of periods for preretirement benefits or the application of certain articles of bilateral agreements only to nationals of the States that have signed the bilateral agreement). However, with regard to the principle of assimilation of facts, the safeguards are much stronger due to the need of introducing preventive emergency brakes. In this regard, Recital No 12 of the Regulation contains a provision that defines the contours of this principle and its borders with the aim of creating safety nets to prevent excesses that could go beyond its final objective.

2.3.2. The establishment of clear limits to the European principle of assimilation

Recital 12 of the Regulation reads: "*In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period."*

The European legislature first approved the principle of assimilation of facts and immediately afterwards marked the limits to that principle with different recitals, in particular No 12. In any case, the principle of proportionality would be applicable even if Recital No 12 did not exist. In fact, unjustified or unwanted results must always be avoided when applying legal provisions. The difficulty is to define what is meant by "unjustified results".

In this regard perhaps we should recall that Article 5 of Regulation (EC) No 883/2004 includes not only the pure assimilation of facts but also the assimilation of benefits and income. Although in colloquial and also in technical terms, the term assimilation of facts includes all situations of Article 5, strictly speaking the situations of letter (a) and (b) should be differentiated. So does the title of Article 5 "**Equal treatment of benefits, income, facts or events**". Recital No 12 only explicitly mentions assimilation of facts, but not assimilation of benefits or income. However, in Recital No 9 facts, benefits and income are mentioned. Consequently, it could be understood, in a very strict way or narrow interpretation, that the principle of proportionality, according to Recital No 12, only concerns fact or events. However, this is only a theoretical discussion. We must insist that for our purpose and understanding it could be convenient to treat letters (a) and (b) of Article 5 in the same way and without differences in the light of Recital No 12. It has to be recalled that the principle of proportionality is an essential element in the application of the law, even if not specifically mentioned in each case. The difference could lie in the intensity of the application of this principle. When the EU legislature points out in Recital No 12 that with regard to the principle of assimilation (a European, not a national principle) proportionality has to be applied, it is reinforcing the idea that the principle itself can entail undesired consequences that have to be avoided. The proportionality principle generally aims to protect the beneficiaries from decisions of Member States, but also the legitimate interests of Member States can be the subject of protection. Consequently, this is the added value of Recital No 12.

On the other hand, it should be emphasised that proportionality is not a goal in itself but a tool for achieving a result that respects, with not always equal intensity, different interests that are in conflict. Proportionality refers to the relationship between a desired result and the means for achieving it. Indeed, the application of this principle presupposes the existence of two legal interests that are in conflict. Concerning Regulation (EC) No 883/2004, proportionality implies the confrontation, to a greater or lesser extent, of European interests (free movement) and Member States' interests. In this regard, proportionality looks for a balance or modulation to avoid, in case of the unlimited and unbridled application of this principle, excessive or unreasonable results. However, this proportionality element runs in a double direction and affects also national institutions when they decide to adopt a measure to avoid these possible excessive or unreasonable results or effects. In this case, they must take into account the principle of proportionality, which requires adequacy of the purposes with regard to the instruments chosen and an adequate justification.

The main characteristic of the principle of proportionality is that it does not respond to absolute criteria that can be applied in all cases. On the contrary, in most cases the proportionality element only allows solutions of concrete and individual cases. It has to be taken into account that proportionality responds to the relationship between conflicting interests, which vary case by case. Consequently, the solutions adopted in many cases, even sharing some common elements, may be different in other cases. Unfortunately, proportionality does not allow an automatic, mathematics or mimetic

application of a preceding solution. For this reason, instead of absolute and fixed rules, it is better to refer to guidelines or recommendations.

Recital No 12 has two faces and two aims. The first one is the need to **avoid unfair or excessive effects**.

Secondly, the measures taken by Member States to prevent these unfair or excessive results may not overly sacrifice the free movement of workers. In fact, Recital No 12 opens the door for allowing Member States to act by introducing limitations to the principle of assimilation of facts, provided that they respect the principle of proportionality. In that regard, in order that national rules comply with the principle of proportionality, it is necessary to ascertain not only whether the means which they implement are appropriate to ensure attainment of the objective pursued, but also that those means do not go beyond what is necessary to attain that objective. Proportionality means fairness and appropriateness with regard to the results achieved by assimilation.

2.3.3. The proportionality test

The European case law has elaborated what is called the "proportionality test" for other fields of law, especially for trades, with three stages that could be used as guidelines for the free movement of persons as well.

- The first stage, corresponding to the **test of suitability** or appropriateness, consists in ascertaining that the act or measure adopted is suitable for attaining the aim sought.

- The second stage, relating to **the test of necessity**, sometimes also known as the '*minimum interference test'*, entails a comparison between the national measure at issue and the alternative solutions that would allow the same objective as that pursued by the national measure to be attained but would impose fewer restrictions.

- The third stage, corresponding to **the test of proportionality in the strict sense**, assumes the balancing of the interests involved. More precisely, it consists in comparing the extent of the interference which the national measure causes to the freedom of movement under consideration and the contribution which that measure could secure to the protection of the objective pursued.[80]

Of course the proportionality test is a complicated procedure. It has to be recalled that it can be used as a mere guideline. In fact, we could also use a different perspective: a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain it.[81]

On the other hand, taking into account the general wording of Recital No 12, there is a kind of **discretion** left to the Member States. However, this discretion cannot have the effect of allowing them to render the principle of free movement devoid of substance. Indeed, this discretion may be more or less broad, depending on the legitimate interests concerned. For this reason, it is difficult to make general statements. Furthermore, whatever the extent of that discretion, the fact nonetheless remains that the reasons which a Member State may invoke by way of justification must be accompanied by an analysis of the suitability and proportionality of the restrictive measure adopted by that State and of the precise evidence on which its argument is based. The balancing test implied by the principle of proportionality assumes an assessment of the more or less restrictive nature of the measure chosen when compared with the alternative measures

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[80] adapted from the Opinion of Advocate General Bot delivered on 3 September 2015 in *The Scotch Whisky Association and Others,* C-333/14, EU:C:2015:845.

[81] judgment in *de Cuyper*, C-406/04, EU:C:2006:491, paragraph 24.

that might have been implemented. An assessment is therefore required of whether there is another measure that would enable the same result to be attained while having less of an adverse effect on free movement. However, when examining proportionality in the strict sense of the national measure, it is also necessary to take into account the advantages and disadvantages of that measure. The CJEU stated:

> "*In that context, it has repeatedly been held that national legislation is appropriate for ensuring the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a 'consistent and systematic' manner".*[82]

It is only where the Member State has a choice between different measures suitable for attaining the same aim that it is under an obligation to have recourse to the measure least restrictive of the freedom of movement.

As Advocate General Polares Maduro states:

> *"However, the exceptions to the fundamental principle of the free movement (…) must be construed strictly."*[83]

In the same way the CJEU has ruled:

> *"The Member State concerned must demonstrate that the measure at issue is appropriate to the aim pursued and that it does not go beyond what is necessary to achieve that aim."* [84]

Essentially, the principle of proportionality entails a consideration of the costs and benefits of a measure enacted by a Member State in the light of the different interests.

This line of reasoning regarding the "proportionality test" may be applied to a concrete case of Regulation (EC) No 883/2004. Indeed, Article 14(4) of that Regulation states:

> *"If the legislation of any Member State makes admission to voluntary insurance or optional continued insurance conditional upon residence in that Member State, the equal treatment of residence in another Member State as provided under Article 5(b) shall apply only to persons who have been subject, at some earlier stage, to the legislation of the first Member State on the basis of an activity as an employed or self-employed person."*

How is the proportionality test to be applied to this Article? In reality, Article 14(4) includes an express restriction established by the legislature of the Union. In any event, it is also advisable to analyse the restrictions of the European legislature itself from the perspective of proportionality. We should ask which kind of unjustified result Article 14(4) tries to avoid. It seems clear that it refrains from possible abuse related to voluntary insurance schemes of any Member State based only on the condition of residence. Indeed, applying Article 5(b) of the Regulation without restrictions could imply that a European citizen residing in Member State A could demand the affiliation in the voluntary insurance scheme of Member State B based only on the condition of residence, without having any link with State B (forum shopping). Consequently, this restriction aims to protect the national interests of State B. However, a total and absolute restriction would be disproportionate because it would not take into account the interests of some citizens

[82] See, by analogy, judgment in *Berlington Hungary and Others,* C-98/14, EU:C:2015:386, paragraph 64 and the case law cited.

[83] Opinion of Advocate General Poiares Maduro, delivered on 13 July 2006 in *Ahokainen*, C-434/04, EU:C:2006:609.

[84] judgment in *EC v Greece,* C-205/89, EU:C:1991:123, paragraph 9.

who have had a link or connection to State B. The restriction of Article 14(4), seeking proportionality, is therefore modulated, including an exception consisting in

> "*the equal treatment of residence in another Member State as provided under Article 5(b) shall apply only to persons who have been subject, at some earlier stage, to the legislation of the first Member State on the basis of an activity as an employed or self-employed person*."

In fact, the final result is balanced and the desired proportionality is achieved. Moreover, the risk of abuse is eliminated or at least diminished.

In a similar way, as we have done in the previous analysis by applying the proportionality test, we could limit the effects of Article 5 of Regulation (EC) No 883/2004. In this regard it should be recalled that the principle of proportionality does not define absolute criteria as this would be incompatible with the principle itself. Indeed, the proportionality principle applies to specific cases and cannot fix immutable rules for its application. In addition, the principle of proportionality does not deal with abstract criterions but needs the relationship between the elements in conflict, i.e. national interests versus citizens' interests or, in other words, national interests versus European interests.

The wording of Recital No 42, which deals with proportionality, could be a guideline for the application of Article 5 related to this principle:

> "*In line with the principle of proportionality, in accordance with the premise for the extension of this Regulation to all European Union citizens and in order to find a solution that takes account of any constraints which may be connected with the special characteristics of systems based on residence, a special derogation by means of an Annex XI — 'DENMARK' entry, limited to social pension entitlement exclusively in respect of the new category of non-active persons, to whom this Regulation has been extended, was deemed appropriate due to the specific features of the Danish system and in the light of the fact that those pensions are exportable after a 10-year period of residence under the Danish legislation in force (Pension Act)".*

The principal of proportionality also applied under the old Regulations where the assimilation of facts was derived mainly from the principle of equal treatment.

The case of Mr ***de Cuyper***[85] dealt with the question whether **Articles 17 and 18 EC** preclude a provision of national law which makes entitlement to an allowance granted to unemployed persons aged over 50 who are exempt from the requirement to register as jobseekers conditional on actual residence in the Member State concerned. The CJEU held that a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain it. The justification given by the Belgian authorities for the existence of a residence clause was the need to monitor compliance with the legal requirements laid down for retention of entitlement to the unemployment allowance. As concerns the possibility of less restrictive monitoring measures, the CJEU held that it had not been established that they would have been capable of ensuring the attainment of the objective pursued. Thus, the effectiveness of monitoring arrangements which are aimed at checking the family circumstances of the unemployed person concerned and the possible existence of sources of revenue which the claimant has not declared was dependent to a large extent on the fact that the monitoring was **unexpected** and carried out on the spot, since the competent services had to be able to check whether the information provided by the unemployed person corresponded to the true situation. In that regard the monitoring to be carried out as far as unemployment allowances were concerned was of a specific nature which justified the introduction of arrangements that were more restrictive than those imposed for monitoring in respect of other benefits. It followed that less restrictive

[85] judgment in *de Cuyper*, C-406/04, EU:C:2006:491.

measures, such as the production of documents or certificates, would mean that the monitoring would no longer be unexpected and would consequently be less effective. Accordingly, the CJEU held that the obligation to reside in the Member State in which the institution responsible for the payment is situated, which was justified in domestic law by the need to monitor compliance with the statutory conditions governing the compensation paid to unemployed persons, satisfied the requirement of proportionality.[86] Therefore, no assimilation was necessary.

Also the principles which the CJEU developed in the case Stewart[87] could serve as a guideline for determining proportionality. The CJEU held that it is legitimate for the national legislature to wish to ensure that there is a **genuine link** between a claimant to a benefit and the competent Member State and to preserve the financial balance of the national social security system. In principle, this constitutes legitimate objectives capable of justifying restrictions on the rights of freedom of movement and residence. However, national legislation which makes acquisition of the right to a benefit subject to a condition of past presence in the competent Member State *to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established*, goes beyond what is necessary to attain the objective pursued and therefore amounts to an unjustified restriction on the freedoms guaranteed by Article 21(1) TFEU for every citizen of the Union.[88]

2.3.4. Articles 4 and 5 of Regulation (EC) No 883/2004

Under Regulation (EEC) No 1408/1971, Article 3 was the central provision for preventing direct or indirect discrimination of persons to whom that Regulation applied. The aspect of assimilation was an element of the general ban on discrimination and derived by the CJEU from that Article. The CJEU had recognised that without assimilating facts in other Member States, equal treatment was impossible in many cases and the national provisions concerned would violate Union law. By applying the principle of assimilation as a fundamental aspect of equal treatment, it was possible to interpret national provisions in conformity with Union law.

However, according to the case law, indirect discrimination can be justified if the national measure is proportionate. This is still valid under Article 4 of Regulation (EC) No 883/2004. A restriction of free movement can be justified, with regard to EU law, only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions.[89] A measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain it.[90] That a national measure is discriminatory *and* cannot be justified is a precondition for applying assimilation.

This legal method which is applied by the CJEU is clearly shown in the judgment *Larcher*: *Firstly*, the CJEU examined the provision concerned under Article 3 of Regulation (EEC) No 1408/71 and stated that it effectuates an indirect discrimination of migrant workers.[91] *Secondly*, the CJEU examined if this indirect discrimination can be justified because it was proportional; in *Larcher* this was not the case.[92] However, the CJEU did not stop there and went one step further: *thirdly*, it examined whether the national provision

[86] judgment in *de Cuyper*, EU:C:2006:491. paragraph 42-47.

[87] judgment in *Stewart*, C-503/09, EU:C:2011:500.

[88] judgment in *Stewart* EU:C:2011:500, paragraphs 89-104.

[89] judgment in *de Cuyper*, C-406/04, EU:C:2006:491, paragraph 40.

[90] judgment in *de Cuyper*, EU:C:2006:491, paragraph 42.

[91] judgment in *Larcher*, C-523/13, EU:C:2014:2458, paragraphs 35-37.

[92] judgment in *Larcher*, EU:C:2014:2458, paragraph 41.

would not be indirectly discriminatory if interpreted in the light of the assimilation principle. In *Larcher*, this was the case.[93]

Under Regulation (EC) No 883/2004 the principle of assimilation was enshrined in a new Article 5 and no longer considered to be an element of the general provision for equal treatment, now enshrined in Article 4 of that Regulation. It is a crucial question if and how Articles 4 and 5 of the new Regulation work together in order to safeguard that equal treatment is achieved like under the old Regulation or even better. And it is of utmost importance to come to a clear conclusion, if also the non-application of Article 5 can be justified, if the national measure is proportional. Recital No 12 seems to support this thesis.

Furthermore, nothing seems to exclude that the method as used by the CJEU in *Larcher* also applies under Regulation (EC) No 883/2004 because Article 4 is now the central provision for safeguarding equal treatment under the new Regulation. It follows that, firstly, an indirect discrimination test under Article 4 is carried out and, if indirect discrimination is confirmed, it must be examined whether that discrimination can be justified by applying the principle of proportionality. If no justification is possible, Article 5 comes into play. Also under the new Regulation the existence of a situation of possible indirect discrimination is virtually the precondition for Article 5 to apply (with the exception of obstacles to free movement). Under the new Regulation indirect discrimination is covered by Article 4 and must be examined under that Article, including the examination of whether the national measure is proportional and can be justified; Article 5 can only intervene in the scope of a national provision if otherwise that provision would violate Union law. It therefore seems coherent that the adoption of Article 5 has not altered the basic interplay between indirect discrimination, including possible justifications due to proportionality, and the application of the assimilation principle. There is no convincing argument why under the new Regulation Article 5 and the assimilation principle should apply directly after indirect discrimination has been confirmed with no room for justifying proportional discriminations, taking into account the criteria as developed by the CJEU. There is also no reason to assume that it was the intention of the European legislature to render absolute the principle of equal treatment only in cases where Article 5 applies, while in other cases of indirect discrimination (where there is no need or room for the application of Article 5) justifications would still be possible if the national measure were proportional.

As regards the legal relationship between Articles 4 and 5 of Regulation (EC) No 883/2004 in general the following considerations can be added:

Certain conditions for the entitlement to benefits can either be **disregarded** or similar situations in other Member States can be **assimilated** in order to interpret national provisions in conformity with Union law. In principle, disregarding certain conditions is the simpler operation. However, this is only possible with regard to conditions where disregarding them merely removes the discriminatory character of a provision while at the same time the competence of the national legislature to define the conditions for the entitlement is respected, e.g. conditions of nationality or residence. Conditions like in *Larcher* (reduction of the working time to a certain extent) or *Knauer* (receipt of a pension) cannot be simply disregarded. Furthermore, only such conditions can be disregarded where it is obvious that as a result of assimilation also facts in other Member States must be taken into account, i.e. where any comparative examination would be redundant, like residence or the nationality of other Union citizens. On the other hand, only facts in other Member States can in principle be the subject of assimilation. If all relevant facts occur in the competent State there is no room for applying the assimilation principle.

Under the old Regulation both operations (disregarding certain conditions and assimilation of facts) were done within the material scope of Article 3 of Regulation (EEC)

[93] judgment in *Larcher*, C-523/13, EU:C:2014:2458, paragraph 49.

No 1408/1971, including the examination of whether the national measure was proportional and indirect discrimination could be justified. Under the new Regulation, disregarding a condition can be done within Article 4 of Regulation (EC) No 883/2004; assimilation is carried out by applying Article 5. As the legislature stated in Recital No 9 that the principle of assimilation of facts should be adopted explicitly and developed, while observing the substance and spirit of legal rulings under the old Regulation, it cannot be assumed that the legislature wanted to **change and weaken the legal validity of national provisions in the framework of Union law**, by simply adopting a specific Article on assimilation of facts and no longer dealing with this aspect within the material scope of the general provision on equal treatment. Only the further development of these Articles in the case law of the CJEU can give rise to different conclusions.

2.3.5. Conclusions

The principle of equal treatment under Article 4 of Regulation (EC) No 883/2004 is not a strict and exclusive principle but can be subject to certain limits and restrictions. According to the case law, indirect discrimination can be justified if the national measure is proportionate. This is the case when, while appropriate for securing the attainment of the objectives pursued, the measure does not go beyond what is necessary in order to attain it. Proportionality does not respond to absolute criteria that can be applied in all cases, but only allows solutions of concrete and individual cases.

In the same spirit of the European coordination regime also Article 5 of the Regulation can be subject to certain restrictions. In order to make this clear, Recital No 12 explicitly points to the principle of proportionality and states that care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period. Excessive or unreasonable results in the event of the unlimited and unbridled application of Article 5 shall be avoided. It follows that Article 5 can only extend the territorial scope of national provisions where that provision is indirectly discriminatory and not proportional.

Given that the situations are manifold, proportionality can only be assessed on a case-by-case basis; guidelines can be found in the existing case law. Proportionality in situations where Article 5 may apply in principle follows the same criteria which were developed by the CJEU in the context of the universal principle of equal treatment. Moreover, the principle of assimilation of facts is a principle created by the European legislature, which – at the same time – adopts some boundaries and limits that have to be examined as an integrated part of this principle. Proportionality and assimilation of facts cannot be considered separated but in a unified way. They are the two faces of the same coin.

As Recital No 9 refers explicitly to the spirit of legal rulings which were delivered under the old Regulation, it cannot be assumed that the legislature wanted to change and weaken the legal validity of national provisions in the framework of Union law, by simply adopting a specific Article on assimilation of facts and no longer dealing with this aspect within the material scope of the general provision on equal treatment. The report on the history of the assimilation of facts as a principle and legal provision has shown that both instruments were and are reckoned as a means to overcome unjustifiable discriminations on the basis of nationality. In this respect the rationales behind Articles 4 and 5 are the same and in this respect identical. Under such circumstances the adoption of Article 5 should clarify a key component and decisive element within the non-discrimination principle of Article 4 but should not alter the concept of indirect discrimination.

2.4. Delimitation between Articles 5 and 6 of Regulation (EC) No 883/2004

The relationship between Articles 5 and 6 is explicitly addressed in **Recital No 10** to Regulation (EC) No 883/2004 and reads as follows:

> *"However, the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods."*

Recital 10 clarifies that with the adoption of Article 5 it was not intended to curtail the material scope of the long-existing aggregation principle, which should continue to apply like under Regulation (EEC) No 1408/1971, subject to further developments of those principles in the case law of the CJEU.

The delimitation of Articles 5 and 6 of Regulation (EC) No 883/2004 is an important issue, as the two provisions have different material scopes which must be observed in order to avoid unwanted legal consequences. Under Article 5 facts do not need to be taken into account always and automatically, but only if they correspond to respective facts in the competent State which applies Article 5. It is one of the crucial issues of this report to identify the criteria which must be fulfilled in order to apply the assimilation provision. In contrast, when applying Article 6 periods completed in other Member States must in principle be taken into account **without questioning their legal quality**, if they are communicated as such by the institution of the Member State where they were completed. Article 6 allows no examination if those periods correspond to periods in the competent State. If the institution in Member State A communicates to the institution in Member State B, that insurance periods were completed because of carrying out a specific economic activity, that institution must take those periods into account even if that economic activity does not lead to insurance periods under the legislation of Member State B. Nevertheless, some assimilation aspects can apply also with regard to periods under Article 6, which requires a differentiated assessment of the legal situation and is one of the reasons why the delimitation between these two articles can be so difficult. If Member State A provides for a special pension for arduous work which is due exclusively for people who have exercised arduous work for a certain period of time, it couldn't be justified why in cross-border cases a migrant worker, who has worked in Member State B at his desk during most of his career, should be entitled to this pension because the competent institution in Member State A would be obliged to take those periods into account without questioning their quality. Drawing the right borderline between Articles 5 and 6 and identifying the interplay between these two provisions is therefore a crucial task which is also reflected by discussions that were held in the Administrative Commission in recent years and led to the adoption of decision H6.[94]

2.4.1. Decision H6 of the Administrative Commission

The trigger for the adoption of Decision H6, were divergent views of delegations within the Administrative Commission (AC) about the interpretation of Article 6. The question was whether periods that were completed in Member State A and – under the legislation of that State – were relevant only for the calculation of a benefit, had to be taken into account in Member State B also for the entitlement to the benefit.

After intense discussions the AC agreed that

> *"1. All periods of insurance — be they contributory periods or periods treated as equivalent to insurance periods under national legislation — fulfil the notion of*

[94] Decision No H6 of 16 December 2010 concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation (EC) No 883/2004 on the coordination of social security, OJ C 45, 12/02/2011, p. 5-7.

> *'periods of insurance' for the purposes of applying Regulations (EC) No 883/2004 and (EC) No 987/2009".*[95]
>
> *"2. All periods for the relevant contingency completed under the legislation of another Member State shall be taken into account solely by applying the principle of aggregation of periods as laid down in Article 6 of Regulation (EC) No 883/2004 and 12 of Regulation (EC) No 987/2009. The principle of aggregation requires that periods communicated by other Member States shall be aggregated* ***without questioning their quality****."*[96]

Thus, the question whether in principle all periods shall be taken into account for entitlement when applying Article 6 was answered in the affirmative. Nevertheless, the discussion in the AC showed that taking into account all periods completed in another Member State also in situations where under the national legislation of the competent Member State entitlement to benefit depends on certain extra qualities of the completed periods, would deprive the national legislature of its competence and lead to results that could hardly be justified by the objectives of Union legislation.

Therefore, Decision H6 clarifies that

> *"3. Member States retain however — having applied the principle of aggregation under point 2 — the jurisdiction to determine their other conditions for granting social security benefits* ***taking into account Article 5 of Regulation (EC) No 883/2004*** *— provided that these conditions are applied in a non-discriminatory way — and this principle shall not be affected by Article 6 of Regulation (EC) No 883/2004."*[97]

According to the explanations in the annex of the Decision, in a **first step** Member State A needs to take into account all periods for the purpose of aggregation. In a **second step** Member State A then verifies whether the other national conditions under its legislation are fulfilled (e.g. the 'actual carrying on of an occupation') and whether these conditions are applied in a non-discriminatory way.

2.4.2. Aggregation in the first step

Article 6 applies to "***periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State***", where the completion of a certain amount of such periods is required for the acquisition, retention, duration or recovery of the right to benefits, the coverage by the legislation or the access to or the exemption from compulsory, optional continued or voluntary insurance. Therefore, the crucial question is what is covered by the terms "*periods of insurance, employment, self-employment or residence*". There can be no doubt that the relevant definitions in **Article 1 (t), (u) and (v) of Regulation (EC) No 883/2004** apply. These definitions refer to the national legislations of the Member States.

So in principle the material scope of Article 6 in the **first step** seems to be clear: Article 6 applies whenever the national legislation requires the completion of a certain number of periods which meet the definitions under Article 1 (t), (u) or (v). In cases where the national legislation requires certain facts or events that are linked to a certain period of time, but do not meet the definitions in Article 1 (t), (u) or (v), there may be room for the application of Article 5.

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[95] Point 1 Decision No H6, OJ C 45, 12/02/2011, p. 5-7.

[96] Point 2 of the Decision No H6, OJ C 45, 12/02/2011, p. 5-7.

[97] Point 8 of Decision No H6, OJ C 45, 12/02/2011, p. 5-7.

The case law of the CJEU offers some examples where the national legislation requires certain facts or events that are linked to a certain period of time, but do not meet the definitions in Article 1 (t), (u) or (v). The legislation or specific scheme of a Member State can make the acquisition, retention or recovery of the right to benefits conditional upon the person concerned being insured at the time of the materialisation of the risk, as was the case in *Hagenbeek*.[98] In *Duchon*[99] the qualifying period, which was required for entitlement to an invalidity pension, was waived when the circumstances giving rise to the acquisition of the right to a pension were the result of an accident at work or occupational disease suffered by a person covered at that moment by compulsory insurance under an Austrian pension insurance scheme. Such requirements do not fall within the material scope of Article 6. What is required is to be insured on a certain day and not that the person must have completed a certain number of periods under Article 1 (t), (u) or (v) of the Regulation. Article 5 applies.

In other provisions the establishment of certain rights is attached to the condition that the person concerned **did receive benefits for a certain period of time**. This was the case in *Warry*[100] (sickness benefits) and in *Öztürk*[101] (unemployment benefits). The case *Öztürk* is of particular importance as this is the only case where the CJEU explicitly discussed the delimitation between aggregation and assimilation. This was due to the fact that the case of Mr Öztürk fell under the Association Agreement between the EU and Turkey and Decision 3/80. At that time the CJEU ruled that the aggregation provision in Decision 3/80 did not apply as long as no implementing provision had been adopted. It was therefore decisive for the outcome of this case whether the competent institution in Austria had to aggregate or assimilate, because the assimilation principle was deduced from the principle of non-discrimination under Article 3(1) of Decision 3/80 which – according to case law – applied without any implementing provisions. The CJEU held that this case did not concern a problem of the inclusion of periods of contributions to old-age insurance, the acquisition of entitlement to an Austrian pension or the calculation of its amount thereby being conditional upon the completion of these periods. On the contrary, the sole issue in the case was taking into account a minimum qualifying period during which the worker concerned **must have received unemployment benefits** as a precondition for the possibility of claiming an early old-age pension in the event of unemployment.[102] The receipt of an unemployment benefit can be considered a fact under the assimilation principle.

The *Paraschi* case[103] was about German legislation which permitted the reference period to be prolonged, subject to certain conditions, but which did not provide for the possibility of a prolongation, where events or circumstances corresponding to the events or circumstances which would enable a prolongation to be granted, occurred in another Member State. The claimant referred in particular to periods of sickness or unemployment which, when completed under the conditions envisaged in the German legislation, prolonged the reference period even if the worker had not received sickness or unemployment benefits, whereas that possibility did not exist where those events occurred in the worker's State of origin. The focus of these provisions was the factual situation of being sick or unemployed and in addition the receipt of a certain benefit. German legislation did not require periods under the definition of Regulation (EEC) No 1408/1971. That is why Article 6 did not apply.

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[98] judgment in *Hagenbeek* EU:C:1966:43.

[99] judgment in *Duchon* EU:C:2002:234.

[100] judgment in *Warry* EU:C:1977:177.

[101] judgment in *Öztürk* EU:C:2004:232.

[102] judgment in *Ötzürk*, C-373/02, EU:C:2004:232, paragraphs 63 and 64.

[103] judgment in *Paraschi* EU:C:1991:372.

2.4.3. Aggregation in the second step

In the **second step** of aggregation, Member State A can verify whether the *"other conditions"* under its legislation are fulfilled and whether these conditions are applied in a non-discriminatory way. Which conditions allow to eliminate in the second step periods that have been taken into account in the first step, must be decided on a **case-by-case basis**. This assessment can be very difficult for the institutions when they apply Article 6, because a clear-cut rule is not possible. Only some guidelines can be identified. Already when Decision H6 was adopted in the AC, certain delegations pointed out that the scope of point 3 is unclear and doubted whether the Decision could be useful in practice.

The main aspects to be taken into account are the social **purpose of the benefit**, i.e. **respecting the competence of the national legislature**, and that any condition is applied in a **non-discriminatory way**. Two examples were already mentioned:

- If for entitlement to an old-age pension the national legislation of the competent State requires 180 periods of insurance, 84 of which must be periods of insurance due to a gainful activity, only periods completed in other Member States due to a gainful activity must be aggregated for this special waiting period of 84 months. Of course for the remaining 96 months' periods completed in other Member States must be taken into account without questioning their quality. The decision of the national legislature to award this pension only to persons who have been in gainful activity for a certain period of time, must be respected. As this requirement can be fulfilled under the insurance schemes of all Member States; no discrimination can arise.

- If for entitlement to a pension for arduous work the national legislation of the competent State requires a certain number of insurance periods due to arduous work, only respective and similar periods completed in other Member States must be aggregated.

- On the other hand, if the old-age scheme of Member State A is employment-related and the old-age scheme of Member State B residence-based, it cannot be assumed that the institution in Member State A is exempt from taking into account insurance periods from Member State B, arguing that they are not employment-related. This should be considered a discriminatory application of Article 5, because migration between Member State A and B would be gravely hampered.

As already mentioned, there is no hard and fast rule for the application of Article 5 in the second step of aggregation under Article 6. It must be assessed on a **case-by-case basis** whether applying Article 5 is possible in order to respect the competence of the national legislature to define the conditions for access to benefits while at the same time avoiding indirect discriminations of EU nationals that cannot be justified.

2.4.4. The judgments in the cases *Bergström* and *ONEm*

It should be mentioned that with the judgment of the CJEU in the case ***Bergström***[104] the delimitation between Articles 5 and 6 may have lost some of its importance. If Article 6 did not apply in a situation, where no period at all was completed in the competent Member State, Article 5 may have possibly been used to fill this gap; this is no longer necessary after the *Bergström* judgment. In this case the CJEU clarified that in principle Article 6 can apply in situations where no period at all was completed in the Member State where a benefit is claimed.[105] On the basis of the use of the term "*aggregation"*, it

[104] judgment in *Bergström*, C-257/10, EU:C:2011:839.

[105] judgment in *Bergström*, EU:C:2011:839, paragraph 63.

was argued that this concept requires the existence of at least two periods of employment, completed in more than one Member State. Accordingly, it would be open to the Member State in which the institution competent to award the benefit is located to provide that one period of employment must have been completed in its territory, thereby making it impossible for a single period completed in another Member State to count towards obtaining a right to a social security benefit. However, the CJEU rejected this view and held that the Regulation requires *"all periods of insurance, employment or self-employment completed in any other Member State"* to be taken into account in the course of aggregation, as if they were periods completed under the legislation of the competent institution. It follows that also in situations where Member State A requires only one day, week or month Article 6 applies and that this one period as defined in national legislation can in principle be completed under the legislation of Member State B. It would be unreasonable to say that Article 6 applies where the legislation of Member State A requires two periods, both of which can be completed in Member State B, while in situations where Member State A requires only one period, Article 6 does not apply and that one period must be exclusively completed in Member State A, or Article 5 applies.

In the case ***ONEm***[106] the CJEU clarified that Article 67(3) of Regulation (EEC) No 1408/71 (Article 61(2) of Regulation (EC) No 883/2004) must be interpreted as not precluding a Member State from refusing to aggregate periods of employment necessary to qualify for an unemployment benefit to supplement income from part-time employment, where that employment was not preceded by any period of insurance or of employment in that Member State. Article 67(3) complies with Articles 45 and 48 TFEU and also with Article 15(2) of the Charter of Fundamental Rights of the EU. However, this ruling is the consequence of the special aggregation provisions for unemployment benefits and its spirit cannot be transferred to other situations.

2.4.5. Conclusions

The assimilation of facts under Article 5 of Regulation (EC) No 883/2004 and the aggregation of periods under Article 6 of Regulation (EC) No 883/2004 are similar as to their function to provide that facts and legal relations in other Member States become effective in the social security system of the competent State. Due to the more specific character of the aggregation provision, Article 6 prevails over the general assimilation rule of Article 5.

Articles 5 and 6 of the Regulation have different material scopes which must be clearly separated because the legal consequences under these two fundamental provisions are completely different: while Article 6 provides for the aggregation of periods in other Member States without questioning their legal quality, Article 5 compels to assimilate certain facts (benefits, income) in other Member States with facts in the competent State only if those facts are comparable, taking into account certain criteria, as developed by the legislature and the CJEU. In the first case, periods are taken directly into account; in the second case, facts are taken into account only after an evaluation or assessment.

Notwithstanding that in practice challenging cases for the administration could always occur, the delimitation between Articles 5 and 6 seems to be relatively clear in the first step according to Decision H6 of the Administrative Commission: Article 6 applies when the national legislation requires the completion of a certain number of periods which meet the definitions under Article 1 (t), (u) or (v) of the Regulation as a condition for the entitlement to benefits. In cases where the national legislation requires certain facts or events that are linked to a period of time, but do *not* meet these definitions, Article 5 can apply.

However, questions about the application of Article 5 can also occur *after* the application of Article 6 has in principle been confirmed (second step according to Decision H6 of the

[106] judgment in *ONEm*, C-284/15, EU:C: 2016:220.

AC): If the national legislation of the competent State requires a period to be linked to certain facts, Article 5 could apply and the periods concerned can be excluded from aggregation if they are not linked to comparable facts, provided that these "other" conditions are applied in a non-discriminatory way. As is the case with Article 5 in general, there is no hard and fast rule how to apply this provision in the second step of aggregation. It must be applied on a case-by-case basis, taking into account the scope and the limits of Article 5. The overriding aspects are that the competence of the national legislation to define the conditions for entitlement to benefits must be respected while indirect discriminations of EU nationals should be avoided.

2.5. The application of the assimilation principle under Regulation (EC) No 883/2004 and the indirect discrimination test under Regulation (EC) 492/2011 in relation to social advantages

2.5.1. Analysis

Regulation (EC) No 492/2011 (former Regulation (EEC) No 1612/1968) does not contain a provision comparable to Article 5 of Regulation (EC) No 883/2004. Nevertheless, the principle of assimilation of facts plays an important role in this Regulation as well, because assimilation is a general principle in EU legislation, and in numerous judgments under that Regulation the CJEU has derived the obligation to assimilate facts in other Member States from the principle of indirect discrimination. Can an assessment under the two Regulations lead to different results, perhaps even for the same benefits, if they are covered by both Regulations? The CJEU has clarified that, although these two Regulations do not have the same personal scope, Article 7(2) of Regulation (EC) No 492/2011 may apply to social advantages which, at the same time, fall within the scope of Regulation (EC) No 883/2004, since Regulation (EC) No 492/2011 is of general application as regards the free movement of workers.[107] The mandate raises in particular the question whether from the cases *Kits van Heiningen*[108] and *Geven*[109] a different understanding of the assimilation principle could be derived.

Before the adoption of Article 5 of Regulation (EC) No 883/2004, the CJEU developed the principle of assimilation of facts in the coordination Regulations mainly from the **prohibition of indirect discrimination**. As no special provision, similar to Article 5, was adopted in Regulation (EC) No 492/2011 and its predecessor, indirect discrimination is still the main legal basis for the application of this principle in that Regulation. So in a first step it will be analysed if the CJEU has ruled differently on indirect discrimination in the coordination Regulation and in the Regulation on free movement of migrant workers.[110] As Advocate General Wahl pointed out,[111] on the one hand it is desirable to interpret concepts of EU law uniformly, as this makes for greater legal certainty. On the other hand, uniform interpretation is not always possible in practice.[112]

In the framework of Regulation (EEC) No 1612/1968 the CJEU held that conditions imposed by national law must be regarded as indirectly discriminatory where, although

[107] judgments in *EC v Luxemburg*, C-111/91, EU:C:1993:92; in *Schmid*, C-310/91, EU:C:1993:221; in *EC v Germany*, C-206/10, EU:C:2011:283; in *EC v Luxembourg,* C-111/91, EU:C:1993:92, paragraphs 20 and 21; and in *Martínez Sala,* C-85/96, EU:C:1998:217, paragraph 27.

[108] *Bestuur van de Sociale Verzekeringsbank v Kits van Heijningen*, C-2/89, EU:C:1990:183.

[109] *Geven*, C-213/05, EU:C:2007:438.

[110] Any reference to Regulation (EC) No 492/2011 also covers Regulation (EEC) No 1612/1968, unless explicitly mentioned otherwise.

[111] Opinon of Advocate General Wahl in *Brey*, C-140/12, EU:C:2013:337.

[112] judgments in *Martínez Sala,* C-85/96, EU:C:1998:217, paragraph 31; in *Collins*, C-138/02, EU:C:2004:172, paragraph 32; and in *van Delft,* C-345/09 EU:C:2011:57, paragraph 88.

applicable irrespective of nationality, they affect essentially migrant workers[113] or the great majority of those affected are migrant workers,[114] where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers,[115] or where there is a risk that they may operate to the particular detriment of migrant workers.[116] A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.[117] So in order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing all the nationals of the Member State in question at an advantage or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question.[118] Indirect discrimination on the ground of nationality is in principle prohibited, **unless it is objectively justified**. In order to be justified, it must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective.[119]

According to settled case law, discrimination can arise only through the **application of different rules to comparable situations or the application of the same rule to different situations**.[120] The non-discretionary application of that principle requires that the criterion by reference to which the situations are compared be based upon factors which are objective and easily identifiable.[121]

As regards the definition of these criteria under Regulation (EC) No 883/2004, see 1.2.

It follows that the definitions for indirect discrimination and related aspects do not differ between the two Regulations. Given that both legal frameworks intend in particular to **safeguard the freedom of movement of migrant workers**, the similarities between those measures are so strong that it seems to be reasonable that the concept of indirect discrimination is interpreted in the same way. Any divergences in this regard would be harmful for legal certainty and hard to explain.

Nevertheless, the case law of the CJEU must be analysed in detail in order to assess whether differences in the application of the indirect discrimination test can be detected, despite their formal identity in definition. The analysis will demonstrate that any assumption in this regard cannot sustain a closer examination. This applies in particular to the cases mentioned in the mandate.

The essential question in the case *Kits van Heiningen* was whether Regulation (EEC) No 1408/1971 applies to a person carrying out an activity as an employed person for two hours per day on each of two days per week. The CJEU affirmed this question and held

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[113] judgments in *O'Flynn*, C-237/94, EU:C:1996:206; in *Pinna*, C-41/84, EU:C:1986:1, paragraph 24; in *Allué and Coonan*, C- 33/88 EU:C:1989:222, paragraph 12; and in *Le Manoir*, C-27/91, EU:C:1991:441, paragraph 11.

[114] judgments in *EC v United Kingdom*, C-279/89 EU:C:1992:439, paragraph 42; and in *Spotti*, C-272/92, EU:C:1993/848, paragraph 18.

[115] judgments in *EC v Luxembourg*, C-111/91, EU:C:1993:92, paragraph 10; in *Paraschi* EU:C:1991:372, paragraph 23.

[116] judgments in *Biehl*, C-175/88, EU:C:1990:186, paragraph 14; in *Bachmann*, C-204/90, EU:C:1992:35, paragraph 9.

[117] judgments in *O'Flynn*, C-237/94, EU:C:1996:206 and in *EC v Belgium*, C-278/94, EU:C:1996:321.

[118] judgments in *Giersch*, C-20/12, EU:C:2013/411; in *EC* v *Italy,* C-388/01, EU:C:2003:30, paragraph 14; in *EC v the Netherlands*, C-542/09, EU:C:2012:346; and in *Erny,* C-172/11, EU:C:2014/157, paragraph 41.

[119] judgments in *Giersch*, C-20/12, EU:C:2013/411; in *Bressol*, EU:C:2010:181, paragraphs 47 and 48, and in *EC v the Netherlands*, C-542/09, EU:C:2012:346, paragraph 55.

[120] judgments in *EC v the Netherlands*, C-542/09, EU:C:2012:346; in *Schumacker,* C-279/93, EU:C:1995:31, paragraph 30; and in *EC v Hungary,* C-253/09, EU:C:2011:795, paragraph 50.

[121] judgment in *EC v the Netherlands*, C-542/09, EU:C:2012:346.

that a person must be considered to be covered by that Regulation, **irrespective of the amount of time which that person devotes to his or her activities**. The CJEU further stated that Article 13(2)(a) of that Regulation must be interpreted as meaning that a person covered by the regulation who is employed part-time in the territory of a Member State is subject to the legislation of that State both on the days on which he or she pursues that activity and on the days on which he or she does not.

As for the situation of *Ms Geven*, who exercised a very small economic activity as well, it was never contested that she was covered by Regulation (EEC) No 1612/1968. The CJEU confirmed in that judgment that the scope of the rules on freedom of movement for workers (and hence of that Regulation) extends to all workers carrying out **effective and genuine activities**, with the exception of those whose activities are on such a small scale as to be regarded as **purely marginal and ancillary**.[122] Accordingly, during the period in question Ms Geven was in a genuine employment relationship allowing her to claim the status of migrant worker for the purposes of Regulation (EEC) No 1612/1968. *Ms Geven's* status of frontier worker did not in any way prevent her from being able to claim equal treatment prescribed by Article 7(2) of that Regulation in relation to the grant of social advantages.

Nevertheless, the question was raised whether *Ms Geven* could be excluded from entitlement to a particular benefit, namely German child-raising allowance, on the grounds **that she was not in a contractual employment relationship of at least 15 hours a week**. It must be pointed out that the crucial point in this particular case was that German child-raising allowance was granted in order to benefit persons who, by their choice of residence, have established a **real link with German society**. That benefit constituted an instrument of **national family policy** intended to encourage the birth rate in that country. The primary purpose of the allowance was to allow parents to care for their children themselves by giving up or reducing their employment in order to concentrate on bringing up their children in the first years of their life. Nevertheless, the German legislation did not confine itself to a strict application of the residence condition for the grant of child-raising allowance but allowed exceptions under which frontier workers could also claim it. Residence was not regarded as the only connecting link with the Member State concerned and a substantial contribution to the national labour market also constituted a valid factor of integration into the society of that Member State.

While the case *Kits van Heiningen* mainly dealt with the question whether persons in minor employment fall under the personal scope of the coordination Regulations as such, the question in the case *Geven* was whether a certain link to the society of the competent Member State can be required for a particular benefit by the legislation of that State, and whether this link is also established by a frontier worker in minor employment.

The CJEU admitted that the fact that a non-resident worker does not have a sufficiently substantial occupation in the Member State concerned is capable of constituting a legitimate justification for a refusal to grant the social advantage at issue. Although a person in minor employment has the status of worker within the meaning of Article 39 EC, **social policy is a matter for the Member States**, who have a **wide discretion** in exercising their powers in that respect.[123] The aim of the German legislature was to grant a child-raising allowance to persons who had a sufficiently close connection with German society, without reserving that allowance exclusively to persons who reside in Germany. It was most important that this close connection was explicitly required by German legislation for the grant of a child-raising benefit. The CJEU accepted that, in exercising its powers, that legislature could reasonably consider that the exclusion from the allowance in question of non-resident workers who carry on an occupation in the Member State concerned that does not exceed the threshold of minor employment as defined in

[122] judgment in *Levin*, C- 53/81, EU:C:1982:105, paragraph 17.

[123] judgment in *Megner and Scheffel*, C-444/93, EU:C:1995:442, paragraphs 18 to 21 and 29.

national law, **constitutes a measure that is appropriate and proportionate, having regard to the objective of the benefit**.[124]

Of course the judgment in the case *Geven* can be criticised. However, any conclusion that the decision by the CJEU derived from a concept of indirect discrimination different from that under the coordination Regulations cannot be upheld. Rather, the CJEU ruled on the concept of "close link" to the society of the competent Member State, which applies in the legal framework of the coordination Regulations as well. The **genuine link concept** has been developed by the CJEU in the context of both the coordination Regulations and the Regulations on free movement of workers.[125] The CJEU accepted this requirement to fall within the wide discretion of the national legislature to define the conditions of access to benefits, without violating Union law.

A very strong argument in this regard is that benefits like the German child-raising allowances also fall under the material scope of Regulation (EC) No 883/2004 and are qualified as family benefits.[126] It may be surprising that the CJEU ruled in *Geven* only under Regulation (EEC) No 1612/1968, but this was certainly due to the fact that the national court had asked its question with regard to Article 7/2 of that Regulation only. However, if the CJEU would have considered that Ms Geven was entitled to a German child-raising benefit under Regulation (EEC) No 1408/1971, despite the fact that entitlement to the same benefit under Regulation (EEC) No 1612/1968 was not due, it cannot be assumed that the CJEU would have remained silent on this essential issue. Furthermore, it would be quite incomprehensible that the German legislature could reasonably consider that the exclusion from the allowance in question of non-resident workers who carry on an occupation in the Member State concerned that does not exceed the threshold of minor employment as defined in national law, constitutes a measure that is appropriate and proportionate under Regulation (EEC) No 1612/1968, while at the same time, the refusal of the grant of this benefit under Regulation (EEC) No 1408/1971 would constitute a violation of Union law.

In the cases *Mora Romero*[127] and *Ugliola*[128] the CJEU ruled that military service in another Member State must have the same legal consequences as if the military service would have taken place in the competent State.

In this context it may be useful to refer to what Advocate General Cruz Villalon pointed out with regard to Regulation (EC) No 883/2004 and Directive 2004/38/EC:[129]

> *"It does not appear to me excessive to recall, in that regard, that the EU legal order could hardly consist of a multiplicity of entirely separate compartments. This is particularly true in the case of two rules of EU law as closely linked as those at issue in this case."*

The link between Regulation (EC) No 883/2004 and Regulation (EU) No 492/2011 seems to be even closer, which is why this essential statement is valid in this regard as well.

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[124] see, by analogy, judgment in *Megner and Scheffel*, C-444/93, EU:C:1995:442, paragraph 30.

[125] judgments in *Collins,* C-138/02, EU:C:2004:172, paragraph 69; in *Stewart*, C-503/09, EU:C:2011:500, paragraph 92; in *EC v Germany*, C-269/07, EU:C:2009:527, paragraph 60; in *Martens*, C-359/13, EU:C:2015:118, paragraph 41; in *Hendrix,* EU:C:2007:494, paragraph 55; in *EC v The Netherlands,* C-542/09, EU:C:2012:346, paragraph 65; in Caves *Krier,* C-379/11, EU:C:2012:798, paragraph 53; in *Giersch*, C-20/12, EU:C:2013:411, paragraph 63; in *Vatsouras and Koupatantze*, C-22/08, EU:C:2009:344, paragraph 38.

[126] judgment in *Hoever and Zachow*, C-245/97, EU:C:2000:687.

[127] judgment in *Mora Romero*, C-131/96, EU:C:1997:317 (Regulation (EEC) No 1408/1971).

[128] judgment in *Ugliola*, C-15/69, EU:C:1969:46 (Regulation (EEC) No 1612/1968).

[129] Opinion of Advocate General Cruz Villalón in *EC v United Kingdom*, C-308/14, EU:C:2015:666.

2.5.2. Conclusions

While in Regulation (EC) No 883/2004 the assimilation principle has been enshrined in a separate Article, there is no similar provision in Regulation (EC) No 492/2011. Nevertheless, as the CJEU has ruled in numerous judgments, the assimilation principle also applies under the latter Regulation and is there still derived from the ban on indirect discrimination. From this it follows that the principle of assimilation of facts is also acknowledged in the context of Article 7(2) of Regulation (EC) No 492/2011. A thorough analysis of the relevant case law reveals that if assimilation is confirmed or denied under Regulation (EC) No 883/2004 the assimilation principle as applied under Regulation (EC) No 492/2011 cannot lead to opposite results. The definitions for indirect discrimination and related aspects do not differ between the two Regulations. Given that both legal frameworks intend in particular to safeguard the freedom of movement of migrant workers, the similarities between these measures are so strong that it seems to be reasonable that the concept of indirect discrimination is interpreted in the same way. Both Regulations share the same spirit and philosophy and, as a consequence, the final results have to be if not always identical but similar in most cases.

2.6. Assimilation of facts as an instrument to secure freedom of movement

The principle of assimilation of facts also plays a leading role in European labour law. To safeguard the freedom of movement for workers, labour law has to prevent any discrimination in employment conditions based on nationality (Article 48 TFEU). Under this provision assimilation of facts also plays an important role in the case law of the CJEU.

The CJEU has held that if military service counts for the determination of the duration of employment and gives rise to advantages in employment (e.g. higher salaries), military service executed outside the competent State is to be treated as if it was executed in the competent State.[130] If labour law provides for the payment of a separation allowance, it shall not be required that the spouse lives in the competent State, but the allowance is also paid if the spouse lives in another Member State.[131] Article 48 of the EEC Treaty must be interpreted as meaning that, where a public body of a Member State, in recruiting staff for posts which do not fall within the scope of Article 48(4) of the Treaty, provides that account is to be taken of the candidates' previous employment in the public service, that body may not, in relation to EU nationals, make a distinction according to whether such employment was in the public service of that particular State or in the public service of another Member State.[132]

Furthermore, the CJEU held that EU law precludes a clause in a collective agreement applicable to the public service of a Member State which provides for promotion on grounds of seniority for employees of that service after eight years' employment in a salary group determined by that agreement without taking any account of previous periods of comparable employment completed in the public service of another Member State. Such clause entails discrimination contrary to the freedom of movement and is, hence, null and void.[133]

A very interesting case dealt with the recruitment of workers for jobs in other Member States by private recruitment agencies on the account of the public system:[134] German

[130] judgment in *Ugliola*, C-15/69, EU:C:1969:46

[131] judgment in Sotgiu, C-152/73, -EU:C:1974:13

[132] judgment in *Scholz*, C-419/92, EU:C:1994:62

[133] judgment in *Schöning-Kougebetopoulou*, C-15/96, EU:C:1998:3

[134] judgment in *ITC*, C-208/05, EU:C:2007:16

law stipulated that employees who are entitled to claim an unemployment benefit or unemployment assistance and who have not found a job after three months of unemployment shall be entitled to a recruitment voucher. By issuing the recruitment voucher, the *Bundesagentur* undertook to pay the fee payable to an agent instructed by the employee, which has placed the employee in employment subject to compulsory social security contributions for a minimum of 15 hours' work a week. This payment was only due if the job found by the agency was subject to compulsory social security contributions in Germany. The CJEU held that it is possible that a private sector recruitment agency may, in certain circumstances, rely on the rights directly granted to EU workers by **Article 39 EC**. Insofar as national legislation provides that a Member State will pay that fee only where the employment is subject to compulsory social security contributions in that State, a person seeking employment is placed in a less favourable situation than if the agency concerned were to have found a job in that Member State, because he or she would, in the latter case, have been entitled to payment of the fee payable to the recruitment agency in respect of his or her recruitment. Such legislation, which creates an obstacle capable of discouraging persons seeking employment, particularly those whose financial resources are limited, and private sector recruitment agencies, from looking for work in another Member State, because the recruitment fee will not be paid by the Member State of the person’s origin, is prohibited by Article 39 EC.

3. SPECIAL QUESTIONS AS TO THE MEANING OF ASSIMILATION OF FACTS – ARTICLE 5 OF REGULATION (EC) NO 883/2004

3.1. Similarity and tolerable differences

3.1.1. General remarks

Equality as a rule is primarily about dealing with differences between facts/situations/benefits in the context of national laws. The mere situation that foreign and internal facts are to be dealt with as equal implies that the differences stemming from the fact's origin which constitute them as being local or foreign ones are to be disregarded and neglected.

Hence, the imperative of equality is mainly how to treat different situations as being alike. So, if one talks in the context of Article 5 of Regulation (EC) No 883/2004 about facts and events, which are to be dealt with like the corresponding ones referred to by the law of the competent State, it should be noted that such operation does not refer to events and facts which are conceived with ones provided for under the law of the competent State as being identical or the same. Rather, they are different, and, nevertheless, should be treated as being like the facts and events verified within the competent State. The facts and events of other countries are embedded in the relevant legal, social and cultural environment, from which they should not and cannot escape.

Also in the light of the cases which gave the CJEU sufficient grounds for establishing the assimilation-of-facts principle differences were accepted when treating facts and events as being alike. When it is imperative to treat military services of different countries as being alike, this is also relevant when the duration of these services differ from one another.[135] If the status of an unemployed child is to be treated likewise – irrespective of the country where the child resides – differences in labour market conditions are to be disregarded and neglected.[136] And if, finally, differences in part-time work by 40% or 50% of labour market participation are treated alike,[137] it becomes evident that similarity offers a wide range of tolerance as to existing differences.

If assessing which facts or events should be considered as alike, similar or equal, the purpose or function of a legal institution plays the decisive role. The legal institution of marriage or parenthood is based on the establishment of a personal relationship between two persons (in Europe) and maintenance obligations emerging from this relationship. Thus, under the concept of marriage all legal institutions could be categorised which have such an effect on the partners. Employment, military service or part-time work are concepts which can be identified by its position within the various legal systems: military service as a commitment based in citizenship to render a service to the state; employment as a contract to provide services under the control of the employer; part-time employment as a form of dependent work, which is substantial, but not as comprehensive as regular employment. Whenever foreign facts fulfil these criteria the assimilation of facts can be obligatory on the basis of functional equivalence between the foreign and the corresponding local situation.

[135] judgments in *Ugliola*, C-15/69, EU:C:1969:46*;* in *Mora Romero*, C-131/96, EU:C:1997:317; in *Adanez Vega,* C-372/02, EU:C:2004:705.

[136] judgments in *Bronzino*, EU:C:1990:85 and in *Gatto*, C-12/89, EU:C:1990:89.

[137] judgment in *Larcher* EU:C:2014:2458.

3.1.2. Digression: extensive assimilation provisions in national legislations outside the scope of European law

If it comes to assessing whether facts and events are to be treated similarly, a huge variety and diversity may emerge and, therefore, is to be dealt with. For example, in the context of family or survivors' benefits it is necessary to examine whether two persons are bound on the basis of a marital or parental status. Acknowledging the similarity between a foreign marriage and a marriage in the competent State is rather easy when the family laws of the two countries are based on the same rules and principles. This is, however, not always the case. Is a country which does not allow same sex marriages committed to regard these as marriages if they were concluded in a country which allows such marriage? What about a polygamous marriage – accepted in Islamic countries – which permits a man to have up to four wives at the same time? Does this form of relationship give entitlement to a family or survivors' benefit under the social security law of the competent State? The answer depends on whether these family relations that are to be compared – the one under the law of the competent State and the one established under the law of another State – differ decisively as to the family relation concerned with the competent State's law.

The social security laws of some Member States have given an interesting answer to this question. In Section 34 of Social Code I, the German social security law provides, as to the family relations which must be taken into account under German social security law, that the family status should be determined **in coherence with the principles of private international law**. It follows that a family relation established under the competent State's family law – to be determined by the law where both partners jointly reside – must be acknowledged, even if this status is not accepted under the German family legislation. Under this rule, national family law establishes an international effect. On the basis of this rule, German social security law also accepts that polygamous marriages established in a formally correct manner are to be accepted. This is explicitly stipulated by Article 25(6) of the German-Moroccan Convention on Social Security[138] and also in the Spanish-Moroccan Convention. As to the numerous wives, German law provides for a division of the full widow's pension per capita – the latter is, hence, to be split in accordance with the number of wives of the deceased insured person. This example clearly illustrates that – in principle – assimilation of facts can take place even in the light of those facts and events which do substantially differ between the competent and the foreign State. Assimilating facts and events means, therefore, to detect similarities between local and foreign facts and events which are by their very nature different but sufficiently alike, so that they can be treated alike.

However, this example shows very well the difficulty to decide whether or not different facts in different States should be treated alike. While the German legislature decided to go that far by even assimilating marriages between two persons with polygamous marriages with respect to the entitlement to a widow's pension, **this consequence cannot be derived from Article 5 of the Regulation**. Union law cannot oblige Member States to deviate from their legal traditions, moral concepts and customs. However, the Member States must take into account other dimensions of international law and are required to respect in particular the rules of private international law[139] and observe the provisions and principles of international human rights legislation.[140]

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[138] 25 March 1981 (*Bundesgesetzblatt* II,S.550); *Bundestagsdrucksache* 10/5041, S.97.

[139] Concerning polygamous marriages: *Cour d'Appel de Chambéry*, *Revue critique de droit international privé*, 1962, 496; Dinv. National Assistance Board Q.B., 21 November 1966, 1(1967)ALLER 750; Reported Decisions of the Commissioner under the National Insurance Act vol. I (1955) R (6)18/52; Vol.2 1958 R(6) 11/53;R (6) 3/55; R (6) 7/55; Royal v Cudhay Packing Co(1922), 190 N.W.427.

[140] Concerning same sex marriages and adoption, see ECHR – 28.6.2007 (No 76240/01 (Wagner and J.W.M./ Luxemburg); 3.5. 2011 No 59759/08 (Negropontis-Gianisis/Greece); and surrogate motherhood, see ECHR – 26.6.2014 No 65192/11 (Mennesou); No 65941/11 (Labassée).

3.1.3. Facts and legal consequences

The case ***Larcher***[141] is currently the key case to understand facts and events under Article 5(b) and to what extent differences between such facts must be neglected or could be relevant for denying assimilation. This case was still handled under Regulation (EC) No 1408/1971.

Mr Larcher is an Austrian citizen who resides in Austria. For more than 29 years, he was employed in Germany as a worker subject to compulsory social security. In December 2000, he began working in Austria in full-time employment. From March 2004 until September 2006, he received under an **agreement establishing a pre-retirement scheme of part-time work for older employees** a **reduction in his normal weekly working time**, from 38.5 hours to 15.4 hours (**40% of the normal weekly time previously worked**). In 2006, Mr Larcher applied in Germany for a retirement pension following participation in a part-time work scheme for older employees. His application was refused on the grounds that such a pension was not due because, contrary to the provision made under German law Mr Larcher – in the context of the part-time work scheme for older employees in which he had participated in Austria – had reduced his working time, **not to 50%** of the weekly time worked previously, **but to 40%** of that time. The institution explicitly took the view that Mr Larcher could have reduced his working time to 50% of normal working time, thereby satisfying the conditions laid down by German law. The German institution did not object that – in principle – the obligation to assimilate could exist, but it took the view that the conditions for assimilation were not fulfilled in this particular situation.

In a first step the CJEU examined the case under Article 3 of Regulation (EEC) No 1408/1971 and stated that the German provision provided for an indirect discrimination of migrant workers which could not be justified. However, this would only be the case, if the German provisions were interpreted without applying the principle of assimilation. The CJEU called to mind that the system put in place by that Regulation is merely a **system of coordination** and that it is inherent in such a system that the conditions to which entitlement to a benefit is subject differ depending on the Member State. When laying down those conditions, Members States must ensure the **equal treatment of all workers** occupied on their territory as effectively as possible and not penalise workers who exercise their right to freedom of movement. For that purpose, facts in other Member States must be assimilated if certain conditions are fulfilled. The CJEU then added comprehensive considerations about the criteria that have to be taken into account when applying the assimilation principle.

Although the Regulation precludes a Member State from **systematically refusing** to take into account, for the purposes of granting a retirement pension in its territory, participation in a part-time work scheme for older employees which took place under the laws of another Member State, that provision does not require the former Member State to **automatically recognise** participation in such a scheme as equivalent to participation in a part-time work scheme for older employees under its own national legislation. Any interpretation of that provision as compelling Member States to automatically treat such schemes as equivalent would in effect **deprive them of their competence in the field of social protection**.

It follows that the national authorities must undertake a **comparative examination** of the two part-time work schemes for older employees in question. Insofar as the primary purpose of that examination by the authorities of a Member State is to assess whether the conditions for the application of a part-time work scheme for older employees under the legislation of another Member State achieve the **legitimate objectives** pursued in the former Member State by such a scheme, those authorities **cannot require those conditions to be identical**. It is not inconceivable that the same objective can be

[141] judgment in *Larcher*, C-523/13, EU:C:2014:2458.

achieved by various means and that the conditions for the application of a part-time work scheme for older employees differ as between those measures. If those conditions were required to be identical, the examination in question **would *de facto* be deprived of all practical effect**, since it seems unlikely that the legislative provisions of two Member States would be identical in all respects.[142]

The CJEU states unambiguously:

> *"It should be noted that that interpretation of Article 3(1) of Regulation No 1408/71 is **the only one** consistent with the principle that Member States retain competence to determine the conditions for granting social security benefits, while at the same time ensuring equality of treatment for all workers occupied on the territory of a Member State by not penalising workers who are exercising or have exercised their right to freedom of movement."*[143]

As regards the assessment of the similarity of the different conditions, laid down in two separate Member States, for the application of their respective part-time work schemes for older employees, that assessment must be carried out on a **case-by-case basis** and **minor differences** with no significant impact on the achievement of the objectives cannot properly be relied upon as grounds for refusing to recognise that participation in such a scheme under the laws of another Member State is equivalent to participation in the national scheme. The two pre-retirement schemes at issue have the **same objectives**, namely to ensure a smooth transition to retirement for workers and to encourage recruitment of apprentices or people who are unemployed, and that the **conditions** for the application of those schemes are **very similar** since the reduction in working time provided for under the German scheme is **50%** and the reduction provided for under the Austrian scheme is from **40% to 60%**. A difference of 10% in the hours worked is not significant enough to compromise attainment of the social policy objectives.[144] This conclusion is not altered by the fact that Mr Larcher could have chosen a reduction by 50%.

It should be remarked that these observations of the CJEU could lead to the question whether in other cases conditions under national laws could also be completely different, as long as the objectives pursued are comparable, or whether the conditions themselves must always be comparable to a certain extent. In other words: are the objectives the only aspect that counts or can a certain similarity of the means always be required? As Article 5 provides for the assimilation of facts and not for the assimilation of objectives this extensive interpretation cannot be followed. Furthermore, also the determination of the means and not only of the objectives must be considered to fall within national competence. It follows that different means must be assimilated if they pursue the same objectives **and** if they are comparable.

The CJEU thus set **very clear guidelines** for the aspects that have to be taken into account when applying the assimilation principle:

- Refusing assimilation **systematically** is not permitted, because this would be a violation of equal treatment.
- Neither is it required to assimilate **automatically**, because this would deprive the national legislatures of their competence in the field of social protection.
- Assimilation must be applied in a way which respects **both aspects**: the national legislatures must **retain competence to determine the conditions for granting social security benefits**, while at the same time **equal treatment** must be ensured.

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[142] judgment in *Larcher*, C-523/13, EU:C:2014:2458, paragraphs 50-55.

[143] judgment in *Larcher*, EU:C:2014:2458, paragraph 56.

[144] judgment in *Larcher*, EU:C:2014:2458, paragraphs 57 and 58.

- The only way to do this is to identify the **legitimate objectives of the national legislation** and to asses if this objective can – more or less – also be achieved under the terms of the legislation of another State. Usually, the same objective can be achieved **by various means**.

- It cannot be required that provisions in national legislations are identical because this is probably never the case and would deprive the assimilation principle of all practical effects.

- The mere fact that the person concerned did not make use of possibilities in the national legislation to make the differences with the scheme in the other State smaller or even eliminate them, does not exclude assimilation if the similarity is still strong enough.

- This kind of examination can only be carried out on a **case-by-case basis**.

The *Larcher* judgment was still delivered under the coordination regime of Regulation (EEC) No 1408/1971, where the assimilation principle was considered to be a European principle in order to prevent indirect discrimination. However, according to Recital 9 of Regulation (EC) No 883/2004, Article 5 of that Regulation shall be interpreted while observing the substance and spirit of legal rulings like in the *Larcher* case. Furthermore, the ruling in *Knauer,*[145] which was already delivered under Regulation (EC) No 883/2004, can be interpreted to the effect that the CJEU applied the same criteria to assess whether the receipt of a first-pillar pension from Austria and a second-pillar pension from Liechtenstein are similar enough to be assimilated and entail the same legal consequences under Austrian legislation. The CJEU held that the concept of 'equivalent benefits' within the meaning of Article 5(a) of Regulation (EC) No 883/2004 must be interpreted as referring, in essence, to two old-age benefits that are **comparable**. As regards the comparability of such old-age benefits, account must be taken of the **aim pursued by those benefits and by the legislation which established them**. In the concrete case adequate similarity was confirmed, because the aim of both pensions is to ensure that the recipients of the benefits maintain a standard of living commensurate with that which they enjoyed prior to retirement. Differences relating, *inter alia*, to the way in which the rights to those benefits have been acquired, or to the fact that it is possible for the insured to obtain voluntary supplementary benefits, must be qualified as minor and do not give grounds for reaching a different conclusion.[146] It follows that also such an assessment can only be applied on a case-by-case basis.

Advocate General Bot had in these proceedings pleaded in favour of taking recourse to a comparative method similar to that of functional equivalence, well-known in comparative law, consisting in seeking, beyond any formal differences, not complete similarity in the nature of the benefits in question, but a "***functional analogy***".[147] He considered that the concept of equivalence used in Article 5(a) of Regulation (EC) No 883/2004 should not be interpreted more narrowly than that of 'like' facts or events mentioned in Article 5(b) thereof. In neither of the situations envisaged by the EU legislature does the requirement of equal treatment mean strict similarity, which would result in the principle's scope being considerably reduced.[148] Foreign pensions which **fulfil functionally the same objective** of enabling the previous standard of living of the individual concerned to be maintained should be regarded as being the same as those under the Austrian legislation. The fact that the foreign occupational pension scheme has several

[145] judgment in *Knauer*, C-453/14, EU:C:2016:37.

[146] judgment in *Knauer*, C-453/14, EU:C:2016:37, paragraphs 33-36.

[147] Opinion in *Knauer*, EU:C:2016:756, paragraph 52.

[148] Opinion in *Knauer*, EU:C:2016:756, paragraph 55.

characteristics that are different from the Austrian pension scheme does not justify a different conclusion.[149]

It should be pointed out that after the very clear explanations of the CJEU in the *Larcher* judgment, where the CJEU explicitly declared a certain method for the assessment of similarity as "*the only one consistent with the principle that Member States retain competence to determine the conditions for granting social security benefits, while at the same time ensuring equality of treatment",* it could hardly be assumed that the CJEU applied a different method in a judgment which was delivered only one year later, unless the assimilation principle as enshrined in Article 5 of Regulation (EC) No 883/2004 would be considerably different to the assimilation principle as derived from the ban on indirect discrimination. However, this assumption is excluded by Recital No 9. The possible argument that Regulation (EC) No 883/2004 has already been adopted in 2004, a few years before the *Larcher* judgment was delivered, is not convincing given that the reasoning of the CJEU in the case *Knauer* seems to be consistent with the reasoning in the case *Larcher*. Despite the different wording in the Opinion of the Advocate General in *Knauer* a closer analysis leads to the conclusion that in both judgments the same method was applied.

Nevertheless, it must be pointed out that a certain similarity of facts in other Member States can only be considered to be sufficient if otherwise, as the CJEU pointed out, *"the examination in question would de facto be deprived of all practical effect (…)."*. If certain facts can arise in other Member States in the same way as in the competent Member State, there is no reason why the legal requirements should be smaller and identity should not be required. Nevertheless, one should always bear in mind what was already pointed out, namely that the facts and events of other countries are embedded in the relevant legal, social and cultural environment, from which they should not and cannot escape. Therefore, it is necessary to carry out in every case a careful assessment of whether identity can be demanded. It should also be recognised that it is easier to compare facts like working part-time or part-time unemployment than to compare legal conditions. When the analysis deals with legal conditions there are many more complex issues such as the beneficiary's age, the unemployment rate, voluntary or compulsory unemployment, the aim of the provision applicable *etc*.

3.1.4. Conclusions

In the recent case law of the CJEU the cases *Larcher* and *Knauer* are the key cases for the interpretation of Article 5. In these rulings the CJEU sets clear guidelines on how to apply the assimilation principle and Article 5 to facts/benefits and legal consequences. Despite the different wordings used in these rulings the CJEU seems to apply the same method. The overriding aspect is that Article 5 shall respect two fundamental principles of the Regulation, namely that the national legislature retains competence to determine the conditions for granting social security benefits, while at the same time ensuring equality of treatment for all workers occupied on the territory of a Member State.

On the one hand, identity cannot be required with regard to legal conditions because, as assimilation intends to deal with factual or legal differences, this would deprive Article 5 of all practical effect. On the other hand, a certain degree of similarity is necessary to respect the competence of the Member States to determine their national social policy. The only way for doing this is to identify the legitimate objectives of the national legislation and to asses if these objectives can also be achieved under the terms of the legislation of another Member State. This assessment can only be carried out on a case-by-case basis. There is no fast and easy rule to establish whether Article 5 applies or not. However, the institutions do not always start from zero, but guidelines, spirit and precedent criteria have to play an important role.

[149] Opinion in *Knauer*, EU:C:2016:756, paragraph 60.

If in principle certain facts *can* arise in other Member States in the same way as in the competent Member State, there may be no reason to require more humble conditions for the entitlement to benefits in cross-border cases unless this is necessitated by specific differences of the relevant circumstances in different States.

3.2. What are similar benefits?

3.2.1. Analysis

The case ***Knauer***[150] is one of the key cases for the assessment of similar benefits under Article 5(a) of Regulation (EC) No 883/2004. It is also up until now the only case under Article 5 of the new Regulation.[151]

This case concerned the obligation of two Union citizens to pay contributions to the Austrian health insurance scheme in respect of monthly pension payments made to them by an occupational pension scheme in Liechtenstein. Mr Knauer and Mr Mathis resided in Austria and, in their capacity as recipients of an Austrian pension, were insured under the Austrian health insurance scheme (Article 23 of Regulation (EC) No 883/2004). On account of their previous employment in Liechtenstein, they received old-age pensions provided by a pension fund under the Liechtenstein occupational pension scheme. The Austrian law provided that, if a person who is covered by the Austrian sickness insurance scheme also receives a foreign pension which is covered by the scope of Regulation (EC) No 883/2004, a health insurance contribution must be paid also from that foreign pension where the recipient of the foreign pension is entitled to health insurance benefits. This new legislation was introduced in Austria after Article 5 of the Regulation had entered into force, allowing in principle such assimilation.

The CJEU had to decide about the question whether Article 5(a) of Regulation (EC) No 883/2004 is to be interpreted as meaning that old-age benefits provided under an occupational pension scheme of one Member State and those provided under a statutory pension scheme of another Member State – both schemes being within the scope of that Regulation – are equivalent benefits within the meaning of that provision. It held that, according to settled case law, in determining the scope of a provision of EU law, in this case Article 5(a) of Regulation (EC) No 883/2004, its wording, context and objectives must all be taken into account. It further stated that

> *"The wording of that provision does not give any indication of the way in which the words 'equivalent benefits' should be interpreted." However, (…) the concept of 'equivalent benefits' within the meaning of Article 5 (a) of Regulation No 883/2004 does not necessarily have the same meaning as the concept of 'benefits of the same kind', to which Article 53 of the regulation refers. If the EU legislature had intended to apply the criteria developed by the case-law for interpreting the concept of 'benefits of the same kind' in the context of the application of the rules to prevent overlapping, it would have used the same terms in connection with the application of the principle of equal treatment."* [152]

This explicit statement by the CJEU must be accepted. Furthermore, given the objectives of the overlapping rules and Article 5(a), this interpretation seems to be appropriate. The term "*benefits of the same kind*" according to Article 53(1) of the Regulation concerns social security benefits where their **purpose and objective**, and the **basis for calculating them** and the **conditions for granting them**, are **the same**. These criteria are very narrow and similarity is difficult to establish, which seems to be justified

[150] judgment in *Knauer*, C-453/14, EU:C:2016:37.

[151] In the case *Reichel-Albert*, C-522/10, EU:C:2012:114, Article 5 was discussed in the Opinion of the Advocate General but, finally, did not apply.

[152] judgment in *Knauer*, EU:C:2016:37, paragraph 28. The experienced *connoisseur* of legislative processes on European and national level would not necessarily subscribe to that statement.

as the overlapping provisions under the Regulation have the objective of protecting the recipients of benefits from undue reductions of their benefits. By way of contrast, Article 5(a) of the Regulation mainly (but not only, of course) intends to give rise to positive effects for migrant workers and Union citizens if the receipt of a benefit entails legal advantages under the national legislation of a Member State.

The CJEU further held that two old-age benefits cannot be regarded as being equivalent within the meaning of Article 5(a) of that Regulation merely because they are both within the scope of that Regulation. Such an interpretation would render the requirement for equal treatment nugatory, given that that provision is intended to apply only to benefits falling within the scope of the Regulation. Thus, the concept of 'equivalent benefits' within the meaning of Article 5(a) must be interpreted as referring, in essence, to two old-age benefits that are **comparable**.

Despite the fact that both schemes provide for old-age pensions which fall under Regulation (EC) No 883/2004 there are significant differences between the Austrian scheme and the scheme under the Liechtenstein legislation. However, the CJEU held that, as regards the comparability of such old-age benefits, account must be taken of the **aim pursued** by those benefits and by the legislation which established them. **The aim of both old-age benefits is to ensure that the recipients of the benefits maintain a standard of living commensurate with that which they enjoyed prior to retirement**. For the CJEU it followed that old-age benefits such as those at issue in this case must be regarded as being comparable. The fact that there are differences relating, *inter alia*, to the way in which the rights to those benefits have been acquired, or to the fact that it is possible for the insured to obtain voluntary supplementary benefits, did not give grounds for reaching a different conclusion.[153]

The reasoning of this ruling seems consistent with the method applied by the CJEU in the *Larcher* case (for more details see 3.1.):

- It is not necessary that the essential features of the benefits are identical, but a certain kind of similarity is sufficient; otherwise benefits from different Member States could probably never be assimilated.
- Benefits are similar in terms of Article 5(a) if they pursue the same aim.
- Differences which have no decisive influence on the aim pursued are not relevant.

The basic evaluations of this judgment are convincing as they seem to follow the criteria which the CJEU set up in the *Larcher* judgment and which seem to be consistent with the objectives of Article 5 and other basic principles of Union law. However, it must be pointed out that the wording used in this particular case can also give rise to confusion. That the CJEU based its assessment on the basic function of the two pensions, namely to maintain the standard of living, and not on formal differences, like the financing of the schemes, cannot be scrutinised. However, the CJEU talks about maintaining a standard of living *"commensurate with that which they enjoyed prior to retirement"*. Is this to be interpreted in a way that a first-pillar pension from Member State A providing for a replacement rate of 50% and a first-pillar pension from Member State B providing for a replacement rate of 80% would not be "*comparable*" in terms of Article 5(a)? Given the spirit of Article 5 and the method applied in the cases *Knauer* and *Larcher* this can hardly be the assumption. The conclusion should rather be that it comes down to maintaining a "*certain*" standard of living and not a specific replacement rate.

It should be added that benefits falling under Regulation (EC) No 883/2004 are already in a certain way indirectly aligned, since most Member States have ratified ILO Convention 102, on which the material scope of the Regulation is based. So when we speak for

[153] judgment in *Knauer*, C-453/14, EU:C:2016:37, paragraphs 32-36.

example of old-age pension, the legislations of all Member States, despite their differences, share similar (not identical) concepts that can be helpful in a general comparison.

3.2.2. Conclusions

The clearest conclusion of the *Knauer* case is that the concept of "equivalent benefit" used in Article 5(a) cannot be interpreted in the same way as the concept of "benefits of the same kind" under Article 53 of the Regulation, but follows certain criteria of its own. In the *Knauer* ruling the CJEU set further guidelines for how to apply Article 5 to benefits, which seems to be consistent with the method used in *Larcher*. Again, complete identity cannot be required, but a certain functional analogy is sufficient, taking into account the aim pursued by those benefits. Differences which have no influence on that aim must be disregarded. Also with regard to benefits there is no fast and easy rule to apply Article 5 or not. The analysis of the relevant elements must be carried out on a case-by-case basis. Moreover, the CJEU will maybe soon provide for more information and guidelines in the judgment in case C-431/16.

3.3. How does assimilation have to be applied in relation to salary-linked benefits (C-257/10 Bergström)?

3.3.1. Introduction

Article 5(a) stipulates:

> "*Where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;*"

Within the concept 'income' we can, without any doubt, include wages, salaries or income earned or generated by employed or self-employed workers in a Member State which, theoretically, have to be taken into account by another Member State when calculating a benefit. At this stage, aggregation has already been applied and it is the time of calculating the benefit based on the regulatory salary. For example, if for entitlement to a benefit a period of six months in the last year before the contingency occurred is required and the person concerned completed three months in Member State A and three months in Member State B, the aggregation rule is applied for entitlement to the benefit. However, for the calculation of the benefit, according to the legislation of Member State A, the salaries of the last six months are being taken into account. However, in the competent State A, the person concerned has completed only three months before the worker has pursued his or her work activity in Member State B.

It could not be unreasonable, in a dispassionate reading of Article 5(a), to argue that the competent State should calculate the regulatory salary taking into account the wages earned during the three months in its territory and the salary received during three months in State B. However, Member States have been and are very reluctant to accept any supposition that foreign income should be taken into account for calculating a benefit. Taking into account foreign salary involves the introduction of a foreign element that can break the balance of a system that, like clockwork precision, requires that all pieces work together in coordinated functions. Let us take the example above. Imagine that the benefit in State A amounts to 100% of the wages in the preceding 6 months. The person concerned worked three months in State B and earned € 6,000 per month there. In State A, a country with lower average wages, the person worked three months as well and earned € 1000 per month. The benefit in State A would amount to € 3,500 per month which can introduce a distortion and disrupt the economic and social balance of the insurance scheme in State A, due to the fact that the competent institution has to

award a disproportionate benefit not adjusted to its social reality and disconnected from the real relationship between wages and benefits in its country. However, an inverse and equally disproportionate situation could occur if the competent State was State B. It has to be recalled that the coordination rules do not imply harmonisation. For this reason, considering salaries received in other Member States could introduce undesired indirect harmonisation criteria.

It must be admitted that the general principle of the Regulation is that benefits should be calculated taking into account only income earned in the competent Member State. This is laid down in *e.g.* Article 21(2); Article 56; Article 62(1) and (2) and Annex 11, Spain, (2) of Regulation (EC) No 883/2004. On the other hand, Article 62 (3) of the Regulation allows benefits to be calculated taking into account income obtained in the Member State of last employment which is not the competent State. However, that exception cannot be applied extensively because it covers a very exceptional situation. In fact, the competent State is the State of residence for unemployment benefits awarded to unemployed persons who did not reside in the State of employment.

However, for family benefits, there is no specific calculation rule like for other benefits. This can be considered a **loophole**. In fact, in the case *Bergström*[154] Advocate General Mazek declared:

> "*However, unlike, for example, Articles 23, 47, 58 and 68 of Regulation No 1408/71 relating respectively to the calculation of sickness and maternity, old age and disability pensions, occupational accidents and professional diseases and unemployment benefits, that regulation contains no specific provision governing the calculation of family benefits applicable to the facts of this case".*

3.3.2. The case *Bergström*

Elisabeth Bergström was a Swedish national. She resided in Switzerland as from January 1994 and was employed there until she gave birth to a daughter on 19 March 2002. The family moved to Sweden on 1 September 2002. Ms Bergström did not take up employment in Sweden and was dedicated to the care of her daughter. She applied for parental benefit corresponding to the parent's sick leave benefit, calculated on the basis of the income she had earned from her employment in Switzerland. The Swedish institution considered that she was not entitled to the parental benefit at sick leave benefit level and decided to grant the parental benefit at the basic level, because she had earned income only in Switzerland and this income was not to be taken into account for the calculation of the Swedish benefit. As a consequence, she was not entitled to a higher level of parental benefit. Also some Member States and the EC defended, that, as a general principle, earned income in another Member State is not valid and must not be taken into consideration when calculating benefits.

The CJEU did not follow this approach and argued that this thesis could entail an unequal treatment for migrant workers compared to those who stayed in Sweden[155]. For this reason, the CJEU stated that – in order to eliminate that discrimination – the average earnings of a person exercising the same profession and the same qualifications as Ms Bergström in Sweden should be used as a basis for the calculation in question. Indeed it could be considered a discrimination if Ms Bergström's parental benefit were calculated only at the basic level, whereas workers in equivalent circumstances who work in Sweden are entitled to a benefit calculated according to the income basis for the sick leave benefit. The obligation to remedy the discrimination implied that Ms Bergström's family benefits must be the same as they would have been if she had not availed herself of her right to free movement and stayed in Sweden.

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[154] Opinion in *Bergström*, C-257/10, EU:C:2011:407.

[155] The Court referred to Article 3(1) of Regulation (EEC) No 1408/1971 and the respective prohibition of discriminations on the ground of nationality under Article 8(a) of the Treaty between the EU and Switzerland

> "*Therefore, income levels in Sweden should be taken as a comparator or a point of reference and the amount of family benefit at the level of sick leave benefit should be calculated by reference to the income of a worker in Sweden in a comparable profession, with comparable professional experience and qualifications*."

3.3.3. Interpretation

The assimilation aspect in this ruling can be interpreted in different ways:

Article 5(a) can be considered a typical legal fiction. Moreover, the *Bergström* ruling implies a second fiction when the CJEU states that income levels in Sweden should be taken as a comparator or a point of reference and the amount of the family benefit at the level of the sick leave benefit should be calculated by reference to the income of a worker in Sweden in a comparable profession, with comparable professional experience and qualifications. For this reason it could be assumed that Article 5(a) may be considered as a **first-degree legal fiction** and the *Bergström* ruling as a **second-degree legal fiction**.

A second interpretation would be that the CJEU could not assimilate the income in Switzerland without running into severe conflicts within the legal regime of the Regulation because this was explicitly excluded by Article 23 of the Regulation. However, this would have been to the clear detriment of the migrant worker and – as the CJEU explicitly states – a violation of equal treatment. But the CJEU did not declare Article 23 to be invalid either, maybe because it wanted to avoid challenging the calculation rules in the Regulation as such. The CJEU therefore fell back on a legal reasoning which it had already used in *Nemec*[156]: it held that the Swedish institution must establish a fictitious insurance career in Sweden, comparable to that in Switzerland, and shall calculate the benefit on the basis of the fictitious income that Mrs Bergström would have earned in Sweden.

In the legal framework of Regulation (EC) No 883/2004 the first interpretation would maybe still be considered to be the assimilation of income under Article 5(a). The second interpretation would rather speak in favour of the thesis that the insurance career of Mrs Bergström in Switzerland would be assimilated under Article 5(b) because the work carried out there can be considered as a fact under that provision. Because of this fictitious working career in Sweden a fictitious income in Sweden can be established, which allows the calculation of the Swedish benefit on the higher rate. In the end, significant disadvantages of the migrant worker are avoided while at the same time the calculation rules in the Regulation are respected.

Again, in this ruling we find two opposite interests: free movement versus national interests or in other words European interests versus national interests. The pure European interest would advocate taking into account wages or income received in other Member States for the calculation of benefits. On the other hand, national interests would defend the opinion that only salaries received in the competent State have to be taken into account.

Also the principle of **proportionality** mentioned in the previous section plays an important role here, because the CJEU chose a proportional solution adopting a middle way: the solution selected was the calculation taking into account the income of a person who has comparable experience and qualifications and who was similarly employed in the competent Member State which has to award the said benefit. In fact, the *Bergström* ruling can be considered a slight deviation from the idea of Article 5(a) of Regulation (EC) No 883/2004.

[156] judgment in *Nemec*, C-205/05, EU:C:2006:705

Moreover, as a precedent of this ruling the case law *Nemec*[157] was already mentioned, where the CJEU stated:

> **"***Article 58(1) of Regulation (EEC) No 1408/71 (…), interpreted in accordance with the objective set out in Article 42 EC, requires that, in a situation such as that in the main proceedings, calculation of the 'average wage or salary', within the meaning of the first of those two provisions, takes into account the pay that the person concerned could reasonably have earned, given his subsequent employment record, had he continued to work in the Member State in which the competent institution is situated"*.

Finally, to avoid future problems with the interpretation of Article 5(a), it could be considered to introduce in Regulation (EC) No 883/2004 new provisions on the calculation of benefits and a provision for the calculation of family benefits, which is currently missing.

3.3.4. Conclusions

With regard to the question whether income acquired in other Member States must be assimilated by the competent Member State when calculating benefits, the legal framework seems to be contradictory. On the one hand, there are a number of specific provisions in the basic Regulation which explicitly exclude taking into account such income. On the other hand, in two rulings the CJEU has held that completely disregarding such income could entail indirect discrimination of migrant workers. In order to solve this situation without questioning the legal force of the calculation provisions within the Regulation, the CJEU seems to have chosen a kind of middle course by stating that income from other Member States does not need to be taken *directly* into account, but a fictitious income that would have been earned in the competent Member State on the basis of a comparable insurance career in that State. This could be interpreted as being a modified application of Article 5(a) or as a case of Article 5(b), focusing on the assimilation of the insurance career. It may be advisable to reflect these rulings in the legal framework of the Regulation by adapting the calculation rules.

[157] judgment in *Nemec*, C-205/05, EU:C:2006:705.

4. ARTICLE 5 AND SPECIFIC ASSIMILATION RULES IN REGULATION (EC) NO 883/2004 AND REGULATION (EC) NO 987/2009

4.1. Article 44 of Regulation (EC) No 987/2009 and the aspect of assimilation

4.1.1. Analysis

Article 44 of Regulation (EC) No 883/04 stipulates:

> "1. *For the purposes of this Article, 'child-raising period' refers to any period which is credited under the pension legislation of a Member State or which provides a supplement to a pension explicitly for the reason that a person has raised a child, irrespective of the method used to calculate those periods and whether they accrue during the time of child-raising or are acknowledged retroactively.*
>
> *2. Where, under the legislation of the Member State which is competent under Title II of the basic Regulation, no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of the basic Regulation, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, shall remain responsible for taking into account that period as a child-raising period under its own legislation,* ***as if such child-raising took place in its own territory****.*
>
> *3. Paragraph 2 shall not apply if the person concerned is, or becomes, subject to the legislation of another Member State due to the pursuit of an employed or self-employed activity".*

The rulings *Elsen*[158] and *Kauer*[159] were decisive for the adoption of the current text of Article 44 of Regulation (EC) No 987/2009. Moreover, also the Opinion of the Advocate General in the case *Reichel-Albert*,[160] which was submitted later, facilitates a better understanding of that provision and provides hints for its interpretation.

The first question we might ask is whether Article 44 is based on Article 5 of Regulation (EC) No 883/2004 (assimilation) or rather on Article 7 of that Regulation (waiving of residence clauses). The answer seems clear considering that the wording of Article 7 refers only to cash benefits, while child-raising periods cannot be considered as such. However, if some doubts still remain, it must be remembered that the Opinion of the Advocate General in the case *Reichel-Albert* explicitly refers to Article 5 of the Regulation in the event that the CJEU would consider Regulation (EC) No 883/2004 to be applicable (which was not the case).

In all three cases, the institution involved refused the acknowledgment of child-raising periods (totally or partially), firstly because the Member State where this institution is situated was no longer competent under Title II of Regulation (EC) No 883/2004 and, secondly, due to the fact that the child concerned was not raised in the territory of the competent State (no assimilation of facts). Moreover, the judgments were based on different reasons, but with some similarities.

[158] judgment in *Elsen*, C-135/99, EU:C:2000:647

[159] judgment in *Kauer*, C-128/00, EU:C:2002:82

[160] judgment in *Reichel-Albert*, C-522/10, EU:C:2012:475

The rulings in these three cases were delivered under the provisions of Regulation 1408/1971. However, the basic statements can be extended to the interpretation of Regulation (EC) No 883/2004, notwithstanding that the legal requirements under Article 44 are different from those which the CJEU developed. The CJEU held that the German and Austrian legislation placed migrant workers at a disadvantage with regard to social security, as compared with workers who did not avail themselves of the freedom of movement.

The issue that makes these judgments so peculiar is the fact that the CJEU developed a kind of "subsidiary competence" for taking into account child-raising periods, in case the Member State which is competent under Title II of the Regulation does not take them into account. By adopting Article 44 of Regulation (EC) No 987/2009 the legislature intended to provide for legal clarity and to set up stricter conditions for this secondary competence to become effective. This is clearly stated by the Advocate General:

> *"The effect of Article 44 is to create a purely* ***subsidiary competence*** *for a Member State that is not competent under the general rules in order to allow child-raising periods to be taken into account, provided that the conditions laid down by that article are met. (…)_In these three cases and also in Article 44 of Regulation (EC) No 987/2004 the procedure, has to be the following: "The* ***first stage*** *is to apply the provisions of European Union law relating to the determination of the competent Member State and the legislation applicable, without taking into consideration the outcome of applying the legislation of the various Member States in question. The* ***second stage*** *of the analysis is to examine whether the conditions governing the award of a benefit or advantage, such as the taking into account of a child-raising period, are consistent with European Union law, more specifically the provisions of Regulations Nos 883/2004 and 987/2009 and/or the fundamental freedoms.* ***It is not until the latter stage that the application of Article 5 of Regulation No 883/2004, which establishes the principle of the equal treatment of benefits, income, facts or events, becomes relevant****."* [161]

The determination of the competent Member State and the legislation applicable (first stage of the procedure) is not the subject of this report. This report only deals with aspects related to Article 5 of Regulation (EC) No 883/2004. As the Advocate General clearly pointed out, this question only becomes relevant *after* the competent State has been determined (second stage of the procedure). In a situation where child-raising periods are not taken into account pursuant to the legislation of the Member State which is competent under Title II of Regulation (EC) No 883/2004, Article 44(2) of Regulation (EC) No 987/2009 precludes the institution of another Member State whose legislation remains applicable to the person concerned on a subsidiary basis, in accordance with the conditions laid down in Article 44, from not taking the period concerned into account as a child-raising period as if the child had been raised in its own territory where the criteria for doing so as laid down in its own legislation are not met in the situation at issue.

The application of Article 5 follows the general criteria of this assimilation provision and does not go "beyond the scope of Article 5" as the mandate seems to suggest. The only peculiar aspect in this respect lies in the fact that usually only the Member State which is competent under Title II applies Article 5. **In cases under Article 44(2) of Regulation (EC) No 987/2009 also a Member State which is not competent under Title II must apply Article 5**. This interpretation is supported by Advocate General Jääskinen who, in his Opinion in the case *Reichel-Albert*, states:

> *"Article 5 of Regulation (EC) No 883/2004 requires a Member State which is* ***competent under Title II of that Regulation or bound by the obligation laid down in Article 44(2) in fine of Regulation (EC) No 987/2009*** *to afford legal*

[161] as Advocate General Jaaskinen stated this in the Reichel-Albert case (this could be also extended to the Elsen and Kauer case)

effects to child-raising periods completed and contributions paid in another Member State in the same way as if those facts or events had taken place in its own territory."

4.1.2. Conclusions

Article 44 of Regulation (EC) No 987/2009 provides for a subsidiary competence with regard to taking into account child-raising periods by a State which is no longer competent under Title II of Regulation (EC) No 883/2004. Only after this determination of competence, Article 5 becomes applicable. The application of Article 5 follows the general rules with the exception that a State which is not competent under Title II of Regulation (EC) No 883/2004 applies that provision. No specific conclusions for the material scope of Article 5 of the basic Regulation can be drawn from Article 44 of the implementing Regulation.

4.2. Articles and selected provisions in the Annexes that provide for assimilation

4.2.1. Introduction

When perusing the Regulation many provisions can be found that – directly or indirectly – provide for the assimilation of benefits, income or facts. On the other hand, there are also provisions which provide explicitly that assimilation does not take place, either to avoid unjustified or excessive results or in order to protect the migrant worker from a strict application of that provision which could entail negative results. Through the analysis of these provisions, conclusions could be drawn on the material scope of Article 5: if a provision provides for the assimilation of specific facts, it could be assumed that this legal consequence is not provided for by Article 5; otherwise, this provision would be redundant. Nevertheless, this provision could also be a mere clarification of the material scope of Article 5. Provisions that restrict assimilation could be interpreted to the effect that without this restriction Article 5 would entail the legal consequence which this provision intends to prevent. However, also in this case the provision could be a mere clarification.

With regard to provisions from Regulation (EEC) No 1408/1971 containing assimilation aspects that have not been repeated in Regulation (EC) No 883/2004, conclusions on the material scope of Article 5 of the latter Regulation may be easier.

Some articles of the new coordination Regulations are indirectly applying the assimilation principle or deviate from its spirit, without mentioning it. There are several examples, but three groups could be pointed out:

- Articles that soften or mitigate the content and strict implementation of assimilation. All rules on the overlapping of benefits could be mentioned, in particular Articles 53 to 55 of the Regulation. The strict application of Article 5 could be to the detriment of migrant workers. For this reason, some conditions, requirements and rules of conflict are laid down.

- Articles which deviate from the application of Article 5(a) and establish an exception to this rule. All articles that deal with the calculation of benefits can be mentioned (Articles 21(2), 56, 62(1) and (2) and Annex 11, Spain, (2) of the Regulation, among others). On the contrary, the spirit of Article 5(a) is reflected in all its intensity in Article 62(3) of the Regulation.

- Articles that mention the equating of residences, for instance Article 18(1) of the Regulation ("*as though the persons concerned resided in that Member State*"), or of insurance, for instance Article 19(1), second sentence of the Regulation ("*These benefits in kind shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation*

it applies, as though the persons concerned were insured under the said legislation regarding benefits in kind."). There are many provisions of this type in the Regulations. Although it is doubtful whether these provisions can be considered superfluous, they clarify and guarantee a uniform interpretation.

In the following section some selected provisions in Regulations (EEC) No 1408/1971, (EC) No 883/2004 and (EC) No 987/2009 shall be analysed. Afterwards some general conclusions are drawn.

4.2.2. Provisions in Regulation (EEC) No 1408/1971 that have not been repeated in the Regulation (EC) No 883/2004:

If provisions of Regulation (EEC) No 1408/1971 containing assimilation aspects have not been repeated in Regulation (EC) No 883/2004 the conclusion is legitimate that their material scope is now covered either by Article 5 or by another provision of the new Regulation.

- Article 9a: facts in other Member States which are relevant for extending a reference period must be taken into account.

- Article 10a (3): for entitlement to a special non-contributory benefit in the form of a supplement also a benefit covered by Article 4(1) (a) to (h) of Regulation (EEC) No 1408/1971 must be taken into account. This is now covered by Article 5(a) of Regulation (EC) No 1408/1971.

- Article 23(3) and 68(2): where the amount of cash benefits varies with the number of members of the family, also family members residing in another Member State must be taken into account.

- Article 56: assimilation of accidents while travelling which occur in the territory of a Member State other than the competent State.

- Article 57(2) and (3) regarding the Member State where an occupational disease was first diagnosed and where a preceding activity must have been carried out (in respect of a certain time limit between that activity and the disease).

- Article 65 (1) and (2) regarding death that occurred in another Member State and export of death grants.

In all of the cases mentioned above it seems to be rather clear that these issues are now covered by Article 5 of Regulation (EC) No 883/2004. Conclusions for more controversial issues as mentioned under the following sections can hardly be drawn.

4.2.3. Provisions in Regulation (EC) No 883/2004 that provide for assimilation

In a non-exhaustive list, the following Articles could be mentioned:

<u>Regulation (EC) No 883/2004:</u>

- Article 13(5): "*Persons referred to in paragraphs 1 to 4 shall be treated, for the purposes of the legislation determined in accordance with these provisions, as though they were pursuing all their activities as employed or self-employed persons and were receiving all their income in the Member State concerned*".

  This provision is linked to the applicable legislation: once it is decided – according to Title II of the Regulation – which State is competent, it provides for the assimilation of all activities and income of the persons concerned. It is doubtful whether this provision only stipulates what would be provided for by Article 5 anyway and must therefore be considered as being a mere clarification. It should

be pointed out that the competence of only one State within the scope of the Regulation as provided for by Title II of the Regulation is a **European concept** and does not merely interfere in a corrective way in **national concepts** of the Member States, which is the usual task of Article 5. Firstly, the Regulation prescribes that the territories of all Member States *must* be assimilated with the territory of the competent State, which is determined based on certain criteria according to Title II. Secondly, the Regulation contains additional rules for the consequences of this territorial assimilation: the territories of all Member States are not assimilated in a universal way but only with regard to certain objectives. All these provisions form the European concept of competence according to Title II of the Regulation. Therefore, Article 13(5) could be considered as being an independent and necessary provision.

- Article 37(1) and (2): "1. *The competent institution of a Member State whose legislation provides for meeting the costs of transporting a person who has sustained an accident at work or is suffering from an occupational disease, either to his/her place of residence or to a hospital, shall meet such costs to the corresponding place in another Member State where the person resides, provided that that institution gives prior authorisation for such transport, duly taking into account the reasons justifying it. Such authorisation shall not be required in the case of a frontier worker. 2. The competent institution of a Member State whose legislation provides for meeting the costs of transporting the body of a person killed in an accident at work to the place of burial shall, in accordance with the legislation it applies, meet such costs to the corresponding place in another Member State where the person was residing at the time of the accident*".

  The first provision under (1) provides for an authorisation of the competent State and is therefore a European rule which could *not* be derived from Article 5. The same applies for the differentiation between frontier workers and non-frontier workers. Although some doubts can arise a broad interpretation of Article 5 could allow the presumption that paragraph 2 can be considered an indirect and merely clarifying outcome of Article 5 of the Regulation.

- Article 42(1): "*When an insured person or a member of his/her family dies in a Member State other than the competent Member State, the death shall be deemed to have occurred in the competent Member State.*"

  This provision should be considered to be only a clarification without any doubt.

- Article 58: "*Recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this chapter. 2. The competent institution of that Member State shall pay him/her throughout the period of his/her residence in its territory a supplement equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit"*.

  This provision about the minimum benefit and payment of a supplement should be considered a European concept and not covered by Article 5. However, doubts may arise also in this regard.

- Article 81: "*Any claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former Member State either directly or through the competent authorities of the Member States concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the second Member State shall be considered as the date of their submission to the competent authority, institution or*

tribunal".

To assume that this provision would be comprised by Article 5 anyway and Article 81 is only a clarification, would be a very large interpretation of Article 5. Doubts may arise here. If the Member States involved would have similar internal rules, maybe the conclusion could be drawn that Article 5 extends these internal rules to cross-border cases. However, this is not necessarily the case, **given the competence of the national legislatures in particular with regard to procedural rules**. Therefore, this provision should rather be considered a European concept and not covered by the general rule of Article 5.

Regulation (EC) No 987/2009:

- *Article 49: "Where Article 46(3) of the basic Regulation is not applicable, each institution shall, in accordance with its legislation, have the possibility of having the claimant examined by a medical doctor or other expert of its choice to determine the degree of invalidity. However, the institution of a Member State shall take into consideration documents, medical reports and administrative information collected by the institution of any other Member State as if they had been drawn up in its own Member State.*"

  It could be assumed that this obligation would be covered by Article 5 anyway and Article 49 of the implementing Regulation is only a clarification. Any other interpretation of Article 5 should be considered too narrow.

- Article 54(3): "*For the purposes of applying Article 62 of the basic Regulation and notwithstanding Article 63 thereof, the competent institution of a Member State whose legislation provides that the calculation of benefits varies with the number of members of the family shall also take into account the members of the family of the person concerned residing in another Member State as if they resided in the competent Member State.*"

  This provision refers to the calculation of benefits and not directly to the export of benefits in cash, which is why Article 7 does not apply. It seems beyond question that this is only a clarification of what would be provided for by Article 5 anyway.

4.2.4. Provisions in Regulation (EC) No 883/2004 which restrict assimilation

In a non-exhaustive list, the following articles could be mentioned:

Regulation (EC) No 883/2004:

- Article 14(5): "*Where the legislation of a Member State makes admission to voluntary insurance or optional continued insurance conditional upon residence in that Member State or upon previous activity as an employed or self-employed person, Article 5(b) shall apply only to persons who have been subject, at some earlier stage, to the legislation of that Member State on the basis of an activity as an employed or self- employed person."*

  The purpose of this provision is clear: insurance schemes shall be protected from being excessively made use of by Union citizens from other Member States who have never worked in that State. It follows that Article 5 could be interpreted to that effect that it would provide for the assimilation of residence in all Member States. On the other hand, under 2.3 it was argued why the access of any voluntary insurance scheme to all Union citizens would probably be a violation of the principle of proportionality, which is an intrinsic limitation to Article 5. However, as this provision sets clear conditions for the assimilation of residence we cannot assume that this provision would be covered by Article 5 and be redundant.

- Article 40(3): "*Article 5 shall apply to the competent institution in a Member State as regards the equivalence of accidents at work and occupational diseases which either have occurred or have been confirmed subsequently under the legislation of another Member State when assessing the degree of incapacity, the right to benefits or the amount thereof,*

on condition that: (a) no compensation is due in respect of an accident at work or an occupational disease which had occurred or had been confirmed previously under the legislation it applies; and (b) no compensation is due in respect of an accident at work or an occupational disease which had occurred or had been confirmed subsequently, under the legislation of the other Member State under which the accident at work or the occupational disease had occurred or been confirmed."

Without this provision a person could be entitled to higher benefits in two or more Member States due to only one accident at work. It follows that Article 5 could be interpreted to the effect that, otherwise, assimilation would take place. On the other hand, also here one could argue that this provision could be considered to be only a clarification because such a broad interpretation of Article 5 would be a violation of the principle of proportionality. However, proportionality is a rather vague criterion and may be subject to divergent views.

- Article 22(2): "*Notwithstanding Article 5(a) of the basic Regulation, a Member State may become responsible for the cost of benefits in accordance with Article 22 of the basic Regulation only if, either the insured person has made a claim for a pension under the legislation of that Member State, or in accordance with Articles 23 to 30 of the basic Regulation, he receives a pension under the legislation of that Member State.*"

  This provision ensures that only the Member State paying a pension shall be obliged to pay the health care cost for the person concerned. However, assimilating pensions from other Member States in this respect could be considered to deviate from the coordination regime. It therefore seems doubtful whether Article 5 could be interpreted so broadly. Also the aspect of proportionality must be respected. This provision could be considered as rather a clarification in order to avoid any risk that the CJEU might rule otherwise.

Some entries in Annex XI of Regulation (EC) No 883/2004 explicitly mention Article 5, *e.g*. Germany, (1) and (2), Spain, (4) and Greece (2). Other entries contain assimilation aspects without any explicit reference to Article 5. However, without a detailed knowledge of the national legislations concerned any reliable conclusion on the material scope of Article 5 is difficult.

4.2.5. Conclusions

It is difficult to draw clear and general conclusions from special provisions in the Regulation which contain assimilation aspects. The problem is that usually the European legislature gives no explanation why it adopted the provision concerned: it could have either intended to clarify the material scope of Article 5 in order to avoid that the CJEU or national courts and institutions could rule otherwise; or it could have considered the legal consequences not to be covered by Article 5. It must be taken into account that the legislature is aware that Article 5 is not in its hands alone but is the subject of interpretation by the CJEU and by national courts, authorities and institutions. Indeed, it is in many cases impossible to state with certainty whether a specific provision was adopted only for clarification and would in principle be redundant, or whether the existence of this provision delimits the material scope of Article 5. While each clarification of a provision as abstract as Article 5 should be appreciated because it is useful for legal clarity, such provisions can give rise to an erroneous *argumentum e contrario*. As always, the CJEU has the last word in this regard.

However, some guidelines may be derived from the analysis of specific provisions in the Regulation:

National concepts should be differentiated from European concepts. The task of Article 5 is to extend the material scope of national provisions to facts that happened in other Member States. However, beyond this territorial aspect, the content of national provisions remains unchanged and is determined by the national legislature, the competence of whom to determine its social policy is strictly respected. Therefore, Article

5 stipulates that if national provisions link legal consequences to facts or the receipt of income/benefits then these consequences must also be enforced if the relevant situation happens in another Member State. Article 5 does not determine the content of what is legally provided for (what consequences are linked to which situation). It follows that specific provisions in the Regulations could be a mere clarification of Article 5 only if that provision applies under the condition that the national legislation contains a respective provision. For example Article 37(1) of Regulation (EC) No 882/2004 applies under the condition that the national legislation of a Member State provides for meeting the costs of transporting a person who has suffered an accident at work to his or her place of residence. If this is the case then a person must be transported also to the place of residence in another Member State.

In this line of reasoning, legal institutions like competence under Title II seem to go beyond such a mere extension of the scope of national provisions, as the Regulation not only defines the competent State but also determines **the scope and the limits** of that European competence. Thus, it should rather be considered to be a European concept and not only a modification of national concepts. It can hardly be assumed that only the definition of a competent State under Title II as such is necessary in a strict sense and all legal consequences of that competence could be derived from Article 5 and are in principle redundant. Therefore, provisions like Article 13(5) of Regulation (EC) No 883/2004 should not be considered to be a mere clarification of Article 5, because this provision establishes the nature of competence under Title II. Without it, it would not be clear what competence under Title II is about and how Article 5 could be useful to accomplish it. Nevertheless, this opinion was controversial in the Think Tank. It was also argued that the phrase "*and were receiving all their income in the Member Sate*" could be considered a consequence of the definition of the competent Member State and considered a clarification of Article 5.

Another aspect is that Article 5 and the assimilation principle only stipulate that where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State, **if those facts can be considered to be similar**, which necessitates a comparative assessment, taking into account certain criteria which the CJEU has developed. Therefore, European provisions which prescribe with legal authority that certain facts **must** be assimilated, even if a comparative assessment could lead to the conclusion that there may be relevant differences, seem to go beyond the scope of Article 5. Under this assumption only (natural) facts which are identical in all Member States and where no serious comparison can take place, like the death of the insured person under Article 42(1) of Regulation (EC) No 883/2004, can be the subject of a specific assimilation provision of only a clarifying character.

Particular caution seems to be justified to derive the territorial extension of **procedural provisions** directly from Article 5, given the principle of national procedural autonomy which has been developed in the case law of the CJEU and which may lead to the conclusion that national procedural provisions are in principle outside of the material scope of the Regulation and not covered by Article 5.[162] Thus, provisions like Article 81 of Regulation (EC) No 883/2004 seem to go beyond a mere clarification of what would be the content of Article 5. On the other hand, the judgment in *Warry*[163] allows an opposite conclusion, but it must be pointed out that in this case the CJEU extended an existing European provision (Article 36 of Regulation (EEC) No 574/72) to a further branch of social security.

There are many provisions in the Regulations containing assimilation aspects which could not be derived from Article 5 because they do not comply with the basic concept of that provision as they do not merely provide for a modified application of national provisions or as they prescribe with normative power that a specific assimilation must take place.

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[162] judgments in *Rewe*, C-33/76, EU:C:1976:188, and in *Comet*, C-45/76, EU:C:1976:191

[163] judgment in *Warry*, C-41/77, EU:C:1977:177.

Conclusions could only be drawn from provisions which in principle comply with that concept. However, conclusions about whether a certain provision is only a clarification of Article 5 or goes beyond its scope, are rarely free of doubt. This is due to the fact that the European legislature usually did not explain why it adopted the provision concerned; different motivations are possible. Throughout the wording of the coordination Regulations the influence of the assimilation principle can be observed. It would be a complex task to assess all the implications of this principle. Probably the wording of the Regulations could be simplified by eliminating some articles or changing their wording. Perhaps in the future, after extensive experience with the application of Article 5 of the Regulation has been acquired, the wording of many of these articles could be simplified. In fact, the first success of Article 5 is that some articles of Regulation (EC) No 1408/1971[164] have not been repeated in Regulation (EC) No 883/2004.

5. FINAL REMARKS

The principle of assimilation of facts cannot be considered as a new principle introduced by Regulation (EC) No 883/2004 '*ex novo*'. In fact, the assimilation of facts sometimes was or is only a tool needed for the application of some legal provisions and exists in all branches of law. Moreover, the assimilation of facts is used sometimes as a mere technique, as a simple element, or as a subsidiary principle, or finally as a separated principle that may be linked or connected with other principles. Consequently, there is an evolution of the assimilation of facts that reached its top with the adoption of Article 5 of Regulation (EC) No 883/2004.

It must be pointed out that assimilation of facts has played a crucial role from the beginning of the coordination regime onwards and already existed implicitly or explicitly, in a fragmentary way, in Regulations (EEC) No 3 and No 4, as well as in Regulations (EEC) No 1408/1971 and No 574/1972. However, with the adoption of Article 5 of Regulation (EC) No 883/2004 the Union legislature gave naturalisation to a new principle that although directly emanating from the principle of equal treatment has acquired autonomy and power of its own. Indeed, assimilation of facts guarantees and reinforces the equality of treatment of all beneficiaries, the safeguarding of which is a fundamental aim of the European law on the coordination of social security.

When applying this principle the competent institution is obliged, for instance in the case of acknowledgement of benefits, to take into account relevant facts or events even when they became effective in another Member State. Therefore, some facts or events, according to Article 5, have extraterritorial effect.

When a new principle is adopted, its interpretation and application, mainly at the beginning, constitutes the most important problem. However, it has to be taken into account that this principle did not come suddenly from nowhere. In fact, long before the adoption of Article 5 of Regulation (EC) No 883/2004, the CJEU referred in a number of judgments to assimilation aspects, many of which contained elements that might give hints for the interpretation of Article 5 of Regulation (EC) No 883/2004. In this sense, Recital No 9 of the Regulation establishes: "*[t]he Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings."* Therefore, the most important criteria for interpreting the new Article 5 has to be, as a starting point, the existing case law.

It must be pointed out that the fact that the legislature has adopted Article 5 implies an added value that obliges us to detect and evaluate precisely the dimension of this added value. Unfortunately, this will need time and efforts and we will be confronted in the present and in the future to a long, long run in a continuous reflecting process. Moreover, it has to be stressed that the principle of assimilation of facts is articulated in a general way, maybe to improve its relevance. In this respect, a general wording could lead also to the loss of preciseness. The more general a principle is articulated, the less clear becomes its content.

An additional difficulty for the interpretation of this principle is that, besides Article 5, the Regulation contains special provisions that include assimilation aspects. The problem is that usually the European legislature gives no explanation why it adopted the provision concerned. Anyway, the legislature, when adopting Article 5, and also the special provisions, was aware that its interpretation is not in its hands alone but in the hands of the CJEU and of national courts, authorities and institutions.

On the other hand, the legislature understood that Article 5, due to its general wording, needed the delimitation of its scope and the establishment of some boundaries for not invading other principles (aggregation, waiving of residence clauses) or explicitly for not leading to objectively unjustified results or to the overlapping of benefits of the same kind for the same period or for not rendering another Member State competent or its

legislation applicable. In consequence, the principle of assimilation of facts, its limits and boundaries are the two faces of the same coin.

Probably the application of Article 5 will in many cases not imply any difficulty. However, it has to be admitted that existing grey areas will be frequent and, consequently, the application of this Article and its limits in these grey areas can only be assessed on a case-by-case basis. For this reason, some considerations and guidelines could help in this difficult process. Finally, and in a non-exhaustive way, some of them should be mentioned:

- The principle of assimilation can by no means be considered an absolute principle.
- Assimilation of facts must respect two aspects: national legislatures must retain competence to determine the conditions for granting social security benefits, while at the same time equal treatment must be ensured.
- Refusing assimilation systematically is not permitted, because this would be a violation of equal treatment.
- Neither is it required to assimilate automatically, because this would deprive the national legislatures of their competence in the field of social protection.
- The principle of proportionality is a main issue of the assimilation principle.
- The solutions adopted in many cases, even sharing some common elements, may be different in other cases. Unfortunately, the implementation of this principle will not always be subject to absolute and fixed rules.
- It cannot be required that provisions in national legislations are identical because this would deprive the assimilation principle of all practical effects.

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