B The case-law

This first part of the book is about the case-law only. It contains a thick, roughly chronological description of the case-law in free movement of persons and services. The second part on 'the evolution of interpretive formulas' then traces how certain interpretive formulas have developed in this body of case-law.

I The 1960s

The famous *Van Gend en Loos, 1963* and *Costa v. ENEL, 1964* overshadowed everything the Court delivered up to the 1970s. However, in the shadow of direct effect and primacy other less obvious developments took place. *Costa v. ENEL, 1964* did not just establish the primacy of Community law, but also instilled article 53 Treaty with direct effect, thus precluding a member state from adopting new measures hindering predominantly the establishment of nationals of other member states (p. 596). In 1969, the Court handed down the first judgment in free movement of workers, *Ugliola, 1969*. In that judgment the Court found that the time period completed in the military service of one member state had to be taken into account on an equal basis in another member state when seniority in an undertaking was determined (paras 6 and 7).

By the time the Court had handed down these two judgments, however, it had already decided more than twenty cases in social security. This social security case-law had begun with *Hoekstra, 1964* in which the Court gave the concept of a worker within the sense of both Regulation 3 concerning social security of migrant workers, i. e. a wage-earner or an assimilated worker, and articles 48 and 51 of the Treaty a Community meaning. It thus removed the term 'worker' from the grasp of the member states. The term 'worker' covered persons who were subject to social security under the various national systems. More specifically, a 'worker' was a person who had been employed and could be employed again and was subject to voluntary continued insurance for workers, regardless of any temporary residence abroad. In the second judgment in social security, *Nonnenmacher, 1964*, the ECJ ruled that the principle that the law of the state of employment was mandatorily applicable pursuant to article 12 Regulation no. 3 did not preclude the state of residence from applying its own law simultaneously, when it afforded additional protection to the migrant worker (para. 1b). The next case was *Kalsbeek, 1964*. In this case the Court first clarified that 'legislation' under Regulation 3 included present and future legislation; the Regulation was applicable regardless of whether a member state had notified the amendment of an act. The Court then dealt for the first time with the aggregation of insurance periods. It decided that the apportionment in article 28(1)(b) Regulation 3 need not have been applied if periods had not previously been aggregated pursuant to article 27 in order to acquire, retain or recover a right to benefits,

viz. when a benefit calculated solely on the basis of national law was more advantageous. Moreover, apportionment also had to be applied in systems that relied on the materialization of risks rather than the duration of insurance. (The Court also dealt with some transitional problems in this judgment.) In the fourth social security case, *Dingemans, 1964*, the Court categorized a benefit in Dutch legislation as an invalidity benefit under Regulation 3, and more specifically as a type B benefit. It is noteworthy that all four judgments in social security were handed down upon requests from the same court in the Netherlands, the Centrale Raad van Beroep.

The first two cases in 1965 again originated in the Netherlands. *Bertholet, 1965* opened the line of case-law on insurance subrogation in case of accidents. The Court ruled that the application of the subrogation clause in article 52 Regulation 3 did not depend on any implementing convention between the member states (p. 86); and that there was no reason to restrict the scope *ratione personae* of the Regulation to those who resided in one state while working in another (p. 87). Moreover, the Dutch benefit at issue was within the scope *ratione materiae*. The reference in *Van Dijk, 1965*[22] concerned a frontier worker to whom article 52 Regulation 3 was also deemed applicable. The Court answered in almost the same terms as in *Bertholet, 1965*. Seized once more in the context of insurance subrogation the Court in *Singer, 1965* again refused a restrictive reading of the scope *ratione personae* of Regulation 3 and article 51 ECT and found a German holidaymaker in France who had suffered a traffic accident to be within the ambit of the Regulation (p. 970). Moreover, the Regulation applied to claims based on accidents that had occurred before the entry into force of the Regulation (p. 971). *Singer, 1965* was the first judgment that was handed down upon a reference from France. Eight days before that the ECJ had handed down the first social security case originating in Germany in *Dekker, 1965*. The Court in this case began the line of authority on 'benefits in kind' in sickness insurance. In the case at issue a supplementary contribution to a pension for the purpose of financing sickness insurance was considered not to be a benefit in kind under article 22 Regulation 3.

In *Vaassen, 1966*, the first of two social security judgments of the year 1966, the Court included social security schemes that were run by private law bodies in the legislation covered by Regulation 3; more specifically, the sickness insurance managed by a Dutch pension fund for civil servants was included, although it was optional in the case at issue (p. 274).[23] Moreover, after having dealt with an annex problem, the Court ruled that sickness insurance could not be terminated on the sole ground that the insured person – a pensioner who had survived a worker – had moved to reside in another member state, even though her insurance was optional (p. 277). Thus began the long line of authority on residence clauses in social security. Also in *Vaassen, 1966* the Court added to *Dekker,*

22 The case is sometimes also called *Koster* or *Koster (née van Dijk)*.
23 The second part of the judgment interpreted the annex to Regulation 3 concerning the Netherlands.

1965 that 'benefits in kind' also included reimbursements of costs incurred by the insured because of sickness, in other words indirect benefits in kind, and that 'cash benefits' essentially consisted of payments made to compensate for loss of earnings through illness (p. 278). In *Hagenbeek, 1966* – like *Vaassen, 1966* a reference from the Netherlands – the Court dealt with a change in legislation in the Netherlands and the consequent repercussions on a widow of a migrant worker. The Court essentially ruled that the insurance periods completed before moving abroad were not to be lost and had to be aggregated not just for the purpose of calculating but also for acquiring and recovering a benefit, although the pertinent annex to Regulation 3 concerning the transitional regime in the Netherlands (G(III)(B)(b)) only mentioned 'the purpose of ascertaining the amount of the benefit' (p. 429).

The year 1967 was a key year. The Court decided ten social security cases, as many as in three previous years together. While Advocate-General Gand (in *Ciechelski, 1967*) was 'happy' to see seven cases relating to aggregation pending before the Court, because the preliminary ruling procedure was obviously working, he also 'express[ed] a certain amount of anxiety at the number of questions of law and practice raised […]' (p. 192). The many issues raised by the need to aggregate insurance periods became evident. Six of the judgments of 1967 related to aggregation: *Ciechelski, 1967*; *De Moor, 1967*; *Goffart, 1967*; *Welchner, 1967*; *Couture, 1967*; and *Guissart, 1967*. The Court established that the Community rules regarding aggregation were not to replace, but to supplement the national rules on awarding pensions, notably where national law on its own excluded the acquisition of benefits when the insurance periods completed under national law were insufficient and periods had also been completed in other member states (*Ciechelski, 1967*, p. 188; *Couture, 1967*, pp. 388-9). Community rules had to be applied in their entirety. Aggregation had to go hand in hand with apportionment which (apportionment) could not be applied if aggregation had not been applied previously (*Ciechelski, 1967*, p. 188; *De Moor, 1967*, pp. 206-7). The cumulation of pensions awarded by different member states – be it an award on the basis of national law alone or on the basis of the Community rules on aggregation – to a single migrant worker was not excluded, but the very idea of Community law (*De Moor, 1967*, p. 207). A national authority could not rely on aggregation/apportionment to bring the overall benefits of a migrant worker, viz. the benefits due in all member states together, down to the ceiling applicable pursuant to national law (*Ciechelski, 1967*, p. 189). Cumulating benefits in two states for one and the same insurance period was not possible though (*Ciechelski, 1967*, p. 189). *Guissart, 1967* added that periods completed in one state where they were taken into account to calculate a benefit need not have been treated as notional periods pursuant to the national law of another member state (p. 434). The Court also ruled in *Goffart, 1967* that the suspension of the payment of a pension in one state meant that the person concerned did not meet the 'conditions required by all the legislative systems applicable' pursuant to article 28(1)(f) Regulation 3. Hence, calculation pursuant to nation-

al law alone was applicable in the case at issue. In *Welchner, 1967* the Court refused to oblige Germany to recognize periods of captivity during World War II followed by work in France as substitute periods under article 1(r) Regulation 3 ('assimilated periods'). Germany therefore did not have to factor in such periods of captivity into the calculation of an invalidity benefit. *Couture, 1967* and *Guissart, 1967* made it plain that migrant workers did not in general have the option to chose between the application of national law alone and aggregation/apportionment pursuant to Community law (pp. 388 and 433, respectively). Aggregation and apportionment were not applicable, if national law alone achieved the aims the Community approach pursued (*Couture, 1967*, p. 388). Moreover, even if aggregation was applicable, it did not imply that pensions necessarily had to be determined simultaneously in all member states (*Couture, 1967*, p. 389).

In 1967, the Court in *Colditz, 1967* was also confronted with the following question: Did an application for an old-age pension in Germany mean that the French authorities could 'liquidate' a pension due under the French system or was successive payment of pensions possible, thus giving the person concerned the option to continue to pay contributions in France accruing further rights, while a pension in Germany was already being paid? The Court opted for the possibility of successive payment under article 28 Regulation 3, emphasizing that separate social security systems continued to exist in the member states and that the rules of the Community were not to be applied in a way that a migrant worker was deprived of the benefit of national law. In *Van der Vecht, 1967*, the Court ruled that in general one single national legislation was applicable, so as 'to avoid any plurality or purposeless confusion of contributions and liabilities' (p. 352). In the case of a worker who commuted daily from one state where he resided and where his employer was established to another state where he actually worked the latter state was competent, save when the duration of the work in that latter state did not exceed twelve months (article 13(a) Regulation 3). The state of residence could not levy any additional charges from the employee or the employer, in particular when those charges yielded no additional social security protection (p. 354). Apart from that, the Court clarified that the decisions adopted by the administrative commission under Regulation 3 were not binding; and that the probable duration of employment mentioned in article 13(a) of the said Regulation referred to the duration of the employment of the individual worker (p. 355). Finally, the Court dealt with some of the more intricate details of social security: Courts as authorities had to accept documents submitted in the languages of other member states based on Regulation 3 (*Guerra, 1967*); in the situation when one member state calculated pensions in units of years while another calculated them in units of months, the smaller unit had to be applied in both cases in order to avoid granting two benefits for one and the same period of insurance (*Cossutta, 1967*).

The rest of the decade saw the ECJ handing down four more judgments in social security. Three of them concerned aggregation under Regulation 3. In *De Cicco, 1968* the Court broadened the scope of aggregation to cover a 'mixed ca-

reer' (Advocate General Gand, p. 483), i. e. the career of a person who had pursued a self-employed activity in one state and then worked as an employee in another state. The reason for this broadening was that the self-employed person concerned had been affiliated under national law to a special social security scheme which was treated as an extension of the general social security scheme applicable to wage-earners (p. 481). More generally, the Court noted the tendency of member states 'to extend the benefits of social security in favour of new categories of persons by reason of identical risks', while it was for national law to determine the extent of such extensions (p. 480). In *Torrekens, 1969* the ECJ brought a particular French non-contributory benefit scheme for workers of more than 50 years of age within the scope of aggregation. Despite the applicability of Regulation 3, the Court cautioned that any previously existing social security convention mentioned in the annex was to be applied. In *Duffy, 1969* it was again made clear that the Community rules had to be applied in their entirety. The provisions for the reduction and suspension of benefits referred to in article 11(2) Regulation 3 were only applicable to benefits acquired on the basis of the Community rules on aggregation and apportionment, but not to benefits acquired solely based on national law. Finally, *Compagnie belge, 1969* was another insurance subrogation case in which the Court in a similar way as in *Singer, 1965* decided that for the subrogation in article 52 Regulation 3 to be applicable a link between the professional activity of a wage-earner and the injury he or she had sustained was not required (paras 6-7). Moreover, the subrogation article in Regulation 3 did not alter the jurisdiction of courts, i. e. the place where a claim could be brought (paras 10-1). Finally, the Court reiterated the ruling in *Bertholet, 1965*, namely that the article had direct effect.

The 'constitutional' principles of direct effect and primacy were the beacons of the first years of the Court's case-law. Yet at least quantitatively speaking social security rather than free movement of workers or freedom of establishment dominated the Court's work. Many developments in the social security case-law began in these first years, in particular in the field of aggregation and apportionment of periods of insurance. However, they were in many ways years of uncertainty. Regulation 3 was hard to read – and so was the case-law, not least because the Court during that time never expressly referred to previous judgments. The implications of the rulings remained somewhat uncertain. They related to very specific provisions, but at the same time seemed to include wider principles. The Commission, for instance, repeatedly argued a principle of interpretation in favour of migrant workers based on *Nonnenmacher, 1964*, but never managed to obtain the Court's express backing.[24] Besides that, *Nonnenmacher, 1964* created confusion until as late as *Ten Holder, 1986*, because the Court had been ambiguous in 1964 as to whether more than one legislation could apply to one and the same person. However, aggregation of insurance periods proved the thorniest issue of social security. It became evident during the 1960s that many

24 So argued in *Guerra, 1967*, p. 222 and *Merola, 1972*, p. 1259.

kinds of periods were potentially concerned by aggregation. The interplay in aggregation between national law and Community law, and between different provisions of Community law, such as articles 11, 27, and 28 Regulation 3, also proved challenging.

II The 1970s

In the 1970s the case-law exploded. The Court handed down more than 120 judgments in free movement of persons, services, and social security, the vast majority being social security judgments. 95 judgments were given in social security and half a dozen more concerned mainly free movement of workers but in addition social security (section 0). Free movement of workers contributed with 18 judgments (section 0), while a few more social security cases also dealt with the worker freedom. In contrast, freedom of establishment (section 0) and services (section 0) remained relatively quiet with seven judgments in establishment and nine judgments in services five of which overlapped with the freedom of workers or establishments.

1 Workers

In free movement of workers, *Marsman, 1972* took up the thread of *Ugliola, 1969*. *Marsman, 1972* concerned discrimination based on residence and nationality. The Court held that a rule which required the consent of an authority to dismiss a foreign worker only when the foreigner was resident in Germany amounted to discrimination prohibited by free movement of workers. The residence requirement had only applied to foreign nationals but not German nationals. In *Michel S, 1973* the Court read article 12 Regulation 1612/68 so that a handicapped child of a migrant worker could claim benefits intended to improve the capacity to work. In contrast, article 7 of the same Regulation applied only to benefits for workers themselves but not for their families (paras 13-5 and 8-10).

A first wave of cases

In the year 1975 a first true wave of worker cases was tackled by the Court. The Court handed down five judgments: *Sotgiu, 1974*; *Commission v. France (maritime worker quota), 1974*; *Casagrande, 1974*; *Van Duyn, 1974*; and *Walrave, 1974*. *Sotgiu, 1974* concerned the refusal to increase the separation allowance for an Italian employee of the German postal service on the ground that his wife did not reside in Germany but in Italy. The Court found this approach to amount to indirect, covert discrimination (para. 11). The public service exception did not apply, because it only concerned access to employment in the public