comply with such rules, i. e. including those residing abroad; compliance could be monitored; and lawyers could lawfully be required to reside in the vicinity of the courts they served. However, a service address at the relevant place equally sufficed to guarantee compliance with the professional rules. Finally, the Court held that a host state could take measures against providers that were established abroad and principally directed services at its territory, and thus intended to avoid the professional rules of the host state from being applied to them. *Coenen, 1975* essentially confirmed this approach. Where the person concerned, *in casu* an insurance intermediary, had a place of business in the state where the service was provided, it was unlawful to require residence in addition.

Van Wesemael, 1979 dealt with employment agencies for entertainers. The Court added the aspect of the dual burden. While the need for supervisory rules could justify certain measures, as held in *Van Binsbergen, 1974* and *Coenen, 1975*, the state where the service was provided would have to take two elements into account, namely, on the one hand, a licence that had been issued by another member state under comparable circumstances; and, on the other hand, proper mechanisms of supervision in other member states (para. 30). The Court also rejected Belgium's argument that a previous International Labour Organization Convention justified more restrictive requirements than those allowed under the free movement of services (paras 31-8). In *Koestler, 1978*, finally, the Court ruled that the free movement of services was not violated when debts arising out of a contract akin to a wagering contract which (the debts) were enforceable in the state where they had arisen could not lawfully be enforced in another state. That applied, however, only in so far as debts of that kind were unenforceable as a matter of principle in the latter state.

III The 1980s

During the 1980s the net of case-law in social security was knit tighter. The Court handed down 90 judgments in social security and half a dozen judgments in the free movement of workers in which social security was also addressed. However, in the course of this decade the freedom of workers significantly expanded, too, numbering 55 judgments and a handful of decisions in which the freedom of establishment and services overlapped with the freedom of workers. Establishment and services still maintained a relatively low profile with 21 and 18 cases, respectively, again with some decisions overlapping.

1 Workers

In the judgment in *Levin, 1982* the Court for the first time addressed the concept of a 'worker' in article 48 Treaty and Regulation 1612/68. The Court decided, in

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line with what *Hoekstra, 1964* had laid down for the definition of a 'worker' in social security, that 'worker' was a concept that needed to be interpreted uniformly throughout the Community. Part-time work was also 'work', provided it was a genuine and effective economic activity of more than purely ancillary and marginal scale (para. 17). Moreover, the motives of the person for making use of the freedom to move were irrelevant. In *Kempf, 1986* the Court built on *Levin, 1982*. The part-time work of Ms Levin had generated income below the minimum means of subsistence, but she had been able to supplement it with income from her husband and real property. *Kempf, 1986* added that a low income based on 12 lessons given per week, but supplemented in accordance with domestic law by contributions from public sources of the host state still fulfilled the requirements of 'work' in article 48 Treaty. In *Lawrie-Blum, 1986* the Court included teacher trainees in the scope of the worker definition. It clarified that a person was a worker, if she or he 'perform[ed] services for and under the direction of another person in return for which [she or] he receive[d] remuneration' (para. 17). *Lair, 1988* clarified that the status of a worker and the rights flowing from it could be maintained even after the employment had ended (paras. 33 et seq.). The Court in *Steymann, 1988* added that the activities within a Bhagwan community, which (the activities) were typically not directly remunerated but for which the community provided an 'indirect quid pro quo' (para. 12), could constitute work under article 48 Treaty provided that the activity was effective and genuine. *Bettray, 1989* excluded from the scope of 'work' in article 48 Treaty activities in a drug rehabilitation programme, because they were mainly designed to allow the person concerned to recover the ability to take part in the employment market (para. 17). Yet neither the public origin of the funds to pay for the activities nor the level of productivity of the persons concerned were relevant for the categorization of an activity as 'work' (para. 15). *Agegate, 1989* clarified that fishermen who received remuneration in the form of a share of the fish they caught could be 'workers'. The definition of 'worker' in article 55 of the Act of Accession of Spain and article 48 Treaty were congruent. An assessment was needed case by case, factoring in the distribution of risks, working hours, and the degree of liberty. That payment consisted in a 'share' and that remuneration was calculated on a collective basis was not decisive (para. 36). Finally, in *Danmols, 1985* the Court refused to apply the above definition of a 'worker' in social policy where only partial harmonization had been achieved by a Directive on safeguarding employees' rights in case of transfers of undertakings (Directive 77/187) (paras 24-6).

'Work' could also occur outside the Community, as had already been indicated in *Walrave, 1974* (paras 28-9). In *Prodest, 1984* the Court held that an employment contract by a Belgian national with a French company created a sufficiently close link to the territory of a member state so that the requirements of 'work' were met, although a part of the activities under the contract was performed outside the Community. In *Lopes da Veiga, 1989* the Court found with reference to *Commission v. France (maritime worker quota), 1974* that employ-

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ment of a national of a member state aboard a ship registered in another member state constituted 'work' for the purpose of Regulation 1612/68, even though some work might be carried out outside the territory of the Community. There was a link within the meaning of *Prodest, 1984* to the territory of a member state.

Advantages

Most of the judgments of the 1980s in free movement of workers dealt with article 7(2) Regulation 1612/68. *Reina, 1982* was the first of the decade to deal with that article. The Court ruled on the basis of the definition of social advantages in *Even, 1979* that a childbirth loan was a social advantage, although the benefit pursued a demographic aim and was granted on a discretionary basis. In *Castelli, 1984* the Court decided that the minimum income guaranteed to the elderly was a social advantage under article 7(2) Regulation 1612/68. Hence it had to be granted to the dependent mother of a migrant worker who had retired. More specifically, a convention establishing reciprocity could not be required as a prerequisite. This judgment was confirmed in *Frascogna, 1985* for the mother of an active migrant worker and re-confirmed in *Frascogna II, 1987*. *Frascogna, 1985*, moreover, rejected a residence requirement that did not apply on an equal basis to a state's own nationals, or more precisely their relatives in the ascending line (para. 24). In *Scrivner, 1985* and *Hoeckx, 1985* – judgments that were both delivered on the same day – the Court included Belgium's minimex, a benefit guaranteeing minimum means of subsistence, in the benefits covered by article 7(2) Regulation 1612/68, though not in the benefits covered by Regulation 1408/71 (as to the latter, see below). In *Hoeckx, 1985* the Court additionally made it clear that a discriminatory residence requirement was not lawful. *Deak, 1985* added that article 7(2) Regulation 1612/68 comprised the benefit a migrant worker enjoyed when her dependent descendant could claim a tideover unemployment benefit. Moreover, the nationality of the descendant was irrelevant. *Mutsch, 1985* added a further aspect to article 7(2) Regulation 1612/68. According to *Mutsch, 1985* it amounted to a social advantage for the residents of a region of a member state to be able to conduct legal proceedings in the language that was one of the official languages of that member state. This privilege therefore had to be extended to the speakers of the same language from other member states. In *Reed, 1986* the Court decided that the fact that one was able to be accompanied by an unmarried partner also constituted a social advantage under article 7(2) Regulation 1612/68. If reunion with partners was possible in a member state, that possibility had to be open to migrant workers as well.

Educational advantages

One of the branches of the case-law on article 7(2) Regulation 1612/68 dealt with educational advantages. The first case in point was *Forcheri, 1983* where the Court after having given a first indication in *Casagrande, 1974* brought education into the focus of Community law. To levy higher enrolment fees for voca-

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tional studies from the wife of a worker was discriminatory.[25] The Court detached this approach from the free movement of workers and article 7(2) Regulation 1612/68 in *Gravier, 1985* and expanded it on the basis of article 7 Treaty to students who did not work and did not have any link whatsoever to a migrant worker. The Court moreover sent a very broad definition of 'vocational training' (para. 30), including courses in strip cartoon art. *Gravier, 1985* was followed up by *Commission v. Belgium (vocational training, interim), 1985* in which the Court granted interim measures, because Belgium did not apply the *Gravier, 1985*-ruling to the enrolment fees at universities. The so-called 'minerval' was charged as a supplementary fee from foreign students (para. 2). However, the infringement procedure was later declared inadmissible in *Commission v. Belgium (vocational training), 1988*, because the periods set by the Commission to reply to the letter of formal notice and the reasoned opinion were too short. On the very same day that the inadmissibility ruling in *Commission v. Belgium (vocational training), 1988* was handed down, *Blaizot, 1988*, however, clarified the point. According to *Blaizot, 1988* university studies in general were included in 'vocational training' within the sense of *Gravier, 1985*. Exception was made though for courses intended to improve 'general knowledge' (para. 20). Moreover, while the Court in *Barra, 1988* had refused to limit the application of *Gravier, 1985* in time, in *Blaizot, 1988* the Court decided that *Gravier, 1985* applied only *ex nunc* as far as university education was concerned, except for those applicants who had already brought proceedings (paras 25 et seq.). *Humbel, 1988* soon thereafter explained that a programme of studies followed by a student at university would have to be assessed as a whole and in the light of its purpose (para. 11) to determine whether it constituted vocational training. The assessment was, however, not to be made on the basis of the individual years of the programme, if the 'programme form[ed] a coherent single entity' (para. 12) which could not be divided into parts. *Commission v. Belgium (students), 1988* was another follow-up case to *Gravier, 1985*. Belgium still applied a distinction based on the nationality of students in the financing of higher education establishments other than universities. More specifically, only a limited number of students of nationality of member states other than Belgium had been factored in to determine the amount of state financing provided for such establishments. The Court rejected this approach under the *Gravier, 1985* line of authority (para. 8).

Maintenance grants

The judgment in *Lair, 1988* refused to extend this autonomous approach based on article 7 Treaty to maintenance and training grants. Such grants were outside the scope of Community policy. Only workers could therefore claim maintenance grants on a non-discriminatory basis pursuant to article 7(2) Regulation

25 The judgment considered officials employed by the European Community to have the status of migrant workers, see para. 9.

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1612/68. The Court, however, made sure that even those who had ceased work were considered as 'workers' and could thus validly claim maintenance grants, provided that there was 'some continuity between the previous occupational activity and the course of study' (para. 37). In short, the purposes of the previous work and the studies had to be related. Persons who had become unemployed involuntarily and were required to retrain were in addition exempt from this condition of continuity. However, in a judgment of the same day as *Lair, 1988* – *Brown, 1988* – the Court held that a future student who bridged the gap-year before beginning studies by working in a company, undertaking so-called 'pre-university industrial training' (para. 3), in the state where he was going to study could not rely on article 7(2) Regulation 1612/68 to lay claim to a maintenance grant in the host state, despite being a 'worker'. The reason was that his work was only ancillary to the studies to be financed by the grant (para. 27). In *Matteucci, 1988* the Court followed up on the ruling in *Lair, 1988* as to the right of migrant workers to claim maintenance grants under article 7(2) Regulation 1612/68. The Court held that maintenance grants in application of a cultural agreement between two member states had to be opened up for migrant workers.

Family members

The Court also dealt with various matters concerning families under the free movement of workers. In the judgments already discussed in *Forcheri, 1983*; *Castelli, 1984*; *Frascogna, 1985*; and *Deak, 1985* the Court granted family members – in accordance with *Cristini, 1975* and *Inzirillo, 1976* – the benefit of article 7(2), essentially by channelling it through the migrant worker. Yet other judgments also concerned the family members of migrant workers. *Diatta, 1985* concerned a third country national who was married to a migrant worker. However, the two spouses no longer lived together. The Court ruled that article 10 Regulation 1612/68 did not require spouses to live under the same roof and that a marriage had to be considered to last, until it was formally dissolved. Moreover, the right of residence of the third country national spouse derived from article 10, rather than article 11 Regulation 1612/68. The latter merely regulated the right of spouses to be employed in the host state. The Court further elaborated on article 10 in *Commission v. Germany (adequate housing), 1989*. The Court decided that the requirement to have adequate housing for family members in article 10(3) Regulation 1612/68 applied at the time the family joined the worker, but not throughout the entire stay in the host state. Apart from cases of abuse of rights, a member state could therefore only apply housing requirements which it also applied to its own nationals (para. 12).

In *Gül, 1986* the Court recognized that a spouse who was a third country national had access to *any* activity as an employed person pursuant to article 11 Regulation 1612/68 (para. 11). That included even activities that were subject to authorization, provided the ordinary requirements to be met by all applicants were fulfilled. The rights of spouses pursuant to articles 10 and 11 Regulation

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1612/68 were secondary rights which flowed from the original rights of their spouses who were migrant workers. Such spouses could thus rely on article 11 to benefit indirectly from article 3 Regulation 1612/68 and be treated in a non-discriminatory fashion like all migrant workers having the nationality of a member state (para. 20). *Lebon, 1987* continued this line of authority by ruling that members of the family of migrant workers benefitted only indirectly from non-discrimination under article 7(2) Regulation 1612/68, that is when there was a social advantage for the migrant worker himself. Such an advantage did not accrue to the migrant worker when his descendant drew a guaranteed minimum income (minimex) while she (the descendant) was no longer dependent on him (the worker; paras 12-3). Moreover, whether a person was 'dependent' within the meaning of article 10 Regulation 1612/68 had to be decided in the light of the factual circumstances, without regard to the reasons for the support granted or the ability to take up paid employment. Finally, those who moved to seek employment could not benefit from equal treatment in the sense that they enjoyed the full benefit of article 7(2) Regulation 1612/68; rather they only enjoyed equal treatment access to employment.

The indirect approach to non-discrimination of family members of migrant workers was also confirmed in *Matteucci, 1988* (para. 8). In *Brown, 1988* the Court spelled out another limit to the rights of family members of migrant workers, namely that the descendant of a national of a member state could not rely on the rights in Regulation 1612/68 as a family member of a migrant worker when the parent who had been a migrant worker in the host state had left the host state for good, viz. the parent no longer resided or had any employment there. However, this applied only when the parent had left the host state *before* the birth of the descendant (para. 30). In a similar vein the Court held in *Humbel, 1988* that the child of migrant workers could not rely on article 12 Regulation 1612/68 when it sought education – outside the scope of *Gravier, 1985* – in a third member state, i. e. a member state other than where the parents worked and resided. However, *Echternach, 1989* carved out a special situation in this regard. When the parents who had worked in the host state migrated back to their country of origin and their child's education in the host state was not recognised in the country of origin, the child could go back to the host state alone and rely on article 12 Regulation 1612/68. Besides, that article covered 'all forms of education' (para. 29). The interpretation given by the Court to article 7(2) Regulation 1612/68 regarding maintenance grants in *Lair, 1988* also applied to the child covered by article 12 Regulation 1612/68.

Derogations

The Court also expanded the derogation case-law in the 1980s. In *Adoui, 1982* the Court built on *Van Duyn, 1974*. It was faced with the problem that prostitution was not illegal in Belgium, but that the residence permits of prostitutes who were nationals of other member states were not extended. The Court reiterated in keeping with *Van Duyn, 1974* that expulsion on the ground of public order

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could be ordered against nationals of other member states, while it was not possible for a state to adopt such a measure against its own nationals. The Court added, however, that care had to be taken not to apply arbitrary distinctions to the detriment of nationals of other member states, when it was decided to expel a person (para. 7). That would be the case, if a state did not adopt measures against its own nationals in case of behaviour which would have resulted in the refusal to extend a residence permit had a national of another member state displayed it (para. 8). The remainder of the judgment dealt with the minimum procedural safeguards available to those who were subject to expulsion orders pursuant to articles 8 and 9 Directive 64/221. Previously, *Pecastaing, 1980* and *Santillo, 1980* had already elaborated these procedural safeguards. The gist of this procedural case-law is as follows. The articles had direct effect. They essentially required non-discrimination to be applied in procedural matters. At least the opinion of an absolutely independent authority was required when an expulsion order was only subject to legal review. The procedure before that authority had to respect the full rights of defence. The authority had the power to review facts and expediency fully. The opinion it adopted had to be based on present facts, viz. facts as they stood at the time the opinion was adopted, and it had to be duly notified.

In *Gül, 1986* the Court also ruled on derogations. It held that in the light of the free movement of persons the public health derogation did not serve to exclude access by nationals of other member states to entire sectors of economic activity. Rather, it solely served to prevent specific individuals from having access to the territory or a profession when this access would on its own amount to a danger to public health (para. 17). In *Commission v. Germany (adequate housing), 1989*, the Court was faced with the national requirement for migrant workers to have continuous adequate housing. It reiterated the existing case-law on the public policy and security derogations, implying that the requirement was not justifiable under those derogations (paras 17-20).

The Court repeatedly dealt with the public service exception which it had already addressed in *Sotgiu, 1974* and *Reyners, 1974*. The judgment in *Commission v. Belgium (public service), 1980* established that the term 'public service' in article 48(4) Treaty was a Community term (para. 18). The national authorities were not allowed to interpret it as they saw fit. The Court also refused to remove all employment with the state from the scope of the freedom of workers. Instead, only employment fell under the exception that 'involve[d] direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state', requiring a 'special relationship of allegiance to the state' (para. 10). Thus an assessment of each individual post was required. The Court confirmed this interpretation in the follow-up case *Commission v. Belgium (public service II), 1982*. In *Commission v. France (nurses), 1986* the Court corroborated the approach taken in *Sotgiu, 1974* that the way national law classed certain posts, in particular as belonging to civil servanthood, was irrelevant. The Court also reiterated in keeping with *Commission*

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v. Belgium (public service), 1980 that the public service exception did not generally cover hospital nurses (para. 13). Therefore nurses from other member states had to be employed under the same conditions as French nurses (paras 14 et seq.). Later, the Court added in *Lawrie-Blum, 1986* that the activities of trainee teachers did not come within 'public service' (para. 28); neither did those of researchers working for a national research council according to *Commission v. Italy (research council), 1987*. However, in the latter case the Court included the 'duties of management or advising the state on scientific and technical questions' (para. 9) in 'public service'. It also held that discrimination arose from the facts that foreign researchers were offered employment of merely limited duration and that no career structure was available for them in contrast to Italian nationals (para. 13). In *Commission v. Greece (vocational schools), 1988* the Court implicitly excluded directors and teachers of vocational schools from 'public service' (paras 6 and 19-21). Finally, in *Allué I, 1989* the Court held that foreign language assistants did not come within the scope of 'public service'. Quite apart from that aspect, *Allué I, 1989* marked the beginning of a long series of cases on foreign language assistants. The Court in *Allué I, 1989* ruled that nationals of other member states who were employed as foreign-language assistants at Italian universities were covertly and unjustifiably discriminated when 75 per cent of foreign-language assistants were nationals of other member states and foreign-language assistants in general were only given contracts of limited duration, while other university employees regularly received contracts of infinite duration.

No violation of non-discrimination

In the 1980s, the Court also decided in a number of other cases that the principle of non-discrimination on the basis of nationality was not violated. According to *Haug-Adrion, 1984* non-discrimination was not violated with respect to either the free movement of workers or services when an insurance company refused to grant personal premium reductions (no-claims bonuses) applying to regular contracts on personal liability insurance in case of car accidents, in an insurance contract taken out for a car destined for export and thus given customs registration plates. The reason was that the general tariff conditions of the contract were not in any way based on the nationality or residence of the person insured, but rather on the mere fact that the car had customs registration plates (para. 16). According to *Pesca Valentia, 1988*, non-discrimination was not violated, either, by the requirement of national law that 75 per cent of the crew of fishing boats registered in the member state concerned had to be nationals of a member state of the Community. This ruling was confirmed in *Agegate, 1989*. Yet, in *Agegate, 1989* – a judgment that was handed down in the particular context of the Community fishery policy – a requirement for crew members of ships fishing against the national quota to reside on shore in the United Kingdom was struck down (paras 22-5).

In a similar vein, according to *Commission v. Greece (real estate), 1989*, certain restrictions on the acquisition of real estate in Greece imposed on nationals

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of other member states but not Greek nationals, contravened article 9 Regulation 1612/68 and article 48 Treaty: 'access to housing and ownership of property, as provided in article 9 of Regulation […] 1612/68, is the corollary of freedom of movement of workers and is for that reason covered by the prohibition of discrimination […] laid down in [a]rticle 48' ECT (para. 18). Yet, the act of accession of Greece had the effect that Greece's restriction were only partly precluded in so far as they had an effect on persons who had already been lawfully employed at the time of accession (paras 18-9). In *Groener, 1989* no violation of non-discrimination was found, either. The Court held that the requirement for an art lecturer in Ireland to be fluent in Irish as the first national language which had consistently been promoted was covered by the condition in article 3(1) Regulation 1612/68, namely 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'. Hence, the requirement was not precluded.

Diploma recognition

Heylens, 1987 followed up on the diploma recognition judgments in *Thieffry, 1977* and *Patrick, 1977*. It established that the authorities seized with a request for diploma recognition had to assess objectively in the light of the studies and training undertaken whether the person concerned had, 'if not identical, at least equivalent' knowledge and qualifications as those required by national law (para. 13). Some safeguards in the procedure for diploma recognition were also required (judicial remedy and notification of reasons; paras 14-6). The Court also handed down *Commission v. Germany (nurses), 1985* in diploma recognition. The case dealt exclusively with Germany's failure to adopt the legislation to implement the directives regarding diplomas and activities of nurses.

The Ankara Agreement

In the 1980s, the Court initiated a new line of authority. In *Demirel, 1987* the Court dealt with Turkish migrant workers under the Ankara Agreement of 1963 for the first time. The Court acknowledged that the Agreement could potentially have direct effect (para. 14). However, the Court rejected direct effect for article 12. That article only required the parties to be guided by the internal market rules on the free movement of workers in order to establish that freedom with Turkey. It did not have direct effect in the sense of transposing enforceable Community rules on family reunification to the relationship with Turkey. Decision 1/80 which had been adopted within the framework of the Ankara Agreement did not cover family reunification, either (paras 15-25).

Enlargement

A number of transitional problems in the free movement of workers that were caused by the second and third enlargement of the Community, viz. the accession of Greece, Spain and Portugal, were also dealt with during the 1980s. The Court held in *Peskeloglou, 1983* that the Act of Accession of Greece prevented

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member states during the transitional phase after accession from making their employment conditions for Greek nationals more stringent relative to the conditions in force at the time of accession (para. 13). In *Commission v. Greece (real estate), 1989* the Court ruled that the suspension of parts of Regulation 1612/68 under the transitional regime after accession did not affect the rights of migrant workers who were already working in Greece at the time of accession under article 48 Treaty. The right of those who were lawfully employed for the first time in Greece after accession were not affected, either (para. 15). This finding was confirmed for Portuguese workers who had worked in one of the old member states before accession in *Lopes da Veiga, 1989* (para. 10). *Agegate, 1989* transposed the rulings in *Peskeloglou, 1983* and *Commission v. Greece (real estate), 1989/Lopes da Veiga, 1989* to the Act of Accession of Spain.

Technicalities, purely internal situations

Finally, the Court also dealt with some of the more technical details of the free movement of workers and with the issue of situations being purely internal to one member state. *Pieck, 1980* addressed the traditional formal requirements of immigration in the light of Community law. In brief, a traditional visa could not be required any longer from nationals of the member states, the residence permit under Community law was different from the permit required hitherto, and only proportional sanctions could be taken when these formal requirements were not complied with. Imprisonment or deportation were not proportional sanctions. In *Commission v. Italy (tourism), 1986* the Court held that certain unlawful reciprocity and nationality requirements in Italian law with regard to tourism, journalism, and pharmacies were not sufficiently remedied by mere administrative practices. The free movement of workers as well as establishment and services were therefore violated. *Commission v. Belgium (border control), 1989* accepted sporadic and unsystematic border controls of residence permits of nationals of member states, provided that the production of the permit was not a condition precedent to admission to the territory of a member state. In addition, the authorities were allowed to check compliance with the obligation to carry a resident permit on person at all times, if the obligation to carry an identity card was imposed by a member state on its own nationals. *Messner, 1989* found that, while nationals of other member states could be required to report their presence in the host state pursuant to *Watson and Belmann, 1976*, a three-day period to do so was excessively restrictive.

The Court dealt with purely internal situations in four judgments. In *Morson, 1982* the Court ruled that the freedom of workers was not applicable when no link at all was given to any of the situations governed by Community law (para. 16). That was the case when parents who were third country nationals sought residence in the Netherlands with their children who were Dutch nationals employed in the Netherlands and who had never exercised their freedom to work in other member states. *Moser, 1984* added that the claim that a person might at a later point in time, after having passed the educational training to which he

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sought access, make use of the treaty freedoms to seek employment abroad was a purely hypothetical prospect (para. 18). That aspect did not suffice to bring a situation within the reach of Community law when the situation was otherwise confined to a single member state. In *Hurd, 1986* the Court confirmed the approach taken in *Morson, 1982*. It held that employment by a European school in a member state did not suffice for a teacher, who was a national of that member state who had never made use of his freedom, to establish a connection to a situation governed by Community law. The tax treatment to which that member state subjected its own nationals and which had the effect that the national concerned was worse off than nationals of other member states in the same situation was therefore lawful under Community law (paras 54-6). (The Court also addressed other aspects of Community law such as the principle of loyal cooperation.) Finally, in *Iorio, 1986* a train journey within Italy by an Italian national was considered to be a situation purely internal to Italy. Yet the Court also noted that the member states were free to regulate access to public transport, if they did so on a non-discriminatory basis and based on the 'needs of rational and economic organization' (para. 16).

2 Establishment

One of the first judgments in freedom of establishment in the 1980s *Klopp, 1984* concerned lawyers again. Mr Klopp wanted to register with the Paris bar while maintaining his registration in Germany. His request was refused though, because lawyers in France were only allowed to have one set of chambers in France, namely at the place where they were registered. The Court ruled that, while a member state was free to regulate the legal profession, the French requirement violated the freedom of establishment. That freedom included the right to have more than one place of work, else nationals of other member states were required to abandon their business in the state where they had already been established (paras 18-19). Compliance with the host state's rules governing the profession was required, but contact with the clients could also be maintained via 'modern methods of transport and telecommunications' (para. 21).

In *Fearon, 1984* the Court dealt with the Irish system under which a commission had the power to acquire rural land to ensure that it was used for certain purposes. An exemption was granted, though, when the owner of the land had resided within three miles of the piece of land concerned. When the land was owned by a company, the residence of the company's owners was relevant. An Irish company owned by British nationals none of whom met the residence requirement contested the acquisition of land. After having rejected the argument that article 222 Treaty removed the ownership system from non-discrimination and the freedom of establishment, the Court ruled that the residence requirement was not precluded by the freedom of establishment, since it applied to Irish na-

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tionals and nationals of other member states alike (para. 10). The freedom of establishment of companies in article 58 Treaty, in turn, was not concerned, as the relevant company had been Irish (para. 8).

1985

In *Steinhauser, 1985* the city of Biarritz in France required persons to have French nationality to be allowed to participate in a public tender for the allocation of property owned by the municipality. The Court found that the resulting exclusion of a German artist from a tender violated the freedom of establishment, since the renting of business premises facilitated the pursuit of the freedom. All public authorities, including the local authorities, had to comply with the freedom. The measure was obviously discriminatory and thus precluded (paras 14-6).

1986

In *Commission v. France (doctors), 1986* France's registration requirements had the effect that doctors established abroad could not open a second practice in France or work in France while maintaining a practice abroad. Moreover, cross-border medical care could lawfully be offered to a single patient for only two days. According to the Court, the member states had to respect non-discrimination and abstain from raising unnecessary obstacles when regulating the medical profession with a view to ensure protection of health (para. 11). Non-discrimination was violated in that French doctors were sometimes allowed to have a second practice in a specific region. The rules applied were, moreover, unduly restrictive for too absolute and general to be justified by the need of patients for continuous care or by the ethics of the medical profession. In some medical specialties, a single treatment was sufficient for the needs of the patient. Doctors often worked in group practices and foreign doctors were thus prevented from acting as a *locum tenens* for doctors established in France. In particular, the two days-service rule prevented that and thereby infringed the freedom to provide *services* (paras 12-6). *Bertini, 1986* again concerned the medical profession, though this time the training of doctors. Some Italian doctors had argued that the existence of a *numerus clausus* for medical studies at universities in other member states restricted their medical practice in Italy. Medical students from other member states overflowed to Italian universities, thus increasing pressure on the Italian market. According to them, Italy had to introduce a similar restriction to admission to Italian universities. The Court heard none of those arguments. In the absence of measures adopted by the Council, the member states were not required by Community law to restrict access to universities and introduce a *numerus clausus* (para. 11). The absence of a restriction could not impede free movement (para. 10).

Segers, 1986 was a case in which a company was established in the United Kingdom. It conducted all of its business through a subsidiary in the Netherlands. Mr Segers was one of two owners of the company, with each holding 50

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per cent of the shares, and a director of it. Netherlands' law normally granted such company directors sickness insurance benefits. However, in the case of Mr Segers that was refused, because the company was not established in the Netherlands. The Court found that the Dutch refusal violated the freedom of establishment. The refusal to affiliate such a person to Dutch sickness insurance indirectly violated the British company's right to exercise its freedom of establishment by means of a subsidiary (para. 15). While it was possible for member states to apply a difference in treatment in order to combat fraud, the refusal to grant social security benefits was not an appropriate means to do so (para. 16).

1987

In *Commission v. Belgium (bio labs), 1987* the Court found a Belgian rule to be in accordance with the freedom of establishment. The rule had required all directors, partners, or members of private legal persons providing bio-medical laboratory services to be either doctors or pharmacists. The right to pursue a self-employed activity in the host state was subject to the rules of the host state regulating such activity, provided that equal treatment was respected. The Belgian rule applied without distinction. It neither had discriminatory effects, nor was its purpose discriminatory (paras 9-11).

1988 and 1989

In *Commission v. Italy (social housing), 1988* Italy had reserved certain social housing and some reduced-rate mortgage loans to Italian nationals. Relying on the general programmes adopted by the Council to implement establishment, the Court found that housing was of assistance in the pursuit of establishment. The freedom of establishment and, consequently, non-discrimination were applicable to housing legislation. Italy's condition was liable to constitute an obstacle to establishment. Equivalent conditions, including with regard to facilities alleviating the financial burden, had to be granted to nationals of other member states. As providers of services sometimes also had to stay in the host state for a certain time, the Italian approach was also contrary to the freedom of *services* (paras 14-9). The ruling in *Commission v. Italy (social housing), 1988* was confirmed in *Commission v. Greece (real estate), 1989* as far as real estate was needed for the pursuit of the freedom of establishment and services. The nationality conditions Greece applied when it came to real estate acquisition and long-term rental agreements contravened the freedom of establishment and services, since the acquisition of real estate was a corollary of long- and short-term service provision (paras 20-7).

Gullung, 1988 established that a non-discriminatory obligation for lawyers to register with the host state bar was in accordance with the freedom of establishment and services (para. 29). Moreover, Directive 77/249 on lawyers' services did not prevent the host state from applying its own rules on professional ethics, in particular the requirement for lawyers to be in good character (para. 18). Apart from that, a member state could not refuse one of its own nationals who

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was also a national of another member state the benefits of the Directive (para. 12). In *Commission v. Greece (vocational schools), 1988* the Court scrutinized certain of Greece's requirements related to running a school and teaching in Greece. More specifically, foreign nationals could not set up private vocational schools, act as directors and teachers, and give private lessons at home in Greece. The restriction to set up a school could not be justified by the exercise of official authority pursuant to article 55 Treaty, since it was not connected thereto. Supervision could as well ensure the proper operation of schools. A non-discriminatory requirement to be authorized to establish a school was, however, in accordance with the freedom of establishment. The prohibition to give private lessons at home, in addition, was at odds with the freedom of services, as was the exclusion from teaching with the freedom of workers as far those were concerned who had been employed in Greece already at the time of Greece's accession to the Community (paras 8-21). In *Commission v. Greece (registers), 1988* the Court held that Greece violated the freedom of establishment and services in that the law did not expressly provide that nationals of other member states could equally register as ordinary members of the professional organizations of architects, civil engineers, and surveyors and thereby enjoy the benefits that membership conferred. The freedom of establishment and services was equally violated by the explicit nationality condition for access to the profession of lawyers.

In *Commission v. Italy (data-processing systems), 1989* the Court decided that Italy could not reserve the conclusion of public contracts involving the development of data processing systems for the public authorities to companies in which the Italian state held a controlling stake, else domestic companies were favoured (para. 9). The restriction of the freedom of establishment and services involved was not justified. The confidentiality of data could be ensured by duties of secrecy imposed on the staff of companies entrusted with the task; the tasks assigned were unrelated to the exercise of official authority; and a threat to public policy was not established (paras 11, 13, and 15).

Purely internal situations and remainders

In *Gauchard, 1987* the Court refused to address the merits, for the situation was confined in all aspects to France. A French national who was resident in France managed a supermarket in France. That supermarket was operated by a French company. He was prosecuted for having failed to obtain the necessary authorization to extend the sales area of his supermarket. In a very similar situation in *Bekaert, 1988* the Court also refused to address the merits based on the same ground.

For the sake of completeness, *Conradi, 1987* must be mentioned. In this case, the Court held that the definition of a retail trader in Directive 64/233 – concerning the attainment of the freedom of establishment and the freedom to provide services in respect of activities in wholesale trade – was not to be relied up-

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on outside the field of application of that directive for the purpose of application of national law.

Companies

Two more judgments dealt with aspects of establishment that were related to companies, i. e. article 58 Treaty. In *Commission v. France (tax credit), 1986* the Court found a violation of the freedom of establishment in that France granted a tax credit only to subsidiaries, but not to branches or agencies of companies established in other member states, while domestic companies could always claim the tax credit (paras 20 and 26). According to *Daily Mail, 1988*, the freedom of establishment did not force the United Kingdom to allow a company to transfer its central management and control to the Netherlands, while maintaining its legal personality and status under British law.

Diploma

The Court also dealt with a few cases concerning diploma recognition under the freedom of establishment. In *Broekmeulen, 1981* the Court interpreted Directive 75/362 on doctors' diplomas to the effect that a returning own national who had obtained in another member state a doctor diploma which was to be recognized under the directive could rely on the directive for recognition (paras 19-20). Moreover, the right to recognition as a general practitioner flowed directly from the directive. Hence, in such a case an additional preparatory training period could not be imposed by the 'home' member state, in particular when the completion of such a period was not required from nationals of other member states holding a foreign diploma (paras 24-5). According to *Auer II, 1983*, a veterinarian holding the prerequisite Italian qualification was entitled to rely directly on Directive 78/1026 on diploma recognition in veterinary medicine, because France had failed to implement it (para. 16). Accordingly, even though the French authorities had refused to register him as a veterinarian, he could not be prosecuted (para. 19). That judgment was fully confirmed for Italy in *Rienks, 1983*. In *Commission v. Germany (nurses), 1985* the Court held that Germany's administrative practice and conclusion of the relevant Council of Europe Agreement in itself were not sufficient to implement Directives 77/452 and 77/453 on the activities and recognition of diploma of nurses (paras 28 and 38). In *Van de Bijl, 1989* the Court interpreted Directive 64/427 concerning some activities of self-employed persons in manufacturing and processing industries. It *inter alia* found that, while the member states were generally bound by certificates issued pursuant to that directive, a member state was not bound by a certificate issued by another member state, if it evidenced facts which had taken place in the first member state's territory. Indeed, a member state could prevent circumvention of its own rules (para. 26). Finally, *Commission v. Italy, 1987* is to be mentioned. In this case, Italy admitted that it had failed to transpose an amendment to Directives 75/362 and 75/363 on doctors.

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3 Social security

Definitions and scope

During the 1980s, the Court elaborated the case-law on the scope of Regulation 1408/71 and the definitions needed to apply the Regulation in various judgments. In *Walsh, 1980* the Court built on *Brack, 1976*. The Court found that a person could still be considered 'employed' even though her employment had ended, because the insurance scheme still covered her by reason of the contributions she had paid while she had been employed (para. 6). Moreover, the Court reiterated a ruling that had already led to the decision in *Smieja, 1973*, namely that the term 'legislation' used in Regulation 1408/71 generally meant legislation of the member states, while elements of Community law could also be included (paras 8-9). Such was the case with article 8 Regulation 574/72, because the individual derived rights from a combination of national law and Community law. In *Galinsky, 1981* the Court ruled that a person who had worked on a self-employed basis in one member state and as an employed person in another member state came within the scope *ratione personae* of Regulation 1408/71. However, the old-age pension acquired by reason of the self-employed activity and based on national law alone, i. e. not in conjunction with Regulation 1408/71, was outside the scope of that Regulation. Article 77 Regulation 1408/71, which governed family allowances for recipients of old-age pensions, was therefore not applicable to such a pension.

In *Meade, 1984* the Court decided that Regulation 1408/71 did not apply. A national of the United States of America who was self-employed in France could not rely on Regulation 1408/71 to challenge a withdrawal of family benefits on the ground that the second child went to pursue studies abroad; neither could his wife, who was a British national, because she had never worked (para. 7). Their son, also a British national who went to study in the United Kingdom, could not pursuant to *Kuyken, 1977* rely on article 48 Treaty or Regulation 1408/71, either, because he had never been insured under a scheme for employed persons (para. 8). *Frascogna, 1985* also concerned the scope *ratione personae* of Regulation 1408/71. Ms Frascogna was an Italian national living in France with her son who was a worker. She was denied a special old-age allowance for persons who had insufficient income on the ground that she had not resided in France for 15 years. The Court, based on the *Kermaschek, 1976*-line of authority, rejected her claim to have the residence clause set aside on the basis of Regulation 1408/71. She could only claim rights derived from the migrant worker. The French benefit, however, was granted generally to old persons, and not specifically to family members of workers (para. 16). (However, see the assessment under article 7(2) Regulation 1612/68, above.) On the same ground the Court rejected the claim of a descendant of a migrant worker for a tideover unemployment benefit in Belgium in *Deak, 1985*. The tideover allowance was not granted to a person *qua* its status as a family member of an unemployed worker, but on

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the basis of a person's own inability to find employment (paras 14-5). (See again the ruling under Regulation 1612/68, above.) In *Zaoui, 1987* the Court applied the derived rights-approach again. It found that an Algerian national who was married to a French national could not claim a French supplementary allowance to an invalidity pension based on him being the member of the family of a worker (paras. 11-2). (His claim was equally rejected under Regulation 1612/68, because the situation was purely internal to France; para. 15.)

In *Van Roosmalen, 1986*, the Court interpreted the term 'self-employed person' in Regulation 1408/71 with regard to voluntary social insurance so as to encompass a person that pursued an occupation. That included a missionary priest who did not receive remuneration, but was maintained by parishioners (para. 22). According to the Court, since Regulation 1408/71 had been amended to include 'self-employed persons', this term equally had to be interpreted comprehensively, as it had already been established for the term 'employed person' (para. 20). *Van Roosmalen, 1986* had an additional dimension. The Court in *Bozzone, 1977*, had already dealt with the Belgian social security system for work in the former Belgian Congo. *Bozzone, 1977* had recently been reiterated in *Commission v. Belgium (Congo), 1980*. In the same vein the Court again found it irrelevant for the question whether there was 'legislation' pursuant to article 1(j) Regulation 1408/71 that the self-employed activity was pursued outside the Community, so long as a link to a member state's social security scheme was established. That was the case in *Van Roosmalen, 1986*, for the affiliation to a social security scheme in Belgium, albeit for an activity in the former Belgian Congo, evidenced such a link (paras 29-30). This was later on confirmed in *Laborero, 1987* (paras 24-5). *Laborero, 1987*, moreover, made it clear that it did not matter that the social security scheme which covered work in the Belgian Congo was separate from the general social security system in Belgium and required particular conditions of affiliation to be met (para. 17). In addition, the voluntary nature of the scheme was irrelevant and so was the fact, by nature, that the person was no longer working in the case of an application for a survivor's pension.

Social security v. social assistance

Vigier, 1981 returned to the distinction between social security and social assistance. The Court found Germany's scheme which offered victims of nazi persecution the option to buy retroactively into periods of insurance for the time of the persecution to be a scheme of social security which supplemented the general social security scheme. That Germany had not declared the scheme to be part of social security for the purposes of Regulation 1408/71 was irrelevant (para. 15). The decisive point was that eligibility did not depend on a discretionary assessment of the situation and the need of the individual (paras 13-4). In *Piscitello, 1983* a supplement provided by Italian law for old-age pensioners when their pension was below a minimum amount was at issue. Although the Court acknowledged that the benefit also fulfilled purposes of social assistance, it catego-

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rized the benefit as social security, because Italian law established a defined legal position which, once the conditions were met, automatically led to the award of the supplement to the pension. There was no discretionary assessment of the position of the individual (para. 13). After that point was settled, it was clear that the residence clause in Italian law was precluded by article 10 Regulation 1408/71.

In the twin judgments of 27 March 1985, *Scrivner, 1985* and *Hoeckx, 1985*, the question was tabled whether Belgium's minimex benefit was a social security benefit within the meaning of Regulation 1408/71. (For the assessment under Regulation 1612/68, see above). The Court emphasized that, even if a benefit was based on a defined legal position, the decisive question was whether a benefit addressed one of the risks that were exhaustively listed in article 4(1) Regulation 1408/71 (para. 19). With the Belgian minimex this was not the case, since the primary criterion for awarding minimex was the lack of adequate means, that is the need of the person concerned. 'Need', however, was not one of the risks covered by Regulation 1408/71 (paras 20-1). In *Giletti, 1987* the Court then had to classify an allowance granted to the elderly in France to supplement their income. From the fact that article 4(2) Regulation 1408/71 included non-contributory benefits in the scope of the Regulation, it necessarily followed that is was irrelevant that the benefit was financed from public sources. Reiterating that national legislation could at the same time fulfil functions of social assistance and social security, the Court concluded that the French benefit was a social security benefit, because national legislation conferred a *right* to the supplement to a pension which was independent of the need of the person concerned (para. 11). This interpretation was confirmed in *Zaoui, 1987* (para. 8).

Further issues of definition

Campana, 1987 also addressed a definition under Regulation 1408/71. The Court interpreted the term unemployment benefits in article 4(1)(g) Regulation 1408/71. The Court included in this term benefits provided to prevent a person from becoming unemployed, such as Germany's assistance toward vocational training for persons in employment. However, such benefits were only covered by Regulation 1408/71, if the person concerned was at least threatened by unemployment (para. 12).

Derks, 1984 was a case which concerned the amendment of the Netherlands' legislation on incapacity of work which introduced (the amendment) a new type A system, i. e. a system under which the amount of benefits were *not* dependent on the completion of insurance periods, replacing the old type B system, in which the amount of benefits was dependent on periods. More specifically, the case concerned the regime designed to ensure a smooth transition to the new system. In the light of the definitions of 'legislation' and 'period of insurance' in article 1(j) and (r) Regulation 1408/71 as well as the annex relating to the Netherlands the Court, relying on *Blottner, 1977*, ruled that periods completed under the old system were true 'periods of insurance', rather than periods not covered

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by insurance which are sometimes treated as periods of insurance for the purpose of the provision against overlapping of benefits in article 15 Regulation 574/72 (paras 16-7). In the case at hand the Court thus gave preference, with a view to aggregation, to the period completed under the old Netherlands system over an overlapping period of voluntary insurance completed in Germany.

Aggregation and apportionment

In the 1980s, the Court decided more than 30 cases concerning the aggregation of insurance periods, almost all of them under Regulation 1408/71. Just one of them concerned Regulation 3, namely *Salmon, 1980* in which a pension had been awarded in Belgium for insurance periods completed in Belgium based on aggregation pursuant to article 27 and 28 Regulation 3. At the same time, in Germany a pension was awarded based on national law alone for periods completed in Germany. Belgium then reduced the pension awarded in application of article 28(4) Regulation 3. The Court invalidated that approach by holding that no provision in the Regulation or the Treaty allowed the reduction of a pension awarded on the basis of aggregation on the ground that another member state had awarded a pension based on national law alone, provided that the two pensions were not paid with respect to one and the same period of insurance. The reason was that aggregation and apportionment pursuant to Community law already ensured that a member state paid a pension only with regard to periods actually completed under its own system (para. 11).

In *Menzies, 1980*, the issue came up how a supplementary period which, pursuant to national law, was added to the periods of insurance completed in actual fact was to be dealt with in aggregation and apportionment. The Court held that the supplementary period was to be factored in when calculating the theoretical amount, as this was the amount that would have resulted if *all* occupational activity had been carried out in the member state concerned (para. 10). However, in the next step, apportionment, the supplementary period was to be left out of account, because it would 'unilaterally and artificially upset[…] the balance of the burden of the benefits existing between member states' (para. 11), if a supplementary period which did not correspond to an actual period of insurance or even a period of residence would have to be factored in when apportioning, thus resulting in a benefit. In *Besem, 1982*, the Court next elaborated the calculation of the theoretical amount pursuant to article 46 Regulation 1408/71. The Court held that the rules of aggregation and apportionment were a 'complete set of Community rules' (para. 12). They could not be supplemented by national rules which modified the way the theoretical amount was calculated so as to reduce that amount (para. 13). That amount simply had to be calculated in application of national law as if all insurance periods completed in the member states had been completed in the member state concerned. Was therefore precluded a rule of the Netherlands which applied *exclusively* in the calculation under Community rules and which had the effect that the daily wage which was the basis of calculation of an invalidity benefit was reduced in proportion to periods during

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which the person concerned had not been insured. *Weber, 1984* concerned the calculation of the theoretical amount for an invalidity benefit under the Netherlands system, which was based on the materialization of the risk (type A), when insurance periods had lastly been completed in Germany where a type B system was in force. The Netherlands system again relied on a 'daily wage' which was based on the last earnings of the insured person. The Court ruled that the theoretical amount needed to be calculated on the basis of national law as always under article 46(2) – which meant in this case that the last earnings in Germany were relevant to determine the 'daily wage'. Article 47 Regulation 1408/71 concerned particular rules to simplify the calculation which did not apply to the approach of the Netherlands system (para. 15).

Benefits of the same kind and rules against overlapping

Remo D'Amico, 1980 raised the question whether Mr D'Amico's Belgian invalidity pension which had been converted into an old-age pension was a 'benefit of the same kind' as his Italian invalidity pension within the meaning of article 12(2) second sentence Regulation 1408/71. The point was raised, because a rule in Belgian law prevented the overlapping of old-age with invalidity pensions. This rule had the effect that pursuant to national law alone Mr D'Amico's Belgian pension at the moment it was converted from an invalidity pension to an old-age pension was reduced to naught. If this rule had been applicable pursuant article 12(2) Regulation 1408/71 in the following calculation under Community law, namely article 46 Regulation 1408/71 by analogy, as well, the Community rules would not have yielded a pension in Belgium, either. Hence the Court, formally applying an *e contrario* argument based on article 43(2) Regulation 1408/71, ruled that an invalidity pension turned old-age pension was of the same kind as an invalidity pension. This ruling was reiterated in *Celestre, 1981* (para. 11). In addition, *Celestre, 1981* also covered an aspect of the calculation under article 46 Regulation 1408/71. The Court made it clear that notional years that were according to Belgian law added to the periods of insurance completed in actual fact – typically in the case of miners – had to be taken into account in the calculation of the pension pursuant to article 46(1) Regulation 1408/71. However, in this calculation a national rule against the overlapping of benefits which reduced the notional periods in the light of periods completed in another member state did not apply pursuant to article 12(2) second sentence Regulation 1408/71 (para. 12). This ruling was confirmed in two judgments of 4 June 1985, *Romano, 1985* and *Ruzzu, 1985*. The fact that the Belgian rule regarding notional periods in *Celestre, 1981* had followed from mere administrative practice, while in *Romano, 1985* and *Ruzzu, 1985* it was applied after having been codified in a legislative act, did not change the assessment made in *Celestre, 1981*. In *Van der Bunt-Craig, 1983* the question was also raised whether two benefits were of the same kind according to article 12(2) Regulation 1408/71 so that national rules against the overlapping of benefits would be excluded in the calculation pursuant to article 46 Regulation 1408/71. In this case a Dutch survivor's

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pension came together with a British retirement pension which had been increased when the spouse had died. The Court answered that benefits were of the same kind when their 'purpose and basis of calculation' were the same (para. 13). This was the case, if both benefits intended to guarantee some means of subsistence to the surviving spouse who had been deprived of the deceased spouse's income, and both benefits were based on the contributions of the deceased spouse (para. 14). In *Valentini, 1983*, in turn, the Court ruled that a French allowance under the guaranteed income retirement scheme was not of the same kind as an old-age pension. The French benefit scheme had not been established with a view to the typical objective of old-age retirement schemes covered by article 46 Regulation 1408/71 which was to dispense elderly people from work. Rather, it had been established mainly to release elderly employees and to generate employment for younger employees in times of economic crisis (para. 17). Moreover, benefits covered by article 46 Regulation 1408/71 were normally based on a person's own contributions and calculated on the basis of periods of affiliation (para. 14). That was not the case with the French benefit (para. 15).

In *Jerzak, 1983* the Court further elaborated on article 12(2) Regulation 1408/71. Article 12(2), in so far as it allowed the application of national rules against the overlapping of national benefits also where national benefits overlapped with benefits awarded by another member state, was according to the Court the counterpart to the facilities Community law afforded to migrant workers. The article intended to prevent the granting of benefits based on Community law which national law considered excessive (para. 10). However, article 12(2) could only be applied when a benefit was awarded in application of Community law (para. 12). When it had been awarded based on national law alone article 12(2) was not to be applied, even if the division of the cost of financing the benefit had been made pursuant to article 57(3) Regulation 1408/71 (para. 15). In *Van Gastel (Coenen), 1987*, the Court again applied the criteria developed in *Van der Bunt-Craig, 1983* and *Valentini, 1983* to determine whether benefits were 'of the same kind'. The question was whether a Belgian survivor's pension was of the same kind as a Dutch old-age pension. The Court held, like in *Van der Bunt-Craig, 1983*, that the objective and purpose of the benefits were the same, viz. ensuring that an elderly person had sufficient means, although one of them was based on the deceased spouse's periods of insurance (para. 11). Moreover, the basis of calculation and the conditions for the award of the benefit were identical as well (para. 12). Finally, the Court rejected an *e contrario* argument based on the annex relating to benefits of the same kind in Denmark, Ireland, and the United Kingdom.

In *Stefanutti, 1987*, in contrast, two benefits were not of the same kind, namely an Italian invalidity pension of a widow in Italy and her survivor's pension from Belgium, because the benefits were not based on the same insurance record. The invalidity pension relied on the widow's own insurance record in one member state and the survivor's pension on the employment record of the deceased spouse in another member state (para. 13). In *Bakker, 1988*, the Court

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further clarified article 12(2) Regulation 1408/71. The Netherlands had amended their pension legislation so as to reflect equal treatment of women and men. To be more specific, the Netherlands no longer awarded a household pension when only one spouse was working, but rather separate pensions, one for each of the spouses. In *Bakker, 1988*, this amendment had a ripple effect in Belgium. As Ms Bakker suddenly received her own pension in the Netherlands, Mr Bakker's second pension in Belgium was re-calculated on the basis of the less advantageous single rate, instead of the higher household rate as before. However, the Court ruled that 'benefits of the same kind' were only overlapping within the meaning of article 12(2) Regulation 1408/71, when different benefits which were awarded to one and the same person overlapped, but not when benefits were paid to two persons (para. 14). The Belgian rule which provided that the single rate instead of the household rate was to apply to calculate a pension when the spouse of the person concerned received benefits in her own right – as in this case, due to the amendment in the Netherlands – was therefore not a rule against the overlapping of benefits within the sense of article 12(2).

Di Felice, 1989 again dealt with a rule against the overlapping of benefits. In this case a Belgian early retirement pension was refused, because the worker was receiving an invalidity pension in Italy. The Court categorized this rule as a rule against the overlapping of benefits and, in expanding *Celestre, 1981*, the Belgian early retirement pension as a benefit of the same kind as an invalidity pension, regardless of the facts that the retirement pension had not been converted from an invalidity pension or that it concerned early retirement (paras 14-5).

Further aggregation

In *Coppola, 1983*, the Court clarified *Petroni, 1975*, in which article 46(3) Regulation 1408/71 had been invalidated in so far as it required the reduction of a benefit acquired solely on the basis of national law. Article 40(3) Regulation 1408/71 required national authorities to aggregate periods during which sickness benefits were granted in another member state, if such a period was required by national law for the award of an invalidity benefit. However, when periods were aggregated pursuant to this article then the invalidity benefit concerned was not any longer based solely on national law within the sense of *Petroni, 1975*. Thus article 46(3) Regulation 1408/71 could be applied to such a benefit. In *Collini, 1987* the Court came back to article 46(3) Regulation 1408/71. The Court had to decide how the ceiling in that article was to be applied when Belgium was calculating an old-age benefit based on Community law, while Italy had awarded a pro rata old-age pension. The Advocate General was careful to point out that only the calculation pursuant to Community law was at stake (p. 5497), thus ruling out any implication of the *Petroni, 1975*-line of authority in this case. In Belgium, the independent amount pursuant to article 46(1) Regulation 1408/71 was higher in the case of Mr Collini than the pro rata amount calculated pursuant to 46(2) Regulation 1408/71. Thus only the first amount was relevant. However, article 46(3) Regulation 1408/71 set as an overall ceiling, i. e. an up-

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per limit to the sum of all the benefits awarded in the member states, the highest theoretical amount pursuant to article 46(2)(a) Regulation 1408/71. Given that in the case at hand that ceiling was exceeded when the Italian pro rata pension and the Belgian independent pension under article 46(1) were added up, the question had to be answered how the benefits were to be reduced in application of article 46(3). The Court ruled first that the ceiling in article 46(3) applied in all cases, even if the exceeding of the ceiling was not due to a duplication of insurance periods (paras 11-2). Then the Court supplemented article 46(3) by holding that when an independent pension met with a pro rata pension, as in the case at hand, only the independent pension had to be reduced so far that the ceiling in article 46(3) was no longer exceeded (para. 16).

Before *Collini, 1987* the Court had decided another case that related to insurance periods completed in Belgium and Italy, *Sinatra II, 1986*, a follow-up case to *Sinatra, 1982* (as to this case, see below). In *Sinatra II, 1986*, an invalidity benefit awarded in Belgium under a special scheme for miners came together with an Italian pro rata pension. The amount of the Belgian benefit did not depend on the length of insurance periods. The conditions for its award it were met without that periods of insurance completed abroad had to be taken into account. Under these circumstances, the Court ruled that the Community rules in article 46 Regulation 1408/71 had to be applied as usual, including the determination of the independent amount, the apportioned amount, as well as the comparison of the two, in spite of article 45(2) Regulation 1408/71. Arguably, that article excluded aggregation when periods were completed under a special scheme for a particular occupation in one member state, such as Belgium's miners scheme, and periods were completed in another member state under a scheme that was not comparably special. However, article 46 did not require that all periods were capable of aggregation to determine benefits (para. 20). In this case therefore article 46 had to be applied fully.

Aggregation and third states

In *Borowitz, 1988* aggregation of periods completed in third countries became an issue. Germany had concluded a convention with Poland according to which some insurance periods completed in Poland were assimilated to periods completed in Germany. In the case of a migrant worker who had completed periods in Poland, the Netherlands, and Germany the question arose how the periods completed in Poland were to be dealt with under article 46 Regulation 1408/71. The Court essentially answered that nothing in the Regulation precluded Germany from applying an integrated approach: when Germany calculated the pension pursuant to article 46 Regulation 1408/71 the provisions of the convention together with national law could be applied, in this case to assimilate Polish with German periods or to determine whether a semi-complete insurance record was given in the light of periods completed in Poland, the Netherlands, and Germany (para. 25). However, another member state, like the Netherlands, was not required to apply conventions concluded by other member states (para. 26).

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Short periods of insurance and other intricacies

The Court came back to short periods of insurance, i. e. of less duration than a year, in *Vermaut, 1982*. According to article 48 Regulation 1408/71, a member state was not required to award a pension under article 46(2) Regulation 1408/71 for an insurance period of less duration than a year which had been completed under its insurance schemes. However, a member state where a longer period had been completed had to factor in those short periods in the calculation of the theoretical amount under article 46 Regulation 1408/71, while refraining from a *pro rata* calculation. As the calculation of the theoretical amount presupposed that all insurance periods had to be treated as if they had been completed in the member state concerned, the overall effect in *Vermaut, 1982* was that periods spent in the service of the army or as a prisoner of war during World War II had to be taken into account in the calculation of the theoretical amount under Belgium's system, although a short period of insurance abroad had preceded them (para. 11). Moreover, Belgium could not require that the contributions paid during the short periods be transferred to Belgium (para. 15). The Court again dealt with article 48 Regulation 1408/71 in *Malfitano, 1982* in which a worker was insured in Belgium for a short period, then went on to work in other member states, and finally claimed invalidity benefits in Belgium. The Court first ruled that the concept of periods of *residence* in article 48 was only applicable in member states where such periods gave rise to entitlement to benefits. The concept had been introduced into the Regulation when member states acceded to the Community whose insurance systems determined affiliation based on residence. Belgium was not such a state and hence the Belgian authorities were precluded from relying on the concept of periods of residence (para. 6). Second, when applying the alternative condition to be met for disregarding short periods of insurance in article 48(1), i. e. that a right on the basis of national law was not acquired, the point in time was relevant when the insurance periods had actually been completed. In other words, the Belgian authorities' argument was rejected that a right was not acquired under national law on the ground that the legislation that had been in force when the insurance periods had been completed was not any longer in force when the incapacity for work materialized (para. 14).

In *Browning, 1981* the Court dealt with the award of a supplement to a pension pursuant to article 50 Regulation 1408/71. The Court in this case deduced from the declarations made by the member states with regards to supplements covered by article 50 that a supplement to a pension paid by the United Kingdom, a state which had not put forward a declaration, did not come within the scope of article 50. This article only covered special guarantees of minimum incomes (article 11) that were applicable separately from the ordinary calculation of pensions pursuant to article 46 Regulation 1408/71 (para. 13). In particular, the supplement of article 50 was not just the difference between the benefit calculated and the theoretical amount according to article 46(2)(a) Regulation 1408/71 (para. 14).

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Recalculation

In *Sinatra, 1982* the Court dealt with a change in personal circumstances and its effects on the calculation under article 46 Regulation 1408/71. A pension had been awarded to a migrant worker in Belgium based on a household rate because the spouse of the pensioner had not worked. When she began to work, the issue arose whether a pension awarded in application of article 46 Regulation 1408/71 had to be recalculated given that in a recalculation the single rate instead of the household rate would have been applicable. The Court decided that article 51 Regulation 1408/71 did require a full re-calculation, i. e. under national law as well as and under Community law, with a 'fresh comparison' (para. 8), whenever the personal circumstances changed. It was only when a pension was adapted in accordance with 'the general evolution of the economic and social situation' (para. 10) that article 51(1) rendered a re-calculation unnecessary. The Court in *Van der Bunt-Craig, 1983* added that no provision of Community law required current benefits awarded in application of Community law to be re-calculated periodically because of fluctuations in currency conversion rates (para. 24). In *Cinciuolo, 1984* the Court extended the scope of article 51. The Court held that the exclusion of re-calculation when a benefit was merely adapted to the changing economic circumstances was also warranted in case of benefits which had not strictly been calculated pursuant to article 46 Regulation 1408/71. More specifically, when an occupational disease benefit which supplemented an invalidity pension granted in Italy and which had originally affected the calculation of an invalidity pension granted in Belgium was periodically adapted in Italy to the economic circumstances, this adaptation did not trigger a re-calculation of the Belgian pension, despite the fact that the supplement was not, strictly speaking, a benefit determined under article 46 (paras 10 and 13). In *Jordan, 1989* the Court again came back to article 51 Regulation 1408/71. According to the Court, a re-calculation of a pension was necessary when the method of determining the benefit was changed (para. 11). However, when the legislation according to which a benefit had been calculated was amended, but the amendment was only applicable to pensions calculated after a specific date, viz. the date of entry into force of the amendment, article 51 Regulation 1408/71 and article 48 Treaty did not require that pensions which had been calculated before that date were re-calculated (paras 13-5).

Aggregation and conditions of affiliation

The Court also dealt with the taking into account of insurance periods completed abroad outside the technical domain of aggregation for the purpose of awarding pensions. *Coonan, 1980* was a case in point. Yet it was a case that was complicated by the high specificity of the law of the United Kingdom and an apparently wrong decision to affiliate Ms Coonan to the British insurance system. The case was so complex that in fact Advocate General Mayras found it 'difficult to formulate meaningful answers to the questions referred' (page 1471). The problem in *Coonan, 1980* was approximately as follows. Ms Coonan had completed

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insurance periods in Ireland and then, before having reached the Irish pension age of 65 years, left to the United Kingdom where she continued to work as a self-employed person. In the United Kingdom, she was already beyond the regular retirement age of 60 years. When she applied for sickness benefits in cash in the United Kingdom her application was rejected, because the British scheme in question subjected those benefits to the condition that a person had been subject to a pension scheme in the United Kingdom for a certain period of time before reaching retirement age, if that person continued to work after having reached the age of retirement. In these rather specific circumstances, the Court ruled that for the purpose of meeting the British condition the periods of affiliation to an insurance scheme in Ireland did not have to be treated as equivalent to periods of affiliation to the British scheme. The Court held that articles 18 and 46 Regulation 1408/71 did not apply in this case (para. 8). The Court based its decision essentially on *Brunori, 1979* according to which the member states were competent to lay down the conditions of affiliation to their insurance schemes (para. 12). Thus, when affiliation to a specific scheme was subject to previous affiliation to the national social security scheme a member state was not required to treat periods of affiliation to the scheme of another member state as equivalent (para. 13). Moreover, it was not the purpose of Regulation 1612/68 to create rights under the national law of one member state by virtue of insurance periods completed in another member state (para. 6).

Vigier, 1981 was a case in which the Court built on *Coonan, 1980*. Germany had offered the option to victims of nazi persecution to buy in retroactively the periods during which the victims had been persecuted. However, the option was only offered subject to certain conditions, namely the person concerned had to be an insured person, i. e. she must have paid at least one contribution to a German insurance scheme. Based on *Coonan, 1980*, the Court decided that article 9(2) Regulation 1408/71 did not require periods of insurance completed under the scheme of another member state to be taken into account to determine whether that condition was met. Like in *Coonan, 1980* it was a matter of prior affiliation to a scheme of a member state. For that purpose, affiliation to the scheme of another member state need not have been treated as equivalent (para. 19). In *Schmitt, 1989*, a judgment that was only summarily published, the Court again repeated that the member states were competent to lay down the conditions of affiliation to insurance schemes. In *Hartmann Troiani, 1989* the Court also dealt with the conditions of affiliation to insurance schemes, but this time in the context of voluntary continued insurance. The German authorities required that a woman was compulsorily affiliated to a German insurance scheme to be eligible for a retro-active buy-in into insurance, after insurance contributions had been refunded to her before because of marriage. The Court ruled that this was a condition of affiliation to an insurance scheme which was precluded neither by article 48 Treaty nor by article 9 Regulation 1408/71 concerning optional or voluntary continued insurance. Article 9 Regulation 1408/71 merely precluded residence requirements and required that periods of insurance completed abroad

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were treated as equivalent when national law relied on a minimum period of affiliation.

Finally, an unexpected issue of aggregation arose in *Rebmann, 1988*. It was unclear which member state had to take into account periods of unemployment for the purpose of awarding a pension in the case of a frontier worker. Was it the member state where the worker was last employed or the member state where he resided? In the absence of a provision dealing with the issue, the Court fell back on the 'general spirit and the intendment' of Regulation 1408/71 (para. 11) to consider as competent the member state where the frontier worker had worked last. That approach was in line with the general idea in article 13 Regulation 1408/71 to apply the law of the member state of employment to a frontier worker. The exceptions to this approach for sickness, invalidity, and unemployment benefits lent themselves only to analogous interpretation if a situation was closely connected to one of these exceptions (para. 17). This was not the case for the taking into account of unemployment periods for pension purposes. In most cases, indeed, it was in the member state of employment where a frontier worker had already acquired a right to a pension (para. 19). For the sake of completeness, the case *Vlaeminck, 1982* must be mentioned to conclude aggregation. In this case, the Court answered that the national court had correctly applied the Community rules concerning aggregation and overlapping of benefits in recalculating a survivor's pension awarded in Belgium and that therefore no question of Community law had been raised.

Overlapping benefits, supplements

Periods of insurance and the overlapping of benefits did not just matter in aggregation to determine old-age or invalidity pensions. Cases concerning sickness and family benefits also raised the issue of overlapping of benefits. In *Walsh, 1980* the problem was that maternity benefits in two member states were potentially overlapping. Article 8 Regulation 574/72 addressed the problem by assigning the competence to one member state, viz. the member state where the confinement took place or *eventualiter* the member state to whose legislation the worker was last subject. The Court answered that the aim of article 8 Regulation 574/72 was to grant an allowance to a mother and her child for the time before and after confinement. The article had to be read together with article 12 Regulation 1408/71. According to the Court, maternity benefits only overlapped within the meaning of article 12 when a person's claim for benefits was actually satisfied in the member state of confinement *and* in another member state. Thus, after benefits had been exhausted in the member state of confinement and the legislation of another member state to which the mother had been subject provided further benefits, e. g. a maternity allowance for a longer period, she could go on to claim those benefits (para. 15-7). Shortly after *Walsh, 1980*, the Court was faced with a constellation raising a similar problem with regard to allowances for dependent children in *Laterza, 1980*. Article 77 Regulation 1408/71 assigned the competence for such allowances to the member state where

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a pensioner resided when the pensioner drew a pension in that state and at the same time a pension in another state. Yet the Court fell back on *Rossi, 1979* to hold that this competence applied only in so far as the allowance in the state of residence was actually payable. When the amount of the allowance potentially payable in the state where the other pension was paid exceeded that of the allowance granted in the state of residence that other state had to pay a supplement to guarantee the greatest benefit (paras 8-9). The Court applied the same reasoning to orphan's pensions under article 78(2) Regulation 1408/71 in *Gravina, 1980*. A change of residence of an orphan in receipt of an orphan's pension based solely on national law had the effect pursuant to article 78(2) Regulation 1408/71 that the member state where the orphan had moved to became competent for the orphan's benefits. However, this article was not to have the effect of depriving an orphan of a benefit based solely on national law. According to the Court, the state where the orphan resided originally had to continue to pay a supplementary benefit to guarantee the greater benefit it had awarded in the first place (para. 8). The Court later on in *D'Amario, 1983* held that this ruling applied regardless of whether the orphan ever moved residence, as long as the orphan resided in a member state where the migrant worker had been subject to a social security scheme (para. 7).

In *Beeck, 1981* the Court developed this line of authority further. In this case family allowances potentially overlapped, because one spouse worked in Denmark where the family lived and the other spouse worked in Germany. Articles 13 and 73 Regulation 1408/71 assigned the competence for family allowances in such a constellation to the member state in which the family resided. Family allowances in the other state, i. e. Germany, were suspended. In this case, German law contained a clause which excluded all benefits, including a potential supplement to bring the foreign benefits up to the amount normally payable in Germany. However, after having confirmed that a frontier worker could rely on article 73 Regulation 1408/71, the Court ruled based on article 51 Treaty that article 73 Regulation 1408/71 and article 10(1)(a) Regulation 574/72, which contained an implementing rule against overlapping, had to be read to the effect that Germany had to grant a benefit to supplement the allowance awarded on the basis of Danish law so as to guarantee the family the higher amount of benefits ordinarily granted in Germany. This was valid, although the national rule excluded the award of a benefit in such cross-border situations (para. 12). Next, *Robards, 1983* established that it was irrelevant for the rules regarding the overlapping of family allowances that the 'family members' had divorced (para. 15).

The entire line of authority regarding the exportability of the supplement was questioned in the light of article 51 Treaty in *Patteri, 1984*. However, the Court ruled that article 51 Treaty had to be interpreted so as to cover all measures that promote the free movement of persons (para. 8). The interpretation laying the foundation for the award of a supplement to the local family allowance was therefore in accordance with article 51 Treaty and the article 77(2)(b)(I) Regulation 1408/71 thus interpreted was valid (para. 10).

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In *Salzano, 1984* the Court relied on *Ragazzoni, 1978* and reiterated that a benefit was only payable within the meaning of the suspension rule in article 76 Regulation 1408/71 when all the requirements for the award of the benefit were met. In *Salzano, 1984*, this was not the case. That the family concerned refused to make an application for family benefits in Italy meant that not all conditions of substance and form for the award of the Italian benefit were met. The benefit was thus not payable in Italy. It did not overlap with a family benefit granted in Germany and article 76 Regulation 1408/71 was not applicable (paras 7 and 10). This interpretation was later on fully confirmed in *Ferraioli, 1986*.

In *Kromhout, 1985* again an issue of overlapping of family benefits arose. The Court first decided that it was sufficient that one parent was a worker for the Community rules on family allowances to apply; whether the other parent was also subject to Community rules was irrelevant for the application of the rules against overlapping, as was the question whether the marriage had been divorced. Then the Court addressed the situation that one parent was employed in Germany and received family allowances there, while the other parent resided with the children in the Netherlands where she was eligible by the sole reason of her residence to family allowances on the basis of Dutch law alone. The Court decided that the interpretation given to the rules against overlapping of family allowances requiring the award of a supplementary benefit also applied when an allowance was granted on the basis of national law alone in the member state where one parent resided and when, pursuant to that national law, the award of an allowance was solely subject to residence in the member state concerned. Thus, the Netherlands could suspend the overlapping part of the allowance, but had to guarantee the amount in excess by granting a supplement (paras 22 and 27). The judgment in *Kromhout, 1985* was, however, put into perspective in *Burchell, 1987*, albeit only for the `coincidence' (Advocate General Darmon, p. 3338) that the national legislations of two member states each by itself granted family allowances with respect to the same children and for the same period. This was the case, because Ms Burchell lived in the United Kingdom with the children, while Mr Burchell resided in the Netherlands where he was employed. The Court decided that when the Dutch legislation on its own already granted benefits, although the children were not resident in the Netherlands, article 73 Regulation 1408/71 need not have been applied. Consequently, the British authorities could not rely on article 10(1)(a) Regulation 574/72, either, to exclude the overlapping of benefits and to reduce the British benefit accordingly (para. 18).

Adding to the disparities

Pinna, 1986 also concerned the obligation of the member states under Community law to award family benefits even though the family of a migrant worker did not reside in the member state where the migrant worker was employed. More specifically, the Court held that the exception in article 73 Regulation 1408/71 which exempted France, as the only state, from the general obligation

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to award benefits even though the family did not reside in the member state concerned was incompatible with articles 48 to 51 Treaty. The Court therefore invalidated article 73 Regulation 1408/71 in so far as it dealt in a different way with benefits awarded in France than with benefits granted in other member states. The reason was that the Community legislature had to refrain from introducing 'unnecessary differences' in the social security rules and from 'adding to the disparities' existing in the social security systems of the member states (para. 21). Exempting France's benefits from exportability, moreover, amounted to covert discrimination of migrant workers in France which was prohibited by article 48 Treaty (para. 24). The French authorities therefore had to apply the regular regime that applied to family benefits in all other member states pursuant to article 73 Regulation 1408/71, as was later confirmed in *Pinna II, 1989*. The approach developed in *Pinna, 1986* served as a basis of argument again in *Lenoir, 1988*. In this case a pensioner who had moved from France to the United Kingdom was refused some benefits supporting his children in going to school, because he no longer resided in France. The Court held that the benefits had to be categorized as family benefits other than family allowances according to article 1(u) Regulation 1408/71, since they were not based exclusively on the number of children or their age. Consequently, under article 77 Regulation 1408/71 they were not exportable. However, article 77 did not thereby add to the existing disparities and it was not discriminatory to refuse the benefits within the sense of *Pinna, 1986*. Article 48 Treaty was not concerned with the disparities of national social security systems, as long as they (the systems) applied on the basis of objective criteria. Article 77 Regulation 1408/71 was applicable to all migrant workers alike. Moreover, the French benefits at stake were tied to the social environment. Hence, they could be made dependent on residence (paras. 13-7).

More supplements

Ventura, 1988 reiterated the obligation of a member state to pay the supplement when orphan's pensions under its legislation were higher in amount than the pensions paid in another member state. The Court, moreover, clarified that, even though article 48(1) Regulation 1408/71 had precluded the award of an old-age pension to the migrant worker in the case at hand because the insurance period he had completed had not amounted to a full year, that article could not be relied upon to exclude the award of an orphan's pension in the same member state, given that the conditions required by national law were met. For lack of an express reference in the rules governing orphan's pensions article 48(1) could not be applied to them (para. 11). In *Baldi, 1989* article 78 Regulation 1408/71 regarding orphans was said not to be relevant, because it was not the worker who had died, but his spouse who had not been working. However, the Court decided that in this case Belgium's increase in family allowances by reason of a spouse having deceased constituted a family allowance. As Mr Baldi drew an invalidity pension – first only in Italy, then also in Belgium – article 77 Regulation 1408/71 applied. Under this article, regardless of whether paragraph 2 letter a re a pen-

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sion in Italy only or letter b re a pension in Belgium also was applicable, the case-law regarding the supplement to family benefits to guarantee the greater benefit was pertinent (para. 22). In *Georges, 1989* the Court decided that the supplement-case-law also applied when a family member was working in two member states. In this case, Mr Georges was self-employed in Belgium where he resided with his family and at the same time employed in France. The Court decided on the basis of article 76 Regulation 1408/71 that the higher family allowance payable in France had to be guaranteed in this case, too (para. 12). Finally, the Court decided in *Dammer, 1989* that the supplement approach was also valid when each spouse worked in a different member state and they both resided with the children in a third member state. This eventuality was not addressed by the rule against overlapping in article 10(1)(a) Regulation 574/72. In such a case, the highest family benefit awarded by one of the states where one of the spouses was employed had to be guaranteed by providing a supplement (para. 25).

Unemployed frontier workers

In the 1980s, the Court also dealt with unemployment benefits. *Fellinger, 1980* raised the issue of how unemployment benefits were to be calculated for frontier workers. In the case of a frontier worker who had been last employed in Luxembourg, Germany had taken the notional salary, i. e. the salary which that frontier worker would have gained in Germany for the same work, as a basis for the calculation of unemployment benefits in Germany. This approach was literally sanctioned by article 68(1) Regulation 1408/71. This article provided that a state could use the notional salary as a basis of calculation instead of the salary last gained in that state, if a worker had been in employment in that state for less than four weeks. Yet the Court held that the notional salary-approach in article 68(1) Regulation 1408/71 was not to be applied to frontier workers, else they would never receive unemployment benefits based on the last salaries they had in fact gained. Article 68 Regulation 1408/71, in declaring the notional salary as relevant, dealt with an exception to the regular situation where migrant workers received unemployment benefits based on the salary last gained in the member state concerned. That was why the notional salary was not suitable as a basis when it meant to turn the exception into the rule by covering each and every case of frontier work (paras 6-7). As a result, Germany had to calculate the unemployment benefit based on the income last received in Luxembourg.

Aubin, 1982 also dealt with frontier workers. According to this judgment, frontier workers did not have a choice where to claim unemployment benefits according to article 71(1) Regulation 1408/71. They had to claim them in the member state where they resided, save when they were not wholly unemployed. In that case the member state of employment was competent. In contrast, workers other than frontier workers who did not have residence in the state where they worked had a choice, namely they could hold themselves available to the employment offices in the member state either where they worked or where they

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resided and claim benefits accordingly. Of course, they were not allowed to cumulate benefits (para. 19). In *Guyot, 1984* those cases, in which workers resided in a different state than the state of employment, were further clarified. The Court explained that article 71 Regulation 1408/71 did not cover a person who had resided and been employed in one and the same state when she had become unemployed, even if she then moved residence to another state. The regime for exporting unemployment benefits in Article 69 Regulation 1408/71 rather than article 71 Regulation 1408/71 applied in such a situation.

Atypical frontier workers

In *Miethe, 1986* again a particular situation came before the Court. Mr Miethe and his wife had always resided and worked in Germany. They moved to Belgium, however, thus making it possible for their children to come home every evening from the school they visited in Belgium. Mr Miethe maintained all professional links in Germany and went to work there on a daily basis. When he became unemployed he would have been entitled to benefits in Belgium, for he was a frontier worker. In the light of this designation of the competent state, according to the court, national law could not be applied. Even if German law on its own granted Mr Miethe unemployment benefits, he did not have the option to claim benefits there (para. 11). However, the Court left the national court the possibility to treat Mr Miethe as an 'atypical', 'false frontier worker' (paras 14 and 15). As he should receive benefits in circumstances most conducive to finding new employment and his chances were probably best in Germany given his professional ties, he could be regarded, instead of as a frontier worker, as a worker who resided in another state than the state where he worked (para. 18). This would create the choice for Mr Miethe to claim unemployment benefits in Germany based on article 71(1)(b) Regulation 1408/71. The Court significantly expanded this reasoning applied in *Miethe, 1986* in the judgment in *Bergemann, 1988*. Ms Bergemann had moved from the Netherlands to Germany to reside with her husband whom she had recently married. She had worked in the Netherlands and used her final holiday to move to Germany. As she clearly was not a frontier worker, the question was raised whether she could, like a false frontier worker, benefit from article 71(1)(b) Regulation 1408/71 to acquire a claim to unemployment benefits in Germany. In the light of *Di Paolo, 1977*, in which the close ties to the state of residence were considered pertinent, the Court acceded to that claim because she benefitted from more favourable conditions in Germany to find new employment (para. 21).

Article 71(1)(b) also created another difficulty in *Warmerdam-Steggerda, 1989*. In this case it was doubtful whether insurance periods completed abroad had to be taken into account for the purpose of acquiring unemployment benefits. More specifically, the case concerned the issue of how a period of employment in Scotland was to be treated under article 67 Regulation 1408/71 when such a period was considered under the Scottish system as a period of invalidity insurance, but not as a period of unemployment insurance. Ms Warmerdam-

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Steggerda had completed such a period in Scotland and then went back and claimed unemployment benefits in the Netherlands. The Dutch authorities had to decide what was relevant for unemployment benefits provided under the Dutch system, namely a) the fact that the employment periods completed in Scotland did *not* qualify as unemployment insurance periods in Scotland leading to the conclusion that they could be disregarded under the Dutch system; or b) the fact that the employment periods would have qualified as unemployment insurance periods had they only been completed in the Netherlands leading to the conclusion that they had to be taken into account by the Dutch authorities. The Court applied a literal interpretation of article 1(r) and (s) Regulation 1408/71 and opted for variant b) (para. 17, second sentence).

Exporting unemployment benefits

The regime for exporting unemployment benefits was already at stake in *Testa, 1980*. The regime based on article 69 Regulation 1408/71 allowed job seekers to continue to receive unemployment benefits for three months while searching for employment abroad. It was an independent regime of Community law which had to be applied uniformly throughout the Community, the Court held (para. 5). A job seeker could therefore not fall back on national law to continue claiming benefits, if he forfeited the right to unemployment benefits according to article 69(1) for having exceeded the three months period and failed to come back in time (para. 5), save where he could rely on the ground in article 69(2). This regime was, moreover, in accordance with, on the one hand, article 51 Treaty, because it extended the rights of workers and hence could be made subject to certain conditions, and, on the other hand, with the fundamental right to property (paras 14 and 19-21, respectively). However, according to *Cochet, 1985*, the regime in article 69 Regulation 1408/71 was not applicable in a particular situation, namely when a worker who had resided in another state than where he had worked claimed unemployment benefits in the state of residence pursuant to article 71 Regulation 1408/71 and *then* moved residence to the state where he had been employed. In such a situation, the exceptional right to claim benefits in the state of residence became undone and the regular right under article 13 Regulation 1408/71 to claim benefits in the state of the last employment applied (para. 16). More specifically, the state where the worker had been employed last had remained the 'competent state' within the meaning of article 69, although benefits had been granted under article 71 Regulation 1408/71 by the state where the worker had resided. In *Vanhaeren, 1988* the Court again clarified a detail of article 69 Regulation 1408/71. The Court decided that when a person went to seek employment abroad while receiving benefits under article 69 and actually succeeded in finding employment the state where the new employment had been found became the 'competent state' within the sense of article 69. When the person then returned to the original state this state could no longer be the 'competent state', although it had been just that previously (para. 12).

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A Kafka novel

In *Baccini, 1982* the Court addressed a case the creation of which 'the Commission's representative justifiably likened to a Kafka novel' (Advocate General Verloren van Themaat, p. 1080). Ms Baccini had received invalidity pensions in Belgium and in Italy, before she became fit for work again. As a result, the Belgian invalidity pension was withdrawn, but unemployment benefits were refused, because she was deemed unfit for work given that she still received an invalidity pension in Italy. In spite of the wording of article 12(2) Regulation 1408/71 the Court decided that where it was clearly established that the person was indeed fit for work unemployment benefits based on national law were not to be refused on the sole ground that national law deemed a person unfit for work because an invalidity pension was being paid to her in another state pursuant to Regulation 1408/71 (para. 15). However, the Court had to address the situation once more in *Baccini II, 1983* and it was still 'little short of absurd' according to the national court in the question referred (p. 594). This time the Court judged that the ensuing Belgian decision that Ms Baccini was not any longer invalid was not covered by article 40(4) Regulation 1408/71. It was not binding on the other member states, since articles 48 and 51 Treaty and Regulations 1408/71 and 574/72 did not regulate the conditions of the withdrawal of benefits (para. 17).

Sickness

The Court also dealt with sickness benefits in a few cases in the 1980s. *Jordens-Vosters, 1980* was one such case. The Court clarified that the chapter on invalidity benefits in Regulation 1408/71 dealt with cash benefits, while medical benefits in kind came within the chapter on sickness benefits, regardless of the terms national legislation used. The Court, moreover, held that the rules to determine the institution obliged to provide sickness benefits in kind did not oust national rules granting beneficiaries additional benefits, i. e. benefits that an institution was not required to provide under the chapter on sickness benefits in Regulation 1408/71 (paras 12-13). More generally the Court held that Regulation 1408/71 was not to be construed so as to prohibit national law from granting broader social security benefits than those a member state was required to provide under the Regulation (para. 11).

Mittelfranken, 1980 was another case that dealt with sickness benefits, though on the basis of Regulation 3. The Court decided that, in case a worker was affiliated to two insurance schemes in one state, each institution that managed one of the two schemes had to be considered the competent institution for the purposes of articles 20(1) and 23(1) and (3) Regulation 3. It was thus up to national law to decide how the costs of providing benefits were ultimately allocated between the two institutions (paras 9 and 10). The Court then also confirmed the infringement brought in *Commission v. Belgium (pension deductions I), 1985*. Belgium had levied sickness insurance contributions on pensions paid in Belgium to pensioners residing abroad, although those pensioners did not

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have a right to claim sickness benefits in Belgium under article 27 to 32 Regulation 1408/71 (paras 3 and 6).

Applicable legislation

In the 1980s, the Court also dealt with the rules determining the applicable legislation in a number of cases. In *Kuijpers, 1982* the Court ruled that the one and only legislation applicable was determined by Regulation 1408/71. When a person worked in two states, the legislation of the state where he resided was applicable pursuant to article 14(1)(c)(i) Regulation 1408/71, if he also worked there. When a person worked and resided in the Netherlands, while he also worked in Belgium, the Netherlands could therefore not regard his employment in the Netherlands as secondary and on that ground refuse to apply Dutch law. The Regulation did not draw any distinction between primary and secondary work (para. 15). Moreover, although the member states had the power to determine the right or duty to be affiliated to insurance schemes, they could not determine the extent to which their own legislation or that of another state was applicable (para. 14). In contrast, in *Koks, 1982* – which was handed down on the same day as *Kuijpers, 1982* – the power of the member states to determine the right and obligation to become affiliated to their social security systems as well as the conditions of affiliation thereto prevailed. The Dutch way of treating a spouse as uninsured when her husband was insured abroad for retirement purposes was therefore not subject to challenge under Regulation 1408/71 (para. 11). (Directive 79/7 on equal treatment of women and men in social security was not yet applicable at that time.)

In *Coppola, 1983* the Court was faced with a question of aggregation of insurance periods which it solved by means of the provisions on the applicable legislation. When a worker had last been employed in Italy and before that in the United Kingdom, were the British authorities required to aggregate periods of insurance for the purpose of acquisition of a right to sickness benefits in the United Kingdom? The Court replied that only one single legislation was to be applied. That was normally the legislation of the state where the worker was employed pursuant to article 13 Regulation 1408/71. For the purpose of article 18(1) Regulation 1408/71, when a person who was no longer employed sought sickness benefits, the legislation of the member state where the person had last been employed was the applicable legislation (para. 11). It was also in that state where the 'competent institution' pursuant to article 18(1) Regulation 1408/71 was located, i. e. in the case at hand Italy. It was for that institution exclusively, rather than for the British authorities, to aggregate periods of insurance for the purpose of acquiring rights to sickness benefits (para. 12).

In *Brusse, 1984* the Netherlands and the United Kingdom had come to the agreement that Dutch legislation be applied to a specific person for a period of time in the past, because that person had been wrongly affiliated to a Dutch insurance scheme during that time. The Court ruled that such an agreement was lawful under article 17 Regulation 1408/71 even for time periods in the past and

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even if the wrong affiliation had been the worker's fault. The agreement was subject only to the condition that it was done in the interest of the worker (paras 18, 21, and 25). Such an agreement fully replaced articles 13 to 16 Regulation 1408/71 in their function to determine the applicable legislation. Hence, when the worker applied for family allowances for the period concerned the applicable legislation had to be determined in accordance with the agreement. Consequently, article 73 Regulation 1408/71 had to be applied fully. It was not defeated by a residence clause contained in national law (paras 30-1).

The Court came back to the judgment in *Coppola, 1983* in *Ten Holder, 1986*. It declared that the *Coppola, 1983*-ruling, according to which a worker who had ceased work continued to be subject to the legislation of the member state in which he had last been employed, applied regardless of how much time had elapsed since he had last worked, provided that he did not begin to work anew elsewhere (para. 14). There was also another aspect to *Ten Holder, 1986*. Ms Ten Holder returned to the Netherlands where she had worked at an earlier point in time. After her right to continued sickness benefits based on Regulation 1408/71 in Germany had been exhausted, she claimed sickness benefits in the Netherlands. However, the Court reiterated that only one legislation was applicable at a time. The Court referred to *Kuijpers, 1982* and *Koks, 1982* to rule that the title II of Regulation 1408/71 constituted a complete system of conflict rules which had the effect that the member states were not able any longer to determine the scope and the criteria for the application of their legislation as far as persons and territory were concerned (para. 21). The Court also limited the *Petroni, 1975*-ruling – according to which rights acquired on the basis of national law alone were not to be lost – to national rules against overlapping. It was not applicable when it came to determining the applicable legislation. A person could therefore not be insured under the systems of two states at the same time (para. 22). This second aspect of *Ten Holder, 1986* was confirmed in *Luijten, 1986* for the right of a self-employed person to family allowances. The Court, finally, in *Agegate, 1989* referred back to *Luijten, 1986* to hold that it was in accordance with article 13 Regulation 1408/71, when a ship flew the flag of a member state and consequently that state's law was applicable on board that ship, to require a worker on board that ship to pay contributions to the social security system of that member state, as long as the exception in article 14b Regulation 1408/71 was respected (paras 27-9).

Non-discrimination and residence

The Court relied on non-discrimination and the waiver of residence clauses in article 10 Regulation 1408/71 in a number of cases in the 1980s. In *Überschär, 1980* the Court addressed the obligation to buy-in retrogressively lacunae in a pension insurance career. Annex V of Regulation 1408/71 in conjunction with German law established a distinction. On the one hand, there were persons who were German nationals or nationals of other member states who resided in Germany. They could buy into the German insurance scheme for periods during

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which they had paid contributions to a compulsory insurance scheme in another member state. However, they were obliged to do so retrogressively, i. e. the latest period had to be bought into first. On the other hand, there were persons who had been affiliated to the German system in the past, but who were not German nationals or did not at the moment reside in Germany. They could *not* in Germany buy into periods of compulsory insurance completed abroad. However, they could in turn buy-in periods during which they had not at all been affiliated to an insurance scheme and they could do so freely, i. e. without having to buy-in retrogressively (para. 13-4). The Court held that the financial consequences of the distinction varied with the objective facts of the situation of each person who was concerned (para. 17). The distinction therefore did not breach non-discrimination.

In *Camera, 1982* the Court was faced with a case to be assessed under Regulation 3. Belgium required residence for the acquisition of a right to invalidity benefits. The Court first briefly dealt with the submission of a claim to the wrong authority and the fact that national law considered certain cases of residence as irregular. Then the Court extended the reasoning in *Smieja, 1973*, which had concerned the effects of a residence transfer on rights already acquired, to the case at hand which was about the effect of such a transfer on rights to be acquired. Consequently, Belgium's residence requirement was precluded by article 10(1) Regulation 3. The Court built on this ruling when it decided in *Van Roosmalen, 1986* that a residence period required for the acquisition of an invalidity benefit in the Netherlands had to be interpreted in the light of article 10(1) Regulation 1408/71. A person could therefore not be prevented from acquiring a Dutch invalidity benefit on the sole ground that that person did not reside in the Netherlands (para. 39). The Court relied on *Camera, 1982* in the same vein in *Giletti, 1987*. A pensioner who was paid a pension in France while residing in Italy could not be prevented from acquiring or maintaining the right to a French supplement to that pension on the sole ground that he did not reside in France (paras 15-6).

The Dutch transition

Spruyt, 1986 concerned the arrangement made in the Netherlands to manage the transition from the old to the new old-age insurance system. The new system was based on residence as the main criterion to determine entitlement. As before, a wife's pension was accessory to the pension of her husband which in turn was increased proportionately. In essence, the transitional arrangement was as follows. A person who resided in the Netherlands when he retired had a right to have periods completed before 1957, when the new system came into force, taken into account for a pension awarded under the new system. That transitional arrangement was adapted in the annex to Regulation 1408/71 to the situation of migrant workers. Generally speaking, workers who did not reside in the Netherlands when they retired were entitled to claim a pension under the new system based on time periods completed before 1957, if and to the extent they had had

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a sufficient link to the Netherlands during that time. Such a link could consist in residence or employment in the Netherlands during a time period before 1957. According to the Court, that transitional arrangement and its adaptation by the annex to Regulation 1408/71 complied with non-discrimination. Without the adaption in the annex, non-discrimination and article 10(1) Regulation 1408/71 would modify the Dutch transitional system to the effect that every worker in the Community would have a valid claim for benefits with regard to periods before 1957 under the Dutch transitional arrangement (para. 21). However, the Court found the following aspect of the adaptation to be discriminatory. A husband was entitled to claim benefits for the time before 1957 under the transitional arrangement as adapted by the annex. Yet, his pension was not increased based on a specific period of residence of his wife in the Netherlands. That period was a period of residence of the woman before she married the man. In essence, the reason for that period being left out of account was legislative oversight, i. e. the case of spouses moving abroad at a certain point in time had not been envisaged when the adaptation of the transitional arrangement had been drafted (see paras. 24-7). In contrast, the same could not be said in *De Jong, 1986*. A woman had not yet been married during the time she had lived in Italy. Later on she married and settled with her husband in the Netherlands. With her not having been married at the time she lived in Italy, that period of residence was lawfully left out of account when the husband's pension was calculated in the Netherlands under the transitional arrangement as adapted by the annex (para. 17). After all, she had not had any connection whatsoever to the Netherlands when she had resided in Italy (Advocate General Mancini, p. 675). In *Rijke, 1987* the Court added that the way the transitional arrangement had been interpreted in *Spruyt, 1986* and *De Jong, 1986* did not invalidate the requirement in Dutch law for a married woman to submit an application within one year after she had left the Netherlands to reside abroad, if she wanted to benefit from continued voluntary insurance in the Netherlands. Such a requirement was covered by the power of the member states to determine the conditions of insurance affiliation (para. 17-8).

Further non-discrimination

In *Roviello, 1988* the Court struck down a provision in the annex to Regulation 1408/71, because it was discriminatory. Germany's system of awarding invalidity pensions was based on a categorization of work into four classes, namely highly skilled, skilled, semi-skilled, and unskilled work. The idea was that an invalidity pension was only awarded, if an incapacitated worker was unable to work in the class right below the class his previous work had been in. For migrant workers point 15 of section C of annex VI to Regulation 1408/71 determined, according to the Court, that only activities were to be taken into account for the purpose of this categorization that were subject to compulsory insurance under German legislation (para. 15). That approach violated equal treatment, because migrant workers were refused pensions that would have had to be grant-

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ed if previous work of higher qualification in other member states had been factored in (paras 15-18). Point 15 section C annex VI Regulation 1408/71 was therefore invalid in so far as it had to be interpreted in that sense.

Finally, the Court held non-discrimination to be violated in three more judgments with a social security dimension. *Stanton, 1988* was a case that concerned the time before Regulation 1408/71 had been amended to include self-employed activities. Since the Regulation was therefore not applicable, the Court decided the case on the basis of the Treaty instead. Mr Stanton had been employed in the United Kingdom where he was subject to social security insurance. At the same time, he pursued a self-employed activity in Belgium. The exemption from contributions to the Belgian social security system for self-employed activities was not applied to Mr Stanton, because it was only applicable by law when the principal work in employment was subject to Belgian social security. The Court found that the free movement of persons was concerned, because a person worked in one member state and at the same time pursued a self-employed activity in another member state. The ruling in *Klopp, 1984* which validated more than one place of work also covered simultaneous employment and self-employment (para. 12). Belgium's approach disadvantaged persons who pursued occupational activities outside Belgium and thereby violated articles 48 and 52 Treaty (para. 14). Article 7 Treaty was not violated though, since there was no indirect discrimination (para. 9). The disadvantage could not be justified, because the contributions Mr Stanton was required to pay in Belgium did not afford him any social security protection additional to the protection he enjoyed by reason of the contributions he paid in the United Kingdom (para. 15). *Wolf, 1988* was handed down on the same day as *Stanton, 1988*. The decision was identical, though the employed activity was pursued in Germany. In *Allué I, 1989* the Court decided that the exclusion of foreign language assistants from social security coverage normally available to other workers violated non-discrimination in article 3 Regulation 1408/71 given that the majority of those assistants were nationals of other member states (paras 20-1).

Technicalities

The Court also addressed a series of technical details of the social security rules of the Community in the 1980s. In *Damiani, 1980* the Court dealt with the provisional pension to be awarded immediately pending verification of the details of the definitive pension. More specifically, court proceedings to claim such a provisional pension were not excluded by article 45 Regulation 574/72 and in such proceedings interest to be paid on the provisional pension could be ordered, if national authorities had failed to award it (paras 7-8). In the case *Giuseppe Romano, 1981* the problem of gains and losses through currency fluctuations was solved on the basis of the idea that a migrant worker's rights based on national law alone were not to be lost. The Court in this case also granted national courts the liberty to disregard decisions by the administrative commission established by the social security rules of the Community (para. 20). In short, the situation

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was as follows. A migrant worker was awarded a pension based on Community law retroactively in Italy. Consequently, the Belgian authorities retroactively reduced the pension that had been granted provisionally before, based on Belgian law alone. The Belgian authorities then informed the migrant worker of the amount they intended to claim back from him owing to overpayment. The amount they received from the Italian authorities as arrears, though, was lower than the amount they claimed back from the migrant worker, because the currency conversion rates had fluctuated between the date on the basis of which the amount to be claimed back was calculated and the date when the arrears were actually paid. However, the Court ruled that the amount claimed back from the migrant worker could not, in such circumstances, exceed the amount of the payment the Belgian authorities had received from the Italian institution (para. 25). *Fanara, 1981* concerned a similar constellation. In this case, however, the arrears paid by the Italian institution exceeded the amount to be claimed back from the migrant worker due partly to currency fluctuations between the two dates at which the respective amounts were calculated. The Belgian authorities refused to hand on the exceeding amount to the migrant worker based on a provision of national law, arguing that the Belgian pension had been based on national law alone and hence *all* Belgian rules could be applied. The Court rejected that argument (para. 12). Even though the Belgian pension had been awarded on the basis of national law alone, the provisions of Community law dealing with provisional payments and recovery of sums paid in excess had to be applied. Articles 45(1) and 111 Regulation 574/72 did not leave any room for the Belgian rules (para. 14).

Knoeller, 1982 concerned the forms to be used to communicate information between the member states according to Regulations 3 and 4 with regard to insurance periods completed by migrant workers. To achieve the aim of simplifying the 'complex administrative operations of aggregation and apportionment' (para. 10) authorities also had to take account of supplementary information communicated in documents other than the 'official' forms furnished by the administrative commission. In *Scaletta, 1985* the Court decided that the obligation to notify the authorities when moving abroad pursuant to article 59 Regulation 574/72 could be met in any form, be it in writing or orally, and at any time. Disregard for the obligation was not, moreover, to result in loss of rights. The authorities could examine, though, whether the conditions for receiving benefits were met up to the time when they were notified of a change of residence (paras 10 and 15-6).

In *Deghillage, 1986* the Court decided that a member state's national authority who was awarding benefits had the duty pursuant to article 57 Regulation 1408/71 to recognize the diagnosis of a migrant worker's occupational disease first made by an authority in another member state in accordance with that state's legislation (para. 17). *Rindone, 1987* followed-up on *Deghillage, 1986*. The Court held essentially that under article 18 Regulation 574/72 the findings as to the incapacity to work made by the medical officer of the institution situat-

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ed where the migrant worker resided had to be accepted by the competent institution of another member state. The alternative option of having the migrant worker examined by a doctor of the choice of the institution having the power to grant benefits pursuant to article 18(5) Regulation 574/72 only meant that a medical doctor could be sent to see the migrant worker or the latter could be requested to go see a doctor in the member state where he resided. It did not mean that the migrant worker had to travel to the doctor of the institution's choice in the member state where the institution was situated (para. 21).

In *Viva, 1988* the Court dealt with the transition from Regulation 3 to Regulation 1408/71 and the resulting effect on the re-calculation of pensions. The Court decided that, since Regulation 1408/71 had entered into force pensions could not any more be awarded on the basis of Regulation 3 (para. 9). Yet, according to the Court, pursuant to *Saieva, 1976* the authorities were not allowed to re-calculate a pension awarded under Regulation 3 *ex officio*, but only upon request of the beneficiary and when the calculation under Regulation 1408/71 was more favourable for the beneficiary. Article 51 and 100 Regulation 1408/71 established an exception though, namely when a change in personal circumstances as explained in *Sinatra, 1982* supervened, the pension had to be re-calculated pursuant to Regulation 1408/71, even if originally it had been awarded pursuant to Regulation 3 and even in the absence of a request to that effect by the beneficiary (para. 11). *Delbar, 1989* in a sense also concerned a transitional problem, more specifically a problem of payment of family benefits to a self-employed person. The problem arose, because article 73 Regulation 1408/71 had not been amended regarding self-employed persons together with the general broadening of the scope of Regulation 1408/71 to encompass self-employed persons, but only at a later stage. Before that later stage, however, the Court held that self-employed persons could not claim family benefits directly based on article 51 Treaty given that article 73 Regulation 1408/71 had not yet been amended and article 51 Treaty only concerned workers (paras 8-11). With *Tiel-Utrecht, 1984*, finally, another subrogation case was tabled before the ECJ. Yet the Court did not enter the subrogation issue, because the basis of the insurance concluded in the case at issue had been purely contractual. The insurance relationship was therefore not covered by Regulation 1408/71 (para. 16).

4 Services

Broadcasting

Debauve, 1980 dealt with a prohibition in Belgium for cable television providers to broadcast advertisements. As held in *Sacchi, 1974*, the freedom of services applied to television broadcasting, provided that the situation was not purely internal to a member state (paras 8-9). Given the widely varying levels to which TV advertising was allowed in the member states, the Court did not find any issue

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with the freedom of services. The prohibition was applicable to all cable television providers without distinction based on the origin of the service or the nationality of the provider. Moreover, the Belgian broadcasting organizations were all subject to the same ad ban (paras 12-5). Finally, the possibilities for each consumer him- or herself to tap into television signals from abroad which naturally contained advertisements did not change the assessment. Discrimination could only arise from human activities, but not natural phenomena such as features of the landscape (paras 19-21). *Coditel, 1980* again concerned cable TV providers in Belgium. The dispute arose because of the transmission via cable of a German channel that broadcast a movie over which a company in Belgium held exclusive copyrights. According to the Court, the freedom of services did not prevent the copyright holder from opposing the Belgian cable TV companies' relaying of the German channel (para. 17). The freedom of services did not limit national intellectual property rights except when an arbitrary discrimination or a disguised restriction of trade was involved (para. 15). Exclusive assignment of copyrights along national borders was thus possible (para. 16). The case came back to the Court, though, in *Coditel II, 1982*. This time the Court was asked to rule on the compatibility with competition law of an agreement granting an exclusive right to show a movie within one member state. In this context, the Court held that the distinction inherent in the derogation clause of the free movement of goods in article 36 Treaty between the existence of an industrial and commercial property right which was not to be affected by the Treaty and its exercise which was capable of constituting a disguised restriction of trade applied in the context of the free movement of services, too (para. 13). (The Court then went on to hold that it was possible, depending on the circumstances, that an exclusive agreement for a specific area fell short of competition law when it restricted trade. However, that was not the case in general for an exclusive licence to show movies.)

Posted workers

In *Webb, 1981* a company established in the United Kingdom lawfully provided manpower to companies in the United Kingdom and extended that service to the Netherlands, though without the prerequisite Dutch licence. The Court held that the freedom of services applied even within the domain of social policy or when the free movement of persons was involved (paras 9-10). The licence requirement constituted an obstacle to the supplying of manpower as a service. The legislation of the host state could not necessarily be applied in its entirety to a service provider established in another member state. Rather, service provision could only be restricted in the interest of the general good, if the restriction was applied to all persons concerned equally, and if the same interest was not already safeguarded by 'home' state legislation (para. 17). Due to the sensitive social policy issues involved in manpower services and the diverse criteria the member states applied, a member state was entitled to require a licence, even from service providers established abroad that complied with home state legislation (paras

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16-9). In turn, the member state concerned had to abstain from discrimination and give due credit to the conditions fulfilled by the service provider in the home state (para. 20).

In *Seco, 1982* the Court dealt with a similar constellation, namely French companies seconding workers to Luxembourg to carry out construction work in fulfilment of a contract. In this case, Luxembourg required the French company to pay social security contributions on behalf of the employees sent to work in Luxembourg. The workers were third country nationals who remained compulsorily affiliated to France's social security system. The Court judged that, because covert discrimination equally fell foul of the free movement of services, Luxembourg could not lawfully require the French company to pay social security contributions on behalf of the workers. The workers sent to work in Luxembourg were already insured under the French social security system. They contributions paid in Luxembourg for the same period did not yield any additional protection. The need to control immigration did not justify a discriminatory burden on service providers from other member state, either. Moreover, to impose such social security contributions in Luxembourg was unsuitable to make French companies comply with minimum wages in Luxembourg, which as such could be imposed though (paras 8-14).

Variety

In the following years, a number of cases raised issues free movement of services. In *Transporoute, 1982*, the Court applied Directives 71/304 and 71/305 on contracts of public works, found that under Directive 71/305 Luxembourg could not require a tenderer established in another member state to provide an establishment permit issued in Luxembourg, and held that result to be in accordance with the freedom of services (para. 14). In *Mialocq, 1983* the Court clarified the ruling in *Sacchi, 1974*. French law had established a monopoly of regional centres of artificial animal insemination. While article 37 Treaty did not apply to service monopolies pursuant to *Sacchi, 1974*, the Court decided that such monopolies were capable of affecting the free movement of goods indirectly when they treated imported goods less favourably than domestic goods.

Luisi and Carbone, 1984 concerned Italy's restrictions of foreign currency exports. The Court decided that not just service provision, but also service reception abroad, in particular for medical purposes and the purposes of tourism, education, or business, was covered by the free movement of services. Consideration for such services, even in cash, was the necessary corollary of the freedom of services, as such protected by it, and not to be made subject to more rigorous controls than the services themselves (paras 10-16). As a consequence, the free movement of services applied to such payments, while the free movement of capital was applicable in cases of investment of funds (paras 22-3). Whereas the member states had the right to apply certain controls to the non-liberalized flows of capital, such controls were not to impede the normal pattern of service provi-

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sion. Any discretion of the authorities in this regard was, in particular, ruled out (paras 33-5).

Infringement in the insurance sector

In 1986, the Court was seized with a series of infringement procedures relating to the insurance sector. *Commission v. Germany (insurance), 1986* concerned insurance policies taken out voluntarily by consumers and co-insurance. (See the limitation of the ruling in para. 24.) Germany had required foreign insurance providers to have a German authorization and an establishment in Germany. With regard to consumer contracts the Court decided that the restriction posed by the authorization requirement was justified by the need to protect consumers, in particular since no harmonisation had taken place yet. It was necessary though that the conditions already fulfilled in the 'home' state were duly factored in to minimize the dual burden (paras 28-33 and 47). Yet to have a permanent establishment in Germany was precluded. That condition negated the very substance of the freedom of services (paras 54-6). In contrast, consumer protection was no ground to justify an authorisation requirement in the business of co-insurance, as in that business contracts were not a mass phenomenon, but rather negotiated individually (para. 64). The free movement of services and Directive 78/473 on co-insurance were therefore violated in that regard (para. 67). This violation of the freedom of services was confirmed in *Commission v. France (co-insurance), 1986*, *Commission v. Denmark (co-insurance), 1986*, and *Commission v. Ireland (co-insurance), 1986*, all of which were handed down on the same day as *Commission v. Germany (insurance), 1986*.

Public works

CEI and Bellini, 1987 added to *Transporoute, 1982* (above) in establishing in clearer terms the function of the freedom of services and establishment in the context of the directive on contracts of public works (Directive 71/305). Belgium had set a maximum value for works which a contractor was allowed to carry out at a time as a condition for the award of a contract. The Court held that the member states were free within the framework established by the Directive to set up further procedural and substantive rules, provided they complied with the freedom of services and establishment. Belgium's condition did not violate those freedoms (paras 14-6). *Beentjes, 1988* then reiterated the ruling in *CEI and Bellini, 1987* as to the function of the freedom of services and establishment (para. 20). The question whether the condition in a call for tender for contractors to be capable of employing long-term unemployed persons had a discriminatory effect and hence violated the freedom of services was then left for the national court to answer (paras 29-30).

Lawyers

Commission v. Germany (lawyers), 1988 addressed Germany's implementation of Directive 77/249 on lawyers' services, notably the requirement to work in

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conjunction with a lawyer of the host state. The Court held that Germany went beyond what was required to implement the Directive and the freedom of services in requiring foreign lawyers to work in conjunction with a German lawyer when representation by a lawyer was not mandatory for clients in proceedings (paras 14-5). The Court, in addition, struck down the requirements spelling out in detail what 'work in conjunction' meant (paras 26-32). Moreover, the restriction of the right to plead resulting from the principle of territorial exclusivity – lawyers were only allowed to represent clients where they were admitted to the bar – even though equally applicable to Germans, could not be applied to foreign lawyers, since not all host state rules governing established lawyers were automatically to be applied to foreign lawyers providing services (paras 41-3).

Broadcasting again

Bond, 1988 again dealt with the broadcasting of programmes via cable television. The Netherland's law contained a prohibition for Dutch cable operators that relayed programmes broadcast abroad to transmit advertisement directed at the public in the Netherlands or with subtitles in Dutch. The national television channels in the Netherlands, in contrast, were allowed to broadcast a certain amount of advertisement, although the ads were to be channelled through a foundation which made the necessary arrangements. Advertisers who had aired ads in Dutch or with subtitles on foreign channels which were then relayed by Dutch cable operators to the Dutch public complained about a violation of the freedom of services. The Court held that two sets of transfrontier services against remuneration were involved, namely Dutch advertisers contracting with foreign broadcasters and those broadcasters contracting with Dutch cable operators. It was immaterial that the remuneration was paid indirectly, i. e. that in the context of the latter set of services the Dutch consumer paid fees to the Dutch cable operator, rather than the broadcaster paying the cable operator for the service of relaying (para. 14-6). Both sets of services were restricted by the ad ban. The Dutch advertisers were precluded from contracting with broadcasters, the latter with cable operators (para. 22). The prohibition of subtitles reinforced the restriction by the ad ban. The restrictions were moreover discriminatory, as the national television stations generally could broadcast advertisement, albeit via a foundation, in contrast to foreign broadcasters transmitting via cable to Dutch viewers (paras 24-6). Such discrimination was in need of justification which only one of the grounds of derogation expressly mentioned in article 56 Treaty in conjunction with article 66 Treaty could provide (para. 32). Economic aims were excluded as grounds of justification (para. 34). Public policy grounds, such as the need to maintain the non-commercial pluralistic nature of broadcasting, were valid as such. Yet they did not prevail in this case, for more proportionate, less restrictive measures than an outright ad ban would have been available. A restriction of air time for ads, for instance would have been an alternative (para. 37). Moreover, a non-discriminatory ban on all advertisement, including adver-

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tisement by the Dutch national television stations, would comply with the freedom of services (para. 38).

Remuneration

Humbel, 1988, a judgment which mainly concerned the *Gravier, 1985*-line of authority, also clarified the term 'services' pursuant to article 59 Treaty. The characteristic of remuneration, according to the Court, was that it constituted consideration for a service normally agreed upon between the parties involved. That was not the case with national public education which was normally funded by public means, even though sometimes contributions were required. In public education, the state did not pursue a gainful activity, but rather fulfilled its basic function of providing the population with education (paras 17-9).

Transport services

In *Corsica Ferries, 1989* the Court refused to apply the freedom of services for the years 1981 and 1982, although higher charges were essentially imposed in case of ferry transports between ports in Corsica and member states (or Africa) than in case of transports between ports in Corsica and France. The reason for the Court's ruling was that transport services were subject to liberalization through the transport policy. That liberalization was implemented only by Regulation 4055/86 (paras 10-4). However, the Court emphasized that the freedom of services – like the freedoms of goods, persons, and capital – precluded restrictions even if they were only minor. Moreover, a trader's freedom to provide services could be affected by tax measures (paras 8-9).

Tourists

Finally, *Cowan, 1989* confirmed that a tourist was a service receiver who enjoyed the freedom of services. Tourists therefore had to be protected from physical harm in equal measure as a state's own citizens (para. 17). More specifically, when a tourist from the United Kingdom became the victim of a crime in France and claimed compensation under French law France could not refuse such compensation on the sole ground that the victim did not have a French residence permit – in particular when no similar requirement was imposed on French citizens – else French law ran afoul of the prohibition of discrimination on the basis of nationality. The same was valid as to the condition that the state of which the victim was a national had concluded an agreement of reciprocity with France (paras 10-3).

IV The 1990s

The case-law grew exponentially in the 1990s. During this decade, the Court handed down more decisions in our domain than in the 25 years before: more than 350 decisions. Social security and workers contributed the bulk with almost

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