C The evolution of interpretive formulas

In the following three chapters, the evolution of a set of interpretive formulas is traced, beginning with broad and restrictive formulas, followed by formulas that rely on the ideas of coordination and on a notion being fundamental.[26] The chapters on 'broad' and 'coordinated' are structured according to four time periods, each of roughly 15 years. These time periods were chosen, to reflect the broader development of case-law described in the part on 'the case-law'. An initial phase of about 15 years, 'the early days', was generally marked by the first steps of the Court, mostly in social security in which Regulation 3 applied. The next 15 years leading up to the 'Maastricht moment' saw the surge of the free movement of workers case-law, while social security shifted mostly to Regulation 1408/71. Then came the Maastricht period which was marked by many sweeping judgments in the freedoms of workers, establishment, and services. It is hard to determine an end to that period, but it seems that 'the present' has begun around the year 2007 – though this terminology should not be given too much weight. This chronological structure is admittedly to some extent random. But a direct, chronologically unstructured examination of formulas throughout almost 60 years of case-law would simply be impractical. For each of the time periods thus identified, first the occurrences and then the power – the 'spin' – of interpretive formulas are examined. The chapter on 'fundamental' is structured slightly differently due to its focus on a more recent interpretive formula. It begins with the roots of the formula, moves on to the occurrences and then examines the power/spin of the formula.

I 'Broad'

In this chapter, broad and restrictive interpretive formulas are examined: When have such formulas occurred in the Court's case-law and when did they spin the Court's decisions? The chapter begins with the time span during which the case-law of the Court on persons and services began to establish itself, i. e. the period leading up to the mid-1970s, and then proceeds by time spans of roughly 15 years.

26 For an answer to the question why these three types of formulas are examined see the introduction to this book.

1 In the early days: until the mid-1970s

Three branches of broad interpretation

The Court tackled the first serious wave of free movement of workers cases in the years 1974 and 1975. In some of these cases the Court applied two interpretation techniques that are of interest. On the one hand, in *Cristini, 1975* the Court stated that the right of workers to the same social advantages pursuant to article 7(2) Regulation 1612/68 was not to be interpreted restrictively (para. 12).[27] On the other hand, the Court decided in *Bonsignore, 1975* that a migrant worker was not to be expelled from the host country based on general preventive grounds. The Court arrived at this conclusion in *Bonsignore, 1975*, because the public policy and security derogations from the freedom of workers, as exceptions from the principle, had to be interpreted strictly (para. 6). A few months before that, the Court in *Van Duyn, 1974* had stated in a similar vein that public policy restrictions of the freedom of workers had to be interpreted narrowly, because they derogated from a fundamental principle. The member states were not to determine the scope of the restrictions unilaterally without being subject to Community control (para. 18). A similar approach was applied in *Rutili, 1975*. According to that judgment, public policy restrictions of the fundamental principle of equal treatment and the free movement of workers had to be interpreted strictly, so that the member states could not determine their scope unilaterally without control by the institutions of the Community (para. 27). Hence the need for a genuine and sufficiently serious threat to public policy. Similarly, the Court had previously put forward in *Sotgiu, 1974* that the public service exception was not to have a scope beyond the aim for which it had been included in the Treaty, given the fundamental nature of the freedom to move (para. 4).

However, the above judgments from the wave of worker cases of the mid-1970s did not mark the first time that the Court applied those two types of broad interpretation. Indeed, those broad interpretations had become so rich by then that the notion of 'branches' of a broad interpretation is in order, namely (i) a first branch of the broad or restrictive interpretation of terms as such and (ii) a second branch of the strict interpretation of exceptions to broad rules. In addition, a third branch of broad interpretation (iii) had grown by the mid-1970s. Let us examine how these three branches had established themselves before the Court overcame the first wave of worker cases in the way described above. The exclusive focus, obviously, is on the judgments within the scope of this book.

27 Some of the footnotes of this chapter mention cases in which the text of the Court's decision proves that the parties or the Advocate General had argued on the basis of broad interpretation, while the Court ultimately did not include that broad interpretation in its reasoning. For instance, the Commission in *Alaimo*, *1975*, at p. 112, argued a broad interpretation of the right under article 12 Regulation 1612/68. The Court did not address that argument as such, but recognized it in substance by confirming the interpretation given in *Casagrande, 1974*.

First branch: broad interpretation of notions

After having adopted a strict interpretation of an essential procedural requirement for the validity of a decision, viz. unanimous assent by the Council, in three Coal and Steel Community cases[28] and having interpreted the procedural term 'another person' in the 'broadest' sense in *Plaumann, 1963*[29], the Court began to clarify the scope *ratione personae* of Regulation 3 and lay down the details of what the term worker meant in social security. In *Hoekstra, 1964* the Court reasoned that 'workers' within the scope of Regulation 3 were not limited to employed persons but included those who had once been employed and could be employed again (para. 3). Similarly in *Bertholet, 1965* and *Van Dijk, 1965* the Court did not see a reason to restrict the scope *ratione personae* of Regulation 3 to those who had been employed in several states or who had been employed in one state while they had resided in another or to exclude frontier workers (pages 87 and 104, respectively).[30] Next, the Court reasoned in *De Cicco, 1968* that Regulation 3 was based on a wide conception of persons to whom it applied. The Regulation covered not just wage-earners but also assimilated persons and thereby it followed a tendency of the member states to extend the benefits of their social security schemes to new categories of persons by reason of identical risks. Regulation 3 thus had to be applied to a special scheme for craftsmen (p. 480). In *Compagnie belge, 1969* the Court then saw Regulation 3 as applicable whenever a wage-earner was in a situation involving international elements. The subrogation article, i. e. article 52, hence applied in case an employed person was injured in a traffic accident during a private journey abroad (paras 4-6). Based on the same expansive reasoning as in *De Cicco, 1968*, the Court afterward ruled in *Janssen, 1971* that a person treated as a self-employed helper under national legislation was a person assimilated to a wage-earner within the meaning of Regulation 3 (paras 5-9).

Apart from that wide approach to the personal scope of Regulation 3, the Court also dealt with the idea of broad notions in several other social security cases. In *De Moor, 1967*, the Court discarded a 'liberal interpretation' of article 28 Regulation 3 which would have led to proportional calculation independently of whether article 27 on aggregation of insurance periods had been applied previously (p. 207).[31] In *Torrekens, 1969* the Court reasoned that the periods that were assimilated to insurance periods pursuant to article 1(r) Regulation 3 were

28 *Lemmerz, 1965*, at p. 699; *Mannesmann II, 1965*, at p. 741; and *Aciéries du Temple, 1965*, at pp. 772-3. Obviously, these cases are not within the domain of case-law this book covers. They are mentioned to complete the picture of the beginning of the case-law, which is, obviously, of great importance.

29 *Plaumann, 1963*, at pp. 106-7: '[…] provisions […] regarding the right of interested parties to bring an action must not be interpreted restrictively'. The case concerns custom duties and admissibility in annulment procedures. It is also merely mentioned to complete the picture.

30 Advocate General Gand in the joint opinion in these cases advocated the same wide interpretation of the scope *ratione personae* as the Court had applied in *Hoekstra, 1964*. See p. 93 of the opinion.

31 In *Molkerei Zentrale, 1968*, at p. 155, moreover, the Court reasoned that the term 'directly' and 'indirectly' in article 95 Treaty had to be interpreted widely. This decision is merely mentioned for completeness. It is not within the body of case-law investigated by this book.

to be understood widely so that a French non-contributory scheme was covered and aggregation had to be applied (para. 17). In *Frilli, 1972*, the Court used expansive rhetoric with regard to the distinction of social security and assistance. It found – though very much on the facts of the case and with much caution – that Belgium's guaranteed income for elderly persons was covered by Regulation 3, *inter alia* because article 1(s) addressed benefits 'in the widest sense' (para. 17). In *Callemeyn, 1974* again certain benefits meeting both objectives of social security and assistance were drawn within the scope of Regulation 1408/71, once more by means of a notion of benefits in the 'widest possible sense' (para. 10). That formula also served the Court to justify in *Biason, 1974* that a supplementary allowance to an invalidity pension under French law was covered by Regulation 1408/71 (para. 14) and that a benefit for handicapped persons was covered by Regulation 3 in *Mazzier, 1974* (para. 10).[32]

Second branch: narrow exceptions from rules

The second branch of broad interpretation already established itself in some of the first cases concerning the Coal and Steel Community. In those cases, the Court strongly relied on the argument that an exception from a rule had to be construed narrowly.[33] In some early free movement of goods cases the Court applied this approach, too.[34] In *Ugliola, 1969*, the very first judgment in the free

32 In *Anselmetti*, *1975*, at p. 784, Italy argued on the basis of *Frilli*, *1972*, and *Biason*, *1974*, that 'benefits' and 'pensions' in article 1(s) Regulation 3 had to be understood in the 'widest possible sense', but the Court did not reflect that argument in the judgment, while it followed the Italian argument in substance.

33 See notably the early cases dealing with ferrous scrap and the equalization scheme: *Safe*, *1959*, at p. 195, and *Snupat I*, *1959*, at p. 143 – in both cases the Court stated that equalization did not apply to own resources and that this constituted an exception to the rule; *Snupat II*, *1961*, at p. 85 – the Court argued that 'bought scrap' rather than 'own resources' was to be interpreted widely, because the latter constituted an exception to the rule of equalization; *Klöckner*, *1962*, at p. 340, and *Mannesmann I*, *1962*, at p. 371, confirmed the approach in *Snupat II*, *1961*; *Espérance-Longdoz*, *1965*, at p. 1079, and *Hainaut-Sambre*, *1965*, at p. 1109, confirmed that the obligation to contribute to the scheme is the rule, while the exemption from the obligation is the exception which was to be interpreted strictly. These cases are outside the scope of this book and are mentioned for the sake of completeness.

34 Already in *Commission v. Luxembourg and Belgium (gingerbread)*, *1962*, at p. 432, the Court concluded that the prohibition of new custom duties together with the free movement of goods constituted an 'essential rule' any exception to which had to be clearly stipulated and narrowly interpreted; in addition, the concept of charges having equivalent effect complemented the rule rather than the exception. This was confirmed in *Commission v. Luxembourg and Belgium (milk products)*, *1964*, at p. 633. Moreover, the Court in *Commission v. Luxembourg and Belgium (gingerbread)*, *1962*, at p. 434, explained that the derogations in agriculture from the common market rules were exceptional in nature and had to be narrowly interpreted; to extend them would transform the exception into the rule. That narrow interpretation of the rules on agriculture as exceptions to the free movement in the common market was confirmed in *Commission v. Italy (potable alcohol)*, *1969*, at para. 6. In *Germany v. Commission (sheep)*, *1966*, at p. 169, the Court again found that the prohibition of charges having an equivalent effect to custom duties was a fundamental provision for the free movement of goods, an essential legal principle. Hence, only those exceptions that could clearly be allowed based on a narrow interpretation were admissible. In *Commission v. Italy (artistic objects)*, *1968*, at p. 430, the Court ruled that the derogations from the free movement of goods in article 36 of the Treaty could only be applied to quantitative restrictions and equivalent measures and not to the prohibition to levy export duties, because as an exception to the fundamental rule of free movement the article had to be construed strictly. In *Salgoil*, *1968*, at p. 463, the Court reasoned that articles 36, 224 and 226 of the Treaty dealt with clearly defined exceptional cases which were not susceptible to a wide interpretation. In *Bock*, *1971*, at para. 14, the Court argued that article 115 Treaty had to be narrowly construed

movement of workers, the Court did not apply the technique with full force though. The Court merely stated that exceptions to the free movement of workers had to be strictly construed and that the restrictions were limited to those mentioned explicitly by article 48(3) Treaty (para. 6). In *Marsman, 1972* the Court more openly stated that article 48 was only subject to the conditions which were laid down restrictively in article 48(3) (para. 4). In the coordination of social security, in contrast, the narrow interpretation of restrictions did not gain any foothold at all, despite the flood of cases the Court dealt with in that domain. *Bentzinger, 1973* would have lent itself to such an interpretation, as it concerned the relationship between article 12 Regulation 3, i. e. the rule that the legislation of the state of employment is applicable, and article 13(1)(c), i. e. the exception that the legislation of the state of residence applies when employment is carried on in several states one of which is the state of residence. The Court did not reason on the basis of a narrow interpretation of the exception though, perhaps because it would not have yielded the result the Court had in mind.[35]

Third branch: the greatest possible freedom

A third branch of broad interpretation had established itself before the first wave of workers cases in the mid-1970s. The Commission in *Guerra, 1967* (page 222) argued expansively in favour of migrant workers in case of doubt, which the Court had allegedly established in *Nonnenmacher, 1964*. While the Court had indeed ruled along these lines in *Nonnenmacher, 1964* (para. 1(B)), finding that two social security legislations could under certain circumstances be applied simultaneously, the Commission's argument was not reflected in the judgment in *Guerra, 1967*. The Commission put forward the same expansive argument in *Merola, 1972* (pages 1258-9), but again to no avail. Yet, indisputably, the Court in the earliest social security cases relied on the rather disruptive idea that article 51 aimed at the establishment of 'as complete a freedom of movement for workers as possible' forming part of the 'foundations' of the Community (*Hoekstra, 1964*, para. 1). *Nonnenmacher, 1964* used similar language, namely the 'greatest possible freedom of movement for workers' (para. 1(B)), though leaving aside the 'foundations of the Community', to substantiate what the Commission later on in *Guerra, 1967* in vain tried to promote as a principle of interpretation in favour of the migrant worker. Despite the failure of the Commission's argument

and applied, because derogations from the free movement of goods were authorized which created obstacles to the implementation of the common commercial policy. Moreover, in *Marimex*, *1972*, at para. 4, the Court again stated that article 36 of the Treaty had to be interpreted strictly, because it derogated from the basic rule of the free movement of goods. It was therefore not to cover rules of a different nature than those within the scope of article 30 to 34 of the Treaty. (Again, these cases are mentioned for completeness only.).

35 For completeness, the Commission advocated a strict interpretation of article 36 Treaty in the famous goods case *Dassonville*, *1974* (see p. 847), based on the ruling mentioned above in *Commission v. Italy (artistic objects)*, *1968*. The Court did not reflect that argument in its decision, though, because it found that the measure at issue constituted a means of arbitrary discrimination or a disguised restriction (paras 7-8).

in *Guerra, 1967*, the *Hoekstra, 1964*-formula was born to last.[36] In *Singer, 1965* the Court essentially reiterated the same solution it had found in *Van Dijk, 1965*, as to the scope of the term 'worker' in the context of subrogation, but in addition underpinned it with the *Hoekstra, 1964*-formula, including the foundational aspect which *Nonnenmacher, 1964* had omitted. In substance the Court affirmed in *Singer, 1965* that the solution complied with article 51 of the Treaty (p. 971).

In a sense, *Heinze, 1972* was an offspring of that interpretive branch. The Court distinguished social security from assistance with regard to a benefit designed to prevent the spread of tuberculosis by stating that Regulation 3 had to be interpreted in the light of the 'fundamental aim' of article 51 Treaty which was to establish 'the most favourable conditions' for achieving the free movement of workers (para. 4). The same formula was obviously used in *Ortskrankenkasse Hamburg, 1972* (para. 4) and *Land Niedersachsen, 1972* (para. 4). (The judgments came down on the same day and concerned the same issue.)[37]

So, by the time the Court tackled the first wave of free movement of workers cases – and Hans Kutscher by the way famously established the canon of interpretation of Community law in 1976 in his 'Methods of Interpretation'[38] – we can discern three branches of broad interpretation. (i) The broad or restrictive interpretation of notions as such – this was predominantly applied in social security, viz. secondary law cases, but also in one free movement of workers case, namely *Cristini, 1975*. (ii) The idea that a rule is to be construed broadly, while the exception thereto narrowly. The Court applied this technique in the free movement of workers, interpreting mostly primary law. In particular in the mid-1970s worker cases, the Court mixed the idea of narrowly construing ex-

36 The differences in the wordings of the passages in *Hoekstra*, *1964*, speaking of 'as complete a freedom as possible' and in *Nonnenmacher*, *1964*, using the term 'the greatest possible freedom', are due to diverging translations. In the judgments in French the two passages are identical: 'l'établissement d'une liberté aussi complète que possible de la circulation des travailleurs'. (Yet the foundation-part of the *Hoekstra*, *1964*,-formula was absent in the *Nonnenmacher*, *1964*-passage in French, too.) The true source of the formula is thus *Hoekstra*, *1964*. That is why we designate it as the *Hoekstra*, *1964*-formula.

37 A number of further cases that were decided before the first wave of worker cases are to be mentioned. (i) Probably the most disruptive judgment of that period, *Costa v. ENEL*, *1964*, came down without any of the broad rhetoric that is of interest to this book. (The disruption, of course, was not caused by the establishment dimension of the judgment. That dimension was rather unspectacular.) (ii) The limits of what can be argued on the basis of a broad interpretation were shown in *Murru*, *1972*. Mr Murru argued vaguely on the basis of the spirit and principles of Regulation 3 together with the need for a broad interpretation (see Advocate General Römer, p. 342, and p. 335), but the Court refused even to address those arguments in the judgment. (iii) Probably the most famous judgment in social security, *Petroni*, *1975*, interestingly, was drafted without any of the expansive rhetoric one would expect from such a judgment. The 'if workers were to lose advantages guaranteed by the laws of a single member state'-formula (para. 13) broke free though and developed a life of its own; see by way of examples the cases *Ten Holder*, *1986* (para. 22), and among the latest *Da Silva Martins*, *2011* (paras 74-5). Note also that *Petroni*, *1975* did not come out of the blue. Its theme was already subliminally present in the very early social security cases, such as *Kalsbeek*, *1964*, and *Nonnenmacher*, *1964*, but also more obviously in *Keller*, *1971* and, of course, *Niemann*, *1974*.

38 Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice'. Kutscher did not in his contribution distinguish the interpretive formulas examined in this chapter. See the brief discussion in the introduction.

ceptions to rules with a hierarchical, structural approach. The freedom is fundamental, whereas the derogation therefrom is not; hence the first must be broadly, the second narrowly understood. (iii) The 'greatest possible freedom'-approach, which was confined to social security.

The spin exerted by interpretive formulas

Within those three branches, the judgments in which a broad interpretation spun the decision into a specific direction are of particular interest. When was a broad notion, a narrow exception, or the 'greatest possible freedom' instrumental in the Court's reaching a specific result? Of course, the answer to this question can never be straightforward. The spin that an interpretive formula provides may vary in force. It can be strong or weak. Moreover, everything the Court says in a decision is instrumental to some extent, else it would not, or at least should not, be said. Nevertheless, a number of judgments stand out, among them most clearly those of the third branch.

The 'greatest possible freedom'-passage was clearly spinning the case towards the finding that Dutch legislation could be applied simultaneously in *Nonnenmacher, 1964*. The broad reading of the 'worker'-notion in *Hoekstra, 1964* pivoted on that formula. And the offspring of the *Hoekstra, 1964*-formula was also clearly instrumental in the Court's finding in the tuberculosis judgments that the benefit at issue was a social security benefit (*Heinze, 1972*; *Ortskrankenkasse Hamburg, 1972*; and *Land Niedersachsen, 1972*). In the first branch, a broad 'worker'-notion spun the decision to some degree in *Bertholet, 1965*, while spin was less obvious in *Van Dijk, 1965*. In *De Cicco, 1968* a wide approach to the scope *ratione personae* of Regulation 3 was pivotal in the Court's reasoning and so was it in *Janssen, 1971*. In the judgments in the second branch, the narrow interpretation of exceptions exerted less spin on the decisions.

2 From the mid-1970s until the 'Maastricht moment'

By the time Joseph Weiler announced the 'Transformation of Europe'[39] in 1991 and the Maastricht treaty came around, the Court had handed down scores of judgments in which formulas of broad interpretation were applied and further refined. Let us therefore take a closer look at this development, beginning with the first branch, i. e. broad notions.

a) First branch: broad notions

In *Bozzone, 1977* the Court interpreted the term 'legislation of a member state' in articles 1(j) and 2(1) Regulation 1408/71 widely: 'The term is remarkable for its breadth' (para. 10). This formula was reiterated in *Commission v. Belgium (Congo), 1980* (para. 4) and additional arguments against the applicability of the

39 Weiler, 'The Transformation of Europe'.

same Belgian legislation that had been at issue in *Bozzone, 1977* were rejected. (The cases dealt with Belgian benefits acquired during work in the former Belgian Congo which were subject to residence in Belgium or Belgian nationality.) In *Blottner, 1977* the term 'legislation' in article 45(3) in conjunction with article 1(j) Regulation 1408/71 was also interpreted 'widely', so as to cover legislation that had been in force at the time when an individual was subject to it, but not any longer when the Regulation entered into force, as well as legislation that is in force when the risk materializes (para. 17).

In *Brack, 1976* the Court came back to the scope *ratione personae* of the social security provisions. It fell back on the passage stated in *De Cicco, 1968* and *Janssen, 1971* with regard to Regulation 3 and the tendency of member states to expand the applicability of their social security schemes, but in doing so dropped any reference to a wide conception of the persons covered (para. 20). Nonetheless, the Court concluded very much on the specifics of the case that the person concerned was an 'employed person' within the scope of Regulation 1408/71, although national law had refused to grant that status in the case at issue. In *Walsh, 1980* the Court again refused to interpret the personal scope of Regulation 1408/71 restrictively. Thus, a 'person who is compulsorily insured' pursuant to article 1(a)(ii) included those who did not pay contributions at the time the risk materialized but were still insured owing to compulsory contributions paid as an employed person at an earlier period (para. 6).[40]

In *Levin, 1982*, the Court then ruled more explicitly as to the terms 'worker' and 'activity as an employed person' in the free movement of workers. Those terms defined the scope of application of a fundamental freedom and as such they were not to be interpreted restrictively (para. 13). *Forcheri, 1983* took it a step further. Seized with the question of whether the fees for vocational training payable by the spouse of a person employed by the Community could be higher than for a spouse of a regular migrant worker, the Court first extended the benefit of free movement to workers employed by the Community and then stated that the right to free movement was not to be interpreted narrowly according to the legislative practice of the Community and established case-law of the Court (para. 11). Hence vocational training came within the ambit of the Treaty.

In *Robards, 1983* the Court accepted a wide interpretation of the term 'spouse' in article 10(1)(a) Regulation 574/72 in the light of the purpose of that provision. Consequently, it included a divorced spouse (paras 15-9). The Court used the conclusion reached in that case – no restrictive interpretation of article 10(1)(a) – to underpin the solution it found in *Kromhout, 1985*, namely the application of the rule against overlapping, although Regulation 1408/71 was not technically applicable to one specific parent (para. 16).

40 *Pierik II, 1979*, in a sense also interpreted the personal scope of Regulation 1408/71 extensively, though without using any of the characteristic wording. The Court merely stated that the definition of a 'worker' in article 1(a) Regulation 1408/71 had 'a general scope' (para. 4); article 22(1)(c) Regulation 1408/71 was therefore not to be interpreted so as to include only active workers. Pensioners were entitled to rely on that article, too.

Next, on a more general level, the Court rejected a challenge to the *Laterza, 1980*-supplement[41] in *Patteri, 1984*. It had been argued that article 51 Treaty had to be interpreted restrictively allowing the Council only to regulate aggregation and residence. However, the Court turned down that restrictive interpretation. Referring to the very first three social security cases, *Hoekstra, 1964*; *Nonnenmacher, 1964*; and *Kalsbeek, 1964*, the Court ruled that aggregation and residence were just two among other topics which the Council could lawfully address to implement the fundamental freedom of movement (paras 7-8).

In *Diatta, 1985* the Court held that article 10 Regulation 1612/68, having regard to its context and objectives, was not to be interpreted restrictively (para. 17). The article therefore did not require spouses to live under the same roof permanently and the marriage had to be dissolved formally for the rights to expire under that article. In *Reed, 1986* the Court, however, rejected an even broader interpretation of article 10 Regulation 1612/68. In the absence of a general social development in the Community, unmarried partners could not be considered as spouses within the sense of that article (para. 15). However, article 7(2) Regulation 1612/68, in turn, was not to be narrowly construed pursuant to *Cristini, 1975* (para. 25 of *Reed, 1986*). Hence, social advantages included the possibility to live together with an unmarried partner. Nationals of other member states had to benefit from the same advantage in that regard as Dutch nationals.[42]

With *Hoeckx, 1985* the Court returned to the distinction between social security and assistance. Yet the *Frilli, 1972*-formula which had spoken of benefits 'in the widest sense', did not find an echo in the case of Belgium's minimex. Instead, the Court found, minimex amounted to social assistance. Yet it fell within the purview of article 7(2) Regulation 1612/68. The Court thus in substance fol-

41 *Laterza*, *1980*, is an interesting case. The Court established a right to a supplement under article 77(2)(b)(1) in order to guarantee the higher benefit previously awarded by a member state other than the state where the person concerned resided. However, the Court handed down this expansive ruling without any of the characteristic broad reasoning; it merely referred to the 'greatest amount' (para. 9). The Court, of course, proceeded in a similar way in *Gravina*, *1980* (para. 7).

42 *Even*, *1979*, is noteworthy in this context. The national court had enquired about a broad or restrictive interpretation of Regulation 1408/71 with regard to an exemption from the reduction of pensions in case of early retirement of soldiers who had been injured in war and suffered from invalidity. The Court eschewed Regulation 1408/71 which it held inapplicable to victims of war (article 4(4)). It also considered article 7(2) Regulation 1612/68 inapplicable, for the article was not concerned with benefits offered as a reward for the service offered to a country during wartime and as a recompense for hardship suffered during that service. The Court thus in substance rejected a broad application of article 7(2) Regulation 1612/68. In some contrast to *Even*, *1979*, the Court in *Reina*, *1982*, read article 7(2) rather expansively and included a childbirth loan despite the aim of demographic policy it pursued. The Court used none of the language typical of such expansive rulings though.

lowed the Commission which had argued that article 7(2) was not to be interpreted restrictively (para. 8).[43] The ruling in *Scrivner, 1985* was identical.[44]

The first and the second branch connecting

In *Kempf, 1986*, the Court again was seized in the context of Belgium's social assistance. In that context, the Court reminded the national court of the fact that the term 'worker' had to be broadly construed pursuant to *Levin, 1982*, after that court had found that the work of a music teacher of 12 lessons per week was genuine and effective. Interestingly, in this case the first and second branch of broad interpretation, i. e. the broad interpretation of terms as such and the narrow construction of exceptions, connected. The free movement of workers as one of the foundations of the Community, and in particular the terms 'worker' and 'activity as an employed person' were to be interpreted broadly, while derogations and exceptions were to be construed narrowly (para. 13). It followed that where the work pursued was genuine, it did not have an impact on the rights as a worker that the income was supplemented by assistance originating from the public purse. In a similar, though less immediate way the two branches came into contact in *Lawrie-Blum, 1986*. A trainee teacher was a worker, for the term determined the scope of a fundamental freedom and as a consequence was to be understood broadly (para. 16). The public service exception derogated from a fundamental freedom and hence had to be limited to what was strictly necessary to protect the interests which that article deemed worthy of protection (para. 26). The post of a trainee teacher did not meet those very strict requirements (para. 28).

The first and the third branch connecting

In *Van Roosmalen, 1986* again two of the branches of broad interpretation connected, this time the first – broad interpretation of terms – and the third, the 'greatest possible freedom'. The Court reiterated that before the amendment of

43 *Piscitello*, *1983*, *Giletti*, *1987*, and *Newton*, *1991* all concerned the distinction between social security and social assistance as well. In *Piscitello*, *1983* an Italian social aid pension, in *Giletti*, *1987* a French supplementary allowance for pensioners, and in *Newton*, *1991* a British mobility allowance were at issue. In all cases the *Frilli*, *1972*-formula – benefits 'in the widest sense' – cannot be found. Interestingly – or perhaps accordingly – the Court in *Newton*, *1991* found that the benefit was only part of social security, if the person concerned had worked in the member state concerned before. In *Piscitello*, *1983* and *Giletti*, *1987*, the Court found that the benefits concerned were to be categorized as social security, despite the absence of the *Frilli*, *1972*-formula.

44 *Gravier*, *1985*, is obviously an important decision in this regard. The Court decided that non-discrimination pursuant to article 7 Treaty directly applied to access to vocational training. Consequently, students from other member states could not lawfully be subject to higher fees for vocational training. The Court handed down this disruptive ruling without using any broad language, probably out of respect for the member states' sensitivities in educational matters. *Brown*, *1988* set some limits to *Gravier*, *1985*, with regard to maintenance grants for students, again without applying any typical language. Interestingly, the Court in *Brown*, *1988* considered as a worker a prospective student who found employment before the beginning of his studies because of the perspective of those studies. Again the Court refrained from using any of the broad reasoning that is typical for other judgments expanding the worker notion. Equally in *Lair*, *1988*, handed down on the same day as *Brown*, *1988*, the Court refrained from reasoning in expansive terms, even with regard to article 7(2) Regulation 1612/68 and the definition of a 'worker', though again the substance was rather far-reaching.

Regulation 1408/71, which extended the scope to cover self-employed persons, the scope *ratione personae* of the Regulation had to be construed broadly, given the aim of article 51 which was to contribute to the greatest possible freedom of workers, one of the foundations of the Community (para. 18). That was valid also after the amendment, i. e. for self-employed persons (para. 19). Factoring in the qualification with regard to the Netherlands in the annex, a priest who was maintained by his parishioners thus was a self-employed person (para. 22). In a second step the Court then restated the *Bozzone, 1977*-formula – 'the term [legislation of a member state] is remarkable for its breadth' (para. 28) – to find that a priest who had worked in a third state while being affiliated to a Dutch social security scheme had enough of a link to that scheme so that Regulation 1408/71 was applicable.[45] That second step was confirmed in *Laborero, 1987*, again with reference to *Bozzone, 1977* (para. 23). The formula used was slightly different, the Court namely stated: 'the term 'legislation' is very broad'.[46]

Lebon expanding Kempf

In *Lebon, 1987* the Court interpreted the notion of a 'dependant' of a migrant worker as a factual circumstance in which a person depended on a worker, irrespective of the reason for the dependency or the capacity of the person herself to pursue a gainful activity, and underpinned that interpretation by the *Kempf, 1986*-approach requiring a broad construction of the free movement of workers as one of the foundations of the Community (para. 23). The Court thus detached the *Kempf, 1986*-formula from the worker-notion and applied it in a broader context. In contrast, the Court in *Bettray, 1989* restated the need for a broad notion of a 'worker' given that it defined the scope of one of the fundamental freedoms (para. 11), but conversely concluded, after having applied the criteria developed to determine whether an activity constituted genuine 'work', that a rehabilitation programme which allowed former drug addicts to pursue a remunerated activity with the aim of reintegration did not amount to 'work'. In *Lopes da Veiga, 1989* the Court reiterated the *Kempf, 1986*–approach – this time again with regard to the term 'worker' calling for a broad interpretation (para. 13) – to lay the foundation for the argument why a mariner working on board a ship flying the flag of a member state was entitled to rely on articles 6 to 8 Regulation 1612/68.[47]

45 In 1986, the Court also delivered the bold judgment in *Ten Holder*, *1986*, according to which in essence the legislation of the member state of former employment continued to apply, if the person concerned did not take up employment again after she had stopped working. The judgment obviously led to the introduction of article 13(2)(f) Regulation 1408/71. Note that one party feared an excessively broad application of article 13(2)(a) (para. 11), but that fear was not reflected in the wording of the Court's decision.

46 The Commission in *De Jong*, *1986*, had argued in the written submissions that a broad interpretation of point 2(c) of part I of Annex VI to Regulation 1408/71 was necessary, but abandoned the argument in the oral submissions (paras 11-2). This argument was not reflected literally in the Court's reasoning, in contrast to the third branch of broad interpretation (see below).

47 In *Agegate*, *1989* in contrast, the Court elaborated on the term 'worker' in the Act of Accession of Spain and Portugal – where it was to be understood in the same way as in the free movement of workers – with regard to fishermen, without having recourse to a broad understanding of the term (see

With *Antonissen, 1991* the Court expanded the possibilities for job seekers to stay in the host state. From the outset, the Court in this judgment made it clear again that the free movement of workers in general had to be interpreted broadly in keeping with the *Kempf, 1986/Lebon, 1987*-approach (para. 11). Hence, the Court rejected a strict interpretation which would have threatened to render article 48(3) Treaty ineffective. In *Giagounidis, 1991* the Court then reiterated the broad approach in *Kempf, 1986/Lebon, 1987* to free movement, while referring to *Antonissen, 1991*, in order to disregard the relatively clear wording of Directive 68/360. It was not necessary for identification to produce the specific document used when immigrating to the host state.

Further broad interpretation

In *ASTI, 1991* the Court refused to interpret the notion of 'trade-union organizations' in article 8(1) Regulation 1612/68 restrictively (para. 16). As a consequence, participation in the elections to occupational guilds in Luxembourg had to be open for migrant workers. In keeping with *Lawrie-Blum, 1986* the Court in *Bleis, 1991* decided that the 'very strict' conditions of the public service derogation were not fulfilled in the case of secondary teachers, either (para. 7).[48]

In the entire period leading up to the 'Maastricht moment' the Court applied broad interpretation, in a literal sense, in only two cases concerning the freedom of establishment. One of them was *Knoors, 1979* and concerned secondary legislation implementing the freedom of establishment. The Court held that Directive 64/427 on self-employed persons in manufacturing and processing industries was based on 'a broad definition of the beneficiaries' (para. 17), so that a state's own nationals who returned from abroad were entitled to rely on it in principle vis-à-vis that state. The other case was *Steinhauser, 1985*. In that case both the plaintiff and the Commission had argued a broad interpretation of the freedom of establishment so as to include not just the taking up, but also the pursuit of business in the host state (paras 9-10). The Court followed them on the merits and rejected the nationality condition applied in certain offers for the allocation of premises (para. 16).

b) Second branch: narrow exceptions from rules

Let us now see how the second branch of broad interpretation, in which rules – broad rules – are combined with narrow exceptions, developed up to the 'Maastricht moment'. In *Di Paolo, 1977* the strict interpretation of an exception appeared for the first time in a social security judgment. The Court explained that the rule in article 67 Regulation 1408/71, which declared the state of employment as competent for unemployment benefits, suffered an exception in article

paras 34-6). In a similar vein, the Court in *Le Manoir, 1991*, did not employ any broad language when qualifying a trainee as a worker.

48 In *Faux, 1991* one of the parties argued on the basis of a wide interpretation of the notion of a frontier worker pursuing an occupation, thus including workers who were partially or intermittently, but not wholly unemployed (para. 8). The Court did not follow that argument by deciding that even a wholly unemployed frontier worker came within the scope of Regulation 36/63 (see para. 11).

71, that is that the state of residence was competent in some circumstances, such as in the cases of frontier workers and weekly commuters. From that the Court deduced that the concept of residence in another state than the state of employment was not to be given an 'excessively wide interpretation'. Indeed it had to be interpreted strictly (paras 12-3).

With *Bouchereau, 1977* the Court then returned to the free movement of workers. It reiterated the approach applied in *Van Duyn, 1974* and *Rutili, 1975* to the public policy derogation in article 48(3), namely as an exception to the fundamental rule of the free movement of workers it had to be construed strictly, precluding any unilateral determination of its scope by the member states. The Court then circumscribed the remaining discretion further by adding the need for a 'genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society' (para. 35).

The second branch of broad interpretation was then left dormant for more than five years, before being revived by *Peskeloglou, 1983*. The Act of Accession of Greece contained a permission for the member states and Greece to maintain existing immigration authorization schemes for a number of years. According to the Court, that permission constituted an exception to the free movement of workers and consequently had to be interpreted restrictively (para. 12). The conditions for taking up and pursuing employment could therefore not lawfully be made more stringent during the transitional period.

In *Kempf, 1986* and *Lawrie-Blum, 1986* the second branch connected with the first branch, as already mentioned above.[49] *Commission v. Italy (research council), 1987* further confirmed the approach taken in *Lawrie-Blum, 1986*. As a derogation from the fundamental principle of free movement, the public service exception had to be construed in such a way as to limit its scope to what was strictly necessary for safeguarding the interests which that provision allowed the member states to protect (para. 7).[50] The posts in the Italian national research council were not be considered as coming within the public service derogation.

The second branch in establishment and services

In *Commission v. Greece (vocational schools), 1988* the second branch for the first time bore fruit under the freedom of establishment. The Court, obviously inspired by the workers case-law, decided that the official authority exception in article 55 Treaty derogated from the fundamental principle of the freedom of es-

49 Note that the Court in the famous case *Johnston, 1986* – a case that is outside the scope of this book – relied on the narrow interpretation of the public safety derogation from an individual right in article 2(2) Directive 76/207 on equal treatment for men and women (para. 36).

50 Before, *Commission v. Belgium (public service), 1980* had elaborated extensively on the public service derogation, which Belgium had understood institutionally so as to allow exemption of all public service posts from free movement. The Court rejected that understanding and opted for a narrow exception, without however using any language typical of the second branch or, more specifically, the wording used in *Sotgiu, 1974*. Similarly, the public service exception had been at stake in *Commission v. France (nurses), 1986*. The Commission in that case had argued a narrow interpretation of the exception (para. 5). Yet none of the typical language made it into the Court's own reasoning, either.

tablishment and therefore was to be interpreted in a manner which limited its scope to what was strictly necessary to safeguard the interests which it allowed the member states to protect (para. 7). The setting up of a private school and a vocational training school or the activity of teaching at home were not in that sense connected to the exercise of official authority.

Next, in *Bond, 1988* the second branch – and 'broad' interpretation in general – for the first time truly reached into the nascent realm of the free movement of services. The public policy derogation in article 56 Treaty, to which article 66 referred, was at issue. The Court stated: '[T]he measures taken by virtue of that article must not be disproportionate to the intended objective. As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard.' (Para. 36) One cannot help but notice the difference to the public policy derogation under the free movement of workers and establishment: the word 'strict' (or 'strictly', etc.) is absent from the *Bond, 1988*-passage. This might be explained by the context of audiovisual services in which *Bond, 1988* was set, a context that has always been particularly sensitive for the member states. It could also be due to services more generally, which is a domain in which economies traditionally have been more structured and infused by the state as an actor in its own right. *ERT AE, 1991*, the next services case in which the second branch played a role, did not provide any clue in this regard. It was also set in a context of audiovisual services. Moreover, the Court in this case tersely stated that article 56 Treaty, to which article 66 Treaty referred, had to be interpreted strictly (para. 24), thus bringing the second branch closer to the first.

Weakness of the second branch in social security

In between these two judgments in services, the Court built on the second branch in two more cases. The first, *Rebmann, 1988*, in a sense, both confirmed the weakness of this branch in social security but also in a way strengthened it. Faced with the question of which state had to take account of periods of unemployment for pension purposes in the situation of frontier workers, the Court reiterated that the member state of employment was as a rule the competent state for frontier workers pursuant to article 13(2)(a) Regulation 1408/71, a rule which suffered exceptions though, in particular in the case of unemployed frontier workers, for reasons of practicality and policy. The Court acknowledged that those exceptions as derogations were in principle susceptible of application by analogy, thus defying on the face of it the narrow interpretation of an exception. However, application by analogy was only possible when the situation which the exception did not govern expressly was closely connected to the situations it covered explicitly and identical grounds that had led to the exception being established in the first place applied *in concreto* (para. 16). That was not the case for periods of unemployment with regard to pension rights. Indeed the member state of employment was in a more regular and better position to take

those periods into account. On the merits the Court thus strengthened the second branch by rejecting on the facts of the case reasoning *per analogiam* for an exception, while at the same time confirming its weakness in social security by basically allowing the extension of an exception – and by not mentioning the rule–broad/exception–narrow interpretation in the first place.[51] The second case was *Agegate, 1989*. In this case, the Court transposed the approach taken in *Peskeloglou, 1983* from the Act of Accession of Greece to that of Spain and Portugal. The authorization for states to take exception from the freedom of movement, as a derogation, equally had to be interpreted restrictively, precluding states from making conditions more stringent (para. 39).

c) The third branch: the greatest possible freedom

In the third branch, which is dominated by the *Hoekstra, 1964*-formula of the 'greatest possible freedom', we witnessed two outbursts of broad interpretation as it had been applied before, one in the years 1986/87 and another in the years 1990/91, after an isolated appearance in 1978. The latter appearance occurred in *Belbouab, 1978* where the Court began by stating the *Hoekstra, 1964*-formula – the aim of article 51 Treaty was the 'greatest possible freedom' for workers which was one of the foundations of the Community (para. 5) – and thus set the tone for the decision to take. Was relevant to determine the nationality of a person the time period during which insurance periods were completed rather than the point in time at which a person applied for a pension.

The third branch's outburst in the mid-1980s

After this one isolated appearance, the third branch disappeared from view for some time – a busy time notably with the Court handing down 70 social security judgments – only to come back to prominence in six judgments in the mid 1980s. In *Spruyt, 1986*, the *Hoekstra, 1964*-formula (in para. 18) introduced, together with other passages, the Court's reasoning on the complex transitory provisions of the Netherlands for spouses which (the reasoning) ultimately led to the finding that the provisions were discriminatory. In contrast, in *De Jong, 1986*, handed down on the same day, the Court did not find any discrimination, because the spouse had not resided in the Netherlands at the relevant time. However, the Court also introduced its reasoning in *De Jong, 1986* by the *Hoekstra,*

51 In *Fellinger*, *1980* the Court addressed the situation of a wholly unemployed frontier worker, who claimed that the salary last gained in the state of employment was relevant to determine the amount of unemployment benefits he had a right to in the state of residence – in relatively clear contradiction to the rule in article 68 Regulation 1408/71. In essence, the Court acceded to the claim and decided that the rule in article 68, including the exception contained therein, could not be applied to wholly unemployed frontier workers, for it would mean to make the rule the exception. If the rule, including the exception, was applied to them, they would never receive benefits on the basis of the salary they in fact had gained. Indeed the rule implicit in Regulation 1408/71 was that the benefits normally had to be calculated on the basis of the actual last salary, rather than a notional salary. Hence, for fully unemployed frontier workers the actual last salary was relevant. The Court did not discuss the logic the second branch would have implied, possibly because it would not have yielded the result the Court had in view, but possibly also because it would just have added an additional, unnecessary layer of complexity to an already complex train of thought.

1964-formula (para. 14). *Van Roosmalen, 1986*, in which the first and the third branch of broad interpretation connected was already discussed above.

In *Rijke, 1987*, the Court again reiterated the formula as a preliminary remark (para. 13) before answering the question asked by rejecting that a one-year time period to file an application for voluntary continued insurance in national law was precluded under Regulation 1408/71. In *Rindone, 1987* the Court next underpinned with the *Hoekstra, 1964*-formula – dubbed '*Spruyt, 1986*' by the Court – the decision that an institution of the competent state had to accept the findings of the medical officer of the institution at the place where the person concerned was resident (para. 13). The Court concluded the outburst of the third branch of the mid-1980s in *Campana, 1987*. Interestingly, the Court in this case reverted to the formula used in *Heinze, 1972*, which we called the 'offspring', rather than the *Hoekstra, 1964*-formula, to include certain German benefits into 'unemployment benefits' under Regulation 1408/71. Most probably the Court did so, because benefits with preventive functions were at issue both in *Heinze, 1972* and *Campana, 1987*. With this outburst of the third branch in the mid-1980s it is in particular noteworthy that the Court in three judgments, namely *Spruyt, 1986*; *De Jong, 1986*; and *Rijke, 1987*, placed the *Hoekstra, 1964*-formula ahead of the reasoning on the specifics of the case and hand in hand it with other 'principles' from the case-law, such as the *Petroni, 1975*-formula.

The third branch's outburst at the beginning of the 1990s

After that, the third branch did not make an appearance in the next 35 social security judgments. Then the second outburst came with *Winter-Lutzins, 1990* and four more judgments belonging to the third branch within less than a year. *Winter-Lutzins, 1990* again concerned the Netherlands' transitional arrangement which had already been at issue in *Spruyt, 1986* and *De Jong, 1986*. The Court again began with the *Hoekstra, 1964*-formula (para. 13), together with other case-law, before entering the specifics of the case, essentially confirming the sufficient-link requirement, evidenced e. g. by residence, in order to benefit from notional years. In *Buhari Haji, 1990* the Court was faced with a similar context as in *Belbouab, 1978*. Hence the Court first mentioned the ruling in this case before reiterating the *Hoekstra, 1964*-formula, though without the foundational part (para. 20), as it had done in *Belbouab, 1978*. In contrast to the latter case though, the person concerned in *Buhari Haji, 1990* did not succeed, because at the relevant time he had been a British national, and thus the national of a non-member state. (At the relevant time, the United Kingdom had not yet joined the Community.)

In *Rönfeldt, 1991* the Court then used the *Hoekstra, 1964*-formula, in a slightly different wording, namely 'the greatest possible measure of freedom' (para. 24), together with the *Petroni, 1975*-approach, to justify why the benefit of a convention between member states which had been in force before Regulation 1408/71 became applicable had to be maintained. Next, in *Noij, 1991*, the

Court took recourse *inter alia* to the *Hoekstra, 1964*-formula, again in a somewhat different form mentioning 'the fullest possible freedom' (para. 13), to found a more general principle that pensioners could not lawfully be required to contribute to the social security scheme of the state where they were resident for benefits which were payable by another member state that paid their pensions. Finally, in *Masgio, 1991*, one of the relatively rare social security cases in which the principle of non-discrimination was applied, the Court found that non-discrimination had to be interpreted in the light of its objective, namely to contribute to the greatest possible freedom of movement, one of the foundations of the Community (para. 16). Again combining this *Hoekstra, 1964*-logic with the *Petroni, 1975*-approach, the Court found that Germany's way of determining, and notably reducing a pension, was discriminatory.

'Conditions most favourable'

In addition to the *Hoekstra, 1964*-formula, which was generally consolidated during the 15 years up to the 'Maastricht moment', another offspring of the third branch of broad interpretation developed. In *Mouthaan, 1976* the Court stated that article 71(1)(b)(ii) Regulation 1408/71 aimed at granting unemployment benefits to the worker 'in conditions most favourable to the search for new employment' (para. 13). The term 'conditions most favourable' is, of course, reminiscent of the formula initially used in *Heinze, 1972* which we named the 'offspring', i. e. 'the most favourable conditions'-passage (para. 4). Indeed, in the French versions of the two judgments the terms are identical ('les conditions les plus favorables'). Witness therefore the sprouting in *Mouthaan, 1976* of a second offspring of the third branch of broad interpretation. In *Mouthaan, 1976* the passage was used to explain why the legislation of the state of residence was applicable under article 71 Regulation 1408/71 to a frontier worker. While the passage was then curiously absent from *Di Paolo, 1977* where the Court explained the logic of article 71, it came back in *Aubin, 1982* (para. 12). In this judgment, the Court cited the *Mouthaan, 1976*-formula again to explain the reasoning underlying article 71, before coming to the conclusion that Belgium's legislation was applicable in the case at issue, irrespective of whether the person concerned was a frontier worker or not.

In *Miethe, 1986* the Court was next faced with a 'false frontier worker' (para. 15). Mr Miethe, a German national, had moved to Belgium for family reasons, while retaining all business and ties in Germany. Formally, he would have been entitled to unemployment benefits only in Belgium rather than in Germany as a frontier worker under article 71(1)(a)(ii). Yet the Court cited the *Mouthaan, 1976*-formula to justify why Mr Miethe was not a frontier worker properly speaking, although he returned to Belgium on a daily basis. Since he maintained all his ties in Germany and found the most favourable conditions to seek work there, he was a worker other than a frontier worker who benefitted from the choice available under article 71(1)(b) to receive benefits either in the state of employment or the state of residence. In *Bergemann, 1988* the *Mouthaan, 1976*-

formula was again and for the last time applied during the period up to the beginning of the 1990s. It served to found the right under article 71(1)(b) of a person who had worked in the Netherlands, but while she was on leave moved her residence to Germany to live with her husband and child; she did not return to the Netherlands anymore. For the Court, with her not being a frontier worker, she found the most favourable conditions for new employment in Germany (para. 21), resulting in article 71(1)(b) being applicable.

d) Spin – in the second branch

Among the judgments examined within the three branches of broad interpretation those in which this interpretation was decisive – a phenomenon we named 'spin' – are again of particular interest. In the *second* branch, broad interpretation for the first time in *Bouchereau, 1977* began to provide spin and help the Court steer the decision in a specific direction. In *Bouchereau, 1977* the Court initiated the relevant part of the judgment with the need for a strict interpretation of the public policy exception. This spin continued throughout the period in a similar way for the exception in *Peskeloglou, 1983* as well as with the connection of the two branches in *Kempf, 1986* and with *Lawrie-Blum, 1986*. In *Commission v. Italy (research council), 1987* second branch logic also provided spin, but it was blurred by other arguments. In *Commission v. Greece (vocational schools), 1988*, that logic provided spin for the establishment and services aspects of the case and was carried through to the worker aspect of the judgment. In *Bond, 1988*, again interpretation belonging to the second branch provided some, but not the only spin. Perhaps typically, the only cases within the second branch in which a broad interpretation-formula was used, but failed to provide spin were the two social security cases, *Di Paolo, 1977*, and *Rebmann, 1988* with their inconclusive reasoning, and the services case *ERT AE, 1991*, which again bears witness to the weakness of the second branch in social security and services.[52] This means, conversely, that whenever the broad rule/narrow exception-formula was used in *worker* cases, it was pivotal.

Spin in the third branch – evolving into empty spin

The third branch is equally interesting with regard to spin. In eight judgments during the period the greatest possible freedom formula spun the decisions, namely *Belbouab, 1978*; *Spruyt, 1986*; *Van Roosmalen, 1986*; *Campana, 1987* with the offspring formula; *Masgio, 1991*; *Noij, 1991*; and to a more limited extent *Rönfeldt, 1991*. In one judgment, *Rindone, 1987*, the formula played a minor role as an ex post confirmation of the decision reached before in the judgment.

However, in early 1986 an entirely new phenomenon of spin appeared in a third branch judgment: empty spin. In *De Jong, 1986*, the Court for the first time did mention the formula of the 'greatest possible freedom', but in substance

52 *Agegate, 1989*, is an exception in this regard. This can be explained by the fact that it essentially just restated *Peskeloglou, 1983*.

decided against those who were supposed to enjoy that greatest possible freedom. It was the first judgment in the third branch in which an unbiased reader encountered the formula and thus caught a glimpse of the result to come – only to see the decision being turned around, the result being in fact the inverse of what the use of the formula had implied.[53] This empty spin in *De Jong, 1986* finds an explanation in its twin judgment, *Spruyt, 1986*, which was identical in most parts, except for a decisive aspect of the facts, namely non-residence. This aspect led the Court in *De Jong, 1986* to adopt a decision in clear opposition to that it had taken in *Spruyt, 1986*.

Soon, however, empty spin became somewhat more common in the third branch. In *Rijke, 1987*, *Winter-Lutzins, 1990*, and *Buhari Haji, 1990* the 'greatest possible freedom' was stated, the outcome thus 'announced' – but the Court then backed out, ruling in the inverse sense. Admittedly, the explanation for empty spin given in *De Jong, 1986* is also valid in *Rijke, 1987* and *Winter-Lutzins, 1990* which were both connected to the same legislation that had been at issue in *Spruyt, 1986*. *Buhari Haji, 1990*, moreover, to some extent mirrored *Belbouab, 1978* in that the facts were quite alike while the formula had been used with genuine spin in *Belbouab, 1978*. Despite that, it cannot be overlooked that the formula of the 'greatest possible freedom' lost some of its power and magic when empty spin emerged. The formula sorts weakened from the period leading up to the 'Maastricht moment'.

In contrast, the second offspring of the third branch, the *Mouthaan, 1976*-formula, remained untainted by empty spin. The formula served to spin the decisions in *Miethe, 1986* and *Bergemann, 1988* and thus to grant a not quite obvious right to unemployment benefits. Within the second offspring the formula was never used in the sense of empty spin.

Why empty spin?

Beyond what was said above the deeper causes for the emergence of empty spin within the third branch are hard to pin down. Why would the Court want to state a formula such as the *Hoekstra, 1964*-formula, which typically spins a decision, only then to decide against the direction of that spin? There is no obvious explanation from within the case-law. An examination of extraneous factors would have to investigate a number of points. Perhaps the emergence of empty spin correlates with – or is even caused by – Hjalte Rasmussen's serious and profound critique of the Court's activism.[54] While Rasmussen did not directly attack the Court for being formulaic, his critical study might have prompted some rethinking in general within the Court. That could have resulted in a more trans-

53 'Empty spin' needs to be distinguished from 'no spin'. In both cases the same formula is used, but with empty spin the formula creates a certain expectation which is then frustrated, while with 'no spin' an expectation is not created in the first place. Obviously, the distinction is partly connected to the position of the formula within the reasoning of the Court. The distinction is probably best understood, when a no spin-case, such as *Rindone*, *1987* is read together and compared with an empty spin-case, such as *De Jong*, *1986*.

54 Rasmussen, *On Law and Policy in the European Court of Justice*.

parent approach to taking a decision, notably one that involved stating an established formula not just when it fitted the outcome desired, but also when that outcome went against the grain of a formula. However, the external perspective on the case-law is not the concern of this book.

Spin in the first branch

In the first branch – broad interpretation as such – spin is less obvious. In *Bozzone, 1977* the formula used – '[t]his definition is remarkable for its breadth' – spun the decision, as much as in *Commission v. Belgium (Congo), 1980*. In *Levin, 1982* the non-restrictive interpretation of the personal scope provided some spin and so it did with the substantive scope in *Forcheri, 1983*. In *Robards, 1983*, the wide interpretation of article 10(1)(a) Regulation 574/72 produced some limited spin; in *Diatta, 1985* it was the non-restrictive interpretation of article 10 Regulation 1612/68. In *Lawrie-Blum, 1986* the broad understanding of a 'worker' spun the first part of the judgment; in *Kempf, 1986* it did so, too. In the second part of *Reed, 1986*, the broad reading of article 7(2) Regulation 1612/68 contributed some spin. In *Van Roosmalen, 1986* broad interpretation provided spin twice, once the broad term 'self-employed person' did and once the *Bozzone, 1977*-formula did. In *Lopes da Veiga, 1989* again the broad 'worker'-notion spun the decision to some extent. The broad understanding of the freedom as such spun the decision strongly in *Antonissen, 1991* and in *Giagounidis, 1991* in the second question.

In only one single judgment the new phenomenon of empty spin emerged: *Bettray, 1989*. In this case the Court set out with the need for a broad understanding of the term 'worker', but ended up with the finding that a former drug addict in rehabilitation could not be a worker. That the judgment was handed down at the end of the 1980s fits well with the emergence of empty spin in the third branch. Finally, it remains to be observed that the phenomenon of spin in general, including empty spin, has become much more common during the period leading up to the 'Maastricht moment', though only in absolute terms. In 30 out of 318 judgments in our domain spin occurred during that period, while it appeared in 8 out of 99 judgments handed down during the period up to the mid-1970s.

e) Some conclusions from the period

During the period leading up to the 'Maastricht moment' it has become obvious that the three branches of broad interpretation we initially identified further established themselves. In keeping with the generally expanding case-law in the free movement of workers and social security the branches grew broader in these domains. In the free movement of services and establishment though the branches remained very weak. The first branch involving broad notions as such encompassed two and the second branch concerning narrow exceptions from rules three judgments. Obviously, this weakness reflects the general state of the case-law in those domains: Free movement of services and establishment was still on-

ly moderately developed at that time. Each one of those five judgments, moreover, remained rather inconclusive from the point of view of broad interpretation.

Beyond these general observations things become more complicated. One could perhaps discern a tendency towards wide scopes in the freedom of workers and secondary legislation based on it. At least the practice under the first branch comprising broad notions indicates so. The 'perhaps' remains a must though, as it is hard to factor in the cases in which broad interpretation did not occur at all. That is the vast majority of the judgments within our domain, namely 318 in the period from 1977 to 1991, out of which 64 were discussed above, one way or another, under broad interpretation. Negative proof is, as always, difficult.

On a more specific level, one evolution is striking, namely the evolution from the notion of a 'worker' being in need of a broad interpretation in *Levin, 1982* to the imperative of interpreting the fundamental freedom of workers as such broadly in *Forcheri, 1983* and *Kempf, 1986*. These judgments, therefore, are of key importance with regard to broad interpretation. The evolution was then completed in *Lebon, 1987* when the link to the 'worker' notion was dropped altogether. Of course, the broad interpretation of the free movement of workers has been 'negatively' present from early on. From the worker cases in the mid-1970s onwards, the second branch was mostly applied to derogations from the free movement of workers, resulting in an imperative to read restrictions narrowly. Conversely, this implies a broad understanding of the freedom itself.

While the first branch spanned both worker and social security cases and the occasional establishment case, something like a rift existed between the domains in the second and the third branch. The second branch has almost exclusively been applied in worker cases, if we ignore for a moment the two services cases, *Bond, 1988* and *ERT AE, 1991*. The Court remained strangely reluctant to reason along broad rules and narrow exceptions in the coordination of social security. Conversely, the third branch involving the greatest possible freedom, with all its curious wave-like comings and goings, has been applied exclusively in social security. There has not been a single judgment in the free movement of workers in which the 'greatest possible freedom' appeared, although intuitively the logic of that notion would chime with the broad approach to the free movement of workers proclaimed in *Kempf, 1986*. While from the point of view of the second branch this rift remains a mystery, it can tentatively be explained from the perspective of the third branch. The Court has probably been reluctant to uproot bluntly the idea of the 'greatest possible freedom' with all its implications in social security and to transpose it to the different field of the free movement of workers. Perhaps rightly so. Obviously, the *Kempf, 1986*/*Lebon, 1987*-formula has risen up to the challenges in equal measure. And the harmony which could be attained by marrying the *Hoekstra, 1964*- and the *Kempf, 1986*/*Lebon, 1987*-formulas is expendable, for the Court at least.

Besides, a further feature of both the second and the third branch during the period leading up to the 'Maastricht moment' strikes us as odd. In both branch-

es, the Court has almost consistently combined the idea – the rule is to be broad, the exception narrow and the freedom is to be the greatest possible – with structural, almost hierarchical logic: the rule is *fundamental*, hence broad; the freedom is part of the *foundations* of the Community, hence it has to be the greatest possible.[55] This hierarchical aspect remains an enigma. Obviously, the derogations from the fundamental freedom are equally part of primary law and therefore 'fundamental' in nature. So, what does this hierarchy within primary law mean? Is it necessary in addition to the duet of rule-exception? Is that duet too weak and hence in need of hierarchical crutches?[56] And where do the 'foundations of the Community' come to an end?

To come to a conclusion with regard to the *power* of the interpretive formulas, i. e. their 'spin', is more difficult. The power of the interpretive formula has been most evident in the second branch, which includes narrow restrictions from broad rules. In free movement of *worker* decisions, whenever the formula was used it usually spun the decision, which is another way of saying that the formula was pivotal. In the freedom of establishment and services the same cannot be confirmed. In the third branch, 'the greatest possible freedom' also usually spun the decisions. It is in this third branch that empty spin occurred for the first time. This is the phenomenon where a formula is stated, thus giving rise to a certain expectation of the outcome, only to be frustrated, because the outcome is counter to this expectation. Empty spin clearly weakened 'The greatest possible freedom'. For the first branch – broad notions more generally – spin is harder to observe, because it encompasses a more diverse, less consolidated range of notions. Nonetheless, spin is clearly observable in the first branch, too (see above).

3 During the age of Maastricht

Let us take a closer look at how broad interpretation evolved over the next fifteen years, from 1992 to 2006 – a period that is best called the 'age of Maastricht', for obvious reasons. Expect an inundating flood, for the number of judgments in general in our domain more than doubled during that period.

a) First branch: broad notions – 'worker'

In the first branch – the broad, or restrictive, interpretation of terms in general – the evolution in the notion of the 'worker' first attracts attention. In *Raulin, 1992* the Court reiterated that that notion was not to be interpreted restrictively (para. 10). That was why a person employed by means of an on-call contract was not *per se* excluded from being a worker. It was up to the national court to

55 To some extent, this type of hierarchical reasoning is also present in the first branch. See only the development towards the broad interpretation of the *fundamental* freedom of workers, which was complete with *Lebon, 1987*.

56 *Commission v. Luxembourg and Belgium (gingerbread), 1962*, at least seems to imply so, in the confusion created over which provision constituted the rule and which the exception (p. 434).

qualify the specific aspects of such a contract under the Court's case-law.[57] In *Twomey, 1992* the Court then addressed the concept of a worker in article 19 Regulation 1408/71 and concluded based on *Pierik II, 1979* that it was not to be interpreted restrictively (paras 13 and 17). The concept included a person who had stopped working in one state, moved to another and then fell ill, before beginning the new employment there.

Next, the Court dealt with the 'worker'-notion in *Krid, 1995* in the context of the Algiers Agreement with Algeria. The understanding of who was a worker had to be broad in the same way as under the Rabat Agreement with Morocco.[58] At least in part as a consequence of that, the widow of an Algerian national could lawfully claim the *Giletti, 1987*-allowance in France.[59] In *Birden, 1998* the Court was called upon to interpret the notion of a worker under the Ankara Agreement with Turkey, namely Decision 1/80. The person concerned had been employed by a social institution within the framework of a social programme financed entirely by the state. According to the Court, under the Ankara Agreement also a broad interpretation of the term 'worker' was required in keeping with the internal market case-law (para. 25), notwithstanding the judgment in *Bettray, 1989* which went against the grain of the general trend in the case-law of the Court towards broad interpretation (para. 31).

With *Meeusen, 1999* the Court further clarified the worker notion of the free movement of workers. Given that it was not to be construed restrictively it could not be excluded in principle that the wife who had been employed by her husband's company in which he was the sole shareholder and director was a worker (para. 13). In *Lehtonen, 2000* the Court accepted that professional basketball players were workers, partly because the notion was not to be interpreted restrictively in view of a fundamental freedom being at stake (para. 42).[60] Returning to

57 *Bernini*, *1992* which was handed down on the same day as *Raulin*, *1992* dealt with the notion of a 'worker', too. One of the questions was whether a trainee in the context of occupational training was a worker. The Court began its answer by the very same definition of a worker as in *Raulin*, *1992* but omitted the passage as to non-restrictive interpretation. More specifically, in *Raulin*, *1992* and *Bernini*, *1992* the beginnings of the definition diverged as follows (divergences are in italics): 'It *must/should* be recalled at the outset that the Court has consistently held that the concept of worker *within the meaning of article 48 EEC Treaty* has a *specific* Community meaning *and must not be interpreted in a restrictive manner*.' (para. 10 and 14, respectively; in *Bernini*, *1992* the Court left the qualification to the national court.) In French the two passages are identical: 'Il convient de rappeler à titre liminaire qu'il est de jurisprudence constante que la notion de travailleur revêt une portée communautaire et ne doit pas être interprétée de manière restrictive.'.

58 The Court in *Kziber*, *1991* and *Yousfi*, *1994* had established that a 'worker' under the Rabat Agreement was not just a person who was actively working, but also a pensioner or a person who did not work any longer because a risk had materialized against which the person had been insured. The Court decided so without applying any literal broad interpretation.

59 In *Megner*, *1995* the Court interpreted the personal scope of Directive 79/7 on equal treatment of men and women in social security partly by adopting the notion of a 'worker' from the free movement of persons. The Court held, in particular, that the concept of the 'working population' was very broad (para. 16) and referred to *Levin*, *1982*, and *Kempf*, *1986*. The definition of a 'worker' had been in the Community sphere since *Hoekstra*, *1964* (para. 20). Hence, the Court concluded, persons in minor employment were part of the 'working population' within the meaning of the Directive. (*Nolte*, *1995* was identical.).

60 In *Leclere*, *2001* some parties had argued a broad interpretation of the 'worker'-notion in order for article 7(2) Regulation 1612/68 to encompass pensioners and certain rights to benefits (para. 54). The

the Ankara Agreement, the Court in *Kurz, 2002* included an apprentice in the 'worker'-notion of Decision 1/80, partly owing to the need for a broad interpretation (para. 32). In *Ninni-Orasche, 2003* the Court again stated that the term 'worker' as in free movement of *workers* was not subject to a narrow interpretation (para. 23). Hence, a short period of employment – 2.5 months in the case at issue – did not in itself disqualify a person from being a worker. The Court then proceeded to qualify a number of other factors as irrelevant for the question whether the person concerned was a worker (paras 28-31). *Collins, 2004* raised the question of how a long absence from the host state of employment affected the status of a worker. In the case at issue the Court found, despite the need for a broad interpretation (para. 26), that a connection did not exist between casual work and the search for a job in the host state 17 years later. (The more famous part of *Collins, 2004* evidently concerned the right of a job-seeker to an allowance in the light of equal treatment and Union citizenship.) In *Trojani, 2004* the Court reiterated the credo of a broad notion of a 'worker' (para. 15), but left it to the national court to assess whether 'work' in a rehabilitation programme of the salvation army for pocket money and certain benefits constituted genuine work. The Court again, as in *Birden, 1998*, carefully delimited the implications of *Bettray, 1989* (para. 19). (Again it is the Union citizenship dimension for which *Trojani, 2004* is known.) According to *Kranemann, 2005*, German trainee lawyers were workers, in part again due to broad interpretation (para. 12). *Mattern and Cikotic, 2006* re-stated that with regard to professional training as a health care assistant (para. 18).

Broad free movement of workers

The Court not only interpreted the concept of a 'worker' broadly, but also the free movement of workers as such, in keeping with the *Kempf, 1986*/*Lebon, 1987*-approach. In *Commission v. Belgium (residence permits), 1997* the Court reiterated the imperative of interpreting broadly the free movement of workers as one of the foundations of the Community so as to include job seekers, as established in *Antonissen, 1991* (para. 14). In *Yiadom, 2000* this approach in the first branch of broad interpretation connected with the second branch involving narrow exceptions to broad rules. The Court was called upon to determine the procedural rights of a person temporarily admitted to the United Kingdom in the light of Directive 64/221. The Court answered with the need for a broad interpretation of the free movement of persons and the corresponding imperative of construing exceptions therefrom narrowly (para. 24). With regard to the procedural provisions which ensure the protection of that freedom the Court then went on to state that they had to be interpreted in favour of the migrant worker (para. 25) – a line that is, somewhat strangely, reminiscent of the *Nonnenmacher, 1964*-argument the Commission had proposed in *Guerra, 1967* and which

Court rejected that approach, without using any broad or restrictive language. Putting *Meints*, *1997* into perspective, the Court required a link between the previous employment and the benefit for article 7(2) Regulation 1612/68 to apply, excluding 'new' benefits (para. 59).

the Court had rejected at that time. The Court concluded in *Yiadom, 2000* that the same procedural rights had to be available in case of temporary admission as when the person was regularly present. In a similar vein, though much less expansively, the Court in *MRAX, 2002* ruled that article 9 Directive 64/221 had to be construed broadly with regard to the persons to whom it applied (para. 101). Consequently, the procedural rights of spouses could not lawfully be made dependent on the possession of an identity document or a valid visa. In *Zhu and Chen, 2004* the Court next held that the sufficient resources of a child Union citizen required by Directive 90/364 did not have to stem from personal resources of the child, but could be provided by her parent. The Court justified that conclusion by the need for a broad interpretation of provisions laying down a fundamental principle like the free movement of persons (para. 31). In *Commission v. Belgium (own resources), 2006* the Court reiterated that very consideration with reference to *Zhu and Chen, 2004* (para. 40) when it invalidated Belgium's approach to personal resources.

Broad interpretation in services

In *Deliège, 2000* the Court in a similar way applied broad interpretation in the free movement of services. Faced with the question whether the sport activities of a judoka amounted to economic activities and provision of services, the Court took recourse to *Levin, 1982* and stated that the terms defined the scope of a fundamental freedom. That was why they were not to be interpreted restrictively (para. 52). After having analysed the activities of judokas in detail, the Court concluded that they indeed offered and received services and enabled others to provide services.

In *Oulane, 2005* the Court took it a step further. Having been asked whether the right of residence of a service recipient under Directive 73/148 on restrictions regarding establishment and services depended on production of an identity document, the Court started out by saying that the free movement of persons was one of the foundations of the Community and that provisions enshrining it were to be construed broadly, referring to paragraph 24 of *Yiadom, 2000* (para. 16). From that the Court concluded that unequivocal proof of the identity of a service recipient other than an identity card or passport had to be admitted.

Further broad interpretation

Apart from the worker notion and the free movement of persons and services as such, the Court also applied broad interpretation in a number of other judgements. In *Imbernon Martínez, 1995* the Court ruled that article 73 Regulation 1408/71 was not to be interpreted restrictively (para. 27). The article broadly applied to all members of the family of a migrant worker. As a consequence, it also precluded the factoring out of the spouse of a migrant worker for the entitlement to and the amount of a family allowance on the ground that the spouse was not

resident in the host state.[61] In *Naruschawicus, 1996* the Court decided that the concept of an employed person in Regulation 1408/71, and hence article 71(1)(b)(i), was wider than the concept of a civil servant in article 13(2)(d) Regulation 1408/71 (para. 21). That was why the special scheme for wholly unemployed frontier workers and other workers having residence abroad applied also to civil servants.[62] With *Meints, 1997* the Court came back to the social advantages in article 7(2) Regulation 1612/68. Since those advantages were not to be interpreted restrictively (para. 39), they included a lay-off benefit granted to those who had worked on a farm the arable land of which was temporarily set aside.

Connection of the first and third branch

In *Stöber and Pereira, 1997*, again two branches of broad interpretation connected, as in *Van Roosmalen, 1986*, i. e. the first and the third branch. Indeed the question raised in *Stöber and Pereira, 1997* was quite similar to that answered in *Van Roosmalen, 1986*. Despite the need for a broad interpretation of the term self-employed persons in order to contribute to the greatest possible freedom of migrant workers, one of the foundations of the Community (para. 30), the limitation of self-employed persons in the annex to Regulation 1408/71 for Germany to those who were compulsorily insured prevailed. (The principle of non-discrimination had to be observed nonetheless.)

More broad interpretation

In *Akman, 1998* the Court concluded in the context of the Ankara Agreement that article 7(2) Decision 1/80 was not to be interpreted strictly (para. 39). Hence, a worker did not necessarily have to be employed in the host state at the time his descendant sought access to the employment market.[63] In *Stallone, 2001*

61 In *Baglieri*, *1993* the national court had harboured doubts with regard to a restrictive interpretation of article 9(2) Regulation 1408/71 (paras 7-8). The Court did not share those doubts, but refrained from using any broad language (see para 14-8). In *El-Yassini*, *1999* the referring court wondered whether article 40 of the Rabat Agreement with Morocco could be interpreted broadly in the same way as its homologues in article 7(1) Regulation 1612/68 and article 6(1) Decision 1/80 (para. 14). The Court opted against such a broad interpretation, but refrained from using any of the typical language. On a different note, interestingly, the judgment in *Bosman*, *1995*, despite its disruptive effect on sports law and the market access approach, was handed down without the use of any broad interpretation at all.

62 In *Naruschawicus*, *1996* the Court referred to *Van Poucke*, *1994* for the wide concept of an 'employed person'. In *Van Poucke*, *1994* the Court had ruled that an employed civil servant to which Regulation 1408/71 applied came within the purview of article 14c Regulation 1408/71 as an employed person. But the Court did not make use of any broad interpretation. In *De Jaeck*, *1997* the reference in *Van Poucke*, *1994* to the Community definition of a worker made the Court clarify that the terms 'employed' and 'self-employed persons' in title II of Regulation 1408/71 were to be defined by the relevant national law (see para. 33). The Court again did not apply any broad interpretation. On a different note, one party in *Vougioukas*, *1995* argued a strict interpretation of the term 'special scheme for civil servants' in article 4(4) Regulation 1408/71 (paras 8 and 24). The Court did not follow that argument. Nor did it address broad interpretation. However, the Court delivered the ruling that aggregation had to be applied to civil servants subject to a special scheme directly on the basis of article 51 ECT, because the failure of the Community legislature to coordinate such schemes violated this article (see para. 36). The Court delivered that rather disruptive ruling without applying any broad interpretation.

63 In *Kulzer*, *1998* the Court interpreted the scope of Regulation 1408/71 so as to include Mr Kulzer, a retired civil servant, although he himself had never made use of his freedom to move. In essence, the movement of his daughter rendered Regulation 1408/71 applicable. The Court interpreted the scope

the Court rejected a restrictive reading of article 68(2) Regulation 1408/71 which would have excluded from the scope of that article a Belgian unemployment benefit that was increased not on the basis of the 'number of members of the family' as mentioned in article 68(2), but depending on whether the unemployed person lived alone or with *one* family member (para. 18).[64] In *Baumbast, 2002*, the Court three times rejected a restrictive interpretation. The Court first ruled that the right of a former migrant worker's children to continue their education pursuant to article 12 Regulation 1612/68 could not be interpreted restrictively (para. 55); next, that right was not to be interpreted so restrictively as to include exclusively common children of the migrant worker and his spouse (para. 57); finally, again given that that article could not be read restrictively, it granted a right of residence to the primary carer of children attending educational courses who (the children) had a right of residence (para. 74).[65] In *Mediakabel, 2005* the Court rejected a narrow interpretation of the term 'broadcasting services' in Directive 89/552, as it would jeopardize the aims of the Directive (para. 49). Hence, the pay-per-view services offered by Mediakabel had to be categorized as broadcasting services.

'Aim and broad logic'

In *Kurz, 2002* – in which the Court also broadly construed the worker-notion under the Ankara Agreement – the Court opened a new line of authority of broad interpretation. Ruling on whether a regular apprentice belonged to the duly registered labour force within the meaning of article 6(1) Decision 1/80 the Court answered in the affirmative and added that that conclusion was consistent with the aim and broad logic of Decision 1/80, which was to promote the integration of Turkish workers in the host state (para. 45). In *Wählergruppe Gemeinsam, 2003* that same approach under the first branch then connected with more broad interpretation under the first branch and with the second

of Regulation 1408/71 that expansively without using any of the language typical for broad interpretation, apart from the passage from *Pierik II*, *1979* according to which 'the term 'worker' was general in its scope […]' (para. 24). On a different note, the Court in *Kuusijärvi*, *1998* applied something like a broad interpretation. It held that article 13(2)(f) Regulation 1408/71, which had been inserted into the Regulation following *Ten Holder*, *1986*, was 'couched in general terms' (para. 40) so that it included any person who had ceased for whatever reason an economic activity, be it temporarily or definitely. Partly as a result of that, a residence clause in Swedish legislation was not precluded.

64 In *Commission v. Belgium (insurance)*, *2000* Belgium argued a restrictive interpretation of article 55 Directive 92/49 so as to exclude insurance for accidents at work offered (the insurance) by private for-profit undertakings as part of Belgium's compulsory social security scheme (para. 37). The Court rejected that argument, but in doing so did not apply any broad language.

65 In *Schilling*, *2003* the referring court very much reasoned in terms of broad/narrow interpretation of article 14 of the Protocol on the Privileges and Immunities of the European Communities (para. 13 and 14), but the Court refused to answer the question asked in those terms (para. 31) and put the emphasis on the free movement of workers. On a different note, in *Öztürk*, *2004* Austria had argued that the concept of indirect discrimination adopted by the Court in *Taflan-Met*, *1996* was not so broad as to require the taking into account of periods during which unemployment benefits were received in another member state for the qualifying period of an early retirement pension (para. 42). The Court did not address broad interpretation, but in substance rejected Austria's argument (paras 62-5). Finally, in *Commission v. Belgium (CESS)*, *2004* the Commission had argued that it followed from *Gravier*, *1985* that the term 'vocational training' had to be construed very widely (para. 12). The Court accepted that argument, though only implicitly.

branch. The aim and broad logic of Decision 1/80 justified transposing the ruling in *ASTI, 1991* and *Commission v. Luxemburg (ASTI II), 1994* as to representation in chambers of workers to article 10 Decision 1/80 (para. 79), against any argument for a narrow interpretation (para. 80). That finding was underpinned by article 48(2) Treaty, which was a general principle, giving expression to non-discrimination, and hence the term 'conditions of work' had to be interpreted broadly (para. 85). Moreover, participation in chambers of workers did not constitute an exercise of powers conferred by public law. That exception to the freedom of movement had to be confined to what was strictly necessary to protect the interests of member states (para. 92).

The 'aim and broad logic' approach first used in *Kurz, 2002* was then taken out of the context of the Ankara Agreement in *Commission v. Austria (trade unions), 2004* and transposed to other Association Agreements the Community had concluded, i. e. the European Economic Area and the Agreements with central and Eastern European and Maghreb countries (para. 8). More specifically, the Court transposed the solution found in *Wählergruppe Gemeinsam, 2003* regarding worker councils, including the narrow interpretation of the derogation, under the Ankara Agreement to the other Association Agreements and stated that interpretation to be 'the only one consistent with the aim and broad logic of the agreements concerned' (para. 53). Hence, the connection between the first and the second branch of broad interpretation was maintained in *Commission v. Austria (trade unions), 2004*.

In *Sedef, 2006* the Court came back to the Ankara Agreement and applied a slightly modified version of the *Kurz, 2002*-formula. Faced with the issue of whether the three indents of article 6(1) Decision 1/80 had to be fulfilled progressively, i. e. the second after the first and the third after the second, the Court stated that the 'broad logic and practical effect' of gradual integration of workers into the host state's labour force required it to be so (para. 37).

The concept of establishment is 'a very broad one'

In the freedom of establishment, an important development in terms of broad interpretation was initiated in *Gebhard, 1995*. The judgment is well known for establishing the test to be applied to restrictions of the establishment freedom (in para. 37), but the judgment also made it clear that the concept of establishment was 'a very *broad* one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities of self-employed persons […]' (para. 25; emphasis added). The Court used this broad definition to delineate establishment from services, which were subordinate (para. 22). As a consequence, Mr Gebhard's activities as a lawyer in Italy came within the reach of the freedom of establishment. This broad concept of establishment was applied in two more establishment cases in the age of Maastricht. In *Reisebüro Broede, 1996* the Court came back to the formula in a situation in

which it was unclear whether debt collection on behalf of companies by a French company in Germany came within establishment or services. Having stated that the concept of establishment was broad (para. 20), the Court directed the national court to determine whether the freedom of services or the freedom of establishment was applicable and proceeded itself to examine the freedom of services, while ending up applying the *Gebhard, 1995*-test. Almost ten years later,[66] the Court reiterated the broad approach to establishment in *N, 2006* (para. 26) to justify why the freedom of establishment applied when a person who held all the shares in a company moved his residence to another member state.[67]

b) *Second branch: narrow exceptions from rules – second branch connecting with third*

Knoch, 1992 was the first judgment in the age of Maastricht in which broad interpretation within the meaning of the second branch, involving narrow restrictions from broad rules, was applied. In addition, in this judgment the second branch became entangled with the second offspring of the third branch relying on 'conditions most favourable' stemming from *Mouthaan, 1976*. Faced with the situation of Ms Knoch, a German national who had worked in the United Kingdom as a university language assistant for two years and then claimed unemployment benefits in the United Kingdom before going back to Germany where she again claimed unemployment benefits, the Court began by reiterating the rulings in *Bergemann, 1988* concerning the most favourable conditions under article 71, i. e. third branch logic (para. 14) and in *Di Paolo, 1977* that article 71 Regulation 1408/71 was a derogation from the general rule in article 67(3) which (the derogation) was to be interpreted strictly, at least with regard to 'residence' thus relying on second branch logic (para. 20). In spite of that second ruling, Ms Knoch's situation in the United Kingdom was not, according to the Court, stable enough to amount to residence in the United Kingdom where she had worked (para. 25). Hence, she had to benefit from the choice in article 71(1)(b)(ii) of where to claim benefits, in Germany or the United Kingdom. Moreover, that included the possibility to receive benefits first in the United Kingdom under British law and then to continue receiving benefits under German law in Ger-

66 It remains unclear why the Court did not make use of the broad conception of establishment laid down in *Gebhard*, *1995* in the meantime. In *Commission v. Belgium (associations)*, *1999* Advocate General Cosmas had at least proposed a broad interpretation of 'profit-making' entities (para. 12), but the Court refused to address that proposition, instead ruling vaguely that the right to form associations in Belgian law applied to nationals of other member states and therefore one of the fundamental freedoms was affected. Hence, Belgium's rules were within the scope of the Treaty (para. 12). The Court concluded that article 6 Treaty precluded the nationality requirements. *Baars*, *2000* could have been another case in point, but the Court failed to mention establishment as a broad concept, although a situation not unlike that in *N*, *2006* was at issue. Possibly the Court preferred not to delimit the freedom of capital, which was being discussed in *Baars*, *2000*, from establishment by giving an undue weight to establishment, as the Court had done it in relation to services in *Gebhard*, *1995*.

67 In *Stauffer*, *2006* the Court reiterated that the concept of establishment was broad (para. 18), but went on to examine the free movement of capital, because the case concerned immovable property that was not actively managed (para. 19).

many, viz. an 'entitlement to successive benefits' (para. 31), else she would not receive benefits under article 71 in 'the most favourable conditions' (para. 33).

Second branch and recognition

Almost three years later the Court came back to the second branch in *Commission v. Italy (dentists), 1995* in the context of Directives 78/686 and 687 on mutual recognition in dentistry, i. e. of secondary legislation essentially implementing the freedom of establishment. This was the very first time that broad interpretation in general was applied in the rules on recognition of professional qualifications. The Court rejected Italy's transitional creation of a special category of dentists. It argued that the derogations from the rule requiring dentists to have one of the formal qualifications in article 2 Directive 78/687, which (the derogations) were laid down in articles 7 and 19 Directive 78/686 and 1(4) Directive 78/687, had to be narrowly construed. In the words of the Court, any derogation from a rule 'intended to guarantee the effectiveness of rights recognized by the Treaty must be interpreted strictly' (para. 23), citing as proof *Bonsignore, 1975*, *Peskeloglou, 1983*, and *Agegate, 1989*. Interestingly, the Court added that 'only derogations expressly provided for in the Treaty or the relevant directives [we]re allowed' (para. 23).

Derogations

In *Commission v. Luxembourg (public service), 1996* the Court next addressed Luxembourg's reservation of entire domains of public service to Luxembourg nationals. In keeping with case-law, the Court rejected Luxembourg's institutional approach to article 48(4) ECT. With regard to primary school teachers the Court in particular confirmed that the 'very strict conditions' for posts to come within the exception in article 48(4) were not fulfilled (para. 33). In a similar vein the Court in *Commission v. Spain (private security guards), 1998* rejected Spain's argument in favour of certain nationality requirements for the provision of private security services. Taking recourse to *Commission v. Greece (vocational schools), 1988*, the Court reiterated that the official authority derogation in articles 55 and 66 Treaty, as a derogation from the fundamental freedom of establishment, was to be interpreted so that it strictly limited the scope to what was necessary for the member states to safeguard their interests (para. 34). The Court then proceeded to refute Spain's arguments as to the connection of the activities of private security guards to the exercise of official authority.

Second branch in social security

In *Bastos Moriana, 1997* the Court dealt with the *Laterza, 1980*/*Gravina, 1980*-supplement in cases when the pension paid was not based on national law alone, but instead on aggregation pursuant to Regulation 1408/71. The Court decided that that supplement-case-law constituted an exception that could not be widened in order to apply in cases of aggregation (para. 19). In those cases the

person concerned was not deprived of a benefit due under national law alone.[68] *Stinco, 1998* next[69] concerned the calculation of the theoretical amount under article 46(2)(a) Regulation 1408/71. It was unclear whether an Italian pension supplement had to be taken into account when the theoretical amount was calculated. The Court replied that that was the case in accordance with established case-law. The newly introduced article 10a Regulation 1408/71 addressed only the non-exportability of certain benefits. It did not change the obligation to factor in statutory minimum benefits when determining the theoretical amount. As a derogation from a rule that was intended to improve the situation of migrant workers, article 10a was to be interpreted strictly (para. 16).[70]

Second branch in services

In *Calfa, 1999* the Court essentially applied the expulsion case-law under the freedom of services. Faced with an expulsion for life for drug possession for personal use in Greece, the Court acknowledged that the use of drugs constituted a danger for the society within sense of the public policy derogation. That exception though, 'like all exceptions from a fundamental principle of the Treaty', had to be interpreted restrictively (para. 23). The Court then went on to find that the expulsion requirements were not met, in particular because of the automatism that applied.[71] Still within the freedom of services, the Court applied second branch logic to secondary legislation in *ARD, 1999*. The Court ruled that the gross rather than the net principle was applicable to television ads under Directive 89/552. Restrictions of the provision of services as a fundamental freedom, such as broadcasting services, had to be expressed in clear terms (para. 29); in the absence of unequivocal and clear terms restrictions had to be interpreted restrictively (para. 30). In the case of article 11(3) Directive that meant an interpretation in the 'strictest possible sense' (para. 31).

In *Cura Anlagen, 2002*, faced with certain restrictions of the freedom to provide services in car leasing, the Court reverted to the *Bond, 1988*-formula: 'As an

68 In *Gómez Rodríguez*, *1998* the Court confirmed the approach in *Bastos Moriana*, *1997* holding essentially that when the age limit for orphan benefits was reached in Spain, a consecutive benefit need not have been granted in Germany, if the benefit was not payable pursuant to German law alone. The Court reached that conclusion without relying on the broad interpretation it applied in *Bastos Moriana*, *1997*.

69 In *Spataro*, *1996* France had argued a restrictive interpretation of the exception for Belgium in article 69(4) Regulation 1408/71 and Advocate General Lenz had seconded that argument (see paras 20 and 28 of the Opinion). However, while the Court in substance conceded the point – article 69(4) only applied to the requalification for Belgian unemployment benefits by a returning job seeker – the Court did not argue on the basis of broad interpretation.

70 In *Plum*, *2000* the Court reasoned that article 14(1)(a) Regulation 1408/71, which determined the legislation applicable in case of posted workers, was an exception from the rule in article 13(2)(a) Regulation 1408/71 that the legislation of the state of employment was applicable (para. 14). Although the Court in the following interpreted article 14(1)(a) narrowly in fact, broad logic under the second branch was not applied explicitly.

71 In *Commission v. Spain (VAT)*, *1999*, a value added tax case, the Court addressed the public safety derogations *inter alia* in articles 48 and 56 and ruled that '[b]ecause of their limited character, those articles do not lend themselves to a wide interpretation' (para. 21). In this judgment, the Court also voiced the following with regard to a specific provision of a value added tax directive: '[…] it must be observed that this exemption, being an exception, is to be interpreted strictly' (para. 31).

exception to a fundamental principle of the Treaty, Article 46 [of the] Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard.' (Para. 31) The Court put that formula ahead of the considerations of the restrictions which it then assessed separately.

Further derogations

In *Nazli, 2000* the Court transposed to Decision 1/80 the expulsion case-law as interpreted in *Calfa, 1999*, including the full passage as to the restrictive interpretation of the public policy exception as well as all other exceptions from fundamental freedoms (para. 58).[72] On the basis of the same passage from *Calfa, 1999* the Court in *Commission v. Belgium (security firms), 2000* rejected Belgium's requirement for private security undertakings to be established in Belgium and the justificatory argument based on public policy (para. 28).[73] In *Yiadom, 2000*, it was already mentioned, the first and the second branch of broad interpretation connected (see above).[74]

Second branch connecting with the third in social security, sometimes

In *Jauch, 2001* the second branch of broad interpretation entwined with the 'greatest possible freedom' of the third branch. The Court was asked to qualify the Austrian care allowance, which was listed in the annex to Regulation 1408/71 as a benefit exempted from exportability. The Court began with the 'greatest possible freedom'-passage from *Hoekstra, 1964*, dubbed *Spruyt, 1986*, and continued that, while the Community legislature could derogate from the exportability of benefits, as it did in article 10a Regulation 1408/71 for special non-contributory benefits, such derogations were to be interpreted strictly (paras 20-1) – a fact the Court had already hinted at in *Stinco, 1998*. The Court therefore had the task to examine whether benefits listed in annex IIa fulfilled the requirements of article 4(2a), which were that a benefit was both 'special' and 'non-contributory'. That turned out not to be the case for Austria's care allowance.

In *Skalka, 2004* the Court confirmed the approach elaborated in *Jauch, 2001*, stating that article 10a Regulation 1408/71 was an exception from the principle of exportability which had to be interpreted restrictively (para. 19). The Court omitted third branch interpretation, merely recounting *Jauch, 2001*. In keeping

72 In *Wijsenbeek, 1999* the Commission argued that the freedom of *Union citizens* to move freely within the Union pursuant to article 8a Treaty had to be interpreted broadly, while limitations of that freedom were to be construed narrowly (para. 36). The Court did not include that argument in its decision.

73 In *Commission v. Italy (temporary labour), 2002* the Commission, faced with Italy's requirement for companies to be established in Italy in order to authorized to provide temporary labour services, argued that the public policy exception was to be interpreted narrowly (para. 13). The Court did not address that argument expressly, but rejected Italy's requirement, because it was a restriction that was not necessary for the protection of workers.

74 In *Commission v. United Kingdom (open skies), 2002* the Commission had argued a narrow interpretation of the public policy derogation (para. 56). The Court did not accept the justification put forward, but did not apply any second branch logic.

with that judgment the Court went on to examine whether the Austrian compensatory supplement to pensions was special and non-contributory. The supplement met both requirements. In *Hosse, 2006* the Court reiterated the exact same approach to articles 4(2a) and 10a, this time not just reiterating the interpretation under the second branch but also that under the third branch (paras 24 and 25). The Court then continued to reject the special nature of the Austrian care allowance at issue. In *Kersbergen, 2006* the Court again scrutinized a benefit under articles 4(2a) and 10a and the case-law, this time the Dutch disability allowance for young people. The Court just cited the second branch interpretation – omitting the 'greatest possible freedom' – and found the benefit to meet both requirements, being special and non-contributory.

Second branch and recognition again

In *Klett, 2002* the Court for the second time applied broad interpretation in recognition of professional qualifications.[75] The Court held that article 19b Directive 78/686 on qualifications in dentistry as a derogation, like the other exceptions in this directive as held in *Commission v. Italy (dentists), 1995*, was to be interpreted strictly (para. 31). A postdoctoral course in dentistry which was merely offered as a transitory measure for those who had already begun it before accession of Austria therefore need not have been opened for doctors from member states other than Austria.

In *Beuttenmüller, 2004* broad interpretation under the second branch was again applied in recognition of qualifications. A German land had argued that the training for teachers in the land consisted of four years of training: three years of courses and 18 months of practical experience through teaching. That would have rendered applicable the derogation from the requirement to recognize foreign qualifications contained in the final subparagraph of article 3 Directive 92/51. However, the Court underpinned the conclusion reached on other grounds by finding that the exception from the general rule that a regulated profession could be exercised in the host state by those qualified to exercise it in the 'home' state had to be interpreted strictly (para. 64). Periods of probationary practice of teachers could therefore not be factored into the four years of post-secondary course in article 3.[76]

More derogations

The connection between the first and the second branch in *Wählergruppe Gemeinsam, 2003* was already discussed (see above). The *Kurz, 2002*-approach

75 On a more general note, in *Luxembourg v. Parliament (lawyer directive)*, *2000* the Parliament and the Council had argued in favour of a strict interpretation of the procedural rule in article 57(2) Treaty requiring unanimous adoption for Directive 98/5, because it was an exception derogating from the general procedure applicable with regard to article 57(1) (para. 52). The Court did not adopt that argument, but ruled that article 57(1) was the right legal basis.

76 In *Colegio*, *2006*, the Court stopped just short of second branch interpretation: dealing with compensatory measures for recognition of qualifications within the purview of Directive 89/48 the Court stated that 'the scope of article 4(1) of the Directive, which expressly authorises compensatory measures, must be restricted to those cases where they are proportionate to the objective pursued.' (Para. 24.).

involving the 'aim and broad logic' and broad interpretation of 'conditions of work' in article 48(2) Treaty namely came together with the narrow interpretation of the public authority derogation, which goes back as far as *Sotgiu, 1974*. In *Commission v. Austria (trade unions), 2004* that connection was maintained (see above). In *Anker, 2003* and *Marina Mercante, 2003* the Court again applied the strict interpretation of the public service derogation in article 39(4) Treaty (paras 60 and 63 and paras 41 and 44, respectively). Consequently, while ship masters had some powers of public authority, they were typically exercised only sporadically, e. g. on small ships. Hence, the application of the derogation was not justified.

Second branch and secondary law

In *Commission v. Italy (direct insurance), 2003* the Court interpreted secondary legislation. Italy had claimed to be entitled to freeze certain insurance premium rates on the basis of the exception from the freedom to set rates contained in the fourth direct insurance Directive 92/49. The Court rejected that claim, because the exception had to be interpreted strictly (para. 34). Italy's approach to price control was not general, binding, and homogenous within the meaning of the exception.

Union citizenship implying a particularly restrictive interpretation of derogations

In *Orfanopoulos, 2004*, the first of seven judgments in 2004 in our domain applying second branch interpretation, the Court was again seized with the expulsion of nationals of other member states. More specifically, the obligation compulsory by law to expel foreigners who had committed certain offences was at issue. The Court first reiterated the need for a broad interpretation of the free movement of workers and a restrictive construction of the corresponding derogations, in particular the public policy derogation (paras 64 and 67). Then the Court added that a 'particularly restrictive interpretation' of derogations from the freedom of workers was called for in the light of the Union citizenship of the person concerned (para. 65). The Court thus added another ring of constraint around derogations from the freedom of workers. The Court then ruled that the duty to expel a national of a member state without that the personal conduct or the concrete danger were taken account of violated article 3 Directive 64/221. Again referring to the narrow interpretation of the public policy derogation, the Court found that the threat posed by the individual had to be present at the time of his or her expulsion (para. 79).

In *Omega, 2004* the public policy derogation was applied again, this time in the context of a restriction of the freedom of services, namely to operate a laserdrome. The Court rehearsed the narrow interpretation required for the public policy derogation from the fundamental freedom of services with the aim of preventing states from determining its scope unilaterally without control by Community institutions (para. 30). Yet the Court did not add the passage from *Or-*

fanopoulos, 2004 as to a particularly restrictive interpretation owing to Union citizenship, preferring to cite *Van Duyn, 1974* and *Bouchereau, 1977*. That can partly be explained by services being at issue, rather than the freedom of workers, which (services) are less directly related to the free movement of Union citizens. As is well known the Court then went on to accept the justification of the restriction by human dignity, in spite of the restrictive interpretation of the public policy derogation endorsed earlier in the judgment.

In *Commission v. Germany (expulsion), 2006*, one out of ten judgments in 2006 that applied second branch broad interpretation, the Court came back to the public policy derogation in the context of the expulsion of nationals of other member states. Faced with several complaints by the Commission, the Court first called again for a narrow interpretation of the public policy derogation as an exception from the fundamental freedom of movement of persons, so as to avoid member states' unilaterally determining its scope (para. 34). But once more the Court omitted the *Orfanopoulos, 2004*-passage requiring a particularly restrictive interpretation by reason of Union citizenship. The Court in the following rejected all the Commission's complaints, bar one relating to the seriousness of the threat, while most complaints centered on the existence of an administrative practice. In *Commission v. Spain (Schengen alert), 2006* the Court found that the Schengen alert violated Directive 64/221, essentially because not sufficient information was made available to verify the threat emanating from a person having rights under the Directive, such as third country national spouses of nationals of member states. Part of the Court's examination was a recital of internal market expulsion case-law, among which was the passage as to the strict interpretation of the public policy derogation (para. 45). The Court again did not recite the *Orfanopoulos, 2004*-passage as to citizenship.

Narrow exception from recognition of driving licences

In *Kapper, 2004* the Court referred to *Beuttenmüller, 2004* to justify that the exception contained in article 8(4) Directive 91/439 on driving licences was to be interpreted strictly (para. 72). The principle required mutual recognition of driving licences, an exception was possible if a driver was subject to a measure affecting his right to drive in the host state. According to the Court, the strict interpretation of an exception from a rule in a directive applied *a fortiori* if the rule intended to enable the exercise of a fundamental freedom (para. 72). Given that, it was not to be refused indefinitely to recognize a licence issued subsequently in another state (para. 76). In *Halbritter, 2006* the Court confirmed that approach under the second branch (para. 26). A member state could therefore not negate the validity of a licence issued in another member state after the blocking period it had ordered had passed. The same second branch logic, moreover, made it impossible to check the ability to drive when a driver officially requested recognition of the licence issued in a state other than the state in which his previous licence had been withdrawn and the blocking period had passed (para. 35). In addition the same logic led the Court in *Kremer, 2006* (para. 28) to decide that the

ruling applied *a fortiori* when a blocking period had not been ordered in the first place.

Narrow derogation from freedom of maritime services

In *Commission v. Greece (cabotage), 2004* the Court applied broad interpretation for the first time to maritime services. Article 6(3) Regulation 3577/92 on maritime cabotage extended for Greece the exception in article 6(2) concerning island cabotage in the Mediterranean. Greece applied that exception with regard to the Peloponnese. However, the Court rejected that interpretation. It underpinned its finding by reasoning that that article was a derogation from the general rules on the freedom to provide maritime services within a member state and, consequently, had to be interpreted strictly (para. 48).

Restrictive interpretation of the in-house exception

In *Parking Brixen, 2005* the Court transposed to public service concessions the distinction between the public authority performing certain activities in-house, i. e. via the departments it controlled, and it entrusting those activities to a third party. The Court ruled so on the basis of equal treatment, the freedom of services and establishment, and the consequent obligation to ensure transparency. Those principles did not apply when the public authority controlled the entity performing the activities and when the essential part of the entity's activities were carried out with the controlling authority. However, given that a derogation from the general rules of Community law was at issue, those two criteria, viz. control and an essential part of activities, were to be interpreted restrictively and the burden of proof was to be shouldered by those who relied on them (para. 63). Ultimately, the Court concluded that the necessary degree of control was not given in the case at issue. In *ANAV, 2006* the Court restated the same approach again in a public service concession case. As a derogation from the general rules of Community law, the in-house exception had to be interpreted strictly and the proof was to be brought by those seeking the benefit of the exception (para. 26). The Court left it to the referring court to assess whether the entity at issue fulfilled the requirements of the in-house exception.

Derogations again

In *Servizi ausiliari, 2006* the Court came back to the official authority derogation as applied in *Commission v. Spain (private security guards), 1998*. Having stated that articles 45 and 55 Treaty were derogations from fundamental freedoms the scope of which had to be limited to what was strictly necessary to protect the legitimate interests of the member states (para. 45), the Court found that the derogation did not apply for lack of a connection to official authority. The auxiliary tax services the entities at issue provided did not let them partake in official authority. In *Commission v. Austria (boilers), 2006*, the Court then reiterated the narrow interpretation of the public security derogation as an exception

from the freedom of services (para. 25). Partly due to that, the requirement for inspectors of boilers to be established in Austria was not justified.

Finally, in *Honyvem, 2006* the Court applied second branch interpretation to a case concerning Directive 86/653 on commercial agents. The possibility in article 19 for member states to derogate from the indemnification due to the commercial agent pursuant to article 17(2) had to be interpreted strictly: 'the terms used to establish exceptions to a general principle laid down by Community law […] are to be interpreted strictly' (para. 24). Whether a derogation was favourable to the agent, as article 19 required, therefore either was to be determined essentially when the contract ended or it had to be clear *ex ante* that a derogation never worked to the disadvantage of the agent.

c) Third branch: the greatest possible freedom

The third branch, which is dominated by the *Hoekstra, 1964*-formula of the 'greatest possible freedom', developed only modestly in the age of Maastricht. Broad interpretation within that sense cropped up only in ten judgments during those fifteen years. The first of them was *Paletta, 1992*. In this case, the Court ruled that the employer of a worker who (the worker) had fallen ill could be considered as the 'competent institution' to which article 18 Regulation 547/72 applied with regard to sickness benefits. Referring to *Rindone, 1987*, the Court found this conclusion to be in accordance with the aim of promoting 'the greatest possible freedom of movement for workers, which [wa]s one of the fundamental principles of the Community' (para. 24). It was already discussed that in *Knoch, 1992* the second offspring of the third branch, the 'most favourable conditions' pursuant to *Mouthaan, 1976*, connected with the second branch (see above).

Two branches connecting

In *De Wit, 1993* again a question came up with regard to the transitional mechanism of the Netherlands which had already been at issue in *Spruyt, 1986* and *De Jong, 1986*. As in those judgments, the Court began by reiterating the *Hoekstra, 1964*-formula (para. 16) and combined it with other case-law, notably the *Petroni, 1975*-line of authority. The Court then reasoned that the annex to Regulation 1408/71 aimed at removing obstacles for migrant workers and hence deserved a broad interpretation, thereby connecting the third with the first branch (para. 20). From this the Court concluded that years in employment of a Dutch person of public law which had been completed under the Dutch social security scheme while residing abroad established a link comparable to residence in the Netherlands. Thus, the transitional mechanism had to be applied according to the relevant annex.

In *Stöber and Pereira, 1997*, the first and the third branch connected but the definition in the annex concerning Germany prevailed, as it was mentioned above. In *Jauch, 2001*, the second and the third branch connected and the con-

nection was maintained in *Hosse, 2006*, but not in *Skalka, 2004* and *Kersbergen, 2006*. This was discussed above.

'The most favourable conditions'

Next, in *Van Gestel, 1995*, the Court again resorted to the *Mouthaan, 1976*-formula, i. e. the second offspring of the third branch involving 'the most favourable conditions', this time to justify that article 71(1)(b) Regulation 1408/71 was also applicable to a person who worked and resided in the same state, but to whom the legislation of another state continued to apply owing to an agreement to that effect between the authorities of the two states (para. 20). Then in *Drake, 1994* the question came up whether the amendment of the annex to Regulation 1408/71 which concerned the Netherlands was valid in the light of articles 48 to 51 Treaty given that it had in essence introduced the condition that a person had to have an income during a period to be eligible for benefits under the relevant Dutch scheme. The Court found that a hierarchy between the annexes and the 'regular' provisions of Regulation 1408/71 did not exist. All provisions were adopted pursuant to article 51 Treaty and hence aimed at the greatest possible freedom of movement in the light of which they were to be interpreted (para. 20). The annex, however, was compatible with that purpose and with *Petroni, 1975*-logic. The reason for the person concerned not receiving any benefits was not the use he had made of the freedom to move, but that he had not worked before he became incapacitated.

In *De Laat, 2001* the *Mouthaan, 1976*-offspring again came to prominence. Faced with the question which member state was competent for unemployment benefits when a frontier worker's employment with the same company was reduced from full-time to part-time work, the Court had recourse to *Mouthaan, 1976*, since such a worker, too, deserved unemployment benefits in the most favourable conditions for finding work again (para. 32). Those conditions were, according to the Court, given in the state of employment, since any additional work that was compatible with the existing part-time employment of the frontier worker would in all probability be located in that state. Hence, the state of employment was competent under article 71(1)(a)(i) Regulation 1408/71, unless a frontier worker became fully unemployed and lost all links with that state.

The greatest possible freedom again

Finally,[77] in *Khalil, 2001* the Court went back to *Singer, 1965*, in which the power of the Community legislature to regulate certain social security aspects of the situation of persons who were not migrant workers had been confirmed on the basis of the *Hoekstra, 1964*-formula. Together with the historical context of the adoption of Regulation 1408/71, the *Hoekstra, 1964*-formula in the *Singer,*

77 The Netherlands and the Commission in *Commission v. Netherlands (frontier worker), 2003* argued on the basis of third branch logic (paras 16 and 25), but the Court found that the possibility to export unemployment benefits for three months applied to frontier workers without using any third branch broad interpretation.

1965-judgment served the Court to explain in *Khalil, 2001* why article 51 Treaty had been the right legal basis to regulate the coordination of the social security issues of stateless persons and refugees at the time the Regulation had been adopted (para. 54).[78]

d) Spin – and advance statement of case-law

In which judgments did broad interpretation spin the decision? In the age of Maastricht, spin in general has become a little harder to observe, in particular in the first branch of broad interpretation. This is due to the Court's practice beginning in that period to re-state entire parts of case-law 'in abstract', i. e. before addressing the case at issue. The practice has been in flux, blending in and out of the more traditional structure of judgments. It is therefore not consistently applied. Generally, it can be said that the Court has resorted to this advance statement of case-law in the interest of clarity, in particular when the case-law has reached a certain complexity. It is evident in *Kurz, 2002*, and even more so in *Ninni-Orasche, 2003*, to some extent also in *Kranemann, 2005* and *Mattern and Cikotic, 2006*.

This advance statement of practice should be distinguished from 'empty spin' which had come up before the age of Maastricht. In 'empty spin', an expectation is raised by the use of a specific formula, but it is then not met, because the decision is taken against the grain of the formula. In an advance statement of practice, case-law is stated in a preliminary fashion, in a similar though not quite as detached way as the Court puts the relevant positive law ahead of the consideration of the case at issue. But obviously the two phenomena overlap.

Spin in the first branch: 'worker'

Spin can be observed at work in a series of judgments in which the Court interpreted the worker-notion under the first branch. In *Krid, 1995* the broad interpretation of the personal scope of the Algier Agreement spun the decision towards the obligation to grant the *Giletti, 1987*-allowance, at least to some degree. In *Birden, 1998* spin was a little stronger with regard to the broad interpretation of the scope of Decision 1/80 under the Ankara Agreement, resulting in the qualification of a position in a social programme as 'work'. In *Meeusen, 1999* broad interpretation of the term 'worker' had a clear impact on the classification of the spouse employed by the company of which her husband was the sole shareholder and director as a worker. In *Kurz, 2002* spin by the broad interpretation of the worker-notion was partly obscured by an advance statement of case-law, but it contributed some momentum toward the qualification of an apprentice as a 'worker'. The same is valid for *Ninni-Orasche, 2003* where very short employment was at issue, *Trojani, 2004* which concerned a personal reha-

78 Advocate General Jacobs added the additional argument, based on case-law, that the personal scope of Regulation 3 and article 51 Treaty had traditionally been interpreted widely – which is in fact an argument under the first branch of broad interpretation – concluding that the inclusion of stateless persons and refugees within Regulation 1408/71 was in keeping with the Court's case-law (paras 40-56).

bilitation programme, *Kranemann, 2005* which dealt with a mandatory legal traineeship, and *Mattern and Cikotic, 2006* which concerned professional training as a care assistant.

Spin in other parts of the first branch

Besides the worker-notion spin is discernible in a number of judgments within the first branch. In *Imbernon Martínez, 1995* the broad interpretation of article 73 Regulation 1408/71 was instrumental in including all family members with regard to residence. In *Meints, 1997* the broad interpretation of article 7(2) Regulation 1612/68 was at least partly relevant in reaching the conclusion that the special lay-off benefit at issue constituted a social advantage. In *Yiadom, 2000* the broad interpretation of the free movement of workers – together with the interpretation in their favour – and the corresponding narrow understanding of derogations spun the decision to some extent towards granting the same rights to a temporarily admitted person as to a regularly admitted person.

In *Deliège, 2000* the broad understanding of the scope of the freedom of services was decisive in including the activities of judokas; the spin did not carry through to the end of the judgment, though, since the Court did not find a restriction. The initial spin hence turned 'empty' in a certain sense. In *MRAX, 2002* a broad understanding of article 9 Directive 64/221 made it possible to apply procedural minimum guarantees regardless of whether specific documents could be produced. In *Wählergruppe Gemeinsam, 2003* several instances of broad interpretation under the first and the second branch provided strong spin, resulting in the imperative to include Turkish workers in elections to a body representing workers. In *Oulane, 2005* the broad construction of provisions implementing the free movement of persons was instrumental to admitting other evidence than identity cards or passports to establish identity. The spin also subliminally carried through to the answers to the further questions.

In *Sedef, 2006* the *Kurz, 2002*-formula provided some spin for the decision that the three indents of article 6(1) Decision 1/80 were to be fulfilled progressively. Yet other arguments also fed that decision. The broad interpretation of establishment as a term hardly provided any spin, except in *N, 2006* where it brought the situation at issue within the scope of the freedom of establishment.

Spin in the second branch

In the second branch of broad interpretation, spin was a very regular occurrence in the age of Maastricht. In *Commission v. Italy (dentists), 1995* the decision hinged strongly on the narrow interpretation of the derogation in Directive 78/686 and 78/687, resulting in the rejection of the additional category of dentists Italian law had created. In *Stinco, 1998* the strict interpretation of the derogation from the rule of exportability of benefits in article 10a Regulation 1408/71 was an important factor in the finding that the calculation of the theoretical amount was not altered by that article. In *Commission v. Spain (private security guards), 1998* the narrow interpretation of the official authority deroga-

tion partly spun the decision towards the rejection of the nationality requirement. In *Calfa, 1999* a restrictive reading of the public policy derogation played a strong part in the rejection of the automatism in expulsion. In *ARD, 1999* the strict understanding of a derogation in the absence of clear wording in secondary legislation clearly spun the decision towards the gross principle under Directive 89/552. In *Jauch, 2001* the strict reading of article 10a Regulation 1408/71 together with third branch logic clearly enabled the decision of the Court to examine the properties of the benefits at issue despite their listing in the relevant annex. In *Klett, 2002* the narrow interpretation of the exception in article 19b Dir. 78/686, compiled with other arguments, allowed the Court to decide that the course concerned did not have to be accessible to migrant doctors.

In *Cura Anlagen, 2002*, in contrast, spin was very limited. The *Bond, 1988*-formula was part of an advance statement of case-law. Consequently, any possible spin was hidden beneath the other case-law put ahead. Yet some spin can still be discerned in that the Court rejected several of the restrictions of the freedom to provide car leasing services.

In *Anker, 2003* and *Marina Mercante, 2003* the strict reading of the public service derogation was partly responsible for the restriction not being justified when the public powers were exercised only occasionally, notably on small ships. In *Commission v. Italy (direct insurance), 2003* the Court's strict construction of the exception in Directive 92/49 spun the decision against Italy's freezing of insurance premium rates. In *Orfanopoulos, 2004* second branch logic provided strong spin towards the conclusion that the legal duty to expel a person and not to assess the threat at the time the expulsion was executed was unlawful. In *Kapper, 2004* the narrow understanding of an exception was instrumental in the conclusion that the recognition of a driving licence issued in another member state could not be refused indefinitely.

In *Parking Brixen, 2005* there was clear spin. After having applied second branch interpretation, the Court went on to interpret the facts very strictly, making it plain that a large degree of control was needed for the in-house exception to apply – a degree of control that was not given in the case at issue. In *Commission v. Spain (Schengen alert), 2006* spin by second branch logic is hard to detect, as broad interpretation was part of an advance statement of case-law. Yet the logic appears softly to have carried through to the Court's decision that the Schengen alert did not live up to the requirements of the internal market. In *Servizi ausiliari, 2006* interpretation under the second branch spun a minor part of the judgment in which the Court found that the provision of auxiliary tax services was not a part of the exercise of official authority. In *Commission v. Austria (boilers), 2006* the narrow understanding of the public security exception mildly spun the decision to find unlawful the requirement of being established in Austria. Furthermore, in *Honyvem, 2006* second branch logic provided strong spin, leading the Court to the conclusion that a derogation in a contract with an agent always had to work in favour of the agent.

Spin in third branch-combinations

In the third branch of broad interpretation, the *Hoekstra, 1964*-branch, spin continued to be a regular occurrence. *Knoch, 1992*, the first judgment in the third branch in which spin occurred during the age of Maastricht, was particularly interesting, because the connection between the third branch of broad interpretation and the second combined with spin. The 'conditions most favourable'-passage, i. e. the offspring stemming from *Mouthaan, 1976*, first spun the decision in one direction, then second branch-logic in the form of the strict interpretation of article 71 Regulation 1408/71 as a derogation from the rule, provided counter-spin. In spite of that counter-spin, the Court found that Ms Knoch had not had residence in the United Kingdom. The third branch then came back (para. 33) as a justification why consecutive unemployment benefits had to be granted in Germany. From the perspective of the second branch, the judgment can therefore be seen as a rare example of empty spin.

In *De Wit, 1993* spin can also be observed in a combination of two branches of broad interpretation, namely the third and first branch. This time both branches, viz. the 'greatest possible freedom' and a broad interpretation of the annex, provided combined spin for the Court to find that the years of employment completed abroad in the case at issue had to be taken into account under the Dutch transitional mechanism.

Spin in the third branch

In *De Laat, 2001* the *Mouthaan, 1976*-formula, that is the 'most favourable conditions', clearly spun the decision of the Court to find the member state of employment competent for unemployment benefits in case of a reduction of employment. In *Khalil, 2001* the *Hoekstra, 1964*-formula supplemented the interpretation of the historical context of the adoption of Regulation 1408/71. In that function it provided some, albeit limited, spin to the Court's decision that Regulation 1408/71 had been validly adopted on the basis of article 48 and 51 Treaty.

Spin at its clearest in third branch

Finally, the judgment in *Jauch, 2001* created an interesting phenomenon with regard to spin. In *Jauch, 2001* broad interpretation under the third branch, i. e. the 'greatest possible freedom', combined with second branch logic, i. e. the strict understanding of exceptions from the exportability of benefits, to create the necessary spin for the Court to found its power to review the properties of certain benefits, namely the properties of being special and non-contributory, despite their listing in the annex to Regulation 1408/71. The result of the following review was that Austria's care allowance did not meet the requirements.

Skalka, 2004 stands in stark contrast to *Jauch, 2001* in this regard. In *Skalka, 2004* the Court reiterated the power it had founded in *Jauch, 2001* to review the properties of benefits in spite of the listing in the annex, citing the strict interpretation of the exception from exportability, while *omitting* the 'greatest possible

freedom'. The benefit at issue, Austria's special supplement, was then found to be both 'special' and 'non-contributory' and hence exempted from exportability.

Conversely, *Hosse, 2006* was again in harmony with *Jauch, 2001*. First, the Court rehearsed both the strict interpretation of the exception from exportability and the 'greatest possible freedom'. Owing to the spin thus created, the Court then found the benefit at stake, an Austrian care allowance, not to meet the requirement of being 'special' to be exempted from exportability. Hence, the allowance was exportable.

Again in stark contrast to *Hosse, 2006* – and thus *Jauch, 2001* – in *Kersbergen, 2006* the Court only recounted second branch logic with the strict understanding of the exception from exportability, but left aside 'the greatest possible freedom'. It then considered the benefit at issue, the Dutch disability allowance for young people, to be exempted from exportability, because it was both 'special' and 'non-contributory'. To sum it up, the Court seemingly added the 'greatest possible freedom' to the narrow understanding of the exception from exportability if – and only if – the benefit concerned was to be exportable (*Jauch, 2001* and *Hosse, 2006*); in contrast, the Court left aside the 'greatest possible freedom', citing merely the strict interpretation of the exception, when the benefit at stake was *not* to be exportable (*Skalka, 2004* and *Kersbergen, 2006*). It appears unlikely that this was a coincidence.

The logical consequence would have to be that *Skalka, 2004* and *Kersbergen, 2006* were cases of empty spin. This indeed is so, but only to a limited extent. In both cases the broad interpretation pursuant to the second branch was part of a sort of an advance statement of case-law, which preceded the examination of the properties of the benefits. Hence, the contrast between the spin created in the advance statement and the following decision against the direction of that spin was softened in both judgments.

Empty spin

Apart from this occurrence, 'empty spin' remained very rare in the age of Maastricht. The empty spin in the second branch in *Knoch, 1992* was already mentioned above. It was the first time that empty spin occurred to some extent in the second branch of broad interpretation. *Stöber and Pereira, 1997* was a case of empty spin only on the face of it. The Court cited the 'greatest possible freedom' based on *Hoekstra, 1964* together with broad interpretation which created spin, but then gave preference to the definition of self-employed persons in the annex which concerned Germany, thus counteracting the spin. However, the 'greatest possible freedom' ultimately prevailed, if only from a substantive point of view, owing to non-discrimination, which struck down the residence requirement. Non-discrimination, therefore, in a sense restored the power of the spin.

In only two more cases empty spin appeared during the age of Maastricht, namely *Collins, 2004* and *Omega, 2004*. In the first question of *Collins, 2004* the broad notion of a 'worker' seemed to create momentum, but the Court decided against that momentum right away. For Mr Collins the connection with

the labour market had been lost by reason of the time that had passed. The following questions then were disconnected from the first. From the perspective of empty spin, *Collins, 2004* therefore belongs in the same row as *Bettray, 1989*. Finally, in *Omega, 2004* the Court first advised a strict interpretation of the public policy derogation from the freedom of services, creating certain spin, but then decided against its own advice that Germany had enough leeway to outlaw simulated killing games by reason of the protection of human dignity. *Omega, 2004*, thus, was the first case of empty spin in the free movement of services.

e) Some conclusions from the period

Broad interpretation evolved in all three branches during the age of Maastricht, albeit to varying extents. In the first branch comprising broad notions as such, we had noted the development in the free movement of workers from the broad interpretation of terms as such, notably in *Levin, 1982*, towards the broad interpretation of the freedom itself, in particular from *Kempf, 1986* and *Lebon, 1987*, during the previous period leading up to the 'Maastricht moment'. It has further evolved during the age of Maastricht, with a culmination in the expansive ruling in *Yiadom, 2000* positing an interpretation in favour of the migrant worker. Yet that interpretation was put forward only with regard to the procedural rights of migrant workers.

It is interesting to see in that context that during the age of Maastricht this development in the free movement of workers was retraced in the other freedoms. The delay in this retracing is due to the case-law on those freedoms taking off only in the late 1980s. In the free movement of services, we have already noted the interpretation of a derogation so that its effects were limited to what was necessary, rather than *strictly* necessary, in *Bond, 1988*. After this modest beginning, the Court became more assertive in the age of Maastricht in *Deliège, 2000* interpreting more generally the terms defining the scope of the freedom of services broadly. In *Oulane, 2005* the Court then continued even more expansively, in the context of receiving services, that provisions enshrining the free movement of persons were to be construed broadly. The second branch underpinned this evolution in services in *Calfa, 1999* where the public policy derogation was said not to be susceptible of a broad interpretation, and in *ARD, 1999* where the Court advocated a strict interpretation of exceptions from the freedom of services as laid down in secondary legislation, indeed an interpretation in the 'strictest possible sense' (para. 31). Again the second branch complemented the first in a specific development, which is a testimony of their common root of broad interpretation. *Calfa, 1999* in addition, in a certain sense, harmonised the second branch across the various freedoms by holding that all exceptions from a fundamental principle of the Treaty had to be interpreted restrictively.[79]

In the freedom of establishment, *Gebhard, 1995* certainly triggered a larger evolution in establishment. It also initiated the concept of establishment as being

79 Yet the Court reverted to the relatively timid *Bond, 1988*-approach in *Cura Anlagen, 2002*.

a very broad one, literally. In the same year, the Court in *Commission v. Italy (dentists), 1995* had already propounded under the second branch that any derogation from a rule guaranteeing Treaty rights was subject to a strict interpretation, and even limited the derogations to those expressly stated. Yet in the age of Maastricht clear textual evidence of a broad interpretation of the freedom of establishment *as such* was missing – that is, evidence which would be comparable to the *Kempf, 1986*, *Lebon, 1987*, *Yiadom, 2000*-line of authority for workers or to the *Calfa, 1999*, *Deliège, 2000*, *Oulane, 2005*-line for services. That observation also applies to Union citizenship. While in *Zhu and Chen, 2004* Union citizenship was at issue, the Court mostly interpreted Directive 90/364 and in that context underpinned its finding by the statement that provisions laying down a fundamental principle like the free movement of persons were to be interpreted broadly. Even before that judgment, *Orfanopoulos, 2004* had put forward that Union citizenship called for a 'particularly restrictive interpretation' of derogations from the worker freedom. Undoubtedly though, at least a nucleus of a more general broad interpretation of Union citizenship was obviously there.

In the second branch comprising narrow exceptions from rules, one point attracts attention. In both *Commission v. Italy (dentists), 1995* and *ARD, 1999* the Court combined second branch-logic with the explicitness of the exception. Both cases concerned second branch interpretation in secondary legislation. In *Commission v. Italy (dentists), 1995* the Court admitted 'only derogations expressly provided for in the Treaty or the relevant directives' (para. 23); in *ARD, 1999* the Court required restrictions of the freedom of services to be expressed in unequivocal and clear terms, else a restrictive interpretation was to be applied. This may have appeared like the beginning of a new approach in case-law, urging not just a restrictive interpretation of exceptions from rules in secondary legislation but in addition requiring them to be clear, an approach that could potentially even replace second branch-logic. However, the ensuing case-law in the second branch failed to confirm that approach. The following cases – *Klett, 2002*; *Commission v. Italy (direct insurance), 2003*; *Beuttenmüller, 2004*; *Kapper, 2004*; *Halbritter, 2006*; *Commission v. Greece (cabotage), 2004*; and *Honyvem, 2006* – all are at odds with the idea of a new beginning.

The rift we observed for the time before the age of Maastricht between the second branch concerning narrow exceptions, which (the branch) had never been applied in social security judgments, and the third branch relying on the greatest possible freedom, which (the branch) had been confined to social security, was finally bridged in the age of Maastricht. *Jauch, 2001* applied second branch logic in social security, notably to the new article 10a Regulation 1408/71. Interestingly, the Court accomplished this transposition by taking recourse to third branch logic. The combination of the second and the third branch in *Jauch, 2001* is not entirely surprising, given the disruptive nature of the judgment. The judgments following after *Jauch, 2001* further rooted the second branch in social security. Yet it remained confined to the context of article 10a Regulation 1408/71.

Apart from that, it is noteworthy that the Court strongly relied on second branch interpretation when it made the requirement of transparency prosper in public procurement outside the relevant directives, notably for the in-house exception beginning in *Parking Brixen, 2005*. This again can be seen as indicative of the disruptive nature of this line of judgments.

Besides those developments in the age of Maastricht we also note that some formulas have phased out. In the first branch, the *Bozzone, 1977*-formula describing 'legislation of a member state' in Regulation 1408/71 as being 'remarkable for its breadth' is one such phrase. It had been used repeatedly before the age of Maastricht, but then did not crop up again. Possibly, this is due to the term having been clarified early on and thus no longer being in need of further explanation. The *Frilli, 1972*-formula involving benefits 'in the widest sense' under Regulation 1408/71 was no longer used, either, perhaps because the distinction between social security and social assistance had undergone legislative transformation. In the third branch, the first offspring brought into being in *Heinze, 1972*, i. e. 'the most favourable conditions' for achieving the free movement of workers, also went out of use during the age of Maastricht.

For the *power* of the interpretive formulas of the three branches – i. e. their spin – it is again hard to come to general conclusions. Their power is best understood by reading the above passages concerning spin. Generally, it can be said though that the practice of the Court to state case-law in advance, that is to say before speaking to the facts of the case – a practice begun during the age of Maastricht – made spin harder to detect. When a formula is grouped together with other formulas and case-law before the law is applied to the facts, it becomes harder to say which formula had how much impact. This advance statement of case-law is not identical to the phenomenon of empty spin which was observed first some time before the age of Maastricht. An advance statement of case-law does not raise any expectations, or at least raises them to a lower level.

Apart from that, the analysis of spin revealed for all three branches of broad interpretation – broad notions, narrow exceptions, and the greatest possible freedom – that the formulas were powerful. In each branch the formulas frequently, though not always, spun decisions. While the analysis above should be considered for the more elaborate details, two more points are noteworthy. First, empty spin occurred for the first time in freedom of services during the age of Maastricht. Second, the clearest manifestation of the spin a formula of broad interpretation can exert is found in the four cases *Jauch, 2001*, *Skalka, 2004*, *Hosse, 2006*, *Kersbergen, 2006*. A holistic perspective on these four cases reveals that the Court added 'the greatest possible freedom' to the narrow understanding of an exception from the exportability of certain benefits if – and only if – the Court wanted the benefit concerned to be exportable. The spin, the power of formulas has never come clearer than this.

4 The present

Finally, we come to the last seven years, a period which is obviously best referred to as 'the present'. Let us examine how broad interpretation has fared in the present, beginning with the first branch, i. e. broad interpretation of notions as such, and moving along to the second and third branch. Again, expect broad interpretation to grow commensurately with the case-law having increased considerably in our domain.

a) First branch: broad notions – 'worker'

The broad interpretation of the worker-notion, one aspect of the first branch of broad interpretation, has been strongly consolidated in the present. *El Youssfi, 2007* was the first out of ten judgment in which the notion of a 'worker' played a role. In the context of the Association Agreement with Morocco it was questionable whether Ms Youssfi could claim rights. The Court stated that the personal scope of article 65(1) Agreement, i. e. the notion of a worker, had to be understood broadly (para. 64). The Court left it to the national court to assess the particulars, but indicated that the person concerned possibly was entitled to claim rights herself as a former worker, or owing to her late husband having been or her descendants being workers.

Next, in *Alevizos, 2007* the Court reiterated that the worker-notion in article 39 Treaty was not to be construed narrowly (para. 67). The Court then elaborated further case-law, among which second branch case-law to the effect of the public service exception not being applicable (para. 69), and found that Mr Alevizos enjoyed the rights as a worker because he had been posted with the North Atlantic Treaty Organization. In *Raccanelli, 2008*, the Court re-stated the broad interpretation of the notion as part of the definition of a 'worker' (para. 33), but then left it to the national court to assess whether a doctoral student who was receiving a grant under a contract was to be qualified as a worker fulfilling the criteria of subordination and remuneration. In *Petersen, 2008* the Court recalled the broad understanding of the worker-notion to justify why a person who was receiving an advance benefit akin to an unemployment benefit in Austria still qualified as a worker for the purposes of the free movement of workers (para. 45). The Court then went on to strike down the residence clause contained in Austrian law by reason of non-discrimination.

In *Vatsouras, 2009* the broad understanding of who was a worker was part of a passage in which the Court reminded the national court that it had to assess carefully and in keeping with case-law whether the persons concerned were 'workers' under article 39 Treaty, despite their short and limited economic activity (para. 26). Next, in *Von Chamier-Glisczinski, 2009* the Court again reiterated the broad interpretation of the term 'worker' right before stating the definition of the term (para. 69). The facts remained inconclusive, though, as to whether the spouse of the person in care had in fact sought work in the host state. With that being unclear the Court refused to apply the free movement of

workers. In *Genc, 2010* the Court then applied broad interpretation within the context of the Ankara Agreement, to which the free movement of workers was to be transposed so far as possible. The broad understanding and the definition of a worker (para. 19) was applied together with internal market case-law to the effect that very limited work was still capable of conferring the status of a worker. In *Van Delft, 2010* the Court also had recourse to broad interpretation along with the worker definition (para. 89). However, the Court found that the freedom of workers was inapplicable, because the persons concerned had all moved residence after they had stopped working. In *Commission v. Netherlands (portable funding), 2012* the broad understanding of who was a worker served the Court to reject the Netherlands' argument that a risk existed that persons resident abroad abusively claimed portable funding in the Netherlands to finance studies abroad (para. 68). Furthermore, in *L.N., 2013* the Court, after having argued on the basis of second branch logic (see below), relied on the broad interpretation of 'worker' (para. 39) to explain why a person who had come to Denmark and worked there, while knowing that he would begin a course of studies in Denmark, still was capable of qualifying as a worker.

Other broad notions

Broad interpretation in general also came to be applied outside the context of the worker-notion in the present, though in a relatively limited number of cases. In *Jia, 2007* the Court first restated *Lebon, 1987* as to the concept of 'dependence' of a relative on a self-employed person. In that context the Court recalled that the free movement of persons, one of the foundations of the Community, was to be understood broadly (para. 36). That led the Court to conclude that the situation of dependence could exist in the state of origin or the state from which the relative concerned had come.

In *Eind, 2007* the Court refused to interpret secondary legislation on movement and residence of migrant workers restrictively (para. 43). Partly as a result of that refusal, the daughter of a migrant worker returning to his home state who (the daughter) was a third country national could not lawfully be refused a right of residence, merely because she could not have benefitted from such a right before her father had moved to work in another member state. In *Commission v. Netherlands (automatic expulsion), 2007* the Court argued that the safeguards in Directive 64/221 required a broad interpretation (para. 35). From that the Court concluded that the safeguards had to be available even to those who were not lawfully resident in the host state. (As to the broad interpretation under the second branch see below.)

In *Geven, 2007*, the Court came back to article 7(2) Regulation 1612/68. The term 'social advantages' in that article was not to be interpreted restrictively (para. 12). As had been held in *Martínez Sala, 1998*, it included the German

child-raising allowance.[80] Next, in *Derin, 2007* the Court was seized with the question of treatment of Turkish nationals which was more favourable under the Ankara Agreement than the treatment Union citizens enjoyed under Union law. In that context, the Court restated *Wählergruppe Gemeinsam, 2003* as part of an advance statement of case-law, including the declaration made in that case that the aim and broad logic of Decision 1/80 was the gradual integration in the host state (para. 53).

In *Metock, 2008* the Court then addressed the question whether the family consisting of a Union citizen and a third country national had had to be founded before the citizen's exercise of the right to free movement or whether it was sufficient when the founding of the family had occurred *after* the citizen's movement for the provisions on family reunification pursuant to the Union citizenship Directive 2004/38 to apply. The Court answered sweepingly that the provisions of the citizenship Directive were not to be interpreted restrictively and be deprived of their effectiveness (para. 84). Hence it was sufficient for the family to have been founded after the citizen had moved to the host state. Owing to the same logic it was irrelevant whether the third country national had entered the host state before or after the Union citizen (para. 93).[81]

In *Bekleyen, 2010* the Court again applied broad interpretation, this time within the context of the Ankara Agreement. The Court re-stated what had already been established in *Akman, 1998*, namely that article 7(2) Decision 1/80 was not to be interpreted restrictively (para. 23). Hence, a need for temporal concomitance between the worker's presence in the host state and the child beginning vocational training there could not be read into that article. The result was an autonomous right of the child to access the employment market in the host state. In *Teixeira, 2010* and in *Ibrahim, 2010* the question came up whether article 12 Regulation 1612/68 required the primary carer of a child in education to have sufficient resources as a condition for the right of residence based on that article. The Court had recourse to *Baumbast, 2002* where it had ruled that article 12 was not to be interpreted restrictively (para. 67 and para. 52, respective-

80 Interestingly, in a judgment of the same day, *Hartmann*, *2007*, which also dealt with article 7(2) Regulation 1612/68 in a constellation that was only slightly different, the Court did not mention the broad interpretation of that article at all.

81 In *Chakroun*, *2010* the Court transposed broad interpretation to the context of Directive 2003/86 on family reunification by third country nationals on the basis of *Metock*, *2008*. The Court refused to interpret the provisions of this Directive restrictively, too (para. 64). This led to the conclusion that for the purpose of applying the income requirement in article 7(1)(c) Directive 2003/86 a distinction was not to be drawn based on when the family concerned had been constituted. The Court also applied some broad interpretation akin to second branch logic in para. 43, ruling that article 7(1)(c) was to be interpreted strictly, because the general rule was that family reunification was to be authorized. That interpretation was put forward based on effectiveness and without any reference to internal market law. On a different note, in *Bosmann*, *2008* the national court enquired whether article 13(2)(a) Regulation 1408/71 had to be interpreted restrictively (para. 13). The Court did not formulate its answer in terms of broad or narrow interpretation, but ruled that that article did not preclude German legislation from applying in addition to the legislation of the state of employment, thus essentially validating the narrow interpretation the national Court had alluded to. Moreover, the Court also sanctioned a restrictive interpretation of article 10(1)(a) Regulation 574/72 at which the referring Court had hinted, too (para. 13). But again the Court refrained from using any terms of broad interpretation.

ly). Based on that argument the Court rejected the need for self-sufficiency under article 12 Regulation 1612/68.

In *Lassal, 2010* the Court drew on the broad interpretation of the provisions of Directive 2004/38 posited in *Metock, 2008* (para. 31). Given that broad interpretation, it did not matter whether the five year-period of residence required for the right to permanent residence to arise had been completed before the date for transposition of the Directive or after.

Very broad establishment

The 'very broad' interpretation of the concept of establishment put forward in *Gebhard, 1995* for the first time has become a regular occurrence in the present. In *Commission v. Austria (self-employment), 2008* the Court made reference to that broad concept (para. 24) to find that self-employed workers in Austria came within the freedom of establishment in spite of Austria's claim that those self-employed persons circumvented the limitations of the free movement of workers applicable to the new member states. (As to the broad interpretation under the second branch applied in this case see below.)[82] In *Filipiak, 2009* the Court again reiterated that 'very broad' understanding of establishment (para. 52). However, the Court could not rule out that the freedom of services was applicable at the same time, because it was unclear whether the person concerned, in addition to being part of a partnership, also provided services. The Court therefore proceeded to examine both freedoms. In *Stoß, 2010* and *Winner Wetten, 2010* the Court proceeded in the same way, after having referred to the broad concept of establishment (para. 59 and 46, respectively). It was for the national court to decide which freedom, freedom of services or freedom of establishment, was in fact applicable. The Court then went on to examine both freedoms.

In *Attanasio, 2010* the Court again delimited the freedom of establishment from the freedom of services. It began by reiterating the very broad concept of establishment (para. 36). In the following the Court analysed only the freedom of establishment, because the operation of a gas station implied a stable and continuous basis. In *Bejan, 2010*, the Court proceeded in exactly the same way as in *Attanasio, 2010*, after having made reference to the very broad concept of establishment (para. 41). The Court then again examined exclusively the freedom of establishment, as the establishment in Romania of an insurer established in another member state was concerned. In contrast, in *Schmelz, 2010* the Court rehearsed the very broad concept of establishment (para. 37), but found that the freedom of services was to be applied exclusively, because the apartment Ms Schmelz owned in Austria was not actively managed.

82 *Elisa, 2007* was a free movement of capital case in which the Court distinguished that freedom from the freedom of establishment. It referred to the broad concept of establishment (para. 63), but found that free movement of capital applied, because the real estate concerned typically was not actively managed. In a similar vein, the Court in *Glaxo, 2009* found, after having declared the concept of establishment as being very broad (para. 46), that the freedom of capital was applicable, in essence because the capital aspects prevailed in the case at issue.

In *Commission v. Austria (notaries), 2011* the Court recited the very broad concept of establishment again (para. 77) to find that the freedom of establishment applied to notaries.[83] (For the broad interpretation under the second branch in the notaries-cases, see below.) Finally, in *A Oy, 2012* the Court transposed the broad interpretation of the concept of establishment to the freedom of establishment under the European Economic Area Agreement. The Court did not cite the broad concept to justify the application of the freedom of establishment rather than the freedom of capital to an exchange of shares involving a Norwegian company; instead, the Court referred to it when explaining the meaning of the freedom of establishment as it was to be transposed to the European Economic Area.

b) Second branch: narrow exceptions from rules

The second branch of broad interpretation – understanding the rule broadly and the exception narrowly – has grown disproportionately in the present. A long series of judgments had recourse to second branch logic. In the year 2007 alone, nine judgments were relevant under the second branch. First, in *Perez Naranjo, 2007* the Court put forward the strict interpretation of the exception in articles 4(2)a and 10a Regulation 1408/71 (para. 29), thus tying in with the *Jauch, 2001*-line. The Court abstained from mentioning third branch logic, though, and held article 10a applicable after a thorough examination of the properties of the French supplementary allowance at issue. As a result, the benefit was not any longer exportable. *Commission v. France (supplementary allowance), 1990* was thus overruled as a consequence of the amendments in articles 4(2)a and 10a Regulation 1408/71.

Derogations, connecting with first branch

Next, in *Commission v. Netherlands (automatic expulsion), 2007* the Court returned to the public policy exception, confirming that it was to be interpreted strictly for it derogated from the fundamental freedom of movement. Its scope was not to be determined unilaterally by a member state (para. 42). The Court then ruled that an automatism in expulsion was not entirely excluded by the Dutch legislation. That legislation was therefore not in accordance with Directive 64/221. In this judgment, broad interpretation under the first branch, i. e. the broad understanding of the safeguards contained in Directive 64/221 (see above) therefore was combined with second branch logic to reach the conclusion that the Netherlands had infringed Union law. In *Polat, 2007* the Court applied the very same passage as to the strict view of the public policy derogation within the context of the Ankara Agreement, namely article 14(1) Decision 1/80 (para. 33). In combination with other expulsion case-law the Court then found that the

83 In the other notaries-judgements, the very broad concept of establishment was applied in the same way: *Commission v. Belgium (notaries)*, *2011*, para. 78; *Commission v. France (notaries)*, *2011*, para. 68; *Commission v. Luxembourg (notaries)*, *2011*, para. 78; *Commission v. Germany (notaries)*, *2011*, para. 79; *Commission v. Greece (notaries)*, *2011*, para. 70; and *Commission v. Netherlands (notaries)*, *2011*, para. 51.

existence of several minor offences as such was irrelevant for the prospects of the offender committing other crimes.

Second branch and posted workers

In *Commission v. Germany (posted workers), 2007* the Court applied second branch interpretation within the context of the freedom of services, more specifically, the posting of workers. The Court found that the requirement imposed exclusively on foreign employment agencies to communicate any change of the place where the posted workers worked was discriminatory. As such it could only be justified by the express grounds contained in article 46 Treaty, which had to be interpreted strictly (para. 86). None of those express grounds had been argued. The same argument prevailed in *Laval, 2007*. In essence, the leaving out of account of foreign collective agreements in Swedish law amounted to discrimination in *Laval, 2007*. According to the Court, that discrimination was not justified, for the grounds argued did not come within the scope of those mentioned by article 46 Treaty, which had to be interpreted strictly (para. 117).

Further narrow derogations

In *Commission v. Austria (bio inspections), 2007* and *Commission v. Germany (bio inspections), 2007* the Court again, after *Servizi ausiliari, 2006*, reiterated that the official authority derogation was to be limited to what was strictly necessary to protect the legitimate interests of the member states (paras 35 and 44, paras 37 and 46, respectively). Accordingly, the Court found, after extensive examination of the powers of the private entities charged with tasks pursuant to Regulation 2092/91, that their connection to the exercise of official authority was not sufficient to justify application of the exception. In *Commission v. Italy (private security), 2007* the public order exception was said to be subject to a narrow interpretation, '[l]ike all derogations from a fundamental principle of the Treaty' (para. 49). Consequently the threat posed by foreign private security undertakings employing guards who had not sworn allegiance to the Italian Republic was not such as to warrant application of the exception. Interestingly, in that judgment the Court did not refer to a narrow construal of the official authority derogation when it held that the derogation did not apply for lack of a direct connection to the official authority.[84]

84 In *Jundt*, *2007* one party had argued that the justificatory ground of the cohesion of the tax system, i. e. the *Bachmann*, *1992*-ground, was subject to a strict interpretation (para. 46). The Court acceded to that argument in substance, but failed to frame its answer in terms of second branch logic. The Court ruled that the direct link required was missing between the contribution of taxpayers in general by reason of the tax they paid and the exemption from tax of expense allowances paid by universities (para. 69). Apart from that, the Court in that judgment did not expressly apply second branch logic to the official authority derogation, either. Instead, the Court reasoned on the basis of an abbreviated formula which in substance also amounted to a strict interpretation: '[T]hat derogation must, however, be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority […]' (para. 37).

Strict interpretation of non-exportability

In *Habelt, 2007* the Court next modified the consideration put forward in *Hosse, 2006*. In *Hosse, 2006* the Court had ruled that the Community legislature could validly derogate from the exportability of benefits, but that such derogations were subject to strict interpretation. In *Habelt, 2007*, the Court ruled along the same lines for the exclusion of benefits for victims of war from the scope of the Regulation in article 4(4). While the Community legislature could validly exclude certain benefits from the scope of the Regulation, such exclusions, like article 4(4), had to be interpreted strictly (para. 65).[85] Accordingly, that article did not apply to Germany's benefit of taking account of certain periods of contribution completed during the Third Reich. The benefit was granted not because of the war, but because contributions had been paid under German legislation. Hence, Regulation 1408/71 applied to the benefit at issue. With the same argument the Court included within the scope of Regulation 1408/71 the benefit that certain period completed under a foreign state's social security scheme were taken account of under German law (para. 108).[86]

Narrow derogations again

In the year 2008, broad interpretation under the second branch was again applied in numerous cases. In *Commission v. Luxembourg (posted workers), 2008* the Court dealt with Luxembourg's qualification of various national provisions as public policy under article 3(10) Directive 96/71, thus rendering them applicable to workers posted to Luxembourg. The Court answered that public policy provisions derogated from the free movement of services. As such they were to be interpreted strictly. Their scope was not to be determined unilaterally by a member state (para. 30). More specifically, the derogation in article 3(10) was an exception from the exhaustive list in article 3(1) that enumerated matters in which the host state could impose its law on the undertaking posting workers. That exception, hence, had to be construed strictly (para. 31). The Court then proceeded to reject every single obligation Luxembourg law had imposed under the heading of public policy. The Court moreover repeated the same second branch logic (in paras 49 and 50) when it rejected Luxembourg's automatic adjustment of remuneration.

In *Jipa, 2008* the Court repeated the imperative to interpret the public policy and security derogations from the free movement of persons restrictively in order to avoid that the member states defined their scope unilaterally (para. 23). That and arguments based on case-law led the Court to the conclusion that only the situation in the state ordering a measure against a person was decisive. It was that situation which determined whether the threat emanating from a person

85 The Court's reference to paragraph 37 of *Hosse*, *2006* was in all likelihood meant to refer to paragraph 25.

86 In *Habelt*, *2007*, the Court also invalidated the exception from exportability contained in an annex to Regulation 1408/71 for certain German benefits. In doing so, the Court did not apply any second branch broad interpretation.

was such as to justify a measure against him, rather than the situation in another state. In *Commission v. Italy (ship officers), 2008* the Court applied *Marina Mercante, 2003* and *Anker, 2003* to Italy's requirement that ship captains be of Italian nationality. The Court referred to the strict interpretation of the public service derogation from free movement in article 39(4) Treaty (para. 15). In contrast, in *Commission v. France (ship officers), 2008*, a decision of the same date with the same content, the Court did not refer to second branch logic. Later on, *Commission v. Greece (ship officers), 2009* applied the very same logic as *Commission v. Italy (ship officers), 2008* (para. 29).

In *Commission v. Austria (self-employment), 2008*, in which the Court had already applied interpretation under the first branch as to the broad concept of establishment, the Court also stated that the public policy derogation from free movement was subject to a narrow interpretation (para. 35), thus bringing together the first and the second branch, though only very loosely. Together with a lack of a serious, present threat this made the Court reject Austria's argument in favour of a restriction of the freedom of establishment because of a vaguely alleged phenomenon of bogus self-employment.

Narrow exceptions from recognition of driving licences

In a series of judgments the Court in 2008 came back to the strict interpretation of the exception from mutual recognition of driving licences in case of sanctions, which (the strict interpretation) had first been advanced in *Kapper, 2004*. In *Wiedemann, 2008* and *Zerche, 2008* that strict interpretation was routinely reiterated as part of a block of case-law (paras 60 and 57, respectively). The Court ultimately concluded that recognition need not have been granted when the residence requirement had not been satisfied. In *Möginger, 2008* the Court then confirmed that a licence issued abroad need not have been recognized when it had been issued during the blocking period a state had ordered. This was valid even if the licence had only been *used* after the blocking period had expired. The Court came to that conclusion after having re-cited the second branch logic applied in the preceding cases (para. 37). In *Weber, 2008*, in turn, the Court again rehearsed the same second branch logic (para. 29). It then found that the authorities did not have to recognize a licence which was issued abroad while the authorities were in the course of adopting sanctions.

The second branch logic with regard to the withdrawal of driving licences was continued in 2009 in *Schwarz, 2009*. In that case the Court routinely recapitulated the restrictive interpretation of the exception from mutual recognition (para. 84). Yet the Court sanctioned the refusal to recognize the Austrian licence at stake, because it had been issued before the German licence which had been withdrawn and a test of the fitness to drive had not been passed after the withdrawal.

In *Wierer, 2009* the Court then slightly modified and expanded broad interpretation. Before this decision, second branch logic had always been applied with regard to the refusal to recognize a driving licence issued abroad in the light

of a domestic withdrawal of a licence, in particular pursuant to article 8(4) Regulation 91/439. In *Wierer, 2009* the Court then applied second branch interpretation to the authorization established in *Wiedemann, 2008* and *Zerche, 2008* to take exception from mutual recognition if it was evident from the foreign licence itself or other irrefutable evidence stemming from the state that had issued the licence that the residence condition had been disregarded. That exception, according to the Court, was not to be understood broadly, else mutual recognition became nugatory (para. 52). Hence, the sources indicating that the residence requirement had been disregarded were exhaustively enumerated in *Wiedemann, 2008* and *Zerche, 2008*.

Later on, in *Scheffler, 2010*, the Court again rehearsed the narrow interpretation of the exception from mutual recognition of driving licences (paras 62-3), but ultimately left it to the national court to decide whether a report issued after a new licence had been granted abroad – a report that related to conduct having taken place before the new licence was issued abroad – cast doubt on the present fitness of the driver concerned to drive. The Court only indicated that that appeared not to have been the case.

Exception from the free choice of one's lawyer

In *Eschig, 2009* the Court next applied second branch interpretation to Directive 87/344 on legal expenses insurance. The Court ruled that the authorization in article 5 to take exception from the rule of free choice of one's legal representative was subject to narrow interpretation and hence could not be applied by analogy (para. 59). Therefore, the exception was not applicable outside the specific cases to which it applied pursuant to the wording of the article, i. e. cases arising from the use of road vehicles.

Derogations, again

In *Commission v. Portugal (vehicle inspection), 2009* the public authority exception pursuant to article 45 Treaty was again applied. The Court stated the usual second branch approach limiting the derogation from the freedom to what was strictly necessary to protect the legitimate interests of the member states (para. 34). However, before that, the Court made it clear that the public authority derogation was applicable not just to discriminatory measures, but also to mere restrictions (para. 33).[87] After having examined the facts the Court then rejected application of the derogation for lack of a direct connection between the bodies taking roadworthiness tests for vehicles and official authority.[88]

87 On the face of it, this second point (in para. 33) could be considered a refusal by the Court to apply the exception restrictively. Yet another perspective seems equally valid, namely that the Court in essence applied *a maiore ad minus*-logic in ruling that measures which were less restrictive of the freedom – mere restrictions – were susceptible to justification on an equal level as more restrictive measures, viz. discriminatory measures.

88 In a series of cases involving imported military goods, the Court ruled that the public safety derogations pursuant to *inter alia* articles 39, 46, and 58 Treaty, were not to be read so as to remove public security issues from the scope of Community law. In addition, articles 296 and 297 Treaty, as derogations from fundamental freedoms, were to be interpreted restrictively (*Commission v. Finland (mili-*

In *Commission v. Germany (posted workers), 2010* the Court applied the derogations in article 46 Treaty relating to public policy, security, and health in the same way as in *Commission v. Germany (posted workers), 2007* and *Laval, 2007*. The grounds mentioned were the only derogations that could lawfully be relied upon to justify discriminatory measures and they (the derogations) had to be interpreted strictly (para. 48). The arguments Germany put forward in justification of the refusal to extend the benefits of the Germano-Polish convention to undertakings established in other member states did not come within the scope of those express derogations. Hence, they were inadmissible.

Further second branch interpretation

After that, two more judgments applied broad interpretation under the second branch in secondary legislation. In *Commission v. Poland (broadband internet), 2010* article 27 Framework Directive 2002/21, a transitory provision, was at issue. It constituted a derogation from the general rule that the preceding Directive 98/10 was abolished in that the article authorized that certain measures adopted under the preceding Directive remained valid. As such it was to be interpreted strictly (paras 50 and 65) and did not include measures concerning high-speed internet, because the preceding Directive did not apply to those measures in the first place. *Volvo, 2010* was about the exception in article 18 Directive 86/653 from the commercial agent's right to indemnity in case of the agent's default which led to the contract being terminated. For the Court, that exception from the right to indemnity was not, as an exception from the rule, to be extended to become applicable in situations when the contract had already been terminated and the agent's default came to light only subsequently. Else an additional ground to deprive the agent from the indemnity was added, whereas no such ground was expressly provided for by the directive (para. 42).[89]

Back to derogations

Sayn-Wittgenstein, 2010 again concerned public policy, which as a derogation from a fundamental rule was to be interpreted strictly (para. 86). The prerequisite threat to a fundamental interest of society was, however, considered to be present in the case at issue, in part owing to the discretion member states had in adopting public policy measures. Austria could lawfully rely on equal treatment of Austrian citizens before the law to abolish titles of nobility, even if that resulted in a Union citizen being hindered in the exercise of her freedom. *Metin*

tary equipment), *2009* paras 45-6; *Commission v. Sweden (military equipment)*, *2009* paras 43-4; *Commission v. Germany (military equipment)*, *2009* paras 68-9; *Commission v. Italy (dual use equipment)*, *2009* paras 45-6; *Commission v. Greece (military equipment)*, *2009* paras 50-1; *Commission v. Denmark (military equipment)*, *2009* paras 51-2; *Commission v. Italy (military equipment)*, *2009* paras 46-7; and *Commission v. Portugal (military equipment)*, *2010* paras 62-3).

89 In diploma recognition the Court stuck to the formula used in *Colegio*, *2006*, which is alike but not quite the same as second branch logic (see above). In *Van Leuken*, *2008*, the Court employed the very same formula – 'the scope of article 4(1) of the Directive [89/48], which expressly authorises compensatory measures, must be restricted to those cases where they are proportionate to the objective pursued,' para. 24 – to develop its differentiated approach allowing partial recognition.

Bozkurt, 2010 dealt with the public security derogation under the Ankara Agreement, namely article 14 Decision 1/80. That derogation was subject to strict interpretation and its scope was not be determined unilaterally by the states concerned (para. 56). The derogation and other related case-law was to be applied by the national court to the facts of the case.

Second branch in universal service

In the year 2011, the Court first applied broad interpretation under the second branch within the context of the Universal Service Directive 2002/21. According to the Court, article 8(1) was an exception to the rule prohibiting the imposition of specific obligations on operators individually. As such it was to be interpreted strictly (para. 31). Hence, essentially, only those specific obligations could be imposed on a designated universal service provider that related to the elements of universal service provision mentioned in articles 4 to 7 and 9(2). In particular, only the specific service provision by such a provider itself to the end-user was covered.

Further derogations

In *Commission v. Austria (notaries), 2011* and the other notaries-judgments the Court had applied the very broad concept of establishment (see above). The Court then connected this first branch interpretation with the second branch. It ordered the usual narrow interpretation of the public authority derogation so that its scope was limited to what was strictly necessary for the legitimate interests of the member states to be safeguarded (para. 83[90]). The Court then proceeded to examine and reject the direct connection to official authority for every single aspect of the activities of notaries. (That rejection, to be sure, concerned only the nationality requirement.)

Commission v. Portugal (real estate agents), 2011 again concerned *inter alia* the public authority derogation with regard to which the Court stated the usual second branch logic amid a long advance statement of case-law. In the following the Court struck down all restrictions Portugal imposed on real estate service providers.

In a series of cases in 2011, the public policy derogation was applied. In *Dickinger, 2011*, a gambling case, the public policy exception was again said to be subject to a narrow interpretation, because it derogated from a fundamental freedom (para. 82). The Court then left it to the national court to decide whether the effective supervision of those offering games of chance necessarily required them to be established in Austria.

In *Graf, 2011* the narrow understanding of the public policy derogation was transposed to the Agreement on Free Movement with Switzerland. The Court

90 Para. 84 of *Commission v. Belgium (notaries)*, *2011*; para. 74 of *Commission v. France (notaries)*, *2011*; para. 84 of *Commission v. Luxembourg (notaries)*, *2011*; para. 85 of *Commission v. Germany (notaries)*, *2011*; para. 76 of *Commission v. Greece (notaries)*, *2011*; and para. 57 of *Commission v. Netherlands (notaries)*, *2011*.

conceded with reference to internal market case-law that public policy within the meaning of the derogation in article 5(1) annex I of the Agreement could vary from state to state and be subject to variation in time. Yet its scope was not to be determined unilaterally by a state and it was subject to strict interpretation when it constituted a justification for a derogation from a fundamental rule such as equal treatment (paras 32-3). Germany's approach of not authorising a land lease by a Swiss farmer on the ground that it would have distorted competition and led to an unsound distribution of land did not possibly fit within that concept of public policy. Hence, it was rejected as incompatible with the equal treatment clause in the Agreement.

In *Aladzhov, 2011* the public policy derogation was, in turn, applied in a Union citizenship case, more specifically based on article 27 Directive 2004/38 on Union citizenship. The Court rehearsed the narrow understanding of the derogation to avoid unilateralism by the member states (para. 34) when faced with the question whether the home state of a Union citizen could impose a prohibition to leave the state as long as tax liabilities remained unsettled or unsecured. Yet the assessment of the facts, including the question whether the risk that the tax owed could not be recovered amounted to a threat to public policy meeting the standards of the case-law, was left for the national court to decide. The same is true for *Gaydarov, 2011*, which was handed down on the same day as *Aladzhov, 2011* and concerned almost the same constellation in Bulgaria (para. 32).

In *Ziebell, 2011*, the public policy derogation under the Ankara Agreement with Turkey was at issue. The Court refused to apply the guarantees contained in article 28(3)(a) Directive 2004/38 by analogy under article 14(1) Decision 1/80. Instead, article 12 Directive 2003/109 which addressed the status of third country nationals in the Union was the right frame of reference. In that context, the narrow understanding of the public policy clause as a derogation from a fundamental freedom which excluded unilateralism by the states concerned had to be applied to the expulsion of a Turkish second generation immigrant (para. 81). After having restated the rest of the expulsion case-law the Court appeared to indicate that the expulsion of the Turkish national concerned was not in accordance with the case-law. But the Court left the ultimate assessment to the national court.

In *P. I., 2012* the Court interpreted the concept of imperative grounds of public security in article 28(3) citizenship Directive. In this context the Court stated that the public policy and security derogation took exception from free movement and as such was to be interpreted restrictively and in a way that avoided unilateralism (para. 23). Accordingly, the Court directed the national court to apply the established expulsion case-law also with regard to article 28(3), while

conceding that certain particularly serious crimes committed by an individual against a child could come within the scope of 'imperative grounds'.[91]

Second branch in secondary law

A few cases of broad interpretation also concerned secondary legislation in the year 2011, among them *Commission v. Ireland (direct insurance), 2011*. The first non-life insurance Directive 73/239 contained an exemption from the requirements of the directive which (the exemption) had covered a specific Irish insurance body when it entered into force. Thereafter, the Irish legislature repeatedly changed the law governing that body, expanding its functions. The Court found that the exemption from the obligations in the Directive had to be interpreted restrictively, since 'derogations or exceptions to a general rule must be interpreted narrowly' (para. 44). As a consequence, the exemption no longer covered the Irish body since its role and functions had been expanded by law. Another case in which second branch logic was applied in secondary legislation was *Commission v. Spain (TV ads), 2011*, in which the duration of certain television spots that were akin to advertisements and the corresponding qualification under Directive 89/552 were at issue. The Court admitted that the derogations from the freedom of services in the Directive were subject to strict interpretation when they were not expressed in clear and unequivocal terms pursuant to *ARD, 1999* (para. 48). However, the restriction on broadcasting time of advertisements was to be applied to any form of advertisements broadcast between programmes or during breaks, unless some other forms of advertisements were clearly disadvantaged. Hence, the time-wise restriction had to be applied to other forms of advertisements that were only slightly longer than the usual ad spot.

More second branch and driving licences

In the year 2012, broad interpretation under the second branch began with recognition of driving licences in *Akyüz, 2012*. The Court took recourse to the narrow interpretation of the exception from mutual recognition allowing the refusal to recognize a licence in case of sanctions. First, the Court restated that interpretation as part of an advance statement of case-law (paras 45-6) leading it to a refusal to equal a first issue of a licence with the situation when a licence was withdrawn. Then the Court reiterated that narrow interpretation to justify the limitation of information sources that testified the lack of residence of the person concerned in the issuing state (para. 65). In that regard, the transmission of such evidence via the diplomatic representation of the host state was valid. In *Hofmann, 2012* the Court next confirmed that the second branch interpretation applied to article 8(4) Directive 91/439 remained valid with regard to article 11(4) of the new Directive 2006/126 (para. 71) – as did the rest of the case-law

91 Interestingly, in *Tsakouridis*, *2010* the Court refrained from applying any broad interpretation of the second branch when construing the ten year-period of residence in the host state required for enhanced protection and when interpreting the notions of 'serious grounds of public policy or public security' in article 28(2) Directive 2004/38 and 'imperative grounds of public security' in article 28(3), although it set a very high threshold for the application of these articles in expulsion contexts.

regarding mutual recognition – despite the transformation of the option not to recognize a driving licence into an obligation.

Narrow student loans

In *Commission v. Austria (transport fare), 2012*, the Court established that article 24(2) citizenship Directive was to be interpreted narrowly as a derogation from equal treatment (para. 54). Consequently, the article only covered student loans and grants, in contrast to general maintenance aid by means of reduced transport fares for students. The final result was that the criterion requiring a genuine link with the host state society was not complied with in that Austria relied on the need to receive an allowance in Austria. The judgment in *Commission v. Austria (transport fare), 2012* was followed up and clarified by *L.N., 2013*. In this judgment – it was mentioned above – the Court applied first branch logic to construe the notion of a 'worker' broadly. The Court combined that interpretation with the narrow reading of article 24(2) citizenship Directive under the second branch, bringing the two branches together. That article released states from the obligation to offer migrant students maintenance grants on an equal basis. As a derogation from equal treatment it was subject to a narrow interpretation which had to be in accordance with the free movement of workers (para. 33). Hence, the Court concluded, the right of a migrant worker to equal treatment with regard to maintenance aid prevailed in case a student who was a Union citizen was working in the host state.

c) Third branch: the greatest possible freedom – moving beyond social security

In the third branch of broad interpretation, in which the *Hoekstra, 1964*-formula has been most prominent up to the present, only a few judgments have been relevant. *Hendrix, 2007* was the first. In this case, the same Dutch benefit was at issue as in *Kersbergen, 2006* and the Court first briefly confirmed the assessment made in that judgment of the lawfulness of the Dutch residence condition under articles 4(2)a and 10a Regulation 1408/71. However, the Court thereafter referred to the *Hoekstra, 1964*-formula – 'the greatest possible freedom', by now re-named '*Jauch, 2001*' by the Court (para. 52) – in order to establish a link to the free movement of workers in article 39 Treaty and Regulation 1612/68. This marked the first time that the greatest possible freedom-formula played a role outside the context of the measures coordinating social security. The Court cited the need to ensure the greatest possible freedom for workers to justify why article 7(2) Regulation 1612/68 and non-discrimination had to be applied alongside with articles 4(2)a and 10a Regulation 1408/71. The consequence was that the residence condition the Netherlands imposed had to comply with non-discrimination and, in particular, had to be justified in the traditional sense, viz. beyond the mere special and non-contributory character laid down in article 4(2)a Regulation 1408/71. Ultimately, the Court considered the residence requirement lawful, but only because its effect was cushioned by a hardship clause in Dutch law.

Obviously, it would have been hard to fit the need for such a clause within the criteria applicable pursuant to article 4(2)a Regulation 1408/71, i. e. 'special' and 'non-contributory'. Hence, the Court preferred to apply article 7(2) Regulation 1612/68 over distorting article 4(2)a Regulation 1408/71 further. From the perspective of the third branch, this preference of the Court brought the *Hoekstra, 1964*-formula in contact with the free movement of workers, which was a novel development.[92]

After *Hendrix, 2007*, 'the greatest possible freedom' was next applied outside the context of article 4(2)a Regulation 1408/71. In *Chuck, 2008* the Court had to answer the question whether aggregation of insurance periods completed in Denmark and the Netherlands had to be applied pursuant to Regulation 1408/71 when the national of a member state concerned resided outside the Union, in the United States. In the absence of any clear indication in the Regulation the Court cited the aim of 'the greatest possible freedom' for migrant workers to give an affirmative answer (para. 28). Suitably the Court referred to *Belbouab, 1978* and *Buhari Haji, 1990*, which dealt with similar situations as *Chuck, 2008*, rather than to the latest third branch case-law which was tailored to a considerable extent to article 4(2)a Regulation 1408/71. The third branch then went still for more than three years.

Revival of third branch

The third branch was, however, revived with *Da Silva Martins, 2011*. In this case the Court availed itself of the 'greatest possible freedom' as a part of its justification of why the German care allowance had to be exportable in the specific context (para. 70). In *Hudzinski, 2012* the Court next had recourse to the *Hoekstra, 1964*-formula (para. 53) to underpin its decision that Regulation 1408/71 did not preclude Germany from granting child benefits, although Germany was not the competent state pursuant to the Regulation. In *Partena, 2012* the Court began the merits with 'the greatest possible freedom' for migrants workers as the aim of article 48 Treaty (para. 46). That led the Court to claim the power for the Union to define the term 'location' in the context of self-employment.

In *Dumont, 2013* the Court then confirmed Belgium's power – and obligation – to take into account for the purpose of an orphan's benefit certain periods of insurance the spouse of the deceased person had completed abroad. In coming to that conclusion the Court repudiated one of Belgium's arguments by reference to the *Hoekstra, 1964*-formula (para. 53). Finally, *Jeltes, 2013* concluded the Court's case-law under the third branch for the present. In *Jeltes, 2013* the Court

92 In *Perez Naranjo*, *2007* the Court applied second branch logic when qualifying a benefit under article 4(2)a Regulation 1408/71 (see above). Yet the Court failed to mention third branch logic, viz. the 'greatest possible freedom'. Since the Court reached the conclusion that the benefit met the requirements of that article and therefore was exempt from exportability, this judgment fits with *Skalka*, *2004* and *Kersbergen*, *2006*. *Commission v. Parliament (special benefits)*, *2007* also categorized certain benefits under article 4(2)a. Interestingly, the Court reached the conclusion that none of the benefits – except one part of a British benefit, potentially – could lawfully be exempted from exportability without applying either second or third branch logic.

made it plain that *Miethe, 1986* was not good law any longer under the new Regulation 883/2004. The new regulation of unemployment benefits, which made it mandatory for unemployed frontier workers to seek pecuniary benefits exclusively where they resided, overrode the authority of *Miethe, 1986* and the logic of the second offspring of the third branch, i. e. the *Mouthaan, 1976*-formula of the 'conditions most favourable', which had been at the heart of *Miethe, 1986*. In coming to the end of the case-law on broad interpretation for the time being, we witness what is very likely to be the end of the second offspring of broad interpretation.

d) Spin – in the first branch

The judgments in which broad interpretation spun the decisions are again of interest. While spin occurred regularly in the first and third branch, the second branch stands out with the most manifestations of spin. Let us briefly go through each branch individually to see where broad interpretation was effective. In the first branch, spin first manifested itself in the present in *Jia, 2007*. The broad interpretation of the free movement of persons provided some spin for the Court to define 'dependence'. However, the first branch-logic was part of a restatement of *Lebon, 1987*, which as a whole inspired the Court's conclusion. In *Alevizos, 2007* the broad worker notion stood at the beginning of the Court's reasoning, providing some momentum towards the final conclusion. Yet the spin was very limited, as the personal scope of article 39 Treaty was not the main issue the case had raised. In *Commission v. Netherlands (automatic expulsion), 2007* a broad interpretation of the safeguards contained in Directive 64/221 was instrumental for the Court's finding that those safeguards had to apply to unlawfully resident Union citizens, too. In addition, a milder sort of spin applied in that the narrow understanding of the public policy exception in part led the Court to the finding that under the Netherlands' legislation an unlawful automatism in expulsion was not entirely excluded.

In 2008, first, the broad interpretation of the provisions of the citizenship Directive 2004/38 was pivotal in *Metock, 2008* in reaching the conclusion that direct family reunification with third country nationals was possible, thus reversing *Akrich, 2003*. However, effectiveness, the wording of the relevant provisions, and the viability of the internal market also underpinned that conclusion. In *Petersen, 2008* the broad worker-formula mildly spun the decision. It was responsible, to a very limited extent, for including an unemployed person who had applied for an invalidity benefit within the scope of article 39 Treaty. In *Commission v. Austria (self-employment), 2008* spin was applied twice. First, the broad understanding of establishment provided certain spin. After having re-stated that understanding, the Court found that the self-employed persons concerned were within the purview of the freedom of establishment, irrespective of whether they circumvented the limitations of the freedom of workers. Second, the narrow interpretation of the public policy derogation was partly responsible for the Court not hearing Austria's argument that countering bogus self-employment was a

public policy imperative. In *Von Chamier-Glisczinski, 2009* spin seemed empty on the face of it. After having put forward the broad understanding of the term 'worker', the Court found the free movement of workers not to apply. Yet that non-applicability was due to the facts having been unclear rather than the Court's unwillingness to extend the worker-notion. Hence, true empty spin did not occur.

In *Genc, 2010* the broad worker-notion in the free movement of workers provided some momentum for the finding that very limited work amounted to 'work' within the meaning of the Ankara Agreement. Yet, in this judgment we clearly see that the broad understanding of 'worker' increasingly becomes part of a ritualistic restatement of the definition, blotting out possible spin. The broad understanding of 'worker' thus more and more becomes akin to an advance statement of practice. In *Van Delft, 2010*, in contrast, there was an element of empty spin. Despite the professed broad interpretation of 'worker' the Court refused to classify the persons concerned as 'workers'. However, the empty spin is put into perspective by the Court having established long before that such persons, viz. mainly pensioners, were not to be considered as workers. The point therefore hardly raised any doubts. Hence, the passage, like in *Genc, 2010*, should be seen more like a ritualistic statement which served to indicate that Union citizenship rather than the free movement of workers had to be addressed. In *Bekleyen, 2010* the refusal to interpret article 7(2) Decision 1/80 narrowly provided the Court with some of the impetus necessary to found a right of the child of former Turkish workers to access the employment market in the host state autonomously. In *Teixeira, 2010* broad interpretation of article 12 Regulation 1612/68 contributed some spin to the answer to question 2(b). It was part of the rationale explaining why self-sufficiency was not required under article 12 for the primary carer of a child in education. The same is obviously valid for *Ibrahim, 2010*. In *Lassal, 2010* the broad interpretation of Directive 2004/38 established in *Metock, 2008* stood at the beginning of the Court's reasoning on why periods of residence in the host state completed before the citizenship Directive became fully applicable counted towards the five year-period needed for the right to permanent residence. It spun the decision to a considerable degree. In *L.N., 2013* the combination of the broad worker notion under the first branch with a narrow reading of the exception in article 24(2) citizenship Directive produced strong spin for the Court to decide that student workers in the host state could rely on equal treatment with regard to maintenance aid.

Spin by very broad establishment

The 'very broad concept of establishment', put forward for the first time in *Gebhard, 1995*, also exerted spin. *Commission v. Austria (self-employment), 2008* was already mentioned. Further, *Filipiak, 2009* was interesting. The Court first put forward the broad understanding of establishment, but then found that the freedom of services could be applicable, too. Hence, *Filipiak, 2009* could be read as a case of empty spin. However, this is the point where the broad construal of

establishment is about to become part of a ritualistic, formulaic statement of what establishment is, a statement that does not play any role whatsoever in the decision – in this case whether services or establishment was at issue – like the broad understanding of 'worker'. Like the latter, it is immediately followed in the pertinent passage by the other elements defining the notion. The 'very broad concept' of establishment thus turned into a sort of advance statement of case-law. This was confirmed by *Attanasio, 2010*. In this judgment the Court used the broad understanding of establishment to begin the delimitation of freedom of services from freedom of establishment. However, broad interpretation was again more part of a definition ritualistically put forward than a formula that truly spun the decision. The same is valid for *Stoß, 2010*; *Winner Wetten, 2010*; *Bejan, 2010*; and *Schmelz, 2010*. In *Commission v. Austria (notaries), 2011* and the other notaries judgments the very broad concept of establishment was part of an advance statement of practice in an even more patent way. Apart from that, the second branch logic in the notaries judgments provided some momentum allowing the Court to reject the public authority derogation as not pertinent. In *A Oy, 2012*, in contrast, the 'very broad concept of establishment' was referred to in order to explain the meaning of establishment within the internal market and then to transpose the concept to the European Economic Area. In this context, broad interpretation provided no spin whatsoever, though.

Spin in the second branch

In the second branch of broad interpretation where broad rules combine with narrow exceptions spin occurred in many other cases besides those already mentioned in connection with the first branch. In *Polat, 2007* the narrow view of the public policy derogation contributed some spin, together with other case-law, for the decision of the Court to declare several minor offences in themselves as irrelevant. In *Commission v. Austria (bio inspections), 2007* and *Commission v. Germany (bio inspections), 2007* the narrow interpretation of the official authority derogation provided spin for the Court to ignore the connection between the activities of private supervisory entities and the exercise of authority. In *Commission v. Italy (private security), 2007* the narrow construal of the public order exception was instrumental in the Court's rejection of the oath of allegiance private security guards were required to take. The narrow understanding of provisions excluding certain benefits from the scope of Regulation 1408/71 in *Habelt, 2007* spun the decision towards applying the Regulation to the German benefits at issue.

In *Commission v. Luxembourg (posted workers), 2008* the strict interpretation of the public policy derogation came first and patently directed the decision towards a rejection of the requirements Luxembourg imposed on undertakings posting workers to Luxembourg. In *Jipa, 2008* some spin was applied by the Court's narrow interpretation of the public policy and security derogation. It made the Court focus on the situation in the state ordering a measure against a Union citizen rather than the situation in other member states.

In *Eschig, 2009* second branch logic provided spin against the extension of the exception Directive 87/344 contained. However, that potential extension was only one minor aspect of the question asked. In *Commission v. Portugal (vehicle inspection), 2009* the narrow interpretation of the public authority derogation imparted some spin. In part due to second branch logic the Court refused the connection of bodies testing the roadworthiness of vehicles with official authority.

Spin and driving licences

In *Wiedemann, 2008* and *Zerche, 2008* second branch interpretation was stated as part of an advance statement of case-law. Had it not been for that advance statement, empty spin would have occurred, since the Court had in fact broadened the exception by sanctioning non-recognition in case the residence requirement had been disregarded by the state issuing the driving licence. In *Weber, 2008* empty spin was somewhat clearer. The Court first hinted at the narrow interpretation of the exception allowing refusal of recognition of a driving licence issued abroad. Yet it then validated the refusal *in concreto*, because the licence had been issued abroad while the authorities were in the course of adopting sanctions. *Schwarz, 2009* also would have been a case of empty spin, but the second branch logic was encapsulated in an advance statement of case-law which slowed down the spin. The Court thus did not counteract spin by sanctioning Germany's refusal to recognize the Austrian licence issued previously. In contrast, in *Wierer, 2009* spin was strong. The narrow construal of the exception from the obligation to recognize driving licences issued abroad was instrumental in the Court's finding that certain evidence was inadmissible for the proof that the residence requirement had been disregarded.

Further spin in the second branch

In 2010, in *Commission v. Germany (posted workers), 2010* the narrow understanding of the derogations in article 46 Treaty spun the decision to some extent. Yet it was more the fact that Germany's arguments failed to fit within the grounds expressly mentioned in that article which was decisive, rather than the strict interpretation of the justificatory grounds as such. In *Commission v. Poland (broadband internet), 2010* the narrow interpretation of the transitory measure in article 27 Directive 2002/21 spun the decision. It was the foundation for the Court to reject the extension of the preceding Directive 98/10 to cover measures concerning high-speed internet.

Sayn-Wittgenstein, 2010 was a case of empty spin. The Court first pushed for a narrow interpretation of the public policy exception, but then turned against that spin. The margin of discretion of member states took precedence over the freedom of Union citizens. The effects of Austria's abolishing of titles of nobility on that freedom hence were lawful. In contrast, in *Gaydarov, 2011*, second branch logic as to the public policy and security derogations provided some limi-

ted spin towards indicating that the Bulgarian approach was unlawful. The ultimate assessment was left to the national court, though.

In 2011, in *The Number, 2011* the narrow construal of the exception in article 8(1) Universal Service Directive 2002/21 provided the initial spin. From that spin, at least partly, resulted the Court's finding limiting the obligations of universal service providers. In *Commission v. Portugal (real estate agents), 2011* the long advance statement of case-law extinguished most of the spin the second branch logic with regard to the public order derogation could have exerted. The public order derogation did not figure very prominently, either, among the grounds Portugal put forward to justify the restrictions it imposed on real estate agents established abroad. Some spin was provided by second branch logic in *Commission v. Ireland (direct insurance), 2011*. The narrow understanding of the exemption in the first non-life insurance Directive 73/239 led the Court to a close examination of the additional functions of the Irish insurance body, with the final result that the exemption no longer covered it. In *Graf, 2011* the narrow understanding of the public policy derogation in the Agreement with Switzerland clearly spun the decision against Germany's argument alleging distortion of competition and unsound land distribution.

Commission v. Spain (TV ads), 2011 was a clear case of empty spin. The Court conceded that the restriction of the freedom of services had to be construed restrictively, but then went on to interpret the limitation on broadcasting time for advertisements contained in Directive 89/552 – which was a restriction of free services – broadly, so that it included all forms of advertisement broadcast between programmes or during breaks, including those Spain had exempted time-wise from the restrictions by qualifying them as other ads not subject to the limitation in broadcasting time. In *Ziebell, 2011* the restrictive reading of the public policy derogation produced the slightest spin, although it was deeply imbedded in a longer statement of case-law. The Court seemed to edge the national court toward the finding that the expulsion of Mr Ziebell was unlawful under the expulsion case-law.

In the year 2012, spin occurred in three more cases in the second branch. In *Akyüz, 2012* the narrow derogation from the mutual recognition of driving licences had an impact two times. First, the spin was stronger in the refusal to equal the issuing of a licence for the first time with a withdrawal; second, the spin was weaker, becoming almost empty, in that the Court admitted an intermediary who transmitted the information from the 'home' state regarding non-residence. In *P. I., 2012* second branch logic made the Court apply the expulsion case-law also under article 28(3) citizenship Directive. In that sense the narrow interpretation of the public policy derogation spun the decision. However, that spin was neutralized to a large extent, even emptied, by the Court's broad understanding of what constituted an imperative ground. Crimes committed by an individual against another individual could possibly amount to such a ground. Yet this approach of the Court must certainly be seen on the facts of the case, i. e. in the light of the crime at issue having been the extraordinarily heavy abuse of a

child. Finally, in *Commission v. Austria (transport fare), 2012* the narrow construal of the derogation from equal treatment in article 24(2) citizenship Directive tipped the balance against the inclusion of more general maintenance aid in the exception. In relation to the requirement of a general link with the host state society the narrow interpretation of article 24(2) was a minor point, though.

Spin in the third branch

In the third branch of broad interpretation, *Perez Naranjo, 2007* is the first judgment to be mentioned as regards spin. It fits in with the remarks made with regard to *Skalka, 2004* and *Kersbergen, 2006*. *Perez Naranjo, 2007* was again a case in which second branch logic could be considered to have provided spin, but then the Court decided in the opposite sense, likening it to a case of empty spin. Yet, the narrow understanding of the exception in this judgment occurs more like an advance statement of case-law which puts spin into perspective. Apart from that, the judgment confirms what we have observed for the other judgments with regard to article 4(2)a Regulation 1408/71, namely *Jauch, 2001; Skalka, 2004*; *Kersbergen, 2006*; and *Hosse, 2006*: The Court simply omits the 'greatest possible freedom' when the benefit at issue is not supposed to be exportable.

In *Hendrix, 2007* the *Hoekstra, 1964*-formula was again clearly instrumental in the Court's disruptive finding that a hardship clause was required to soften the effects of the residence requirement that articles 4(2)a and 10a Regulation 1408/71 allowed the Netherlands to impose. The formula also provided the spin necessary to build a bridge from social security to the free movement of workers. We already noted above that in that regard *Hendrix, 2007* was clearly a novel judgment, for before that, the Court had always avoided bringing the *Hoekstra, 1964*-formula into contact with the free movement of workers. Interestingly, *Hendrix, 2007* can also be read as announcing a new approach that breaks with the spinning practice mentioning third branch logic only with regard to articles 4(2)a and 10a Regulation 1408/71, when the benefit concerned was, in the eyes of the Court, supposed to be exportable. That new approach was implemented in *Commission v. Parliament (special benefits), 2007*. In that judgment the Court essentially eliminated several benefits from the annex of Regulation 1408/71 for they failed to meet the criteria in article 4(2)a. However, in doing so the Court did not apply any second or third branch logic at all. Hence, *Commission v. Parliament (special benefits), 2007* can be understood as announcing that third branch logic would not any longer be applied functionally, with spin, when it came to the qualification of a benefit under article 4(2)a. Indeed, it seemed that broad interpretation altogether would not any longer be applied in relation to that article. This take is confirmed to some extent by the fact that the third branch then went quiet for more than three years. The only judgment that followed until mid-2011 was *Chuck, 2008* which concerned a different context, though. *Chuck, 2008* dealt with the aggregation of insurance periods for Union citizens residing outside the Union. The 'greatest possible freedom' provided the

necessary spin for the decision by the Court to apply the aggregation of periods of insurance completed in several member states even when the Union citizen was resident outside the Union at the moment when he applied for a pension. The third branch then went quiet for more than three years and with it, obviously, the phenomenon of spin.

Then, however, the 'greatest possible freedom' came back. In *Da Silva Martins, 2011* the formula was part of a broader advance statement of case-law concerning the aims of article 42 Treaty. Despite that, the formula can be seen to have provided some spin towards the decision enabling the exportability of a care allowance. In *Hudzinski, 2012* the *Hoekstra, 1964*-formula was again applied outside the context of article 4(2)a Regulation 1408/71. It served to bolster the decision of the Court, reached on the basis of other case-law, to allow the state which was not competent pursuant to Regulation 1408/71 to grant child benefits. In that function, however, the formula did not exert any spin. Next, in *Partena, 2012* the Court began with the *Hoekstra, 1964*-formula and thereby spun the decision to deny the member states the power to define the location where a self-employed activity took place. The formula was thus applied in the context of determining the applicable legislation. In *Dumont, 2013* the Court applied the 'greatest possible freedom'-formula to create some spin to reject the arguments Belgium had put forward to justify why a period needed to have been completed in Belgium for aggregation of periods completed abroad to become mandatory in case of orphan's benefits. Finally, we have already noted *Jeltes, 2013*. The judgment effectively declared *Miethe, 1986* dead under the new Regulation 883/2004, thus indirectly neutralizing any spin of the *Mouthaan, 1976*-formula, the second off-spring of broad interpretation, for the future.

e) Some conclusions from the present

In the present we observed the continuation of broad interpretation in all three branches. The broad interpretation of the worker notion in the first branch has become part of a routine. The Court has regularly cited it as part of the definition of the term 'worker'. In a similar vein, the 'very broad concept' of establishment stemming from *Gebhard, 1995* has become part of the Court's routine when explaining establishment, in particular to delimit it from the freedom of services. As a consequence of these routines, the broad interpretation of the two notions has become more like an advance statement of practice, though not being 'advance' in a localized sense. Consequently broad interpretation has lost some of its power here and spin cannot be discerned. In contrast, second branch logic has its heyday in the present. The use of a narrow interpretation of the exception from a rule has become much more frequent. The cases relevant under broad interpretation within the second branch have become relatively more numerous. Second branch logic has been routinely applied in secondary legislation, too.

At the end of the age of Maastricht, we observed that Union citizenship and the freedom of establishment possibly stood on the threshold of a development

mirroring the evolution in the free movement of workers and services. To recapitulate briefly, in the age of Maastricht and before, the freedom of workers and services was widened first by broad notions, narrow exceptions were added in, and a climax was reached by a sweeping broad understanding of the freedom itself, notably through the *Kempf, 1986*, *Lebon, 1987*, *Yiadom, 2000*-line of authority for workers and through the *Calfa, 1999*, *Deliège, 2000*, *Oulane, 2005*-line for services. Speaking broadly, those developments have been confirmed for workers and services in the present. More strikingly, in the present, Union citizenship has clearly crossed the threshold mentioned. The Court sweepingly declared secondary legislation implementing citizenship as worthy of broad interpretation in *Commission v. Netherlands (automatic expulsion), 2007* and even more clearly in *Metock, 2008* and *Lassal, 2010*. That first branch logic was seconded by interpretation under the second branch in *Commission v. Austria (transport fare), 2012* and *L.N., 2013*. Only *Sayn-Wittgenstein, 2010* ran counter to this trend. In the freedom of establishment, in contrast, corresponding clear evidence is not there. While 'the very broad concept' of establishment has become a regular occurrence, it has also been turned into a sort of advance statement of case-law which merely serves to delimit the freedom of services from the freedom of establishment. Perhaps this lack of evidence of the freedom of establishment crossing the threshold in the same way as the other freedoms is due to the interlinking between the freedom of services and the freedom of establishment. Frequently, services and establishment overlap. What the Court says of the one is valid for the other, at least sometimes. That might equally hold true for the broad interpretation applied to the freedom of services. Perhaps the freedom of establishment has sneaked across the threshold along with services. *Calfa, 1999*, for instance, is in all likelihood transposable from services to establishment for our concerns. Yet some uncertainty remains.

Apart from those broader trends, some more specific points are noteworthy. *Eschig, 2009* seems to have linked second branch logic involving narrow exceptions with a prohibition to reason by analogy, at least in secondary legislation. This approach relatively clearly conflicts with *Rebmann, 1988* where the Court had admitted reasoning by analogy for exceptions under certain circumstances. The situation not covered by the exception namely had to be closely connected to the situation it covered and the same grounds that had led to the establishment of the exception had to justify its application. The Court has so far not applied the approach in *Eschig, 2009* again. On a different, though related note the idea put forward in the age of Maastricht that second branch logic was connected to the explicitness of an exception seems to live on, though on a rather subliminal level. Remember that the idea had been posited in *Commission v. Italy (dentists), 1995* and *ARD, 1999*. The following judgments, *Klett, 2002*; *Commission v. Italy (direct insurance), 2003*; *Beuttenmüller, 2004*; *Kapper, 2004*; *Halbritter, 2006*; *Commission v. Greece (cabotage), 2004*; and *Honyvem, 2006*, all had failed to corroborate that approach though. Yet in the present, *Volvo, 2010* seems to have revived it. The Court ruled that additional exceptions to the

rule establishing the commercial agent's right to indemnity could not be created. The exceptions were limited to those explicitly mentioned. The revival was short-lived, though, if a revival it was. *Commission v. Spain (TV ads), 2011* intervened and revoked the limitation *ARD, 1999* seemed to have laid down. The Court admitted that *ARD, 1999* had made second branch logic authoritative in the absence of clear and unequivocal terms in secondary legislation. Nonetheless the Court proceeded to interpret the exception broadly in *Commission v. Spain (TV ads), 2011*. For lack of any further case-law in the present *Commission v. Spain (TV ads), 2011* for now must be read as a renunciation of the approach linking second branch logic with the explicitness of terms.

In the present the public policy exception has been quite dominant. The derogation was frequently applied. Conversely, second branch interpretation of the derogation lost some of its power, notably in the following judgments. In *Sayn-Wittgenstein, 2010* Austria's public policy concerns prevailed over the freedom of Union citizens, despite a professed narrow understanding of the freedom. In *Tsakouridis, 2010* the strict interpretation of the public policy and public security derogations was not even mentioned. *Dickinger, 2011* and *Aladzhov, 2011* both left the application of the derogation to the national court, although the Court saw a need for narrow interpretation. *Gaydarov, 2011* proceeded in a similar way. Arguably though, the Court stated more explicitly that the situation was not in accordance with the derogation. Yet ultimately the Court left the decision to the national court. *Graf, 2011* could be seen as counter-indicative in this regard. However, it only transposed second branch logic for the public policy derogation to the Agreement on Free Movement with Switzerland. *Ziebell, 2011*, in a sense, positioned itself in the middle of this case-law. The Court hinted at a narrow understanding of the public policy exception and implied that it might have been violated, but left the assessment under the Ankara Agreement to the referring court. In sum, it seems that a less aggressive understanding of the public policy derogation, playing down the effect of second branch logic, seems to be a trend of the day. Note, however, that some public policy decisions fall out with this trend (see above under spin).

In the third branch, *Hendrix, 2007* stands out for it finally connected the 'greatest possible freedom', the *Hoekstra, 1964*-formula which had been applied exclusively under social security, to the free movement of workers. The formula served to justify why the residence condition lawfully imposed pursuant to articles 4(2)a and 10a Regulation 1408/71 had to be assessed in addition under article 7(2) Regulation 1612/68, increasing the need for justification beyond the mere special and non-contributory character of the benefits. Has the bridge thus established been confirmed? The answer is not in the affirmative, at least for the moment. However, in the decisions following after *Hendrix, 2007* the 'greatest possible freedom' was applied outside the articles it had hitherto been typically applied to. The formula no longer turned around article 4(2)a Regulation 1408/71, or the Dutch transition (*De Jong, 1986* and *Spruyt, 1986*). The formula rather unlocked new fields, like the division of powers in *Hudzinski, 2012*, ag-

gregation in *Dumont, 2013*, the export of a care-allowance in *Da Silva Martins, 2011*, or the definition of Union terms like 'location' in *Partena, 2012*. Hence 'the greatest possible freedom' has broken free and begun to take wider influence in the case-law of the Court. Overall, we observe a movement from relatively obscure, highly specific constellations into the 'light'. That movement can be traced from the beginnings with *Hoekstra, 1964/Nonnenmacher, 1964* over *De Jong, 1986/Spruyt, 1986* to *Jauch, 2001* and, finally, the case-law initiated by *Hendrix, 2007*. That the latter case-law is new is evidenced also by *Commission v. Parliament (special benefits), 2007*. That judgment, it seems at least for the moment, has killed off third and second branch logic on broad notions and restrictive exceptions with regard to articles 4(2)a and 10a Regulation 1408/71. All the judgments following after *Commission v. Parliament (special benefits), 2007* that applied the 'greatest possible freedom' did so in the contexts of other articles (see above). Besides those profound developments in the third branch of broad interpretation, it appears that the first offspring of this branch, the case-law having begun with *Heinze, 1972* has continued to lay low in the present. Not a single judgment has tied in with that tradition. More drastically, the second offspring of the third branch, the *Mouthaan, 1976*-line of broad interpretation, was expressly cut off by the Court in *Jeltes, 2013*. Legislative amendment had explicitly revoked *Miethe, 1986*.

Beyond that, it is difficult to find a pattern or come to simple conclusions on the *power* of broad interpretive formulas. The above passages on 'spin' stand on their own. Having said that, spin occurred most regularly and strongly in the second branch on narrow exceptions, while it was quite frequent in the first and third branch on broad notions and the greatest possible freedom, too. In the first branch, two broad notions have lost some of their power in the present, namely the 'worker' and the 'establishment'. The idea that they must be interpreted broadly has become part of a standard statement which is put forward ritualistically. Hence, the notions no longer have any discernible effect. The situation here is similar as with advance statements of case-law. Besides, empty spin continued to occur with some regularity, as in fact have advance statements of case-law.

We conclude with the likely coming to an end of the extraordinary spinning phenomenon with regard to articles 4(2)a and 10a Regulation 1408/71. Remember that the Court in the past only mentioned the 'greatest possible freedom' in the context of these articles when a benefit was to be exportable. After this clearest form of spin by the 'greatest possible freedom' had first been confirmed in the present, it now seems to have come to an end with *Hendrix, 2007* and *Commission v. Parliament (special benefits), 2007*. However, although this clear form of spin seems to have vanished, it is not the end of the 'greatest possible freedom' as such. After *Commission v. Parliament (special benefits), 2007* the formula has found new application outside the context of article 4(2)a and 10a Regulation 1408/71. Yet in the new context – or rather the new contexts – in which the *Hoekstra, 1964*-formula was applied after *Commission v. Parliament (special*

benefits), *2007* the formula proves more alive than ever. The 'greatest possible freedom' continues to exert power and spin decisions in a broader field than ever.

II 'Coordinated'

In this chapter, the evolution of formulas of coordination is traced in the same way as with broad interpretation in the previous chapter, beginning with the early days of the case-law. The entire body of case-law of free movement of persons and services uncovered in the first part is scrutinized for the idea of coordination and for interpretive formulas that rely on it. After it is established where such formulas occur, their power – in other words the 'spin' they exert in the Court's decisions – is examined. What is meant by 'coordinated' and 'coordination' should become clear in the following section.

1 In the early days: until the mid-1970s

The origin of 'simply coordinated'

In the year 1971, the Court handed down the judgment in *Keller, 1971*. In this case, the French authority had applied aggregation and apportionment pursuant to Regulation 3 to calculate an old age pension. Yet the amount of the pension calculated on the sole basis of national law would have been higher, if periods of insurance completed exclusively in France would have been taken account of. The Court ruled that the pension had to be awarded on the basis of national law. As a consequence, Mr Keller was treated more favourably than a worker who had spent his entire career in France. In brief, Mr Keller in addition to the French pension received a pension in Germany. As a result, the overall amount of his pension was higher than a French pension could possibly be. The Court justified this more favourable treatment in the last paragraph. According to the Court, it was not due to Community law, but due to the inexistence of a common social security scheme. The Community approach 'depend[ed] on a simple coordination of national legislative systems which ha[d] not been harmonized' (para. 13).

The idea inherent in this passage of the national social security schemes being 'simply coordinated' was to make a strong career in the Court's social security case-law. However, it did not come out of the void. In 1967, the idea was already present in two judgments: *Colditz, 1967* and *De Moor, 1967*. In *Colditz, 1967* the Court was faced with the question whether all pensions needed to be fixed necessarily at the same time in the states concerned, viz. at the time the worker first applied for a pension in one state. The Court gave a negative answer, leaving the worker the more favourable option to continue to acquire pension rights in one state while in another a pension was already being paid. The answer of the Court began with the fact that Regulations 3 and 4 had not set up a 'common system of social security'. 'Separate systems' were allowed to continue to exist 'creating separate claims against separate institutions against which the recipient ha[d] direct rights either under national law or national law supple-