granted them preferential tariffs, had to offer the same tariffs to all customers willing to provide similar bulk mail at the same point in the distribution chain.

Finally, the Court in *Opinion on GATS amendments, 2009* addressed the modifications to the GATS that had become necessary because new member states had joined the Community. The Court opined that the competence to modify the GATS commitments was still shared between the Community and the member states despite the amendments the Treaty of Nice had made to the common commercial policy. Article 133(6) Treaty declared the competence to be shared with regard to certain sensitive policy fields. Moreover, the act of the Community approving the amendments to the GATS had to be based both on the common commercial policy and the common transport policy.

## VI The 2010s

Not quite half of the decade is over and it is already clear that the case-law of the Court continues to grow – perhaps not exponentially, but certainly steadily on a very high level. The free movement of workers and citizens has already yielded more than 60 decisions and social security some 30 decisions, while the free movement of services and establishment have contributed the bulk, with more than 120 decisions.

### 1 Workers and citizens

#### *Advantages*

The Court developed its case-law on advantages migrant workers enjoyed in the first years of the 2010s. *Commission v. Netherlands (portable funding), 2012* dealt with a requirement the Netherlands imposed when support for studies abroad was applied for. According to Dutch law, funding to study at a university outside the Netherlands, so-called portable funding, was only granted when a prospective student had resided in the Netherlands during three out of the six years preceding enrolment at the foreign university, pursuant to the so-called 3 out 6 years rule. The Commission took issue with the 3 out 6 years rule, but only with regard to article 7(2) Regulation 1612/68, i. e. for workers and their children. The Court sided with the Commission and found free movement of workers and article 7(2) violated. The residence requirement amounted to indirect discrimination, as the majority of those migrant workers, viz. their children, and frontier workers residing abroad were nationals of other member states (paras 39 and 55). The comparability of situations required to find unequal treatment was given between, on the one hand, workers residing in the Netherlands and, on the other, frontier workers or migrant workers falling short of three years of residence (paras 42-44). Such comparability required objective and easily identi-

fiable criteria, not simple probabilities. (The Netherlands had argued that it was more probable that prospective students who resided in the Netherlands would study in the Netherlands; paras 40 and 42). The Court then confirmed that article 7(2) had an independent meaning for the members of the family of a migrant worker, i. e. independent from article 12 Regulation 1612/68, as far as they (the members) were supported by the migrant worker (paras 48-53). That an unreasonable burden would result, if the 3 out 6 years rule was precluded by article 7(2), was not admitted by the Court as a ground to justify the indirect discrimination. If that consideration was admitted, the scope of the market freedoms would vary in time and place in function of the state of public finances. Migrant workers, after all, *per se* had a link to the host state's society, in particular because they paid taxes there. Moreover, the case-law in *Bidar, 2005* and *Förster, 2008* required such a link for Union citizens who did not work, in contrast to workers (paras 58-69). The aim of encouraging student mobility, though, could be a ground to justify the discrimination. The measure was appropriate to achieve that aim, given that most prospective students studied where they resided and most would return there after having studied abroad (paras 75-9). However, the Netherlands had failed to provide evidence that the 3 out 6 years rule was necessary and did not go beyond what the aim required. It was not sufficient to cite two alternatives which would have been more restrictive, namely a language or a local diploma requirement. The Netherlands at least had to show why they had opted for such an exclusive rule in the first place (paras 84-7). The Court, therefore, struck down the rule, while leaving the Netherlands the option of finding less restrictive alternatives.

In *L.N., 2013* a Union citizen had applied for a study course at an educational establishment in Denmark, then went to Denmark while the application was pending and began to work in full-time employment. When he commenced the studies, he continued to work part-time and applied for a maintenance grant in Denmark. For the Court, this was a standard case of a worker seeking benefits under article 7(2) Regulation 1612/68, provided that the national Court found that the work pursued was genuine and effective. The Court also reiterated that the motives of a person to exercise the freedom to work in another member state were irrelevant, as long as the person genuinely pursued or wished to pursue an activity in employment (para. 47). (Denmark had claimed that his motives had been *ab initio* to study in Denmark, because he had submitted his application before arriving in Denmark.) Apart from that, the Court clarified that the status of a Union citizen enrolled at an educational establishment under article 7(1)(c) Directive 2004/38 did not preclude a person from relying on the right of a worker to obtain a maintenance grant (para. 36). More generally, the rights conferred by both Union citizenship and free movement of workers were available at the same time to a Union citizen (para. 30).

In *Prete, 2012* the Court further explained the real link to the host state's employment market that migrant job seekers could lawfully be required to have established, before they came in a position to claim a benefit facilitating access to

that employment market. Belgium required six years of studies at a Belgian establishment of higher education before entitlement to the tideover allowance arose. Abstaining from ruling on the exact duration of studies corresponding to the real link-requirement, the Court made it plain that other factors were capable of establishing a real link in the sense of the case-law, namely registration as a job seeker, periods of residence in the host state, or marriage in the host state and other family circumstances (paras 37-51). Article 39(2) Treaty therefore excluded the Belgian criterion as too general and exclusive, hence violating the rights of job seekers.

*Residence*

With *Radziejewski, 2012* the Court then came back to residence requirements. Swedish law made the availability of a debt relief procedure which granted private individuals relief from debt enforcement by creditors dependent on residence in Sweden. Mr Radziejewski had had residence in Sweden, but went to reside in Belgium, while remaining in employment in Sweden. He was refused a debt relief procedure in Sweden. The residence requirement, in the view of the Court, dissuaded workers from leaving Sweden (para. 31). The need to guarantee the authority of debt relief decisions, though a legitimate ground (para. 36), did not necessitate residence in Sweden. Even with residence in Sweden, a debtor could be sued by his creditors in a court in another member state where the debt relief decision was not recognized, since it was not within the scope of the Brussels framework. Even with residence abroad, the authority of the decision could be guaranteed in debt enforcement proceedings in Sweden (paras 37-43). Moreover, monitoring was legitimate, but could be implemented even in the absence of residence in Sweden, in particular when the person concerned was employed and subject to income taxation in Sweden and could be required to furnish information. To require residence just on the day when the debt relief procedure was opened was ineffective in any case (paras 46-50).

Next, *Caves Krier, 2012* also dealt with a residence requirement, this time in connection with a subsidy Luxembourg granted to employers who engaged unemployed persons of advanced age. Caves Krier, a Luxembourg company, engaged Ms Krier, a frontier worker residing in Germany who had previously lost her employment in Luxembourg and registered with the unemployment office in Germany. Caves Krier was refused the subsidy, because Ms Krier was resident in Germany. The Court held that there was a disadvantage for workers having used their freedom to move in that the benefit was denied based on the residence clause (paras 43-7). The employer was entitled to invoke the free movement of workers to oppose the resulting deterrent effect (paras 28-9). Luxembourg had not argued any justification. In any event, the member states' broad discretion in social policy did not justify the refusal, in particular since frontier workers as a rule entertained links with the employment market of the host state by reason of their (former) employment and the taxes they paid (paras 51-4).

*Taxation*

Numerous cases then concerned various taxes the member states imposed. In *Commission v. Greece (transfer tax), 2011* certain distinctions Greece drew in its tax regime for real estate transfers came to the Court. Greece exempted, first, anyone with permanent residence in Greece and, second, Greek nationals resident abroad from the tax that became due whenever ownership in real estate was transferred. Those exemptions applied whenever such persons acquired a first home in Greece. According to the Court, the requirement to have permanent residence in Greece amounted to indirect discrimination (paras 47-50) and the exemption of Greek nationals resident abroad to direct discrimination (para. 69), with both going against the grain of the freedom of workers and establishment. The first restriction was not justified by the aim of avoiding speculation, even if it were admitted as a ground for justification, as it was unsuitable for that purpose. An obligation to reside at the acquired home did not apply and the property could be rented out (para. 54). Similarly, low-income families were not protected, either, as all families benefitted from the exemption (para. 55). To avoid possible tax evasion or prevent abuse by persons resident abroad and acquiring several 'first' homes in Greece, less restrictive means were available, namely a requirement to register, provide documentation or a declaration, or checks by the authorities (paras 56-7). That ruling applied not just in case of workers, but also of Union citizens who were not economically active (para. 60). For the second restriction, i. e. the exemption of Greek nationals abroad, encouraging the return of Greek nationals from abroad and preserving the links between Greek nationals abroad and their home country were not objective circumstances which were independent of nationality (paras 70-1). For both restrictions, the same assessment applied with regard to the European Economic Area (paras 62 and 75).

*Schulz-Delzers, 2011* next concerned comparability of certain allowances for tax purposes. 'German' civil servants received certain allowances from the German state when they worked abroad. Those allowances were not factored in at all for the purposes of income taxation in Germany. In a similar vein, 'French' civil servants received certain allowances from the French state when they worked in Germany. The German state took the French allowances into account for the purpose of determining the tax rate applicable in Germany. This resulted in a higher tax rate and thus a higher tax due owing to progression. In the case of Ms Schulz-Delzers, a French civil servant working in Germany and married to a German national, the taking into account in Germany of the allowances she received from the French state, led to a higher tax rate applicable in the joint income assessment with her husband, to which splitting applied. The Court did not find an issue under article 39 Treaty, because the situations of a civil servant working abroad for Germany and of a civil servant working for France in Germany were not comparable. Comparability had to be assessed within one and the same tax system, in this case within the German tax system (para. 40). An

allowance the German state paid to one of its civil servants abroad was designed to compensate for the higher cost of living abroad and hence did not increase the civil servant's ability to pay tax in Germany; in contrast, the French allowance by nature increased the French civil servant's ability to pay tax in Germany. The resulting higher tax due, therefore, was not the result of discrimination, but of a determination by the German state of the tax criteria applicable (paras 35-42).

*Commission v. Hungary (property tax), 2011* was about the property tax that became due upon the acquisition of real estate in Hungary. If such real estate served as the principal residence for the acquirer, the tax that had been paid previously on the occasion of acquisition of real estate was offset against the tax becoming due upon the new acquisition. The aim was to avoid double taxation of assets. In brief, only the amount that was invested in addition was taxed. However, that offsetting mechanism applied only within certain time-limits and when the first piece of real estate had been situated within Hungary and it had equally served as principal residence. The Court first found that the freedom of workers and establishment were applicable, since they gave specific expression to Union citizenship pursuant to article 18 Treaty (para. 44). The Court found a restriction of those freedoms, since those having paid property tax abroad previously were excluded from the benefit of offsetting (paras 66-7). The line of authority as to the lack of comparability of residents and non-residents for the purposes of taxation, viz. the *Schumacker, 1995*-line, did not apply to taxes such as property tax (paras 50-64). It had been developed for income taxation where objective differences existed between residents and non-residents (paras 57-8). The two situations at issue – first residence abroad and in Hungary – were thus comparable. However, the distinction Hungary drew was justified by the cohesion of the tax system. A direct link existed between the advantage, i. e. the offsetting of tax, and the disadvantage, i. e. the tax previously paid. A logical symmetry was reflected in that only the hitherto untaxed part of the invested assets was taxed and that Hungary did not have the power to tax property abroad. Moreover, the same taxpayer and the same taxation were concerned. If taxes paid abroad had been factored in on an equal footing, the persons moving to Hungary from abroad would have benefitted unduly from the host state's tax system (paras 70-78). Further, the distinction was proportionate, essentially because the benefit was a tax advantage and had not become a disguised exemption for Hungarians, because a rebate was not given if the tax previously paid had been higher. Moreover, the member states enjoyed some degree of autonomy in taxation and were not obliged to adapt their systems to those of other member states (para. 83-4). A restriction of the freedom of Union citizens who were not economically active was justified on the same ground (para. 89). The same assessment applied for the European Economic Area for the freedom of workers and establishment (paras 91-2). On the same day as *Commission v. Hungary (property tax), 2011* was handed down, the Court decided a similar case with nearly identical reasoning in *Commission v. Belgium (registration duties), 2011*. The Court only applied the free movement of capital rather than persons to a Flemish registration duty that

could be offset against a duty previously paid when acquiring real estate as the principal residence in the Flemish region of Belgium. The Court found that the freedom of establishment was not applicable, since any breach of that freedom was the unavoidable consequence of an interference with the free movement of capital (para.32). Union citizenship pursuant to article 18 Treaty was not relevant, either, since the freedom of capital was the particular provision the Treaty laid down for such situations. Moreover, real estate acquisition in Belgium by persons who were not economically active was covered by the freedom of capital (paras 30 and 32).

In the order in *Notermans, 2012*, the Court confirmed the existing case-law as to registration taxes on imported cars. A registration tax was compatible with the free movement of workers and establishment, in essence if a car was primarily used in the host state and the duration of the use and the depreciation of the vehicle were taken into account. The day before *Notermans, 2012* was handed down the Court decided *van Putten, 2012* which was about the same car registration tax in the Netherlands. However, the facts in *van Putten, 2012* lacked any connection to the freedom of workers or establishment. Persons resident in the Netherlands had, in fact, used cars registered abroad which were provided to them free of charge. For lack of an economic dimension, the national court asked about the implications of Union citizenship pursuant to article 18 Treaty. However, the Court found that the cross-border loan of a car free of charge constituted a movement of capital. The Court then essentially went on to apply the established case-law as to the registration tax under the free movement of capital. Hence, Union citizenship need not have been addressed (para. 55).

In *Commission v. Estonia (tax allowance), 2012* the Court further refined the *Schumacker, 1995*-line of authority. In this case a resident of Finland received pensions of nearly equal amounts in Finland and Estonia. Because the overall amount of the pensions was modest, he was not taxed in Finland at all. Estonia taxed the pension due in Estonia and refused him a tax allowance on the ground that he was not resident in Estonia and did not receive more than 75 per cent of his income in Estonia. The Court found that *Schumacker, 1995* applied, although he received only about 50 per cent of his income in Estonia. In the situation where Finland did not tax the pension due in Finland because the worldwide income was modest, the personal and family circumstances as well as the ability to pay tax were not taken account of in Finland. Estonia's refusal to take into account the circumstances of a non-resident person when taxing a pension due in Estonia and to grant a tax allowance in such a situation came down to penalising the person concerned for having made use of the freedom to move. In such circumstances, the situations of a non-resident person and a regularly resident person in Estonia were comparable (paras 55-6). As advantages were not accumulated in an unjustified way, the free movement of workers was infringed (para. 57).

In *Commission v. Spain (income tax), 2012*, Spain required those moving residence to another member state to pay immediately the income tax relating to

past periods of work, while those remaining in Spain could pay them at a later point in time. According to the Court, the resulting cash-flow disadvantage for those leaving Spain had a deterrent effect and constituted a restriction of the free movement of workers and establishment (para. 59). The situations of those leaving Spain and those remaining there were not objectively different with regard to income taxation (para. 60). The restriction was not justified by the need to recover tax debts effectively, since the instruments of cooperation available in Union law were sufficient for that purpose. Even if those instruments sometimes did not work fully effectively, the member states could not lawfully restrict a fundamental freedom on the basis of a lack of cooperation for the purposes of taxation (para. 72). In contrast to *Truck Center, 2008*, the restriction did not concern a different technique of taxation applicable to non-residents, viz. taxation at source, but the obligation to pay taxes immediately upon leaving a state (para. 74). Fiscal territoriality did not provide justification, either, since Spain's right to tax income generated in its territory was not in doubt. It was only the immediate recovery of tax debts that was at issue (para. 81). The direct link required by the *Bachmann, 1992*-case-law of the cohesion of the tax system was not given, either. In the case at issue the idea of cohesion in any case overlapped with the notion of territoriality (paras 86-7). Under article 18 Treaty the same assessment applied for Union citizens that were not economically active (paras 91-3). For the European Economic Area, though, Spain's measure was justified, as an equally effective instrument of mutual assistance between tax authorities did not exist in that framework and the bilateral conventions with Spain did not contain such an instrument, either (paras 96-8).

*Petersen, 2013* again concerned income tax. Germany exempted income generated in the field of development aid from taxation when the employer concerned was established in Germany. Mr Petersen was a Danish national residing in Germany. He was employed in Denmark by an employer in the context of a development project in Benin. Mr Petersen worked in Benin under that contract. Germany, however refused to exempt his income which was taxable in Germany pursuant to the double taxation convention, because the employer was not established in Germany. The Court ruled that the free movement of workers was applicable. Any restriction on the freedom of services was the unavoidable consequence of a restriction of the freedom of workers (para. 33). That freedom was applicable in principle to a measure adopted by the member state where a worker was resident who was employed in another member state (para. 37). While the work was performed in a third state, a sufficiently close link to the European Union existed when a worker resident in one member state performed work under an employment contract with an employer established in another member state, in particular when the contract was subject to Danish law and Danish social insurance applied (paras 40-3). The refusal to grant the tax exemption was liable to dissuade workers from seeking employment in other member states (para. 46). The need for effective fiscal supervision did not justify that restriction even though the mutual assistance framework did not apply with regard to the

third state. The taxpayer could lawfully be asked to furnish the information required regarding the Danish employer, as in fact it was also required from workers employed in Germany. Information from the third state was not necessary (paras 51-7). Germany, in addition, had failed to explain why development policy goals required the exclusion of workers employed in another member state from the income tax exemption (para. 61).

*Family members*

The Court also addressed the benefits family members enjoyed in the 2010s, namely in *Teixeira, 2010*. The Court ruled that the primary carer of a child in educational training and the child herself who was born in the host state had a right of residence under article 12 Regulation 1612/68, as in principle established in *Baumbast, 2002*. (All other grounds possibly conferring a right of residence were not applicable in the case at issue.) That right was independent for based on article 12 alone, rather than on article 12 in conjunction with article 10 Regulation 1612/68. Hence, the conditions of article 10 need not have been met on a continuous basis (paras 46-9). That independence was in particular significant, because the citizenship directive 2004/38 had repealed articles 10 and 11, but not article 12 Regulation 1612/68. The Court found that amendment not to have changed the right under article 12 (paras 56-60). The primary carer, a former worker and Union citizen, could apply for social assistance without forfeiting her right of residence under article 12 (paras 64-9). The independent right of residence of the child under article 12 lasted, while she was in training, even after having reached majority. The right of the parent also endured, provided that the child was still in need of the parent's care and presence (paras 78 and 86). That the parent had not worked at the exact moment the child had begun her educational training, but only generally during that training, was immaterial for the application of article 12 (paras 72-4). *Ibrahim, 2010* confirmed the independence of the right contained in article 12 Regulation 1612/68. The judgment in addition made it clear that the ruling in *Teixeira, 2010* also applied when the parent who was the primary carer was a national of a third country (para. 29). *Czop, 2012* confirmed the ruling in *Teixeira, 2010* as to article 12 Regulation 1612/68. The Court, furthermore, refused to apply article 12 to self-employed persons, given the clear and precise wording of that provision and the fact that it had been incorporated in the new regulation 492/2001 on workers rather than the citizenship directive 2004/38 (paras 31-3). The Court also confirmed that periods of residence completed before accession to the Union of the state of which the person concerned was a national counted towards the five year-period required for the right to permanent residence pursuant to article 16(1) citizenship directive (paras 34-5; see below).

*Collective agreement*

*Erny, 2012* was a case that concerned article 7(4) Regulation 1612/68, i. e. the nullity of discriminatory individual and collective agreements. Mr Erny was a

French national who resided in France and worked for Daimler, a German company. His salary was subject to taxation in France pursuant to the applicable double taxation convention, because he was a cross-border worker. The net income that resulted for him was higher than that of a comparable worker subject to taxation in Germany. He entered a German scheme of part-time work prior to retirement which was partly based on a collective agreement. The idea of that scheme was to guarantee elderly employees 85 per cent of their previous salaries while they worked part-time. The employer paid a top-up amount in addition to the part-time salary to guarantee 85 per cent of the salary paid before part-time work was begun. The calculation of the top-up amount for cross-border workers was made based on a notional tax position, rather than the actual income the cross-border worker received. In the case of a worker residing in Germany the tax position was more in line with the actual income. The result of this method was that a German worker received roughly 85 per cent of his previous salary, with the top-up amount not being taxed in Germany, while a cross-border worker, such as Mr Erny, received less than 85 per cent and faced taxation of the top-up amount in his state of residence. In the view of the Court, that approach violated the free movement of workers. It created a disadvantage for cross-border workers (paras 42-5) which was not justified by administrative difficulties or the additional financial burden. The grounds suitable for justification of a restriction did not differ depending on whether a collective agreement or a public measure was at issue (para. 48). The autonomy of social partners, codified in article 28 of the Charter of Fundamental Rights, did not imply that Union law could be disregarded (para. 50). Since the relevant provisions were null and void pursuant to article 7(4) Regulation 1612/68, it was up to the parties involved to find suitable solutions (para. 53).

### *Non-discrimination*

The Court also addressed non-discrimination more directly in the 2010s. With *Olympique Lyonnais, 2010* the Court was again faced with a sports case. The professional charter of the French football association, a national collective agreement, required players who were trained by a club in France under a specific contract for young players to sign the ensuing contract with the club that had trained them, else they became liable to pay damages. The Court, in keeping with *Bosman, 1995*, found that the obligation to pay damages constituted a restriction of the freedom of movement a worker, for it was liable to discourage the worker from exercising it (paras 35-6). While the restriction was generally susceptible of justification by the need to ensure the recruitment and training of young footballers, which was distinctive for sports in general, the measure went beyond what was required to attain that aim. The payments footballers were required to make when they signed a contract with a new club were not calculated on the basis of the cost generated by training and recruitment of players in general, but on the basis of an unspecified loss the club had suffered (paras 39-48).

In *Barth, 2010* the Court next dealt with a follow-up to *Köbler, 2003*. Mr Barth had been a professor in Germany and then was employed by an Austrian university, before *Köbler, 2003* was handed down. After *Köbler, 2003* he applied for the special length-of-service increment that had been at issue in that judgment and received it. However, he received the increment only for the three years that had passed before he applied. With regard to the period before that, his application was rejected based on a three-year limitation period in Austrian law. The Court found that the Austrian rejection did not amount to indirect discrimination. The actions of all professors at Austrian universities whose salaries had been calculated wrongly were subject to a three-year limitation period. Further, a worker was not possibly discouraged with regard to periods that took place entirely in the past (paras 37-40). The principles of effectiveness and equivalence flowing from non-discrimination were not violated, either (paras 16-36.)

In *Casteels, 2011* the Court was faced with the multiple successive affiliation of an employee of British Airways with subsidiaries in Belgium, France, and Germany. As Mr Casteels, when he moved on to work for another subsidiary, each time concluded a new employment contract with each subsidiary, albeit on the basis of a coordinating contract, he suffered certain disadvantages in terms of supplementary occupational pension benefits. Notably in Germany the collective agreement applicable provided that periods completed with subsidiaries in other member states were not taken into account for the purpose of the qualifying period for supplementary pension benefits in Germany. Moreover, when Mr Casteels left to be employed by another subsidiary of British Airways he was only reimbursed the contributions he himself had paid in Germany, rather than both his and his employer's contributions. According to the Court, article 48 Treaty could not be relied upon directly for lack of direct effect (paras 14-5). However, the approach of the collective agreement was relevant under article 45 Treaty (paras 19-20). The refusal to take into account periods completed with the subsidiaries in other member states of the same group, despite the existence of a coordinating contract, amounted to a restriction of the free movement of workers. Mr Casteels was disadvantaged in contrast to a worker who had never made use of his freedom, because he suffered financial losses and an adverse effect on his pension rights (paras 23-9). The restriction was not justified, since Mr Casteels would not be enriched unjustly if his claim was met. Staff loyalty could not be argued, either, as Mr Casteels had continuously been employed by one and the same employer (paras 31-2). Moreover, the relevant collective agreement seemed to be susceptible to an interpretation in compliance with article 45 Treaty (paras 34-5).

In *Las, 2013* Flemish legislation that required all employment contracts to be drafted in Dutch, on pain of nullity to be declared by the courts on their own motion, came under the Court's scrutiny. Mr Las, a Netherlands national, had concluded an employment contract in English with a Belgian company which was part of a multinational group. After having been dismissed he claimed based on Flemish law that the contract was null and void. After having confirmed that

an employer was also entitled to rely on the freedom of workers (para. 16), the Court found a restrictive effect on employers and employees fluent in languages other than Dutch (para. 22). Whereas the promotion and protection of official languages, the social protection of workers and the monitoring of that protection were all grounds suitable to justify a restriction, the Flemish requirement went beyond what was required to attain those aims. Arguably, the Charter of Fundamental Rights protected the member states' cultural and linguistic diversity and their national identity (para. 26). Yet it would have been less restrictive to allow contracts drafted in two languages, one being Flemish, the other being a language which both parties understood. The need for free and informed consent of both contracting parties required that, given that sometimes the parties to a contract did not know the official language (paras 31-2).

*Driving licences*

The mutual recognition of driving licences under Directive 91/439 came back to the Court with *Scheffler, 2010*. The case concerned a driver whose driving licence had been withdrawn in Germany because of him having driven under the influence of alcohol. He then obtained a new driving licence while resident in Poland. Immediately after having received the new licence in Poland a psychomedical report was drawn up in Germany, based on a request by him, in the light of the conduct that had led to the previous withdrawal of his licence in Germany. That report attested negatively with regard to fitness to drive. In these circumstances the Court left it to the national court to assess whether this report was 'new' evidence casting such doubt on the driver's fitness to drive as to allow the German authorities to rely on the exception from the obligation to recognize driving licences issued abroad. The Court merely indicated that this did not seem to be the case (paras 72-5).

*Grasser, 2011* then established that a foreign driving licence need not have been recognized if it had manifestly been issued in disregard of the residence requirement. That was the case when a licence issued in the Czech Republic stated itself that the driver was resident in Germany (para. 24). It was irrelevant in this regard whether the licence concerned was the first licence ever issued to the driver or whether another licence had previously been withdrawn from her (paras 26-32). In *Apelt, 2011* the Court clarified that the confiscation of a driving licence equalled a withdrawal within the meaning of Directive 91/439 and the case-law (para. 33). Moreover, when a licence for category B, viz. cars, was vitiated by an error which justified a refusal of recognition, a licence for category D, i. e. buses, which was issued subsequently need not have been recognized, either (paras 38-47). According to *Köppl, 2011*, the latter ruling was also valid when a category C licence was added to a category B licence – even if the error, which was a failure to comply with the residence requirement which in turn was evident from the category B licence itself – was not evident from the category C licence (para. 48).

*Akyüz, 2012* added to this case-law that a refusal to issue a first driving licence in one state was not a ground for that state to refuse to recognize a licence issued in another state later on. In other words, a refusal to grant a licence was not the same as a withdrawal, even if the ground for the refusal – in the case at issue aggressiveness of the person concerned – would have justified the withdrawal of a licence (paras 50-8). The Court in *Akyüz, 2012* also broadly transposed the case-law established under Directive 91/439 regarding the withdrawal of driving licences to the new driving licence Directive 2006/126 (paras 40 and 34). The Court added that 'indisputable evidence' concerning a driver's lack of residence in the issuing state, which justified a refusal to recognize a licence, included the information conveyed by the authorities of the issuing state to the host state, even if it was conveyed through a state's representation in the issuing state. The national court, moreover, had to assess whether residence in the issuing state had been purely fictional (paras 67-8, 71-2, and 75-6). In *Hofmann, 2012* the Court ruled that the case-law established under Directive 91/439 as to the obligation to recognize a licence issued in another member state after a temporary ban on re-application for a new licence had expired continued to apply under Directive 2006/126, despite the slightly changed wording (paras 65-89).

*Ankara*

In the 2010s, the Court addressed the Ankara Agreement with Turkey in a long series of decisions beginning with *Bekleyen, 2010*. Ms Bekleyen was a Turkish national and the daughter of a Turkish worker. Her father had been admitted to work in Germany, but had returned to Turkey with his entire family. After several years, Ms Bekleyen returned to Germany alone to pursue the higher education she had begun in Turkey. The question arose whether she could lawfully claim rights under article 7(2) Decision 1/80 to take residence and access the employment market, despite her and her parent's prolonged absence from Germany and despite the lack of a temporal link between her parent's work and residence in Germany and the educational training she continued in Germany. The Court answered in the affirmative. The idea of article 7(2) was to grant a worker's child an autonomous right to access the employment market, rather than to foster family unity (paras 22-31). It was immaterial that a child returned to the host country alone and that a long time had passed since the worker and his family had first left that country. The children of Turkish workers were, moreover, not treated more favourably than the children of Union citizens – a difference in treatment which article 59 of the Additional Protocol would have precluded. There were more grounds to restrict the rights of those Turkish children than in the case of Union citizens under the Citizenship Directive 2004/38. Their rights could, for instance, be lost when they left the host state for a long time without any legitimate reason (paras 35-44).

With *Genc, 2010* the Court again added to the Ankara Agreement case-law. Ms Genc, a Turkish national, initially had come to Germany to reunify with her husband who was a lawful worker of Turkish nationality in Germany. She re-

ceived a residence and a work permit. After they had separated, she worked lawfully but only during 5.5 hours per week, i. e. her employment only amounted to 14 per cent of a standard full-time job, earning her only 25 per cent of the regular minimum means of subsistence. Her contract was subject to the collective agreement concerned, she enjoyed paid holidays and continued salary payment in case of sickness. During a certain time, she received social security benefits, but she later asked for them to be stopped. The Court applied the internal market definition of a worker, as elaborated in *Megner, 1995* with regard to very few hours of work, to find that she was a regular worker within the meaning of the Ankara Agreement. The national Court had to ascertain, though, that her work was real and genuine, rather than marginal and ancillary, factoring in paid holiday, sickness insurance, union protection, and the long-standing contractual relationship with her employer (paras 18-28). The reason why she had come to the host country initially was not relevant any longer, as it was not one of the conditions exhaustively enumerated in article 6(1) Decision 1/80. Hence, it was irrelevant that the family with which she had at first reunified was not lived any longer in actual fact. She was therefore entitled to claim rights under article 6(1), provided that she met the conditions established by that article (paras 36-40) and that her presence did not constitute a threat to public security or that she was not absent from the host state for a prolonged period of time (paras 41-3).

Next, in *Toprak, 2010* the standstill clause in article 13 Decision 1/80 was at issue. Two Turkish nationals had come to the Netherlands for family reunification with Turkish workers. However, before three years had elapsed, their marriages failed. The marriages had lasted more than one year after their arrival in the Netherlands, though. At the time Decision 1/80 had entered into force, Dutch law had required a period of cohabitation in the Netherlands of three years for an independent right of residence to arise for a spouse. That period was later on reduced to one year, and then again increased back to three years. The Court decided that the standstill clause applied in such a context, because the Netherlands regime, while technically applying only to spouses of foreign nationality, affected also Turkish workers (paras 40-6). Moreover, the objective of the standstill clause required that it be applied with reference to the point in time when the one-year period had become applicable. Thus, any subsequent increase of that one-year period constituted a new restriction precluded by the standstill clause. More generally, conditions were not to be made more stringent than they had been at any point in time after the entry into force of decision 1/80 (paras 49-60). The Court essentially transferred that interpretation to article 41(1) Additional Protocol in *Dereci, 2011*. The Court held with regard to the establishment of a Turkish national in Austria that the tightening of a provision which had relaxed the rules applicable at the entry into force of the Additional Protocol to the Ankara Agreement fell foul of article 41(1) of that Protocol, as it constituted a new restriction (paras 94-8). (For the citizenship dimension of the case, see below.)

In *Metin Bozkurt, 2010* a situation with regard to article 7(1) Decision 1/80 was at issue. A Turkish national had joined his wife in Germany. He unquestionably fulfilled the period of cohabitation in article 7(1). They divorced after he had been convicted of having violated his wife. The Court decided that the divorce was irrelevant, once a spouse had acquired separate rights under article 7(1). So was any kind of employment of the person concerned for the purpose of article 7(1). Beyond the two grounds acknowledged, viz. a prolonged absence and a threat to public policy, security or health, other grounds for removal could not be acknowledged (paras 30 and 35-45). Further, fraudulent conduct to secure rights under Decision 1/80, such as a sham marriage, was no at issue. In particular, the reliance on rights did not amount to such conduct (paras 49-52). Hence, the only point where the crime committed could be taken into account was in the assessment, in keeping with case-law, of the public policy or security threat posed by the person concerned (paras 54-60).

*Pehlivan, 2011* again concerned article 7(1) Decision 1/80. Ms Pehlivan, a Turkish national, had lawfully joined her Turkish parents who were workers in the Netherlands and resided with them for more than three years, as required by article 7(1). During that time, she married a Turkish national. Under Dutch law that marriage broke the family link with her parents, which resulted in the loss of the right of residence under article 7(1). According to the Court, the member states were entitled to impose certain limited conditions that complied with the objective of article 7(1), which was to foster family unity, during the three years of cohabitation with the parents (paras 52-3). However, article 7(1) only required the child to live with her parents. If she had done so, it went against the grain of the objective of that article to consider her marriage during those three years as having broken the link with her parents. Having lived for three years with her parents, she was entitled to claim rights under article 7(1), irrespective of her marriage (paras 57-61 and 64). In *Unal, 2011* the Court interpreted article 6(1) Decision 1/80 in a similar way. A Turkish national had joined his wife in the Netherlands. He received a residence permit and worked lawfully. After he had worked for more than a year with the same employer, it turned out that he had failed during his first year of employment to abide by the condition contained in the residence permit to reside with his wife. The Dutch authorities withdrew his residence permit retroactively, as per the point in time when he stopped residing with his wife. The Court rejected that approach under article 6(1). While a member state had the power to regulate the conditions during the first year of work, once a Turkish national who had lawfully entered the host state had worked there for more than a year – in the absence of a provisional admission to the territory or fraudulent conduct – that Turkish national acquired the rights under article 6(1). Those rights were not to be made dependent any longer on the continuing existence of the circumstances which had given rise to them (paras 49-50). *Gülbahce, 2012* confirmed this decision.

*Ziebell, 2011* raised the question of the impact of Union citizenship under the Ankara Agreement. The case involved a second generation Turkish immigrant,

the son of a Turkish worker who (the son) was born in Germany and had spent all his life there. After several criminal convictions, his expulsion from Germany was ordered. The Court refused to apply by analogy the enhanced protection regime established by the citizenship directive 2004/38 for union citizens having permanent residence in the host state to Turkish nationals having long-term residence in the host state. That regime required that imperative grounds of public security were given to justify an expulsion (paras 57 and 60). The purpose of the Ankara Agreement was purely economic (para. 64). It applied to workers, whereas Union citizenship relied only on nationality and went further than economic integration. The effects of Union citizenship were reserved to the nationals of the member states (paras 69-73). The right frame of reference for the expulsion of a Turkish national therefore was, since Directive 64/221 had been repealed by the citizenship directive, the framework established by the Union for third country nationals having long-term residence in the Union, i. e. article 12 Directive 2003/103. Within that framework, additional guarantees for long-term residents were provided and the traditional established expulsion case-law of the Court applied. That case-law, in essence, required a weighing of the circumstances, but in principle allowed expulsion in case a threat to public *policy* was given, rather than a threat to public *security* under the citizenship directive in case of Union citizens having long-term residence (paras 79-85).

*Kahveci, 2012* then came back to article 7 Decision 1/80. The Court ruled that a family member that had fulfilled the conditions required by article 7 was still entitled to claim the corresponding rights and enjoyed the protection of article 14 Decision 1/80, even if the Turkish worker concerned had been naturalized in the host state while retaining his Turkish nationality. The Court reached this conclusion based on the objective of article 7 which was to promote family reunification. Moreover, a member state was not entitled to add conditions to article 7 or alter rights acquired under that article. That would have been the case, if the article had not been applied any longer after the Turkish worker concerned had gained the nationality of the host state while keeping the Turkish nationality (paras 35-8). *Dülger, 2012* added that the members of the family of Turkish workers who were nationals of third states, viz. third states other than Turkey, also enjoyed the protection of article 7 Decision 1/80. In addition to the objective of that article, the Court relied on a number of other grounds, namely the need for uniform interpretation of the term 'family members' (para. 36); that the parties to the Ankara Agreement had gone 'well beyond considerations of a purely economic nature' (para. 45) with article 7 Decision 1/80; the right to private and family life as enshrined in article 7 Charter of Fundamental Rights which was to be observed as a part of Union law having the same value as the Treaties (para. 53); the corresponding rules applicable to the members of the family of Union citizens (paras 48-51); Regulation 1408/71 and Decision 3/80 which both covered family members who were third country nationals (paras 54-7); and the power the member states retained to authorize family reunification in the first place, subject to the respect of fundamental rights (paras 61-2).

*Bulgaria*

Two cases in the 2010s concerned Bulgaria before and immediately after its accession to the Union. *Pavlov, 2011* concerned non-discrimination in the context of the Association Agreement with Bulgaria before its accession to the Union. Mr Pavlov was refused inclusion in the list of trainee lawyers in Austria by reason solely of his Bulgarian nationality. The Court decided that the inclusion in the list concerned access to a regulated profession, rather than a condition of work. Such access was not, in contrast to the conditions of work, subject to non-discrimination pursuant to article 38(1) of the Association Agreement. Hence, the refusal to include him in the list was in accordance with that article (paras 23-8). In *Sommer, 2012*, an employer in Austria wanted to employ a Bulgarian student lawfully present in Austria, but the work permit was refused on the ground that the relevant quota had been exceeded. The Court in essence found that Bulgarian nationals had to benefit from the same access to the labour market as under Directive 2004/114 on *inter alia* third country national students access to the labour market, although they had become Union citizens and were not any longer third country nationals. Though accession took place before this Directive had to be transposed, the Accession Protocol required that Bulgarian nationals benefitted from the treatment provided in the Directive and that they were given preference over third country nationals (paras 33-5). (The Court then interpreted the Directive on the facts of the case and found that it only exceptionally permitted a restriction based on the situation of the labour market; paras 41-4.)

*Union citizenship*

Union citizenship also occupied the Court in many cases during the early years of the 2010s. *Rottmann, 2010* was the first pure citizenship case of the 2010s. Mr Rottmann was an Austrian national who became the subject of a criminal investigation in Austria. He then emigrated to Germany where he was later on naturalized. He did not mention the criminal investigation vis-à-vis the German authorities. As a result of the naturalization in Germany, he lost his Austrian nationality. When the German authorities learnt of the criminal investigation and the Austrian arrest warrant, they revoked the decision granting Mr Rottmann German nationality, with the result that Mr Rottmann ran the risk of not retaining any nationality at all. The Court first found that the situation was by nature and in the light of the potential consequences within the scope of Union law. Mr Rottmann's Union citizenship was affected by the decision to withdraw the nationality (para. 42). While the member states had the power and discretion to grant and withdraw nationality, they had to respect Union law in their decisions, as established in *Micheletti, 1992*. That implied that the decision to withdraw nationality in particular was subject to judicial review in the light of Union law (para. 48). When a person had acquired nationality by means of deceptive behaviour, a member state had the power to withdraw it, a power which was in accordance with international law and served to protect 'the special relationship

of solidarity and good faith' as well as 'the reciprocity of rights and duties' between a state and its nationals (para. 51). However, owing to Union law and the effect of a withdrawal on Union citizenship, a member state had to respect proportionality in the light of Union law, i. e. to take into account the consequences for the person concerned and his family as well as the circumstances such as the gravity of the deception, the length of the time period since the acquisition of the nationality, and the possibility to re-acquire the former nationality. The latter point on its own was not imperative, although the national court possibly had to offer the person concerned a reasonable period of time to regain his previous nationality (paras 55-8). The member state of which the Union citizen previously was a national equally had to respect proportionality in its decision whether to reinstate him in his nationality (para. 62).

*Union citizenship and students*

Next, in *Bressol, 2010* the French-speaking region of Belgium had introduced a restriction for certain undergraduate medical and paramedical study programmes at its universities, because a great number of students had come from other member states to study at those universities, while returning home immediately after the end of their studies, leaving the French community without a sufficient number of qualified medical graduates. In essence, the number of non-resident students in each of the programmes concerned was limited to 30 per cent of all students in the programme. The places for non-resident students enrolling for the first time were allocated by lot. In the judgment of the Court, the member states were free to opt for a system of free or restricted access to university education, provided they respected Union law (paras 28-9). The situation of the students concerned was within the scope of Union citizenship pursuant to article 18 Treaty and the citizenship directive 2004/38. Relying on residence to determine who was admitted amounted to indirect discrimination (paras 43-7). Justification on the basis of financial considerations was excluded (paras 49-51). The justificatory power of the need to ensure the homogeneity of the higher education system was left open (paras 52-4). However, the requirements of public health applied, in particular if the high number of students enrolled put in danger the quality of the medical education and, despite that high number, not enough qualified graduates were available in the French Community (paras 67-8). Ultimately, it was for the national court, though, to determine whether the restriction was necessary. Protective measures were possible, despite uncertain causal links between education and the situation on the market (paras 69-70). In a thorough objective assessment with figures and solid consistent data the authorities had to show for each study branch the maximum sustainable number of students and the minimum number of graduates needed for the market, along with a number of other factors (paras 71-3). It was also to be assessed whether the restriction was in fact capable of leading to an increase in the number of practitioners in the French Community (para. 76). Further, less restrictive alternatives had to be examined which could incentivize practitioners to settle in Belgium

permanently or which could take into account the aptitudes and knowledge of candidates better than chance on which the drawing of lots relied (paras 78 and 80). Finally, the Court did not see a contradiction between the right of access to higher education in article 13(2)(c) of the United Nations Covenant of Civil and Political Rights and the requirements of Union citizenship (paras 85-7). The temporal effects of the judgment were not subject to any limitation (paras 89 et seq.).

*Commission v. Austria (transport fare), 2012* also concerned students and Union citizenship. The law of some Austrian Länder reduced the fares for public transport for students, but only those students whose parents were receiving family allowances in Austria. According to the Court, such a benefit was within the scope of articles 20 and 21 Treaty, in so far as it indirectly helped students to cover maintenance cost (para. 43). Even if the benefit was covered by Regulation 1408/71 pursuant to article 1(u) of that Regulation, that did not imply that unequal treatment was allowed (paras 44-8). The restriction consisted in the fact that the condition of receiving family allowances in Austria was more easily fulfilled by students who were Austrian nationals, since their parents frequently received family allowances in Austria (para. 50). Article 24(2) Directive 2004/38 was not applicable, because it explicitly only applied to student grants and student loans (paras 54-6). The need for a genuine link with the society of the host state, in principle, could justify a restriction. But the criteria applied to establish such a link were not to be too general or overly favouring an element that did not represent a real and effective degree of connection with the host state. Whether that was the case had to be established in light of the nature and the purpose(s) of the benefit concerned. As an example, it could be taken into account whether the student was enrolled with a private or a public establishment which was financed or accredited by the host state in accordance with its laws. Austria had failed to establish that the benefit at issue was based on such considerations (paras 61-5).

*Permanent residence*

In *Lassal, 2010* the right to permanent residence of Union citizens was invoked. Ms Lassal, a French national, had resided in the United Kingdom lawfully based on Union law for more than five years. She then went back to France to live with her mother for ten months. After that she came back to the United Kingdom. All these facts had taken place before the citizenship directive 2004/38 had to be transposed. She claimed a right to permanent residence under that directive, a right that depended on a period of five years of residence in the host state. The Court reiterated that the Directive did not grant any less rights than Union citizens had before its entry into force (para. 30). Even before the adoption of the Directive, Union law had allowed migrant workers to remain in the host state after having ceased to work (para. 35). Moreover, the purpose of the Directive was to promote integration in the host state. Such integration was taking place already before the Directive became applicable (para. 37). The Directive had to be

applied to present facts (paras 38-9). Hence periods of lawful residence completed before the Directive was to be transposed had to be counted towards the five year-period. Ms Lassal's absence from the United Kingdom, moreover, was not relevant, since she had already been resident in the United Kingdom for more than five years when she departed for France (para. 45). The effectiveness of the Directive which prevailed in case of conflicting interpretations and its objectives dictated that much (paras 49 and 51-3). However, they also dictated that article 16(4) Directive be applied in case she was absent from the host state for more than two years (paras 54-6). *Dias, 2011* was a similar case as *Lassal, 2010*. A Portuguese national had resided lawfully for five years in the United Kingdom. She then stopped working and failed to have sufficient resources to support herself, but continued to hold the residence permit, i. e. the document, issued to her under Directive 360/68. All this took place before the date of transposition of Directive 2004/38. In keeping with *Lassal, 2010* the period of five years of residence gave rise to a right to permanent residence under article 16(1) Directive, though obviously not before the end of the transposition date. A residence permit did not give rise to rights. It was merely declaratory. Hence, she did not have a right to reside in the United Kingdom after having completed the five year-period solely because she had a document entitled 'residence permit'. Her lack of resources meant that she did not have a right to reside in the United Kingdom (paras 47-55). In such a situation, article 16(4) Directive had to be applied by analogy. Like two years of absence from the territory of the host state extinguished the right of permanent residence, periods of residence of more than two years completed without having a right of residence – although formally the person concerned held a 'residence permit' – terminated the right to permanent residence. The integration link to the host state was not just put into question by absence from the territory, but also by qualitative elements like the lack of a right to reside (paras 57-65).

*Ziolkowski, 2011* again concerned the right of Union citizens to permanent residence in the host state pursuant to article 16 Directive 2004/38. The Court held that 'having resided legally' in the host state was an autonomous concept of Community law for lack of reference to national law in article 16 (para. 33). Based on the context and purpose of the right to permanent residence the Court concluded that the conditions in article 7(1) Directive, viz. to have sufficient resources and sickness insurance, had to be met during the five years of residence in the host state which gave rise to the right to permanent residence (para. 34-47). Hence, although a period of residence might have been in compliance with the host state's law, it only counted toward the five year-period of residence, if the Union citizen had had during that period enough resources not to become a burden on the host state's finances. Secondly, for lack of a transitional provision in an Act of Accession, the Directive had to be applied *in toto* right from accession. This implied that periods of lawful residence completed before accession counted towards the five year-period, since the law was applied non-retroactively to the present facts that had their origin in the past. The person

concerned had to show, though, that 'sufficient resources' were available during that period (paras 56-62).

*Union citizenship and expulsion*

*Tsakouridis, 2010* dealt with the enhanced protection of Union citizens against expulsion after ten years of residence in the host state. The case concerned a Greek national who had been born and had always lived in Germany, but had spent two summers working in Greece. He was convicted of drug dealing and sentenced to prison for more than six years. The German authorities ordered his expulsion. For Union citizens having resided for the previous ten years in the host state, imperative grounds of public security were necessary for expulsion, rather than just serious grounds of public security in case of permanent residence or public security or policy grounds in case of regular residence pursuant to article 28(2) and (3) Directive 2004/38. The Court directed the referring court to make an overall assessment of the situation of the person concerned with regard to the ten year-period of residence. All factors had to be taken into account, in particular the duration and frequency of the absences, the reasons for them, and the centre of interest of the person concerned, in order to determine whether the link with the host state had been broken during any absence (paras 32-5). It was also for the national court to assess whether imperative grounds of public security were given. The case-law as to expulsion basically applied, but the requirements were stricter. Very good grounds and a high degree of seriousness of the threat to public security were needed. Drug dealing as part of an organized group was possibly covered; certainly it was within the ambit of 'public policy' in article 28(2) Directive. A balance had to be struck between the imperative grounds of public security and the social rehabilitation and fundamental rights of the person concerned (paras 45-52). The Court added in *P. I., 2012* that the sexual assault, sexual coercion and rape of a minor over many years could lawfully be considered by the referring court to amount to an imperative ground of public security. Sexual crimes against minors were a particularly harmful sort of crime. The national court therefore had the option to find in the case at issue that a fundamental interest of society was concerned (paras 25-8). Expulsion was not to be an automatic consequence, though. The personal circumstances of the Union citizen concerned had to be taken into account and they had to be reviewed, if the expulsion order was implemented more than two years after it had been issued (paras 29-32).

*Union citizenship and names*

In *Sayn-Wittgenstein, 2010* Austria's constitutional abolishment of noble titles in surnames came under scrutiny. The Austrian constitutional court had ruled that a noble surname conferred by adoption in Germany to an Austrian national violated this constitutional rule and the prohibition of distinctions between genders in surnames. This judgment by the Austrian court affected an Austrian national who had not been involved in the proceedings before the Austrian constitutional

court that had led to the ruling. That Austrian national bore the surname *Fürstin von Sayn-Wittgenstein* which meant 'Princess of Sayn-Wittgenstein'. She had conducted business under that name in luxury real estate for 15 years in Germany where she also resided. Her name stemmed from the adoption as an adult in Germany by a German national called *Fürst von Sayn-Wittgenstein*. Following the judgment of the Austrian constitutional court, her surname was changed in the Austrian registers – the only registers she was listed in – to 'Sayn-Wittgenstein'. For the Court, the name change affected the interests of her business which she had pursued under a regular name in Germany for 15 years and caused her as a Union citizen serious inconveniences within the meaning of the *Garcia Avello, 2003* and *Grunkin, 2008*-line of authority (paras 60-70). The Court did not enter into the freedom of services, because the referring court had only asked about citizenship. The restriction could, however, be justified by public policy grounds, namely the constitutional rank of the norm that abolished nobility in Austria and national identity. It was covered by the margin of discretion the member states enjoyed in terms of public policy. The Charter of Fundamental Rights recognized the right to equal treatment before the law in article 20 which was underpinning Austria's approach to surnames. Moreover, the measure, on the facts of the case, did not go beyond what was necessary to achieve the aim (paras 83-94).

*Runevič-Vardyn, 2011* again brought a problem regarding names to the Court. A Lithuanian national belonging to the Polish minority had married a gentleman of Polish nationality. Both were resident in Belgium. In their marriage certificate which had been issued by the Lithuanian authorities her maiden last name in the double-barrelled surname she was going to use was spelled in Lithuanian language, despite her Polish heritage, in accordance with her passport and birth certificate, essentially spelling 'č' instead of 'cz'. Her first name was also written in Lithuanian in keeping with her passport and birth certificate. *His* last name in her double-barrelled surname was spelled in Lithuanian, using 'v' instead of 'w', while it was spelled in Polish with 'w' for him in the same marriage certificate. His first name was spelled without using the diacritical marks, spelling 'L' instead of 'Ł'. After having found that the situation was within the scope of Union citizenship, as it applied immediately to the present effects of facts originating in the past and as the two Union citizens had made use of the freedom to move, the Court first did not find a restriction with regard to her maiden name in the double-barrelled surname, since it was spelled in a uniform way in her birth certificate, passport, and marriage certificate. A deterrent effect did not arise for her, either, despite her Polish origin (paras 69-70). Neither was there a restriction in the spelling of his first name in the marriage certificate. The omission of diacritical marks was frequent, in particular when computers were used (paras 79-81). However, the national court had to examine whether the divergence in the spelling of his surname – first in his name in Polish with 'W', then in her double-barrelled name with 'V' in one and the same marriage certificate – amounted to an inconvenience within the meaning of the case-law, and if

that was the case, whether it was serious enough to constitute a restriction (paras 72-8). In that event, the national court also had to assess whether a fair balance was struck between the protection of the Lithuanian language as part of the national identity, the safeguarding of which the Charter of Fundamental Rights mandated and which *Groener, 1989* had recognized as a ground for justification, and the rights of the persons concerned as Union citizens and beneficiaries of the fundamental right to identity and private life. That his surname was spelled in Polish on the same certificate and that Roman letters could otherwise be used in surnames in Lithuania despite them not being part of the official language was indicative (paras 88-93).

*(Not) purely internal situations, family reunification of Union citizens*

In *Ruiz Zambrano, 2011* a Columbian national was refused unemployment benefits in Belgium. He and his wife had been present in Belgium while several procedures to determine their status were pending. Mr Zambrano worked without having the prerequisite work permit in Belgium. When he was ordered to desist he applied for unemployment benefits. During their stay in Belgium, Ms Zambrano gave birth to two children who both acquired Belgian nationality based on Belgian law, because they risked remaining stateless. The reason why they did not acquire Colombian nationality was that the parents did not undertake the necessary steps. Mr Zambrano then argued that he had a right to residence and work as of the birth of his first child *qua* him being the relative in ascending line of a Union citizen who depended on him. Since he had a right to work in Belgium, his argument went, the periods of his work were lawful and had to be counted toward the period of work required for unemployment benefits. The children had basically never left Belgium, the state of which they were nationals. The Court, first, rejected the application of Directive 2004/38, because it only applied to Union citizens who had made use of their right of movement. Article 20 Treaty, in contrast, applied, for the children unquestionably were Union citizens, given their Belgian nationality. Any measure that had the effect of depriving a Union citizen of the genuine enjoyment of the substance of the rights owing to that status was precluded (para. 42). The refusal to grant Mr Ruiz Zambrano a residence and work permit was such a measure. It forced the children as Union citizens to leave the territory of the Union, for they depended on their parent (paras 43-4). In *McCarthy, 2011*, the Court refined that approach. Ms McCarthy invoked Union citizenship pursuant to article 21 Treaty and the citizenship Directive 2004/38 against the United Kingdom to claim a right of residence for her husband who was a national of a third country. She was a national of the United Kingdom and of Ireland. She had been born in the United Kingdom and had never moved away. In keeping with *Ruiz Zambrano, 2011*, she was not to be considered a beneficiary of the citizenship Directive, since she had never exercised her freedom of movement. The wording, purpose and context of the Directive only guaranteed the movement. A person who was a national of a member state and who had never moved away from that state had

not exercised her freedom to move. That she also held the nationality of another member state, namely Ireland, did not imply that she had exercised that freedom. Her husband could not lawfully benefit from the citizenship directive, either, since he did not have any rights which were autonomous from hers (paras 31-43). As to article 21 Treaty, the situation was not to be considered purely internal to the United Kingdom solely by reason of her never having made use of her right to move. However, she did not suffer any serious inconvenience or was deprived of the substance of her right to move within the meaning of the *Garcia Avello, 2003*/*Ruiz Zambrano, 2011*-line of authority. She had an unconditional right to remain in the United Kingdom by reason of her British nationality. Hence, her situation was confined in all respects to the United Kingdom and article 21 Treaty was not applicable (paras 46-55).

That strand of case-law was further expounded in *Dereci, 2011*. Several third country nationals claimed a right to reside with family members who were Austrian nationals, and thus Union citizens, in Austria. Again the citizenship Directive was inapplicable, for lack of movement by the Union citizens. As to the rights based on the Treaty, a Union citizen did not suffer a serious inconvenience in a situation where it was desirable for her to live with a family member who was a third country national and that desire was not respected. Rather, the Union citizen had to be forced by the circumstances to leave not just the state of which he was a national, but the entire territory of the Union (paras 66-8). Apart from that, it was left to the national court to apply the right to family life either in article 7 Charter of Fundamental Rights or in article 8(1) ECHR, which were two articles with the same meaning, depending on whether the national court found that Union law was implemented or not (paras 70-3). *Iida, 2012* further elaborated that line of authority. Mr Iida was a Japanese national who had married a German national in the United States of America. They had a daughter who was of German nationality. They first moved to Germany where Mr Iida worked in employment. His wife then moved to Austria together with their daughter to work there, while he remained in Germany. Thenceforth, they lived separately, but the marriage as well as the joint parental responsibility were maintained. Mr Iida then applied for a residence permit in Germany as a family member of a Union citizen. That application was rejected. According to the Court, Mr Iida would have had rights as a long-term resident third country national pursuant to Directive 2003/109, had he only filed an application to this effect. However, in the absence of such an application, such rights did not arise (paras 40-8). Under Directive 2004/38 only rights derived from Union citizens were granted to third country nationals. According to case-law, namely *Zhu and Chen, 2004*, dependence of the Union citizen daughter on the third country national parent was not sufficient to found a right of residence of the latter under Directive 2004/38 (paras 54-5). According to *Diatta, 1985*, a marriage was to be considered intact as long as it had not be dissolved officially (paras 57-9). However, a third country national spouse was only a beneficiary of the Directive, if he had accompanied the spouse to or joined her in the host state. Hence, the Di-

rective did not grant Mr Iida any rights in his situation (paras 61-4). Article 20 and 21 Treaty, in turn, provided derived rights for third country nationals in cases of intrinsic connection with the free movement of Union citizens in the member state where the Union citizens resided. The requirement was that those citizens would be deprived of the substance of the rights conferred by citizenship, if the third country national was not granted a right of residence (paras 66-72). That was not the case for Ms and Mr Iida. He sought a right to reside in the state of which his wife and daughter were nationals, rather than where they were resident. He would have a right under Directive 2003/109. His wife and daughter had not been discouraged from moving to Austria. Purely hypothetical obstacles were irrelevant, like the purely hypothetical prospects of exercising a right to move according to *Kremzow, 1997* (paras 73-77). Again the referring court had to apply the fundamental rights of the Charter only when Union law was implemented. Whether that was the case had to be decided in the light of the purpose and character of the implementing legislation and of any possible impact of that legislation on Union law. Had he applied for a permit under Directive 2003/109, for instance, it would have been a matter of Union law and the Charter would have applied (paras 78-81).

In *O and S, 2012* the Court was seized with a further implication of the *Ruiz Zambrano, 2011*-case-law. Both cases at issue were essentially identical. A third country national had married a Finnish national. She then gave birth to a child who became a Finnish national. She had a right of permanent residence in the host state. The marriage was divorced and the mother retained sole custody. She married again, but this time a third country national. From this second reunion another child was born, but this child held the nationality of the third state. The mother then applied for family reunification with her second husband on the basis of the citizenship of the first child. Given that the Union citizen, the child, had never made use of his right of free movement, Directive 2004/38 was not applicable. The Court directed the national court to judge whether the Union citizen was deprived of the genuine enjoyment of his rights. Certain factors were relevant, namely that the third country national mother had a right to reside in the host state; that a refusal to grant family reunification could deprive the first child of the contact to his biological father and the second child of the contact to his biological father; that the consideration in *Ruiz Zambrano, 2011* were not limited to blood-relatives; that a situation of financial, legal, or emotional dependency possibly did not exist between the Union citizen and the second husband of his mother; and that fundamental rights had to be guaranteed (paras 49-59). In contrast to the situation at issue in *Chakroun, 2010* (see below), Directive 2003/86 on family reunification of third country nationals could apply, because the mother concerned had permanent residence in the host state and hence could be a 'sponsor'. In such a situation, the mere fact that one of her children was a Union citizen could not have the effect that Directive 2003/86 was not applicable when family reunification was sought with the spouse who was not the biological father of the Union citizen (para. 69).

*Union citizens and prohibition to leave*

In *Aladzhov, 2011* Bulgaria had imposed on a Bulgarian national a prohibition to leave Bulgaria, until the tax debt which he owed in connection with his work as one of three directors of a company established in Bulgaria had been paid or secured. For the Court, the measure was within the scope of Directive 2004/38, as a Union citizen could invoke it against the state of which he was a national when that state prohibited him from leaving its territory (paras 24-7). Article 27(1) of that directive had direct effect (para. 32). It could not be excluded that the aim of recovering tax debts came within the public policy exception, as the European Court of Human Rights had stated. However, in keeping with the Court's own case-law a serious threat to one of the fundamental interests of society was required, for instance due to the sums at stake or a possible tax fraud being involved (para. 37). The aim of recovering taxes due was not to be considered as serving exclusively economic ends, an aim which article 27(1) excluded for justification (para. 38). In the absence of sufficient facts, justification was for the national court to assess, as were the taking into account of the specific case of the individual concerned, any automatisms involved, and the availability of less restrictive means, such as mutual assistance under Directive 2008/55 (paras 43-8). *Gaydarov, 2011* was handed down on the same day as *Aladzhov, 2011* and concerned a similar situation. A Bulgarian citizen was convicted of drug crimes in Serbia. After having served a prison sentence there, he returned to Bulgaria. That state then ordered him not to leave the country on public security grounds. The Court decided in the same way for the public security ground as for the public policy ground in *Aladzhov, 2011*. In accordance with the Court's case-law the national court in particular had to assess the threat to the society's fundamental interests solely on the basis of the facts of the case, rather than on grounds of general prevention. In *Byankov, 2012*, in a similar vein, a Bulgarian national was prohibited from leaving Bulgaria on the sole ground that he had failed to serve a private debt. The Court found that it could not be excluded that such a prohibition exclusively served economic ends pursuant to article 27 Directive 2004/38. Moreover, a threat to the society within the meaning of the case-law did not exist. The personal situation was not taken into account sufficiently. Moreover, the prohibition – 'the antithesis of the freedom conferred by Union citizenship' (para. 79) – was too absolute. Exceptions, a temporal limitation, or a review of the facts were excluded. Judgments could in addition be enforced in the Union under Regulation 44/2001, with the result that the rights of creditors were not less well protected than under the right to property in the ECHR (paras 39-47). The possibility to have such a measure reviewed after three years pursuant to article 32(1) Directive applied exclusively to measures which had been adopted in accordance with Union law. However, the procedural principles of equivalence and effectiveness *a fortiori* required that a possibility for review existed when a measure was illegal under Union law, for example when a judgment by the Court implied that the measure was illegal (paras 67-81). Apart from

that, the legal remedy against a restriction which (the remedy) was required by article 31 Directive applied only at the time the restriction was enacted. If the person concerned had failed to challenge a measure within the procedural time limits of national law, that article was not applicable (paras 53-5).

*Union citizenship and the broader family*

In *Rahman, 2012* the Court was asked to elaborate on the rights of dependent family members of Union citizens under article 3(2) Directive 2004/38, i. e. of members other than those covered by the 'close' family of a Union citizen pursuant to article 2(2) of the Directive. The obligation to facilitate entry and residence of those family members of a Union citizen did not include a right to entry and residence. Instead, it only required a member state to grant those persons a certain advantage in contrast to all other third country nationals. A member state had to deliver a reasoned decision, based on an extensive examination of the personal circumstances. But otherwise a member state had wide discretion in selecting the factors to be applied for reunification, provided only that the normal meaning of the word 'facilitate' and the effectiveness of the provision were respected. Article 2(2) did not have direct effect, but required a decision to be subject to judicial review (paras 21-5). It was not required, though, that the situation of dependence existed in the member state whence the Union citizen concerned had moved. It was sufficient that dependence existed while the third country national was resident abroad. The relevant point in time in that regard was when the third country national filed the application (paras 28-34). Finally, it was up to the member states (i) to lay down the criteria determining when dependence was genuine and stable, within the confines of the normal meaning of the word and the effectiveness of the provision (paras 37-9), and (ii) to decide whether the situation of dependence needed to endure after reunification (paras 42-5).

*The Union citizenship of a president*

*Hungary v. Slovakia, 2012* dealt with Slovakia's refusal to grant Hungary's president access to Slovakia. He had been invited by a private association in Slovakia on a particular day, namely the day after the day that commemorated the birth of the Hungarian state and the day on which, some 40 years ago, members of the Warsaw pact had invaded Czech territory to quash the spring of Prague. The Court emphasized that the Hungarian president was a citizen of the Union. Yet the rules on citizenship had to be read in the light of international law. That law granted a special status to heads of states, including immunities and privileges, regardless of the capacity in which a foreign state was visited. That status distinguished a head of state from all other Union citizens. A visit by a head of state was thus governed by international law. In accordance with international law specific conditions could be imposed for such visits, conditions which could not be imposed on ordinary Union citizens moving to a member state. Hence, Slovakia was not obliged under Union law to grant Hungary's head of state access

to its territory (paras 44-52). Slovakia's appeal to its right to block a Union citizen's free movement did not amount to abuse of rights, either (paras 56-60).

*Issues left open re Union citizenship*

In *Kamberaj, 2012* the Court was asked a series of questions relating to Union citizenship. The referring court notably raised the question whether the award of a housing benefit could lawfully be made dependent on a minimum of five years of residence in the province of South Tyrol and a declaration from a Union citizen with which the citizen elected to join one of the three linguistic groups of the province. The Court declared these questions inadmissible for lack of a link to the actual facts of the case. Instead, the Court ended up answering the questions asked solely in the light of Directive 2003/109 on long-term residence of third country nationals. Yet it was mostly left to the national court to determine whether the difference in treatment between Union citizens, including Italian nationals, and third country nationals resulting from the uneven funds allocated to finance the housing benefits of the two groups was compatible with the Directive, and more specifically with its concept of core social benefits, as interpreted in the light of article 34 of the Charter of Fundamental Rights. In a similar vein, the Court declined to address a comparison made with the charges levied from Union citizens under Directive 2004/38 in *Commission v. Netherlands (certain charges), 2012* (para. 78). The charges the Netherlands levied from third country nationals when they applied for residence permits were unlawful under Directive 2003/109 in itself, because the amounts charged were so high that they undermined the aims of that directive.

*Further cases*

For completeness, a number of further cases must be mentioned. *Chakroun, 2010* was about the rights of third country nationals who were lawfully present in the Union to family reunification with other third country nationals under Directive 2003/86. The Court in this case fell back on *Eind, 2007* and *Metock, 2008* to interpret the concepts of social assistance and family reunification used in Directive 2003/86. *Commission v. Portugal (military equipment), 2010* was a late judgment in the series of *Commission v. Finland (military equipment), 2009*. Its content was identical to that latter judgment. In *Commission v. Portugal (tax representative), 2011* the Court declined to enter into Union citizenship, given that it had found incompatible with the free movement of capital Portugal's requirement to appoint a tax representative in Portugal when a person liable for certain taxes on investments in Portugal was resident abroad.

## 2 Establishment

### *Taxes*

*Gielen, 2010* brought a specific aspect of the Netherlands' tax system to the Court. Dutch law determined the tax deductions allowed by means of a test which was based on the number of hours the person concerned had worked in self-employment. This test was partly based on the residence of the person concerned. Those resident in the Netherlands could factor in hours worked in the Netherlands and abroad, while those resident abroad could only factor in hours worked in the Netherlands. However, the latter could opt into the Dutch system and, consequently, be treated as residents. The Court decided that the situations of residents and non-residents were comparable for the purpose of determining tax deductions for self-employed persons. In that regard, a difference in treatment based on residence amounted to discrimination to the detriment of non-residents who were most often nationals of other member states (paras 40-8). The opt-in did not remedy the discrimination, else a discriminatory system was validated (paras 49-54).

### *Pharmacies*

*Pérez and Gómez, 2010* came back to pharmacies. The Spanish region of Asturia implemented Spanish law by structuring the distribution of medicinal products. It required pharmacists to have a licence to operate a pharmacy. Each year, a competition was organized for the award of new licences. A series of criteria was applied. Subject to certain exceptions, a minimum distance of 250 meters was to be maintained between new and existing pharmacies. There was not to be more than one pharmacy per 2'800 inhabitants in pre-determined areas. With each new slice of 2'000 persons added to the total population of an area a new licence could be offered. To select between the pharmacists who applied for a new licence, a system of points was applied. For those who had practised as pharmacists in Asturia before, 20 per cent of points were added. In case of a tie, preference was first given to those who previously operated a pharmacy in areas with low population density and then to those who had previously pursued their profession in Asturia. The Court answered the questions asked to give the national court the possibility to avoid reverse discrimination and because it was conceivable that nationals of other member state were interested in operating a pharmacy in Asturia (paras 39-40). According to the Court, Directive 2005/36 made room for a competitive examination as part of a system of geographical division, but freedom of establishment nonetheless had to be complied with (paras 45-50). The Court first (i) addressed the population and minimum distance requirements. The prior authorization requirement was indistinctly applicable, but constituted a restriction. The applicable criteria prevented pharmacists established in other member states from establishing themselves in Asturia (paras 55-9). However, the protection of public health by means of a sound and reliable distribution of medicinal products, as acknowledged by article 35 Charter of Fundamen-

tal Rights (para. 65), justified the restriction. The aim was pursued in an appropriate way, because the requirements were consistent with that aim. The rules other member states enacted were irrelevant in that regard. Planning avoided duplication of structures in densely populated areas and shortfall of supplies in disadvantaged regions. The measures channelled pharmacists towards less attractive regions. The minimum distance requirement avoided concentration of pharmacies, while guaranteeing accessibility (paras 68-83). The preference given to pharmacists who had previously operated a business in areas with less than 2'800 inhabitants supported the aim (paras 86-87). Established pharmacies were not unduly favoured by the structural approach (paras 88-92). Subject to the verification by the national court, consistency was, moreover, guaranteed by some flexibility in the parameters. In particular, if the threshold of 2'800 inhabitants proved too high for certain sparsely populated areas exceptions could be made. If the minimum distance of 250 meters was revealed as being too much for highly concentrated areas, again, exceptions were possible (paras 95-102). To set a simple minimum number of pharmacies allowed to operate in a specific area would not have been equally effective, as concentrations would have occurred and the planning through Spain's regions could have been made impossible (paras 104-12). (ii) In contrast, the preference given in the system of points to pharmacists previously established in Asturia unduly disadvantaged pharmacists established in other member states, given that Directive 2005/36 regulated the activities that holders of formal qualifications in pharmacy were entitled to pursue (paras 120-4). The judgment in *Pérez and Gómez, 2010* was confirmed in *Sáez Sánchez, 2010*, a case which concerned the same legislation of the state of Spain, and in *Polisseni, 2010* and *Grisoli, 2011*, cases stemming from Italy where very similar legislation had been enacted.

In *Susisalo, 2012* the licensing system for pharmacies in Finland was not disputed as such. Rather, a distinction within that system was at issue which allowed the university of Helsinki to operate 16 branches of its pharmacy, while private pharmacies could only run three branches, which were moreover subject to the area concerned being so sparsely populated that an independent pharmacy could not be operated. The university of Helsinki, in turn, was obliged to provide practical training for students in the pharmacies and was required to produce some rare pharmaceuticals. The Court entered the case to allow the national court to exclude reverse discrimination (para. 20). The preference the university of Helsinki enjoyed worked to the disadvantage of private pharmacies (paras 33-4). The resulting restriction could be justified by public health considerations, but only in so far as the additional branches the university was allowed to run actually contributed to the training of students and the production of the rare pharmaceuticals (paras 39-43).

### *Laboratories*

In *Commission v. France (bio labs), 2010* the Court transposed *Apothekerkammer, 2009*, which had been about pharmacies, to biomedical analysis laborato-

ries. In the same way as in that case the Court sanctioned France's requirement that non-biologists could not hold more than 25 per cent of the capital of certain companies operating biomedical laboratories. The criterion, while hindering access of foreign companies to the French market (paras 46-8), guaranteed the independence of biologists in running a laboratory, much like pharmacists in charge of pharmacies, but unlike opticians. That in turn ensured the protection of public health (paras 56-68). The French measure was notably consistent and systematic, as the presence of biologists in some form in the daily operation of the laboratory had to be guaranteed. Exceptions from the 25 per cent-rule were, moreover, made *inter alia* to allow companies established in other member states and lawfully running laboratories there to participate in a French company (paras 70-78). The measure was necessary, too. The independence of biologists could not be guaranteed solely by rules of professional conduct. Severing the voting rights from the financial rights of shareholders would not have been equally effective. Further, 75 per cent of voting rights were needed under French law to take decisions the law considered important (paras 82-8). The Court, however, struck down the prohibition in French law that biologists were not entitled to own shares in more than two companies formed to operate jointly one or more biomedical analysis laboratories (paras 99-102). France had not disputed this aspect of the Commission's claim.

### *Games of chance*

In *Engelmann, 2010* games of chance came back to the Court. In Austria, all concessions to operate games of chance were held by a single Austrian company, which had obtained them for a duration of 15 years, partly because it was constituted as a public limited company in Austria. A public tender had not taken place. Mr Engelmann, a German national, was prosecuted for having illegally operated two establishments in Austria that publicly offered games of chance. The Court assessed the situation in the light of the freedom of establishment and services. In as far as a company had to be a public limited company to be allowed to operate games of chance, the freedom of establishment was restricted. In the absence of sufficient facts, the national court had to assess any possible justification (paras 28-31). In so far as a seat in Austria was required, that amounted to discrimination. Austria in any event had failed to pursue the aim of combating crime consistently and systematically. Less restrictive measures than an outright prohibition of secondary establishments would have been available, namely the requirement to keep separate accounts, the gathering of information on managers and shareholders, or the supervision on premises (paras 34-9). While it was possible to limit the number of licences so that gambling opportunities were restricted and to limit their duration to allow investors to recoup investments made (paras 45-48), a total lack of transparency in the award of licences went against the grain of the case-law developed under the freedom of services for public service concessions. This case-law was applicable to licences to operate gaming establishments, as the Court had already indicated for the

freedom of services in *Sporting Exchange, 2010* (see below). Accordingly, the discretion of the authorities had to be circumscribed, competition and impartiality had to be ensured, and judicial remedies had to be available (paras 46-56).

*Costa and Cifone, 2012* the followed up on *Placanica, 2007*. Italy organised a new tendering procedure for the award of gambling licences to remedy the defects found in *Placanica, 2007*. However, the Court again took issue under the freedom of establishment and services with the way the tendering procedure for the new additional licences to be granted had been set up. First, the new tender guaranteed and entrenched the market positions of licence holders who had been awarded licences in the previous procedure which *Placanica, 2007* had declared unlawful, because it required new licences holders to keep a minimum distance from established licence holders (paras 53 and 58). That disadvantage for 'new' competitors like Stanley, the company established in the United Kingdom which worked via data transmission centres in Italy and which had been at the heart of the challenge in *Placanica, 2007*, was not justified by the needs to reduce gambling opportunities and channel gambling toward controlled agencies, given the expansive gambling politics of Italy. Moreover, the national court had to examine whether the aim of the minimum distance was the protection of established competitors rather than the guaranteed nationwide provision of gambling services (paras 62-5). Second, the new criteria applied for the award and subsequent withdrawal of licences were partly contrary to the freedom of establishment and services. The withdrawal of a licence and the refusal to issue one and the corresponding forfeiture of a large sum bank guarantee could be justified only by the lawful and final criminal convictions of a licence holder for serious crimes. The mere breaking of the trust of the authorities was not such a ground (paras 76-81). Equally, the transparency of tendering procedures, legal certainty, and equal treatment required that a tenderer like Stanley knew in advance whether its business model, namely services offered via data transmission centres, could lawfully be implemented with the new licence (paras 87-90). In any case, Stanley could not be refused a licence on the basis that its managers had been prosecuted before *Placanica, 2007* had been handed down when that judgment had later on declared the prosecutions unlawful (paras 82-4). In seven orders the Court then gave the same answer as in *Costa and Cifone, 2012* in identical circumstances, namely in *Arrichiello, 2012*; *Ferazzoli, 2012*; *Minesi, 2012*; *Pulignani, 2012*; *Rizzo, 2012*; *Veneruso, 2012*; and *Sacchi, 2012*. Only in *Pulignani, 2012* an Austrian company rather than a British company was involved, while the answer remained the same. (For the gambling judgments that were decided primarily on the basis of the freedom of services, see below.)

### *Car insurance*

In *Bejan, 2010* the Court looked at Romanian legislation which required insurers that concluded non-mandatory car insurance contracts to exclude from those contracts coverage for damages that arose because a person had driven the insured car under the influence of alcohol. After having pointed out that the Com-

munity system for mandatory insurance, viz. Directives 72/166, 84/5, 90/232, 2000/26, and 2005/14, did not apply to non-mandatory insurance contracts, the Court found a restriction of the freedom of establishment and services. Foreign insurers were hindered from offering, directly or via an establishment in Romania, non-mandatory insurance contracts that covered damages to a car which arose because a driver was under the influence of alcohol. For lack of information, the justification of that restriction was for the national court to assess (paras 39-45).

*Lawyers, notaries, and courts*

In *Jakubowska, 2010* the Court again dealt with the lawyer Directive 98/5. The Court accepted the case to give the referring court the possibility to exclude reverse discrimination (paras 31-2). It reiterated that the Directive harmonized completely the recognition of admission to the profession in the host state. Nonetheless the member states remained free to lay down the rules of professional conduct, provided that they applied to all lawyers alike. In accordance with article 8 Directive which generally aimed at forestalling conflicts of interests, Italian law could validly prohibit lawyers from exercising their profession in self-employment representing clients in proceedings, while at the same time working part-time as public officials (paras 56-63).

*Commission v. Austria (notaries), 2011* was one in a series of cases in which the Commission attacked the nationality conditions the member states imposed on notaries. In Austria, notaries belonged to the liberal professions, but admission to practice as a notary was subject to Austrian nationality. The Court was only asked to assess this sole condition and only under the aspect of the freedom of establishment, rather than the freedom of services and workers. The direct discrimination was not, according to the Court, justified by the exercise of official authority by notaries. The direct and specific connection required was absent. The probative value and enforceability of authenticated documents was not sufficient to establish that connection, for the parties by consensus agreed to the obligations represented by those documents. The proof inherent in such documents could be refuted and was subject to the judge's unfettered assessment (paras 88-103). The tasks notaries performed notably in the law of succession were either ancillary or performed under the supervision of courts which took the most important decisions themselves (paras 105-110). The official status of notaries was irrelevant. Moreover, notaries were in competition with one another (paras 111-3). That certain acts of the Union excluded notaries from their scope was irrelevant (paras 114-6). *Marina Mercante, 2003* which concerned ship captains did not provide any ground in favour of the nationality condition for notaries (para. 117). Despite the infringement of the freedom of establishment, Austria had not failed to implement Directives 89/48 and 2005/36, given the uncertain legal situation (paras 138-46). Although the case concerned only the nationality condition, the Court indicated that other conditions restricting the access to the profession of notaries, such as the selection procedure for ap-

pointment, the limitation in number or territorial jurisdiction, or the regulation of remuneration, could be justified if they were proportionate (para. 96). The Court ruled in the same vein in five more judgments handed down on the same day as *Commission v. Austria (notaries), 2011*, namely *Commission v. Belgium (notaries), 2011*; *Commission v. France (notaries), 2011*; *Commission v. Luxembourg (notaries), 2011*; *Commission v. Germany (notaries), 2011*; *Commission v. Greece (notaries), 2011*, while in each of those decisions addressing the specificities of the liberal profession of notaries in the respective member state. The Court ruled in *Commission v. Portugal (notaries), 2011*, in addition, that Portugal had not failed to transpose Directive 2005/36 on recognition of qualifications properly. In *Commission v. Netherlands (notaries), 2011* the Court later on ruled in the same vein as in *Commission v. Austria (notaries), 2011* and the other corresponding judgments.

In *Peñarroja Fa, 2011* the Court again refused to apply the public authority exception in the context of courts. The services provided to courts by expert translators who were registered with the courts were not connected to the exercise of public authority. Such translators merely provided accurate translations, while not expressing any opinion on the substance of cases. The discretion of courts was left intact (paras 43-44). Moreover, the Court decided that the practice of courts to keep registers of expert translators from which the judges chose a translator when they needed one, did not make the expert court translator a regulated profession within the meaning of Directive 2005/36 on recognition of qualifications (para. 30). (For the services dimension of the case, see below.)

In *Commission v. Italy (fees for lawyers), 2011* the Commission challenged the maximum fees that Italy's legislation required lawyers to abide by for both in- and out-of-court work. In the view the Court, the Italian measure was binding, since it applied by default when parties had not agreed otherwise (paras 41-4). The access of foreign lawyers to the Italian market was not hindered, though. They enjoyed access under conditions of normal and effective competition. The mere facts that other member states applied less strict or more favourable rules and that foreign lawyers needed to get accustomed to the Italian rules did not amount to obstacles. Further, Italy's maximum fee approach was flexible, allowing for increased fees if the circumstances so required (paras 49-53).

*Stark, 2011* again concerned Directive 87/344 on legal expenses insurance. The Court held that the Directive left a member state free to allow the parties of a legal expenses insurance contract to agree to limit the cost of a lawyer covered to those charged by a local lawyer at the place of the court having jurisdiction. That agreement did not render meaningless the free choice of a lawyer contained in the Directive, provided that *de facto* a choice was not excluded (paras 33).

### *Non-discrimination*

A number of cases in the freedom of establishment during the 2010s concerned more or less directly non-discrimination. *Yellow Cab, 2010* was about the au-

thorization required in Austria to operate bus services in Vienna. That authorization *inter alia* depended on two conditions, namely an establishment was required in Austria and the service to be offered was not to jeopardize the transport services already offered on the same route. Yellow Cab was established in Germany and was refused the authorization to operate a transport service in Vienna which would have been primarily addressed at tourists. According to the Court, the freedom of services did not apply since it had to be implemented by the transport policy. The transport policy measures adopted, however, did not govern the services in question. However, the freedom of establishment applied, but it was not restricted in any way by the requirement to have an establishment in the host state. Yet the detailed rules surrounding the requirement to have an establishment possibly amounted to a restriction of the freedom of establishment (paras 34-5). That was the case when an establishment in the host state was required *before* the necessary authorization was granted, given the dissuasive effect. To require an establishment after the authorization had been granted, in contrast, did not violate the freedom of establishment (paras 37-40). The freedom of establishment was restricted, though, by the authorization requirement. Potentially, the restriction could be justified by the promotion of tourism or environmental concerns. However, the need to prevent the established services of a competitor from being jeopardized was, at least with regard to transport services for tourists, a purely economic argument which did not justify the restriction. Moreover, to rely exclusively on information from such a competitor put into question the objectivity and impartiality an authorization procedure needed to have in order to live up to the freedom of establishment (paras 44-54).

In *Commission v. Spain (shopping centres), 2011* the Court was called upon to decide on a number of conditions the Spanish region of Catalonia imposed in case of the establishment of large shopping centres. Since the Commission had failed to establish that those criteria had an indirectly discriminatory effect – a difference in treatment to the advantage of certain types of retail stores which essentially benefitted Spanish traders would have been necessary (paras 59-61) – the Court examined whether any hindrance to access the Spanish market existed. A prior authorization requirement was such a hindrance, as it depended on the location, size, etc. of the retail store concerned (paras 65-70). The Court then analysed the specific conditions to which the authorization was subject under justification. While restrictions on the size and location of shopping centres were conceivable to protect the environment and the consumer – more specifically, to avoid polluting car journeys, to counter urban decay, to preserve an environmentally integrated urban model, to avoid new road building, and to ensure access by public transport – some specific restrictions Catalonia imposed were too rigorous, as essentially in some cases shopping centres could not be established at all. The necessity was not proven for those restrictions (paras 80-85). Whereas a prior authorization was necessary in an environmental perspective, that authorization was not to depend on the expected market share and the impact on existing traders. Those were inadmissible economic criteria (paras 92-8). An opin-

ion by a committee could be required, but the committee was not to consist of potential competitors. Rather, the interests of consumers and the environment had to be represented (paras 110-1). The Court also sanctioned some soft criteria, like the safety of the project, the mobility it generated, and the need for a broad and varied supply, because harder criteria would have been even more restrictive (paras 117-8). The procedural rule that the authorities' silence implied rejection of an application for a licence after a certain time was lawful, as it was a rule that was easily managed and supervised (paras 122-5). Finally, the determination of the fees payable by reference to the size of the store to be built reflected the overall cost and deviated little from the actual cost that arose (paras 127-9).

### *Ankara and other Agreements with third states*

A number of decisions during the 2010s concerned Agreements with third states. In *Oguz, 2011* the Court came back to the standstill clause in article 41(1) of the Additional Protocol to the Ankara Agreement. The Court clarified that the benefit of the standstill clause was not to be denied to a Turkish national in the United Kingdom on the ground that he had committed abuse of rights. The standstill clause only determined which law was applicable. That law then specified the consequences of an abuse of rights (paras 29-32). More specifically, the ruling in *Kondova, 2001* was not transposable to the case at issue. Apart from the factual differences – the Turkish national had been lawfully present in the United Kingdom, in contrast to Ms Kondova – the standstill clause did not grant a substantive right, while the Europe Agreement provided for a right to establishment and equal treatment (paras 40-5).

*Graf, 2011* concerned the Agreement on free movement of persons with Switzerland. Mr Graf, a Swiss farmer established in Switzerland concluded an agreement with a German farmer to lease a plot of agricultural land in Germany. However, the German authorities refused the authorization required, because competition was distorted when Mr Graf was able to sell the products grown in Germany at a better price in Switzerland. Moreover, the distribution of agricultural land was going to be unsound. The Court found that a farmer as a self-employed frontier worker was entitled to rely on the Agreement to challenge the German rule on which the German authorities had based their decision. Substantively more Swiss nationals than German nationals were established in Switzerland while working in a self-employed capacity in Germany. Hence, the German rule primarily worked to the detriment of Swiss farmers (paras 27-8). The resulting indirect discrimination was not justified. The distortion of competition was not a ground for justification. The public order derogation in the Agreement had to be interpreted in the light of the internal market case-law and the objectives of the Agreement. The requirements of public order could vary from state to state, but they had to be interpreted strictly as derogations from fundamental rules. Hence, public order did not encompass the needs of agricultural land planning (paras 30-4). In addition, the German measure was a new restriction which the

standstill clause in the Agreement prohibited (para. 35). In *Ettwein, 2013* the Court then made it plain – again after it had decided so in the context of social security family benefits in *Bergström, 2011* (see below) – that the Agreement on free movement of persons with Switzerland was not just about discrimination on the basis of nationality. Self-employed German frontier workers who resided in Switzerland while they pursued their self-employed activity in Germany were entitled to rely on the Agreement against Germany even though they were German nationals. The wording and the objectives of the Agreement required so (paras 33-40). Moreover, those frontier workers rightfully claimed application of the *Schumacker, 1995*-line of authority which required the German tax authorities to grant those frontier workers the tax advantage of split tax assessment for spouses who earned all their income in Germany. That was the meaning of Article 21(2) of the Agreement (paras 41-52).

*Technicalities*

In a few cases the Court also addressed the technical intricacies of secondary law. In *Volvo, 2010* the Court applied Directive 86/653 on self-employed commercial agents to allow the national court to exclude reverse discrimination. The Court ruled that a contract that the principal terminated in the ordinary way could not lawfully be terminated again with immediate effect based on a newly discovered default by the agent in order to deprive the agent of the indemnity due (paras 39-44). In *Iaia, 2011* the Court explained the framework Union law set to the statute of limitations for doctors' claims under Directive 82/76 for adequate remuneration during the specialization training and, in particular, the impact of Italy's late transposition of that Directive.

*Legal persons and taxation*

A long series of cases again raised issues under the establishment of legal persons, namely issues of taxation. In *SGI, 2010*, the Court scrutinized Belgium's particular tax treatment of loans granted to companies established in other member states in the light of the freedom of establishment. Belgian tax law added a certain amount to the profit of a resident company when it granted an unusual loan to another company with which it had a relationship of interdependence, namely loans at a rate beyond market conditions or at a gratuitous rate without being under a legal obligation to do so. However, the amount was only added to the profit when the other company, typically a subsidiary, was established outside Belgium. The Court applied the freedom of establishment, because in the case at issue the Belgian company had definite influence over the foreign company (para. 35). The restriction consisted in the fact that the amount was added only when the loan was granted to a non-resident recipient company, but not when a resident company received such a loan (paras 42-54). However, the restriction was justified by a combination of two grounds, namely the needs for a balanced allocation of powers of taxation and for the prevention of tax evasion. Without the restriction Belgium would have had to give up its right to tax profits

generated in its territory and companies could have elected where those profits were taxed (para. 63). Tax avoidance would become possible (para. 67). Moreover, a company had the possibilities to explain the commercial rationale of a loan and thus escape the disadvantage and to have reviewed a decision taken by the tax authorities. The amount was added to the profit only in so far as to bring the loan on an equal level with loans granted at arm's length (paras 73-5).

In *X Holding, 2010* the Netherlands offered parent companies the possibility of consolidated taxation for the whole group. However, such group taxation was only available with regard to subsidiaries subject to taxation in the Netherlands. The Court found the refusal of the advantage of group taxation for foreign subsidiaries to constitute a restriction of the freedom of establishment (paras 18-9). For the purposes of consolidated group taxation, the situations of domestic and foreign subsidiaries were objectively comparable (para. 24). The restriction was justified, though, by the need for a balanced allocation of powers of taxation, else the parent company could have chosen where the profit and loss of a subsidiary was taxed (paras 30-3). Apart from that, permanent establishments and subsidiaries in other member states were not in objectively comparable situations for the purposes of taxation of the parent company in the Netherlands. Hence, it was not necessary to extend the possibility to offset profits of foreign permanent establishments to foreign subsidiaries (paras 39-42).

In *Ciba, 2010*, Hungary charged a particular levy on companies established in Hungary. That levy was calculated on the basis of the wages the company paid to its work-force. The levy served to finance a special ring-fenced fund to develop the employment market in Hungary. Ciba, a company established in Hungary, was required to pay the levy. It was calculated on the basis of all wages Ciba paid in Hungary as well as those that were paid by a branch of Ciba in the Czech Republic. That branch was subject to contributions with a similar purpose in the Czech Republic. According to the Court, the levy was a tax. That the proceeds from the levy were ring-fenced was immaterial. Moreover, the company subject to the levy did not gain any direct benefit in consideration for paying it (paras 23-4). That levies were charged for similar purposes in Hungary and in the Czech Republic did not constitute a restriction of the freedom of establishment. It was the consequence of the absence of measures to avoid double taxation and of the fiscal sovereignty of the member states (paras 25-9 and 38). Rejecting any analogy to *Arblade, 1999*, the Court went on to find a restriction, though, in that wages paid by the branch in the Czech Republic were taken into account for the Hungarian levy while any possibility to reduce the liability to pay the levy with reference to the Czech branch was excluded. In contrast a Hungarian company could reduce its liability, for instance, by organizing training for its workforce (paras 42-4). That restriction was not justified by the cohesion of the tax system (paras 47-8).

In *National Grid, 2011* a company established in the Netherlands held a claim against a company established in the United Kingdom which was denominated in pound sterling. Since the pound rose in value against the Dutch guilder

an unrealised exchange rate gain was generated on that claim. That gain had not yet been taxed in the Netherlands. National Grid then transferred the place of its effective management from the Netherlands to the United Kingdom. Under the double taxation convention between those two states this had the effect that the company's gains and profits henceforth became subject to taxation in the United Kingdom, while the company remained a corporation under Dutch law. The Dutch tax authority subjected the unrealised capital gain to corporation tax as per the transfer of the place management to settle tax debts finally and immediately claimed the tax due. As the debt was denominated in sterling, the unrealised exchange rate gains disappeared at the moment the place of management was moved. According to the Court, National Grid could rely on the freedom of establishment. While it was for the member states to answer the preliminary issue of when a company came into existence and when it ended, the case at issue was about the tax consequences of a change in place of management while the company remained in existence under Dutch law (paras 28-32). The restriction consisted in a cash-flow disadvantage which National Grid suffered in contrast to a company that moved its place of management within the Netherlands (para. 37). The two situations were comparable, even though the exchange rate gain disappeared when the place of management was moved (paras 38-9). In the view of the Court, the restriction was justified by the balanced allocation of powers of taxation, viz. fiscal territoriality with a temporal element, to *determine* the tax due at the moment the change in place of management took place, else a member state risked forfeiting its right to tax capital gains that arose within the ambit of its powers of taxation. The case at issue was different from *N, 2006*, as it was up to the host state to take into account decreases in the value of the claim from the moment the place of management was moved onwards. The disappearance of the exchange rate gain was irrelevant (paras 48-64). However, the immediate *recovery* of the tax at the moment the place of management was changed was less straightforward. The company had to be given the option to choose either (i) to accept the immediate recovery of the tax and suffer the resulting cash-flow disadvantage or (ii) to pay the tax when the gain was actually realised and suffer the disadvantages of providing documentation which allowed the Dutch tax authorities to trace the tax debt and of possibly providing a bank guarantee (paras 65-78). The cohesion of the Dutch tax system did not provide further justification. It coincided mainly with the balanced allocation of powers of taxation (paras 80-2). Further, a general presumption of tax evasion was not to be applied when a company changed its place of effective management (para. 84).

The same ruling as in *National Grid, 2011* applied in two more constellations according to *Commission v. Portugal (exit tax), 2012*, namely when a company transferred its registered office and effective place of management from one member state to another and the first member state immediately taxed unrealised capital gains (paras 27-9); and when a foreign company transferred the assets of a permanent establishment in one member state to another and the unrealised capital gains on those assets were taxed immediately (para. 34). However, a re-

striction did not arise when capital gains were taxed when an economic activity was definitely ceased, because the treatment of foreign and domestic companies was the same (para. 30). In *Commission v. Netherlands (unrealised gains), 2013* the Netherlands did no longer contest, after *National Grid, 2011* had been handed down, that the legislation concerned violated the freedom of establishment (para. 15).

In *Philips, 2012* the tax treatment of resident companies and permanent establishments belonging to the same foreign group was dealt with. The tax legislation of the United Kingdom allowed losses sustained by a foreign group's permanent establishment in the United Kingdom to be transferred to a company established in the United Kingdom belonging to the same foreign group only under the condition that those losses could not be used for purposes of taxation abroad. A similar condition did not apply in purely internal situations. For the Court, that additional condition made it less attractive for foreign groups to establish permanent establishments in the United Kingdom, thus limiting the free choice of the appropriate legal form of establishment (paras 15-6). The situations of resident companies and permanent establishments in the United Kingdom, both belonging to the same foreign group, were objectively comparable for the purpose of the tax treatment of transfers of losses (para. 19). The resulting restriction could not be justified by the need to ensure a balanced allocation of powers of taxation. The powers of the United Kingdom to tax profits generated in its territory was not affected by a transfer of losses from a local permanent establishment to a resident company, in contrast to the hypothetical situation where losses sustained *abroad* would be transferred to a company established in the United Kingdom (paras 25-6). The prevention of a double use of losses, if a ground for justification at all, was not pertinent, either, as the possible use abroad of losses incurred by a permanent establishment in the United Kingdom was not of concern to the United Kingdom (paras 28-31).

*DIVI, 2012* then concerned a tax benefit Luxembourg granted to resident companies. Capital tax was reduced, if the company concerned maintained a reserve on the balance sheet for the five years following the year the reduction was granted. DIVI was a company established in Luxembourg. When it moved its seat to Italy, the capital tax reduction was withdrawn and the tax was claimed immediately. The situation was, according to the Court, within the scope of the freedom of establishment, because, as in *National Grid, 2011*, the tax consequences of a change of seat were at stake (para. 29). The restriction consisted in the withdrawal of the tax benefit. Had DIVI maintained its seat in Luxembourg, it would have continued to enjoy the benefit. Hence, transfers of seat, i. e. the establishment in other member states, were hindered (paras 34-6). The situations of resident companies and those transferring their seat were objectively comparable with regard to the capital tax generated before a change of seat (paras 37-9). The need for a balanced allocation of powers of taxation could not by nature justify the restriction, since the tax would not have been due, had the company remained in Luxembourg (paras 44-5). The cohesion of Luxembourg's tax sys-

tem did not justify the restriction, either, for lack of a direct link. The disadvantage of being subject to corporate income tax and trade tax in Luxembourg during the years the reserve was maintained on the balance sheet was too remote and uncertain (paras 48-9).

In *Commission v. Belgium (investment companies), 2012* the Court first struck down under the free movement of capital the distinction Belgium's tax law drew between (i) resident investment companies and foreign investment companies having a permanent establishment in Belgium and (ii) foreign investment companies. In both cases, a withholding tax was applied to dividends and interests distributed. However only in the first case (i) could the withholding tax be set off against corporation tax due; dividends and interests were, moreover, exempt from corporation tax. In the second case (ii) the withholding tax constituted definitive taxation. For the Court, the distinction deterred foreign investment companies from investing in Belgium (paras 38-40). In keeping with case-law the two situations of investment companies (i and ii) were not different, as they became comparable by reason of Belgium's decision to exercise its power of taxation (paras 50-1). After having rejected a series of arguments Belgium put forward – double taxation conventions did not always allow complete neutralization, unfavourable tax treatment could not be compensated by other advantages, and fund-like entities were not the right basis of comparison, for they lacked legal personality (paras 52-67) – the Court found the restriction unjustified. When a member state decided not to tax resident companies it could not lawfully rely on the need for a balanced allocation of powers of taxation to justify taxation of non-resident companies, in particular when the income earned by resident companies had already been taxed in the hands of the distributing companies as profit realised by them. The effectiveness of fiscal supervision could be safeguarded by guarantees provided by the taxable persons (paras 76-81). The Court then held that those considerations as to the unjustified restriction of the free movement of capital could be transposed *mutatis mutandis* to the freedom of establishment for cases in which an investor exerted definitive influence over a company (paras 84-6). Moreover, the same applied with regard to the European Economic Area Agreement (para. 88).

In *FII Group II, 2012*, *FII Group, 2006*, obviously, came back to the Court. The referring court asked the Court for a number of clarifications. The Court obliged and clarified (i) that the nominal tax rate that had been applied to the profits underlying foreign-sourced dividends had to be taken into account under the imputation method (see notably paras 52 and 62, clarifying para. 56 of *FII Group, 2006*); (ii) that it did not matter that the foreign company distributing dividends to a company resident in the United Kingdom did not itself pay, but rather its subsidiary did pay, corporation tax on the profits underlying the dividends (para. 74); (iii) that the freedom of establishment and capital precluded the payment of advance corporation tax on foreign-sourced dividends not just by the resident receiving company, but also by the parent company under the group income election option in which advance corporation tax was passed 'upwards'

(paras 79-80). The Court, moreover, clarified the relationship of the freedom of establishment and the freedom of capital in cases in which the national legislation applied not just to shareholdings allowing the shareholder to exercise definite influence, but also to financial investments below that threshold. With regard to such legislation, the shareholder was entitled to rely on the freedom of capital with regard to companies established in third states. However, care had to be taken that such companies in third states did not, under the cover of the capital freedom, exercise the freedom of establishment which the Treaty had not extended to them. That was not the case for the legislation at issue in *FII Group, 2006* and *FII Group II, 2012*, since it only covered dividends paid by companies established in third countries to companies established in the United Kingdom (paras 99-100). Finally, surplus advance corporation tax lawfully levied according to *FII Group, 2006* in the case of foreign-sourced dividends need not have been refunded, if it could not be passed on to the non-resident subsidiary because the latter had not generated any taxable profit in the United Kingdom (para. 110).

In *A Oy, 2013* a Finnish parent company wanted to absorb a Swedish subsidiary which had sustained losses in Sweden and had gone out of business, while it remained bound by long-term leasing contracts in Sweden. Whereas the losses incurred by a subsidiary resident in Finland could be taken into account by a resident parent company to reduce its own income for the purpose of taxation in Finland after having absorbed the subsidiary, such was not the case for a Swedish subsidiary. The Court first reiterated that the freedom of establishment was applicable to cross-border mergers and that measures against tax avoidance were relevant only for justification of a restriction (paras 24-8). To refuse the tax advantage – the deduction of losses incurred by a subsidiary – in case of a merger with a non-resident subsidiary constituted an obstacle to the freedom of establishment, as its exercise became less attractive (paras 31-2). For the purpose of taxation of the income of a resident parent company, the situations of resident and non-resident subsidiaries were objectively comparable. In keeping with *Marks & Spencer, 2005* the combination of the need for a balanced allocation of powers of taxation and the prevention of the double use of losses and of the avoidance of taxation justified the restriction, though only in so far as the possibilities of having the subsidiary's losses taken into account for tax purposes in the state where the subsidiary was resident had not been exhausted. This was for the referring court to assess (paras 46-55). However, the mere liquidation of the subsidiary was not *per se* a circumstance which proved that those possibilities had been exhausted (paras 51-2). Finally, Union law did not determine the law applicable to the calculation of the losses in the circumstances of the case at issue. That calculation had to made sure that resident and non-resident subsidiaries were treated equally, though (paras 58-9).

*Further company cases*

In *Attanasio, 2010* Italian law required new fuel service stations to respect a certain minimum distance from existing service stations. The Court answered the question referred, because companies established in other member state were possibly interested in selling fuel in Italy (para. 24). It found that the requirement restricted the freedom of establishment, for it hindered the access of companies established in other member states, which were seeking to establish themselves in Italy, to the Italian market. The minimum distance requirement favoured existing companies, as it only applied to new companies (para. 45). The restriction was not justified by road safety or environmental and public health concerns, since those aims were not pursued in a consistent and systematic manner, given that the measure only applied to new service stations. It would have been less restrictive to examine those aims in each specific case, rather than to impose a general minimum distance requirement which applied in each and every case. The consumer, moreover, was disadvantaged, because the few existing competitors in the market were favoured (paras 52-6).

In *Idrima Tipou, 2010* a Greek law came under the Court's scrutiny that made it possible in specific circumstances to impose fines on shareholders of a company, because the company concerned had violated Greek law. When a Greek company limited by shares operated a television station and in the course of that operation violated Greek legislation or rules of good conduct for journalists, a fine could be imposed not just on the company itself, but also concurrently on share holders who held more than 2.5 per cent of the share capital of the company concerned. The Court, after having found that Directive 68/151 on coordination of safeguards for the protection of members of certain companies did not regulate the matter, went on to examine the freedom of establishment and capital. Those freedoms both had to be applied, since a shareholder holding 2.5 per cent of the shares of a company had or did not have, depending on the circumstances, definite influence over a company's decisions (paras 47-53). On the specifics of the case, the Greek measure deterred investors from other member states more than Greek investors. In essence, it was more difficult for foreign investors to build alliances, as Greek law expected it of shareholders controlling more than 2.5% of share capital, with other shareholders with the aim of making the company concerned comply with Greek legislation and rules of conduct (paras 57-9). The resulting restriction was not justified, because the Greek measure was not suitable to ensure that television companies complied with Greek legislation and rules of good conduct. Essentially, the Greek legislature was wrong to assume that a shareholding of 2.5 per cent or more allowed a shareholder to exercise that kind of influence over a company. Alternative measures that were less restrictive of the market freedoms were, moreover, available (paras 63-9).

*Vale, 2012* concerned the transformation of a company in the sense of a cross-border conversion. Vale was an Italian company that wanted to convert in-

to a Hungarian company. The operation was not a sham. Vale intended to pursue a genuine economic activity in Hungary. It deregistered in Italy where the authorities registered that the company had moved to Hungary and applied for registration in Hungary after having met the substantive requirements of Hungarian law, such as paid up capital, etc. Hungarian law regulated national conversions of companies. However, the Hungarian authorities refused to register Vale as a Hungarian company. The Court found the operation to be within the scope of the freedom of establishment. While it was for the member states to determine the connecting factors for companies, which in turn determined the beginning and life of a company, in this case the company would be governed solely by the rules of the host state. The obligation to allow cross-border conversions, hence, did not infringe the powers of the host state (paras 30-2). Since Hungarian law allowed domestic conversions, there was a difference in treatment in that foreign companies could not lawfully convert into Hungarian companies (para. 36). Arguably, creditors, the fairness of commercial transactions, and fiscal supervision all required protection. But Hungary prohibited cross-border conversions in a general way, regardless of whether those interests were at risk (para. 40). Since national law had to lay down the details, the freedom of establishment could not just regulate those details in the absence of secondary legislation. However, when national law allowed domestic conversions, the principles of equivalence and effectiveness were applicable. Those principles notably allowed to impose on companies the condition of strict legal and economic continuity as well as the requirement to draw up lists and inventories, etc. However, the principles precluded a refusal to register the predecessor company. Hungarian authorities could also not lawfully refuse to admit any foreign evidence relating to the deregistration abroad. However, they were entitled to apply national legislation as to the evidence required (paras 49-59).

In *Express Line, 2011* the Court dealt with Belgium's legislation which imposed on postal service providers outside the scope of universal services a mandatory out-of court complaint procedure for customers. A company established in Belgium which was part of the DHL group established in Germany was affected by that legislation. After having found that Directive 97/67 on universal postal services did not restrain the freedom of action of the member states in this regard, the Court did not find a restriction of the freedom of establishment. All service providers in Belgium were subject to such a procedure. Those providers could expect that a member state would afford legal protection to customers of postal services. Nearly all member states provided for external complaint procedures in such cases (paras 61-2).

### *Companies and third states*

Some cases also concerned the establishment of companies with regard to third states. In *Fokus, 2010* the acquisition of real estate in Austria by legal persons established in Switzerland was at issue. In keeping with the case-law applicable, the Agreement on Free Movement of Persons with Switzerland did not apply to

legal persons. Hence, when an Austrian company that was owned by a Swiss company acquired real estate in Austria, the Swiss company could not invoke the Agreement, more specifically article 25 of annex I liberalizing real estate acquisition, to challenge the authorization requirement Austrian law imposed on the Austrian company seeking to purchase real estate in Austria (paras 33-6). The Swiss company was entitled, in principle, to rely on the freedom of capital of the Treaty. But in the case at issue the Austrian authorization requirement had only been formally amended, but otherwise remained the same in substance since the freedom of capital had entered into force. It was therefore covered by the clause in the Treaty that had grandfathered restrictions of the freedom of capital as per the Treaty's entry into force (paras 43-8).

*A Oy, 2012* concerned Finland's tax treatment of exchanges of shares. Exchanges of shares between companies established within the Union benefited from tax neutral treatment in Finland in implementation of Directive 2009/133. However, when one company involved in the exchange of shares was established in a state party to the European Economic Area and the other in Finland, the exchange of shares was treated as a disposal subject to taxation in Finland for the Finnish company. Directive 2009/133 was not applicable in such a constellation, because it covered only exchange of shares within the Union. However, the freedom of establishment under the European Economic Area Agreement applied. That freedom was identical to the internal market freedom (paras 15 and 21-2). Finnish law operated a difference in treatment in that purely domestic exchanges of shares did not give rise to taxation, whereas they did when a Norwegian company was involved (paras 26-9). That restriction of the freedom of establishment under the European Economic Area Agreement was not justified by the need to prevent tax evasion, since a general presumption of tax evasion could not lawfully be applied. The effectiveness of fiscal supervision was to be assessed differently for Norway, Liechtenstein, and Iceland than for Union member states, because an information exchange mechanism akin to Directive 77/799 did not exist in the European Economic Area. However, in the case at issue a bilateral mechanism compensated that lack. Hence, Finland's approach was precluded (paras 32-7).

In *Scheunemann, 2012* Germany's inheritance tax was lower on inherited shareholdings in companies established in a member state than for such holdings in companies in third states. However, the reduction applied only to shareholdings that amounted to at least a quarter of the share capital. According to the Court, solely the freedom of establishment was applicable, because the German legislation was aimed at shareholders holding at least a blocking minority that allowed them to influence a company. The idea of the legislation was to encourage heirs to exercise influence in a company of which they inherited shares, so that jobs could be saved and the survival of the company could be guaranteed. Any effect on the freedom of capital was an unavoidable consequence of the restriction of the freedom of establishment. That was why the freedom of capital need not have been examined. As the freedom of establishment, unlike the free-

dom of capital, was not extended to cover third countries, the German legislation did not fall within the ambit of the freedom of establishment (paras 25-34).

*Diploma*

A number of decisions also concerned diploma recognition during the 2010s. In *Vandorou, 2010* some persons had first obtained diplomas in a member state and then acquired the authorization to pursue a regulated profession there. Some of them (i) gained practical experience *before* obtaining the authorization; others (ii) gained practical experience *after* having received the authorization, but in another member state than the state where they received the authorization. The Greek authorities imposed supplementary requirements as a condition for the authorization to exercise the corresponding regulated professions in Greece, but refused to take into account, in the determination of those requirements, the practical experience the persons concerned had gained. According to the Court, the practical experience was not to be qualified as 'professional experience' within the meaning of Directive 89/48 on mutual recognition as it had been gained before the authorization to pursue a profession was granted (i) or in another state than the state where the authorization was granted (ii) (paras 61-4). However, the experience had to be taken into account, when determining supplementary requirements, in the assessment of knowledge and qualifications to be made due to the freedom of establishment case-law. That case-law was not inapplicable solely because of the existence of the Directive (paras 65-71).

In *Koller, 2010* diploma recognition in Austria for the purpose of practising as a lawyer was at stake. Mr Koller had obtained a master of law in Austria. He had also acquired a master of law in Spain through courses he had visited concurrently at a Spanish university. The latter master entitled him to practise as an attorney in Spain, which he did for three weeks after having been admitted in Spain. He then applied for admission to the bar in Austria. In Austria admission was contingent on five years of practice. His application to take an aptitude test in order to be admitted was rejected based on the argument that he could not be admitted to the test for lack of having practised in Austria. The Court decided that the qualification Mr Koller held constituted a 'diploma' within the meaning of the Directive 89/48. He had followed a three year-course at university and was admitted to practice in Spain where an additional part of his educational training had taken place. Hence, he benefitted from access to the profession in the host state (paras 26-35). Given that a legal profession was at issue Austria could subject him to an aptitude test for which his qualifications had to be taken into account. However, he was not to be refused access to the test, the aim of which was to establish whether he had the necessary practical experience, on the ground that he lacked practical experience in the host state (paras 38-40).

*Ebert, 2011* again concerned diploma recognition of lawyers. In this case, the Court made it plain that two equivalent ways existed for a lawyer admitted in the 'home' state to practice as a lawyer in the host state under that state's title for lawyers. Either the lawyer concerned practised for three years as a lawyer in

the host state and in that state's law under the 'home' state title, then the lawyer was automatically entitled to practice under the host state title pursuant to Directive 98/5; or the lawyer practised in the host state for less than three years, then he could seek admission to practise under the host state's title under Directive 89/48 and could be required to take an aptitude test (paras 30-4). In any case, a lawyer was always required to abide by the host state's regulation of the profession. A lawyer could also be required to join the bar, if that requirement was indistinctly applicable (paras 37-41).

In *Toki, 2011* the Court partly overruled *Price, 2006*. It concerned the constellation where a profession was not regulated in the member state of origin, the United Kingdom, but partly 'governed' by a professional organization with which membership was optional, while it was regulated in the host member state, Greece. The Court ruled that in that constellation the host state always had to apply point (b) of the first sub-paragraph of article 3 Directive 89/48, regardless of whether the person concerned who had obtained a diploma in the state of origin was a member or not of the professional organization in the state of origin. In other words, the host state, Greece, could insist on two years of actual pursuit of the profession concerned in the state of origin, the United Kingdom (paras 23-5). Actual pursuit in that context meant the normal exercise of the profession in the state of origin, regardless of in which capacity – employed or self-employed, for which employer, for-profit or not, or in which regulatory framework. The activity need not have covered the full range of activities, but was not to consist just in research or assistance of students (paras 31-9).

*Mosconi II, 2013* concerned the recognition of diplomas of architects in Italy. The Court entered the case to allow the national court to exclude reverse discrimination – apparently in contrast to *Mosconi, 2004*, an unpublished case in which the same issue had been at stake, but the Court had rejected the case for the situation having been purely internal to Italy. The question referred had been worded differently, though, in *Mosconi, 2004*. The Court reiterated that architects from other member states benefitted from automatic mutual recognition under Directive 85/384 on recognition in architecture. Hence, they could not lawfully be excluded from projects on certain classified heritage buildings, which were part of the regular profession of architects in the host state, or be asked to pass additional examinations to prove their qualification (paras 49-51).

## 3 Social security

### *Scope and definitions*

The scope of the social security rules of the Union was clarified in a few decisions at the beginning of the 2010s. In *Borger, 2011*, the Court had the occasion to explain the personal scope of Regulation 1408/71, viz. the term 'employed person'. Ms Borger was an Austrian national who had been employed in Austria

when she took statutory leave to take care of her child. During the two years she technically remained in employment. She then extended the leave for another six months in order to benefit from a children allowance. During her leave of absence she joined her husband who worked in Switzerland. The Court reiterated that the only point that mattered for the applicability of Regulation 1408/71 was that she was subject to a general or special scheme, be it on a compulsory or a voluntary basis, a scheme which insured here against at least one of the risks listed in article 1(a) Regulation 1408/71 (para. 26). Were thus irrelevant whether her employment was suspended during the additional six months; any personal motives for the suspension; and whether the additional six months would be taken into account for her claims when she would retire (paras 28-32). In a sense, the Court previously had clarified the personal scope also in *Baesen, 2010*. The Court explained that it was up to national law to define the terms 'civil servants' and 'persons treated as such' in article 13(2)(d) Regulation 1408/71. National law was free to establish that a person who was in some respects subject to a scheme for civil servants fell within the purview of that article (paras 25-30).

In *Salemink, 2012* the Court shed light on the territorial scope of Regulation 1408/71. After the Netherlands had exercised its sovereignty on the continental shelf adjacent to its territory by allowing the exploitation of gas through a rig, it could not lawfully claim that the free movement of workers was not applicable to a person employed by a Dutch company for work on that rig (para. 36). Consequently, Regulation 1408/71 applied to such a person, resulting in Dutch legislation remaining applicable pursuant to article 13(2)(a) Regulation 1408/71 when that person moved residence from the Netherlands to Spain. In such a situation, it was contrary to that article and the freedom of workers for the Netherlands to deny that person an incapacity benefit normally due under Dutch compulsory insurance on the sole ground that the person concerned did not have residence in the Netherlands. Moreover, to refer such a person to optional continued insurance was not an alternative, since it was less favourable (paras 37-44). In *Commission v. Netherlands (rigs), 2012* the Court was seized with a similar allegation with regard to Portuguese workers on platforms on the 'Dutch shelf', but the procedure was inadmissible, because the Commission had failed to explain in detail which benefits were withheld from those workers. *Bakker, 2012* concerned a similar constellation as *Salemink, 2012*. When a worker was employed for work aboard a ship flying the Dutch flag the connection established to the Netherlands was sufficiently close to warrant application of Dutch law, even if the ship regularly operated in the territorial waters of China or the United Arab Emirates (paras 27-30). Pursuant to article 13(2)(c) Regulation 1408/71 Dutch law was applicable. The connecting factor was the work aboard the ship. Hence, residence in the Netherlands could not lawfully be required for compulsory insurance with the Netherlands' social security system (paras 32-5).

*Special non-contributory benefits*

*Bartlett, 2011* again concerned the United Kingdom's disability living allowance, one part of which, the care component, had been the subject of *Commission v. Parliament (special benefits), 2007*. In *Bartlett, 2011* the focus was on the other part, the mobility component. The Court confirmed that it was a special non-contributory cash benefit which was listed in the annex to Regulation 1408/71 (paras 21-32). As it was closely linked to the social environment the Union legislature could lawfully make the mobility component subject to a residence requirement by including it in the annex, thus rendering article 10a Regulation 1408/71 applicable, without violating the free movement of workers (paras 38-40). (In the absence of precise facts the Court chose to focus on the free movement of workers, rather than Union citizenship.) *Commission v. Germany (benefits for the blind), 2011* also was a follow-up to *Commission v. Parliament (special benefits), 2007*. In the light of this judgment, Germany no longer contested that certain benefits for the deaf, blind, and disabled constituted sickness benefits under Regulation 1408/71 which were not to be made subject to residence (paras 26-30). Apart from that, such benefits were social advantages within the meaning of article 7(2) Regulation 1612/68, too. Under that provision a residence requirement was equally precluded, because it resulted in indirect discrimination (paras 38-40).

*Stewart, 2011* concerned a British benefit granted for a year in case of incapacity in youth. The benefit was non-contributory and depended, among other conditions, on the residence, the presence for 26 out of the 52 weeks preceding the application, and the presence on the date of application in the United Kingdom. Ms Stewart, a British national who suffered from Down's syndrome, was denied the benefit, because she had moved to another member state with her parents when they retired. The Court classified the benefit on the specifics of the case as an invalidity benefit rather than a sickness benefit, because after a year it was replaced by a long-term invalidity benefit with which it constituted a single benefit (paras 30-53). As such it was exportable, because article 10 Regulation 1408/71 caught not just the retention but also the acquisition of benefits and because it was not listed as a benefit coming within the ambit of article 10a Regulation 1408/71 (paras 59-69). The residence condition was therefore not permissible. The requirement to be present for 26 weeks during the year preceding the application, moreover, in so far as it did not in any event amount to a residence requirement, constituted a restriction for it deterred Union citizens from exercising their freedom to move within the Union (paras 72-86). The needs for a genuine link with the member state granting the benefit and to maintain the financial balance of that state's social security system constituted grounds to justify such a restriction, in particular for a non-contributory benefit. However, the criterion was too exclusive. Other circumstances equally established such a genuine link, e. g. the facts that Ms Stewart had lived most of her live in the United Kingdom and received a disability allowance there thus establishing a relationship

with the British system; that she was credited national insurance contributions in the United Kingdom; and that her parents on whom she depended had worked or received benefits there before moving abroad after retirement. Hence, the criterion went beyond what those aims required (paras 88-103). The requirement to be actually present on the day of application, in turn, was not suitable to achieve those aims (paras 106-8).

*Discrimination*

In *Landtová, 2011* the Court partially invalidated a judgment by the Czech constitutional court. That court had decided in essence that a pension calculated under Czech law alone had to be granted, when it was higher than a pension calculated pursuant to the Agreement between the Czech Republic and the Slovak Republic which allocated the competence to take into account periods of insurance completed before the dissolution of the Czech and Slovak Federal Republic. The Court found issue exclusively with the granting of the more advantageous pension to Czech nationals resident in the Czech Republic only. Both those requirements were precluded by articles 39 Treaty and 3(1) Regulation 1408/71, for amounting to direct and indirect discrimination, respectively (paras 42-8). Apart from that, the judgment of the supreme court merely granted a more advantageous benefit under national law. That did not affect the allocation of competences between the Czech Republic and the Slovak Republic, which had been preserved by article 7(1)(c) in conjunction with point 6 of annex III(A) Regulation 1408/71. As such it was compatible with Regulation 1408/71 (paras 32-9). In line with *Terhoeve, 1999*, until the Czech Republic had remedied the discrimination found – possibly by removing the advantage – the persons disadvantaged had to benefit from the more advantageous solution which Czech nationals had enjoyed hitherto (paras 51-3).

*Applicable legislation*

The Court also elaborated on the provisions determining the applicable legislation in a few decisions. In *Hudzinski, 2012* the Court was called upon to clarify *Bosmann, 2008*. In two separate cases, two Polish nationals claimed child benefits in Germany for their children who were resident in Poland. In both cases, Poland, rather than Germany, was the competent state pursuant to Regulation 1408/71. In one case pursuant to article 14a(1)(a), because Mr Hudzinski, a self-employed farmer in Poland, had come to Germany as a seasonal worker and had been employed for three months in Germany; in the other pursuant to article 14(1)(a), because Mr Wawrzyniak had been posted to Germany, while remaining employed in Poland. Both workers had lawfully become, by application, subject to unlimited income taxation in Germany. That was why German law granted an entitlement to child benefits, if it had not been for the national rule against overlapping which fully excluded German child benefits in the amount of 154 Euro per child in the light of the Polish benefits being paid in the amount of 12 Euro per child. The Court stuck to *Bosmann, 2008*. Germany had the power to

grant child benefits in such circumstances, although Germany was not the competent state pursuant to Regulation 1408/71. In spite of the principle that only one legislation could be applied at a time, the aim of the free movement of persons required that Germany had that power (paras 41-9). That the persons concerned had not suffered a disadvantage in contrast to *Bosmann, 2008* was irrelevant (paras 51-7). That the workers were not resident in Germany was irrelevant, too, because being subject to unlimited taxation in Germany established a similarly close connection to Germany as the children's residence (paras 58-67). For the case of Mr Wawrzyniak, the posted worker, the Court further decided that when Germany subjected him to unlimited taxation and he thus basically contributed to the financing of child benefits Germany could not lawfully apply a national rule against overlapping. Migrant workers were disadvantaged, in particular when the amounts of the benefits diverged strongly and German law did not reduce the benefit by the amount granted in Poland, but rather denied a benefit altogether (paras 70-84).

In *Partena, 2012* Belgian law established an irrebuttable presumption that those who managed a Belgian company from abroad in fact pursued a self-employed activity and, by reason of that activity, were subject to social security contributions in Belgium. After having pointed out that the case concerned the situation where the agent of a Belgian company was either employed in Portugal or did not pursue an activity at all in Portugal while being resident there, the Court held that 'the location' of an activity was the general criterion which allowed the determination of the applicable legislation. Hence, first the location was to be established, then the law of the member state which applied in that location determined whether an activity amounted to 'employment' or 'self-employment' (paras 42-54). In contrast to the latter terms, the term 'location' was a term of Union law. It meant the 'place where, in practical terms, the person carrie[d] out the actions connected with that activity' (para. 57). The irrebuttable presumption Belgium applied ran the risk of frustrating that definition. It was not justified by the need to combat social security fraud, because it went beyond what was required by that aim. The person concerned notably had to have the possibility to prove that he in actual fact carried out the actions connected with an activity in another member state (paras 58-60).

*Format, 2012* clarified what it meant to work normally in several member states as required by article 14(2)(b) Regulation 1408/71. The authorities issuing certificate E 101, according to the Court, had to base their finding in this regard first on the contract concluded between the employer and the employee and the foreseeable place of work, but also on the circumstances, such as previous contracts concluded with that employee or the practice of the employer concerned in general. If the employee did not in actual fact work in several member states, but only in one, the certificate E 101 previously issued had to be withdrawn. Article 13(2)(a) Regulation 1408/71 then typically became applicable (paras 43-50).

*Sickness*

*Elchinov, 2010* was one of a few cases dealing with sickness benefits. It concerned treatment for sickness received abroad under article 22 Regulation 1408/71 and the freedom of services. Mr Elchinov, a Bulgarian national who was insured in Bulgaria, suffered from an eye sickness for which an advanced treatment was only available in Germany. Obviously, Bulgarian law did not specifically include the treatment method, but it broadly included a category within which the treatment could fall. Mr Elchinov applied in Bulgaria for the authorization to receive that treatment in Germany, but underwent treatment there before the authorization was refused. After having reiterated the case-law established under article 22 Regulation 1408/71 and article 49 Treaty, the Court held that reimbursement could not lawfully be excluded in all cases in which the authorization had not been granted before the treatment was administered, including urgent cases, even though all other conditions had been met (paras 45-50). Whether the treatment method to be applied abroad corresponded to a treatment available under national legislation which determined only broad categories of what it covered, was for the national court to decide in the light of the lists of treatments national law had established (paras 58-62). If the treatment method was covered, article 22 Regulation 1408/71 applied and the authorization had to be granted, if the same or equally effective treatment was not available in the competent state (paras 64-67). In any event, an assessment on a case-by-case basis was required. Hence, a general presumption that national legislation did not cover a treatment method when it was not available in Bulgaria could not lawfully be applied under article 22 Regulation 1408/71 or article 49 Treaty (paras 69-72). If treatment abroad was provided under article 22 Regulation 1408/71, the amount to be reimbursed was basically determined by host state legislation, with the modifications established by the case-law. If treatment was provided under article 49 Treaty, 'home' state legislation was pertinent. In any case, form E 112 was normally not needed any longer when treatment had been sought before authorization was granted. Direct reimbursement was then required (paras 74-80).

*Van Delft, 2010* dealt with the sickness insurance of pensioners. The Netherlands had reformed their sickness insurance system to introduce general compulsory insurance for residents. That reform had some effects on those receiving pensions in the Netherlands while being resident abroad. Those pensioners had under the previous system taken out voluntary insurance with companies in the Netherlands or in other member states. The switch to the compulsory system arguably had the effect of rendering articles 28 and 28a Regulation 1408/71 applicable, entitling those pensioners after registration in the host state to sickness insurance there as if they were ensured there at the expense of the state paying the pension, i. e. the Netherlands. Accordingly, the Netherlands authorities deducted contributions from the pensions. In addition, the Netherlands legislation provided that the voluntary insurance contracts of such pensioners be terminated auto-

matically. According to the Court, the pensioners concerned could not lawfully elude the new Dutch system and hence Regulation 1408/71 by not registering in the host state. In spite of the appearance created in *Van der Duin, 2003*, such an option or right to choose was not inherent in the system of Regulation 1408/71. That system relied on solidarity and applied regardless of whether the persons subject to contributions in fact received benefits. Moreover, when articles 28 and 28a were applicable, article 13(f) was not. The deductions the Netherlands made were therefore lawful (paras 38-79). The free movement of workers, moreover, was not applicable to pensioners who had moved residence after having ceased all occupational activities (paras 88-93). Rather, Union citizenship applied. The introduction of the new system and the resulting effects on pensioners abroad were compatible with Union citizenship, in particular since it contained a mechanism to adapt the contributions to the cost of living in the state of residence (para. 104). However, Union citizenship required that the consequences of the automatic termination of insurance contracts were not discriminatory of the pensioners concerned, notably because of their lack of residence. Subject to the national court's assessment, discrimination could notably reside in the less advantageous conditions granted to non-residents by insurance companies for new contracts for supplementary insurance, which had become necessary because the old contracts had been terminated by law. Even a practice by insurance companies that implemented a political agreement was caught by the prohibition of discrimination of Union citizens (paras 94-128).

*Da Silva Martins, 2011* further developed the *Molenaar, 1998*-line of case-law which had qualified benefits granted to address the risk of reliance on care as sickness benefits. In the case at issue, a Portuguese national received old-age pensions in both Germany and Portugal. When he moved his residence from Germany to Portugal after retirement the benefits he received under his German care insurance were discontinued. Basically, German law would have allowed him to remain subject to care insurance on an optional continued basis, but it was unclear whether that was possible under Regulation 1408/71. The Court first recounted the *Molenaar, 1998*-case-law and emphasized that the reason why benefits granted to counter the risk of reliance on care had been qualified as sickness benefits was that that risk had only recently been addressed by the laws of the member states and was, hence, not covered by Regulation 1408/71. The Court then answered very much on the specifics of the case. Given that German law did not a priori preclude optional continued insurance, Regulation 1408/71 was not opposed to such continuation. The principle that only the social security legislation of a single member state was applicable did not apply to care benefits when they had to be qualified as sickness benefits while they addressed a risk different from sickness, i. e. the risk of becoming reliant on care (paras 37-59). Hence, basically sickness benefits were to be provided by Portugal as the state of residence paying a pension, while Germany had to provide care benefits. If it turned out that Portugal's social security system provided cash benefits to address the risk of reliance on care, Germany would have to top-up those benefits,

else contributions the pensioner had paid would be lost without return (paras 60-87). (For the case-law regarding care insurance under the freedom of services see below.)

### *Aggregation*

The aggregation of insurance periods also came back to the Court in the 2010s. In *Tomaszewska, 2011* Polish law required the completion of a minimum period of contribution of 30 years for the acquisition of a pension. To the periods of contribution actually completed a maximum of a third of those periods could be added as periods of non-contribution. The Court found that periods of contribution completed in other member states had to be taken into account not only to determine the actual number of periods completed, but also to determine the number of periods of non-contribution capable of being added, otherwise a restriction of the free movement of persons arose (paras 32-7). Migrant workers would have been treated less favourably. Such a disadvantage was not justified by administrative difficulties, because only the grounds mentioned in article 39(3) Treaty, namely public policy, security, or health, were capable of justifying such a restriction (para. 38).

*Salgado González, 2013* next dealt with the calculation of the theoretical amount for aggregation in Spain. In the case at issue, the Spanish authorities had, according to the Court, correctly taken into account periods of insurance completed in Portugal for the qualifying period of 15 years required by Spanish law (para. 45). However, when establishing the average contribution basis, which served to determine the pension to be paid in Spain, the authorities had to adjust the divisor used so that it reflected the periods completed in Spain only, when they calculated the theoretical amount under article 46(2)(a) Regulation 1408/71. If the same divisor was used as in situations where a person had not made use of the freedom to move, i. e. the divisor 210, migrant workers would be disadvantaged for the theoretical amount resulting for them would be lower (paras 46-51).

After that, in *Van den Booren, 2013* the Court reiterated that benefits were not of the same kind for the purpose of the calculation under article 46(2) Regulation 1408/71 when they were based on the insurance careers of two different persons. Hence, the Belgian rule against the overlapping of benefits was lawfully applied, when a person's survivor's benefit in Belgium was reduced in the light of an increase in that person's own old-age benefit due in the Netherlands (paras 28-36). While the considerations that decided *Van Munster, 1994* and *Engelbrecht, 2000* were not transposable to the case at issue, the national court had to make sure that no unjustified obstacle to the free movement of persons arose (paras 38-46).

### *Unemployment*

Unemployment benefits occupied the Court in *Jeltes, 2013*. The Court emphasized the amendments the new Regulation 883/2004 had made to the scheme

governing unemployment benefits and found, as a consequence, that the *Miethe, 1986*-case-law as to the atypical frontier worker did no longer apply. The Union legislature had taken the decision that all wholly unemployed frontier workers were to receive unemployment benefits where they resided, even if they retained strong links in the member state where they used to work. Pursuant to article 65 Regulation 883/2004, frontier workers in addition benefitted from the employment services of the state of their last employment (paras 24-35). The Netherlands could therefore lawfully rely on a residence condition to refuse unemployment benefits to wholly unemployed frontier workers residing in Germany or Belgium even if they were Dutch nationals. Such a condition had the same effect as article 65(2) (paras 39-40). The fact that unemployment benefits were in general higher in the Netherlands in such circumstances did not amount to a restriction of the free movement of persons (paras 41-45). The transitional regime of article 87(8) Regulation 883/2004, which allowed the maintenance of benefits paid under Regulation 1408/71, applied in principle by analogy to unemployment benefits pursuant to article 71 (paras 51-6). However, whether the situation of the person concerned had not changed since the entry into force of Regulation 883/2004, a further condition for article 87(8) of that Regulation to apply, was for the national court to assess under national law (paras 57-60).

*Family benefits*

A number of decisions then concerned family benefits. *Schwemmer, 2010* specifically addressed article 76 Regulation 1408/71 and article 10 Regulation 574/72. Ms Schwemmer, a German national who was in minor employment in Germany not subject to mandatory social security, was married to a worker who was employed in Switzerland. She took care of their children, after they had divorced. Her application for child benefits in Germany based on her residence there was only partially granted, because her former husband could have applied, but did not apply for child benefits in Switzerland. The German authorities suspended the benefit as far as it 'overlapped' with the Swiss benefit and merely granted her the top-up amount. After having reiterated that Regulation 1408/71 applied pursuant to the Agreement on Free Movement with Switzerland (paras 31-2), the Court found that the Regulation applied *ratione personae*, since the children's father was an employed person in Switzerland. The divorce was irrelevant and so was the fact that the annex to the Regulation had the effect of excluding the mother from the scope of the Regulation (paras 34-8). Article 76 Regulation 1408/71, though basically applicable to situations of overlapping benefits, was not to be applied, since the right to child benefits in Germany was not based on the mother carrying on an occupation in Germany as required by that article, but based on her residence. That was why the article, including its amendment in the second paragraph requiring that any lack of application for a benefit be disregarded, was not applicable (paras 40-6). Article 10 Regulation 574/72 addressing the overlapping of family benefits was pertinent, though. Under that article, all formal and substantive conditions of national law for the award of benefits

had to be met for overlapping of benefits to occur. Hence, in the absence of the husband's application for benefits in Switzerland, overlapping did not occur under article 10 Regulation 574/72. The amended article 76(2) Regulation 1408/71 was not to be applied by analogy to article 10 Regulation 574/72 (paras 49-58). Germany, thus had to award the full child benefit.

*Xhymshiti, 2010* also concerned family benefits under the Agreement with Switzerland. In this case, a Kosovar worked in Switzerland, while he was resident in Germany with his wife who was also a Kosovar. Both their children were German nationals. The German authorities refused to top-up the child allowance Ms Xhymshiti was paid in Switzerland. The Court ruled that Regulation 859/2003, which had amended Regulation 1408/71 to include third country nationals within its scope, was not applicable under the Agreement with Switzerland. The relevant annex of the Agreement had to be amended for that purpose. In absence of such an amendment, Switzerland had to be considered a third country for the purposes of Regulation 859/2003. The Xhymshitis' situation therefore only concerned one member state and a third country, which was why Regulation 859/2003 was not applicable (paras 30-39). The Union citizenship of the two children did not change that assessment in any way. Hence, German law was applicable exclusively. The refusal to top-up the allowance was lawful (paras 41-4).

In *Bergström, 2011* again family benefits under the Agreement with Switzerland were at issue. A Swedish national had worked in Switzerland. After having given birth to a child she stopped working and then went back to Sweden where her husband had found employment. Her application for the Swedish parental benefit was rejected, because she had not completed the prerequisite 240 days of employment in Sweden. In fact, she had not completed a single day of employment in Sweden, but all of them in Switzerland. The Court found, based on the wording, the aim, and the equality of treatment clause of the Agreement, that the Agreement and with it Regulation 1408/71 applied to a returner, a person who came back to the state of which she was a national, after having worked in another state party to the Agreement (paras 28-34). With the parental benefit being a family benefit, periods of employment as qualifying periods had to be aggregated. More specifically, Sweden's authorities had to aggregate periods completed in Switzerland, even if *all* periods had been completed in Switzerland. The Agreement and Regulation 1408/71 were entirely unambiguous in that regard (paras 36-44). For the income determining the amount of the parental benefit, the provisions of the Regulation 1408/71 on sickness benefits were pertinent. Since she had never earned income in Sweden, the income of a person in a comparable situation in Sweden had to be the yardstick, rather than the income she had gained in Switzerland (paras 47-52).

*Perez Garcia, 2011* dealt with family allowances of pensioners who were receiving pensions in two member states, namely Germany and Spain, and who had moved residence from Germany to Spain. The Court ruled that a right to such an allowance was not to be considered to be 'acquired' under articles 77(2)

(b)(i) and 78(2)(b)(i) when a pensioner had lawfully opted for a benefit in Spain which did not qualify as a family allowance and the exercise of that option excluded the grant of a Spanish family allowance which would have been due but for the option exercised. In such a situation, Germany could not lawfully refuse to grant a full family allowance to the pensioner whose pension was due under German law alone. In particular, article 76(2) Regulation 1408/71, which had been amended to guarantee that the option to a right was to be considered a right acquired, was not applicable by analogy under articles 77 and 78, for lack of a specific amendment of those articles. That interpretation was imperative, else the migrant worker was deprived of benefits due under national law alone (paras 42-55).

*Aggregation more broadly*

*Reichel, 2012* was about child-raising periods to be taken into account for the calculation of an old-age benefit. Since Regulation 1408/71 did not address that question and Regulation 987/2009 implementing the new Regulation 883/2004 did not yet apply, the applicable legislation in the case at issue was determined by the closest connection to a member state. For Ms Reichel, this was Germany, because she had resided and worked in Germany before she gave birth to two children and worked there again after the period during which she had resided with her husband in Belgium and raised her children, without however ever working in Belgium (paras 26-30 and 32-6). In those circumstances, the freedom of Union citizens to move required Germany to take into account the periods of child-raising in Belgium in the calculation of the old-age benefits due. German law could not lawfully refuse to take into account those periods completed abroad, solely because more than a month had passed between the completion of the last period of insurance by virtue of work and the birth of the child. Otherwise Union citizens who had exercised their freedom were disadvantaged (paras 37-44).

In *Dumont, 2013* benefits for orphans were at issue, more specifically aggregation for the purpose of acquisition of such benefits. The Court made it clear that articles 78(2) and 79(1) Regulation 1408/71 only determined the applicable legislation. Beyond that, the applicable national law provided for the conditions for the acquisition of benefits. When pursuant to Belgian law it was required to take into account not just the periods the deceased person completed but also those of the surviving parent, aggregation had to be applied to the latter periods as well (paras 37-47). Moreover, that applied irrespective of whether periods had been completed in Belgium at all before the death of the deceased parent, since Belgian law was applicable pursuant to Regulation 1408/71 (paras 49-60).

*Ankara*

*Akdas, 2011* concerned a Dutch special non-contributory supplement to invalidity benefits which was intended to bring up invalidity pensions to the level of the Dutch minimum wage. For this supplement an amendment of Regulation

1408/71 had deleted the residence clause waiver. However, a corresponding amendment of article 6(1) Decision 3/80 under the Ankara Agreement had not been adopted. Hence, the Court found, the Netherlands could not refuse to continue to grant the supplement to a Turkish national lawfully receiving Dutch invalidity benefits, just because he had moved his residence to Turkey. Since Decision 3/80 had not been amended, Union citizens were not treated less favourably than Turkish nationals which would have been at odds with article 59 Additional Protocol to the Ankara Agreement (paras 76-95). Apart from that, the Court found that article 6(1) Decision 3/80 had direct effect (paras 68-73).

For completeness, three more decisions must be mentioned. In *Reinke, 2010* the Court ordered the case closed, because the main claim before the national court had been met in the meantime. In essence, it had concerned the claim of a pensioner insured in Germany for reimbursement of the cost caused by an emergency hospital treatment in Spain. She had been admitted to a private hospital to have a stroke treated, because no bed in the public hospital had been available. In *United Kingdom v. Council, 2012* the United Kingdom sought interim relief. The Council had granted the mandate to renegotiate the Agreement with Switzerland on free movement of persons pursuing the aim of replacing Regulation 1408/71 with Regulation 883/2004. The United Kingdom claimed that the legal basis of the Council's decision was wrong and that it would suffer irreparable harm if the Joint Committee under the Agreement decided to replace Regulation 1408/71 before the Court ruled on the merits of the action. The Court rejected that argument, holding that the Union would have to renegotiate the replacement in the Joint Committee if it turned out that the Council had relied on the wrong legal basis (paras 37-8). Moreover, rights acquired by Swiss nationals in the United Kingdom in the meanwhile were not necessarily acquired, but could be limited in several regards (para. 45). Damage would be pecuniary in nature anyway (para. 41). Finally, the case brought by the Commission in *Commission v. Belgium (indexation), 2013* was rejected on procedural grounds. The Commission had failed to state coherently how Belgium had infringed Union law by abolishing a condition for indexation of pensions as per 2004 and not for the time period before that. The condition had been to have residence within the Union or in a country with which Belgium had concluded a convention guaranteeing reciprocity only.

## 4 Services

### *Posted workers*

With *Commission v. Germany (posted workers), 2010* posted workers came back to the Court. The Court confirmed the allegation of the Commission that Germany had to extend the advantages contained in a bilateral convention between Poland and Germany, from the moment on that Poland had acceded to

the Union, to other member states. More specifically, companies from other member states than Germany which posted Polish workers to Germany had to be able to benefit from the quota allocated in the convention to such workers, else they suffered direct discrimination contrary to the freedom of services, because they were forced to establish themselves in Germany (paras 40-1). Only the grounds expressly mentioned in the Treaty could possibly justify such discrimination. Economic considerations and practical difficulties, such as the effective monitoring of posting and the recovery of social security debts, apart from not being express grounds, were not admitted by the case-law to justify discriminations that were not direct (paras 47-51). Besides, the need to maintain the balance and reciprocity of bilateral agreements, a ground established by *Gottardo, 2002*, was not a ground that could be argued for relationships between the member states (paras 42-6). As a further point the Court ruled that the standstill clause in the Act of Accession of Poland covered a labour market protection clause of Germany which had existed at the time of accession and was updated depending on the circumstances. Germany was therefore allowed, depending on the prevailing situation, to add or remove to a list districts in which a 30 per cent-ceiling of unemployment was reached and for which the restrictions for Polish workers contained in the convention with Germany, which the Act of Accession covered, applied as a consequence (paras 64-6).

In *Rani, 2010* the Court confirmed that the posting of workers was not to be made subject to a company being established in the host state. For lack of transitional provisions in the Act of Accession, Hungary was not allowed to maintain in force a provision that reserved the activities of temporary work agencies to national companies (paras 37-9 and 48). *Santos Palhota, 2010* declared Belgium's formalities applying to companies posting workers to Belgium incompatible with the freedom of services. Directive 96/71 did not regulate the measures imposed to control compliance with the Directive (paras 25-7). However, the need to declare the posting of workers five days ahead of the beginning of the works in fact constituted an authorization requirement, because the workers posted were not allowed to begin their work during those five days. As such, the requirement did not comply with the case-law which allowed only a simple declaration (paras 33-41 and 51-2). The documents to be furnished by the company posting workers were in line with that case-law, though (paras 55).

In *Vicoplus, 2011* the Court spelled out two points. On the one hand, the old member states, such as the Netherlands, could lawfully require Polish posted workers to have a work permit during the transitional phase after accession, although the transitional measures in the Act of Accession of Poland technically only concerned workers and not employees posted as part of service provision. However, that kind of service provision possibly had the same impact on the labour market which the transitional measures intended to prevent (paras 26-40). On the other hand, a 'hiring out' of a worker pursuant to article 1(3)(c) Directive 96/71 presented three characteristics, namely the worker concerned was employed by the agency posting him; the making available of an employee

was the main purpose of the service provision, in contrast to a 'posting' where it was a secondary part of a broader service provided; and the employee concerned was working under the control and direction of the user undertaking in the host state. The return to the member state of origin, however, was not a necessary characteristic of 'hiring out' a worker (paras 44-50).

In *Commission v. Belgium (employment agencies), 2011* the Court confirmed that Belgium had infringed the freedom of services by requiring that temporary employment agencies in Brussels met certain requirements. According to Belgian law, they namely had to have the exclusive purpose of providing services as temporary employment agencies and they had to have a particular form of company. In both cases it was difficult for the Court to imagine how such serious restrictions could be justified (paras 15 and 21). (Belgium had not contested the infringement.)

### *Games of chance*

In *Santa Casa, 2010*, one of a long series of gambling cases of the 2010s, the Court ruled that it did not have jurisdiction. The national court decided to maintain its question despite the ruling in *Liga Portuguesa and Bwin, 2009*, but failed to explain the facts and national law sufficiently to allow the Court to answer the question referred. *Ladbrokes, 2010* and *Sporting Exchange, 2010* then again concerned a gambling and betting monopoly. In *Ladbrokes, 2010* the Netherlands had entrusted a single licence to one national operator of certain games of chance. A British company that lawfully offered games of chance in the United Kingdom was prohibited from offering them in the Netherlands via internet. The Court left the application of the criteria developed in the gambling case-law to the referring court. In particular, that court had to verify the consistency and systematics of the national measure. In that regard, it was not inconsistent with the aims of preventing fraud and addiction, which were both part of consumer protection, to expand games of chance in a controlled way in order to draw gambling away from clandestine to legal activities. For that purpose, ads, a range of games, and new distribution channels were all necessary. Even the generation of profits was not inconsistent, provided that it was incidental and not the main aim of the measure. The national court had to verify, though, whether unlawful gambling constituted a real and significant problem in the Netherlands, taking into account the conditions of the licence issued and the code of conduct enacted (paras 26-36). Assuming that the national legislation was compatible with the freedom of services, any measures implementing it, including actions brought by private individuals, did not constitute additional restrictions warranting a separate examination (paras 42-9). If the circumstances discussed by the Court were all found by the national court to be present, the Netherlands authorities were not obliged to recognize the licence issued in the United Kingdom or in general tolerate games of chance offered via internet even in the absence of any advertising (paras 54-7).

In *Sporting Exchange, 2010*, handed down on the same day as *Ladbrokes, 2010*, the single licence issued by the Netherlands for sports and horse race betting were also challenged by a British company offering services via internet. The Court ruled in the same way as for games of chance via internet and for justification on the grounds of preventing fraud and addiction (paras 26-36). The Court added, though, that the obligation of transparency, which had been developed under the freedom of services for public service concessions, had to be respected, too, with all the implications when the single licence available in the Netherlands was issued, irrespective of whether it was a service concession or not. The grounds justifying the restriction that consisted in the availability of only one licence, did not justify the lack of a sufficient degree of advertising of the licence to be awarded, since the award as such did not have an impact on the proliferation of gambling. Justification of the lack of transparency was only possible, if the licensed operator was subject to direct state supervision or strict control (paras 42-60).

*Sjöberg, 2010* also dealt with gambling legislation. Sweden reserved all activities relating to games of chance to a public non-profit entity. Accordingly, a private for-profit operator, be it established in Sweden or other member states, could not lawfully offer or advertise gambling services in Sweden. In the case at issue, two editors of magazines in Sweden had advertised the services of private for-profit operators established in other member states where they were licensed to offer games of chance. The editors were prosecuted. The Court held that the restriction of the freedom of service recipients in Sweden as well as of providers established abroad which resulted from the prohibition for private for-profit operators to offer games of chance in Sweden could be justified by the aim of imposing strict limits on for-profit gambling. A member state was entitled to see it as unacceptable that private entities exploited social evils or the weaknesses and misfortune of gamblers. Along with the prohibition of the services as such, a ban on advertisements of the services prohibited was equally justified (paras 41-5). The national court had to take care, though, that purely domestic violations of ad bans were not subject to lighter penalties or subject to less diligent prosecution than in the case of cross-border ads, else discrimination contrary to the service freedom arose (paras 55-6).

The next wave of gambling cases was overcome by the Court on 8 September 2010. In *Stoß, 2010* the monopoly created by some German Länder to offer sports betting and lotteries was at issue in the light of the freedom of services and establishment. The Court confirmed first that it was possible, based on the member states' discretion, to establish public monopolies for gambling, although authorizations of private persons combined with appropriate controls, as practised in other member states, were possibly less restrictive (paras 74-82). Having confirmed that the transnational gambling possibilities the internet offered were not such as to jeopardize by themselves the consistency and systematics of regional monopolies (paras 85-7), the Court focused on the circumstances prevailing in Germany. While each game of chance needed to be assessed on its own in

terms of restrictions, it was nevertheless inconsistent with the aims of preventing money squandering and addiction, in the view of the Court, that highly addictive gambling machines were only subject to authorization and the corresponding policy had been substantially expanded, while there was a monopoly for betting and lotteries. Moreover, some of the proceeds from lotteries which were aggressively marketed fed the public purse, which in turn was at risk of becoming an end in itself. In those circumstances, the referring court could find that a monopoly in betting on sports competitions was not any longer justified (paras 91-105). In spite of that, Germany was not under a duty to recognize authorizations to offer gambling services issued in other member states, but could require that providers obtain a new authorization in Germany (paras 111-4). Besides, the Court clarified that a study as to the risks inherent in gambling was not necessarily needed before adoption of a national measure. A measure could be proven proportionate without such a study (paras 71-2).

*Carmen Media, 2010* also concerned the regulatory framework for gambling, as amended, in Germany. The Court added that the fact that the authorization to offer gambling services granted by Gibraltar in the case at issue exclusively covered services provided via internet to recipients established abroad was not such as to render the freedom of services inapplicable. Any possible tax avoidance was not the topic of the preliminary ruling procedure, though (paras 42-50). Moreover, the Court confirmed that the specifics of gambling services offered via internet were such that a prohibition to offer them in Germany was not inappropriate (paras 98-105). A transitional period of one year, combined with certain conditions, that allowed those who had offered lotteries lawfully via internet under the previous legislation to convert their businesses did not render the German measure inconsistent, either (paras 106-10). *Winner Wetten, 2010* then also related to the German gambling legislation, but concerned the freedom of services and establishment only indirectly. Rather, a problem of the primacy of Union law was raised, namely whether the German constitutional court could lawfully grant a transitional period during which the legislation of a Land had to be adapted. (For the gambling judgments that were decided primarily on the basis of the freedom of establishment, see above.)

Next, in *Zeturf, 2011* the Court mainly left it to the national court to assess the public monopoly in France on the organisation of horse races and horse race-betting in the light of the established case-law. The Court reiterated though the applicable case-law as to (i) the objectives a system of exclusive rights for betting could lawfully pursue, confirming that generating revenues for social policy aims, such as the rural development of horse breeding, did not in itself constitute a reason justifying a restriction on gambling services (para. 53); (ii) the strict control to be exercised over the body holding exclusive rights to organize horse race betting, pointing out that even a public non-profit body could be tempted to expand betting so as to raise more revenues and be able to accomplish its public policy task more effectively, which possibly resulted in an inconsistency with the aims pursued (paras 59-62); (iii) the controlled expansion of gambling activities

by a dynamic commercial policy pursued by the holder of exclusive rights. In a similar vein, the Court left it to the referring court in *Dickinger, 2011* to assess the monopoly of a private licence holder in Austria to organize casino games via internet. Yet the Court clarified a number of points. First, a mere computer server in Austria supporting internet services provided from Malta did not render the freedom of establishment applicable, for lack of a stable and continuous basis in the host state. Rather, the freedom of services was exclusively applicable (paras 34-7). Second, the monopoly of a private company as a licence holder had to be assessed in the light of the criteria developed in the case-law. However, the aim stated in the relevant act of maximising revenue for the state could not alone justify the restriction of services inherent in a private monopoly (para. 55). Third, a substantial increase in the activities of the holder of an exclusive licence and the corresponding increase in income called for particular attention by the referring court when assessing whether an aim justifying a restriction was pursued in a systematic way, despite an expansive commercial policy for games of chance (para. 61). Hence, a distinction had to be made in cases of monopolies between a restrained commercial policy which channelled gamblers towards lawful offers and an expansionist policy which in reality aimed at increasing revenues (para. 69). Fourth, the requirement of a certain legal form and financial capacity of the holder of the exclusive licence was in accordance with the freedom of services, provided the requirements were not excessive (para. 77). Fifth, the need for the registered office to be located in the state where the exclusive licence was granted was only susceptible of justification by grounds mentioned explicitly in the Treaty. Under the public order ground an exclusive licence combined with an establishment requirement was in any case not justified by the aim of maximizing public revenue (para. 81). Sixth, the prohibition for the exclusive licence holder to set up branches abroad was a restriction for which no justification had been put forward; the freedom of a member state to regulate games of chance in its territory was not a ground suitable for justification in that regard (para. 87). Finally, the requirement established by the services case-law to take into account 'home' state regulation, controls, and supervision did not apply to games of chance. For lack of harmonisation a member state need not have trusted the checks undertaken by other member states which were possibly based on different choices and means. Those checks did not necessarily provide sufficient guarantees for consumer protection (paras 96-9).

In *HIT, 2012*, the Court next assessed Austria's requirement to have a permit to advertise in Austria games of chance lawfully offered in another member state. The permit was only granted, if the level of protection of the consumers in the member state where the games of chance were offered corresponded to the level of protection guaranteed in Austria. The Court found that requirement to be a justified restriction of the freedom to provide services, given that it was up to each member state to set the level necessary to protect consumers. However, it was only to be required that the level of protection in the other member state

was equivalent, rather than identical to the level in Austria, else the Austrian rule went beyond what was necessary to protect consumers (paras 23-32).

In *GarkaIns, 2012* the Latvian legislation prohibited games of chance in a list of locations, but conferred local authorities wide discretion to assess the situation and grant permits. In the case of GarkaIns, a Latvian company that wanted to open an amusement arcade in a shopping centre in Riga, the local authorities refused the permit, because the centre was heavily frequented and within the vicinity of a school. The inhabitants of the neighbourhood allegedly had to be protected from disturbances. The Court addressed the question to allow the referring court to exclude reverse discrimination and because it was 'far from inconceivable' that companies in other member states wanted to open amusement arcades in Latvia (paras 20-1). Examining only the freedom of services, as the national court had only asked about services, although the freedom of establishment was possibly concerned as well (paras 24-32), the Court again left the ultimate assessment to the national court. However, the Court stated that a broad discretion was not, in principle, excluded under the freedom of services. The national court had to make sure, though, that the protection of consumers and residents was genuinely pursued and that the requirements of the authorization case-law were met, i. e. objective, non-discriminatory criteria known in advance were to be applied and reasons had to be given in the decision (paras 40-7).

Finally, in *Stanleybet, 2013* the monopoly in games of chance in Greece came to the Court. Greek legislation granted exclusive rights to a company the Greek state controlled. However, some of the control over the company was released and private shareholder were allowed to hold the majority of shares in the company. The company benefitted from preferential treatment in terms of advertising. It expanded its activities and offered games of chance *inter alia* in Cyprus. Yet the Greek authorities rejected the request for permits by British companies that lawfully offered games of chance in the United Kingdom. The Court reiterated the established case-law on state monopolies in games of chance and again left the assessment to the national court, pointing out though that the activities of the Greek monopolist seemed inconsistent with the aim to combat crime (para. 35). If the national court found that the freedom of services and establishment were violated, a transitional period was not to be granted, as the Court had already held. That did not necessarily imply, though, that the Greek authorities were obliged to grant the British companies any permits. Liberalization of the market of games of chance was not the only possibility. Other reforms could be undertaken (paras 38 and 44-7).

### *Medical services*

The Court addressed medical services in several decisions in the 2010s. In *Commission v. Spain (Chollet), 2010* the Court refused to extend the reasoning in *Vanbraekel, 2001* to unscheduled medical treatment in a hospital abroad which (the treatment) had become necessary during a temporary stay. The Court ruled that a person insured for sickness in Spain was not deterred from seeking medi-

cal services in France when the treatment in France had not been planned, but became necessary e. g. during a tourist visit. The restrictive effect on the freedom to seek services in other member states was too uncertain and indirect. Hence, the cost to be born regularly by the insured person herself under the French system, which was equally imposed on the person who had been treated in France and was insured under the Spanish system, need not have been reimbursed to the latter person owing to the freedom of services, even though it would have been covered had the treatment taken place in Spain where treatment was generally free of charge. In coming to that conclusion the Court relied on a number of factors, chief among them (i) that the member states lacked control over the increasing number of unscheduled treatments abroad; (ii) the uncertainty of whether treatment in the host state would be required at all; and (iii) that the very fabric of the system established by Regulation 1408/71, which consisted in an overall compensation of risks, would have been undermined in case of full reimbursement (paras 58-79).

The judgment in *Elchinov, 2010* as to the prior authorization to receive medical treatment for sickness abroad concerned the freedom of services as well as article 22 Regulation 1408/71 (see above, under social security). In *Commission v. France (Vanbraekel), 2010* the Court reiterated that a prior authorization scheme for *extra muros* treatment abroad was not justified under the freedom of services. However, the Court qualified that ruling in that planned *extra muros* treatment involving major medical equipment which national law listed exhaustively could lawfully be likened to hospital treatment. The same considerations as with hospital treatment, notably the need for proper planning, justified a prior authorization scheme in such cases (paras 34-44). Moreover, the Court found that the French legal provisions and administrative practice were such as to allow for respect of the *Vanbraekel, 2001*-line of authority (paras 57-68).

In *Commission v. Luxembourg (lab analyses), 2011* reimbursement of the cost arising from analyses conducted in laboratories abroad was excluded by Luxembourg's social security system, unless an agreement to that effect existed. According to the Court, an obstacle to the freedom of movement of medical services existed in that it was unlikely that foreign laboratories concluded agreements under Luxembourg's social security system (paras 37-41). Luxembourg had failed to show that medical services as such and the balance of the social security system would have been put at risk, if reimbursement had been granted in the case of foreign laboratories. Luxembourg's conditions and limits for reimbursement were applicable though, as long as they were objective, non-discriminatory, and transparent (paras 44-6).

In *Commission v. Portugal (medical treatment), 2011* the Court did not add much to the existing medical services case-law, but simply applied it to Portugal's system. Portugal had failed to comply with the freedom of services in that it required a triple prior authorization for *extra muros* specialist medical treatment abroad for the cost caused to be reimbursable. (Portugal required that authorization only outside the scope of article 22 Regulation 1408/71; paras 60-87).

Moreover, in other cases of such treatment, e. g. by general practitioners or dentists, the service freedom was *a fortiori* violated, because provision was not made at all for reimbursement in Portuguese law (para. 92).

In *Commission v. Germany (care insurance), 2012* the Commission challenged under the freedom of services the limited exportability of benefits under the German care insurance. However, the Court ruled that the medical services case-law was not transposable to benefits provided under care insurance (paras 50 and 52). Such benefits were akin to sickness benefits, as the case-law under social security had established (see above), and articles 22 and 32 Regulation 1408/71 applied to them. Given that particular regime for receiving care benefits in kind and cash abroad, the Commission had failed to show how the German rules on care insurance restricted the free movement of services (paras 51-8).

*Taxes*

Taxes occupied the Court repeatedly under the freedom of services during the beginning of the 2010s. *Zanotti, 2010*, a case referred by an Italian court, concerned the tax deductibility of tuition fees paid for university courses at educational establishments abroad. The Court reiterated that the freedom of services was applicable when public education was not concerned because the services provided were mainly financed by private funds (paras 26-34). Tax deductibility could not lawfully be refused for courses attended abroad, if it was permitted for similar courses attended in Italy, else a higher tax burden resulted (paras 40-4). However, Italy was allowed to limit the deductible amount in general to 19 per cent of the fees paid and subject it to the limit of the tuition fees paid at the universities which were closest to the tax residence of the person concerned, because then a deterrent effect did not result (paras 45-62). A possibly less restrictive measure proposed by the Commission was irrelevant, given that a restriction did not arise (paras 63-5). The same analysis was applicable under Union citizenship, if the freedom of services for some reason did not apply (paras 68-77).

In *Commission v. Portugal (tax on interest), 2010* the Court rejected the Commission's allegations that the freedom of services and capital was violated. The Commission's example of calculation had failed to establish that the tax-burden on interest on loans taken out by non-resident companies was heavier in Portugal than in case of loans taken out by resident companies (paras 27-30).

In *VAV-Autovermietung, 2010* the Court ordered that the amendments the Netherlands had made to its law on the taxation of cars used in the Netherlands, since the Court had handed down *Van de Coevering, 2006* and *Ilhan, 2008*, did not live up to the freedom of services. The amount of tax on leased cars levied at the occasion of the car's first use in the Netherlands had to reflect the duration of the lease contract as well as the actual use made of the car in the Netherlands. It was not sufficient to reimburse proportionately, without interest, the amount that was initially levied in full, after it had turned out that the car was no longer used in the Netherlands (paras 27-8).

In *Schmelz, 2010* the Sixth VAT Directive 77/388 itself was scrutinized by the Court on compatibility with the free movement of services. The Directive allowed the member states to exempt small undertakings established in their territory from value added tax with loss of the right of deduction, while they were precluded from exempting such undertakings established abroad. Ms Schmelz was resident in Germany and rented out an apartment she owned in Austria. The German authorities claimed value added tax on the rent generated, while Austria would have exempted her as a small undertaking from such tax in application of the authorization in the Directive. The Court found that the freedom of services applied to the lease of the apartment pursuant to *Hengartner, 2010* (see below), although she had rented it out for several years. The freedom of establishment, in contrast, only applied in case of a permanent presence in real estate that was actively managed (paras 39-43). The Directive, in allowing the member states to exempt only locally established undertakings from tax, established a restriction to freedom of services. Undertakings established in Austria were in a position to offer more attractive services owing to the exemption (paras 51-4). However, the need to ensure effective fiscal supervision justified the restriction. The Directive provided for a simplified scheme for small undertakings which exempted them from most formalities in order to reduce the administrative burden they had to shoulder. That was why the 'home' member state of a small undertaking, in this case Germany, did not have any data to communicate to the host state, viz. Austria. Such data was necessary, though, to supervise those undertakings fiscally and to ascertain that the conditions for the exemption to apply were in fact met. Thus, to extend the exemption from value added tax to undertakings established abroad would mean to undo the simplified scheme, because only then was it possible to prevent tax evasion. For the same reason the state where a small undertaking was established was justified in taking account only of the turnover generated in its territory for the purpose of the exemption (paras 59-73).

In *Tankreederei, 2010* Luxembourg refused to grant tax credits for investments used abroad, notably in the case of the Luxembourg company Tankreederei on the ground that the vessels it operated from Luxembourg provided refuelling services to ships in the Netherlands and Belgium. The Court found the freedom of services to be restricted by the selective tax deductibility (paras 17-8). Luxembourg had not argued any justification, but the Court pointed out nonetheless that the refusal was not justified. Were rejected in particular the balanced allocation of powers of taxation, for all of Tankreederei's activities were taxable in Luxembourg, the cohesion of the tax system, for lack of a direct link to the taxation of income of service recipients, and the prevention of abuse for wholly artificial arrangement were not specifically targeted (paras 21-9). Finally, while the choice of interests to be promoted by means of tax benefits was up to the member states and in that regard a degree of connection with society could be required, the general refusal for investments made abroad lacked any connection to a social objective (paras 30-2).

In *Waypoint, 2011* the Court invalidated a tax credit Belgian law granted in so far as it relied on the establishment of a contractor in Belgium. The tax credit was granted based on the income from a loan which (the loan) served to finance the acquisition of an asset, but only when that asset was used by a company established in Belgium. Waypoint had leased an aircraft and then subleased it to a company established in France. It was refused the tax credit for the initial lease. The Court decided that the tax credit hindered the conclusion of contracts serving to finance the acquisition of assets which were ultimately used by companies established outside Belgium (paras 23-5). The freedom of services was thus restricted. A justification had not been put forward. In *SIAT, 2012* the Court also invalidated a Belgian tax rule, at least partly. Belgian law drew a distinction in terms of tax deductibility of business expenditures, namely expenditures that arose in connection with service contracts concluded with parties established in Belgium were presumed to be necessary and hence deductible, if the taxpayer demonstrated the authenticity and the amount paid; expenses that arose from contracts concluded with parties established in other MS in which the party to the contract was not subject to tax on income or was subject to a regime which was considerably more advantageous than the Belgian regime were presumed not to be deductible, unless the taxpayer proved that the payments related to a genuine and proper transaction and did not exceed what was normally paid for such transactions. According to the Court, there was a restriction of the freedom of services in the presumption and the substantive conditions to rebut it. In addition, uncertainty was created, because it was unclear which tax regimes were considerably more advantageous. In fact the Belgian authorities determined that on a case-by-case basis (paras 20-9). Comparability was not an issue, because in both cases the person concerned was resident in Belgium and subject to the conditions imposed by Belgian tax law as well as to the supervision in Belgium (paras 30-3). Justification was in principle possible by a combination of the needs to ensure fiscal supervision, to prevent tax evasion and avoidance, and to guarantee a proper allocation of powers of taxation. In particular, the Belgian regime did not exclude deductibility categorically, but rather allowed the taxpayer to bring proof. Moreover, it facilitated the allocation of powers of taxation (paras 36-48). However, the measure went beyond what those grounds required. The uncertainty created by the notion of a tax regime being considerably more advantageous and the fact that the tax authority need not have brought any prima facie proof as to tax avoidance had the effect that the only criterion applied to pinpoint tax avoidance was the level of taxation in the other member state. In that regard, the measure was not proportionate to the aim pursued (paras 54-9).

Next, in *X NV, 2012* a Dutch semi-professional football club invited some British peers for friendly matches and paid them a certain amount of money. The Dutch authorities ordered the Dutch club to pay directly wage tax on the remuneration paid to the British clubs, since the Dutch club had failed to withhold wage tax on the payments. The Court found the obligation to withhold wage tax at source to amount to a restriction of the freedom of service recipients. A recipi-

ent was deterred from receiving services by providers in other member states, given that the obligation to withhold tax did not apply in cases of resident service providers. The restriction arose regardless of whether the tax burden was greater than in purely domestic situations, because the administrative formalities and the risk of liability as such amounted to a burden for the service recipient. It was irrelevant that the burden was probably negligible or that it was possibly set off by other advantages. The case was not comparable to *Truck Center, 2008*, because the service provider and the recipient were different entities (paras 20-33). Yet the restriction was justified by the need to collect taxes effectively, given that only occasional services of short duration were concerned. To require the service provider to submit a tax declaration instead, would have simply shifted the burden on the provider. In addition, the tax authorities would have faced an increasing burden (paras 39-52). That the Netherlands had in the meanwhile abolished the obligation to withhold wage tax did not have an impact on the assessment, because the system of protection of a member state had to be assessed on its own, even if it was amended later on (paras 37-8). Moreover, the tax treatment of the service provider in the state where it was established did not have an impact on the question whether the service recipient in the state where it was established faced a restriction due to the obligation to withhold wage tax (paras 55-6).

### *Telecommunication and broadcasting*

The Court addressed telecommunication services in numerous decisions in the 2010s. In *Telekomunikacja Polska, 2010* the Court clarified that the Framework Directive 2002/21 and the Universal Service Directive 2002/22 left enough room for the national legislature to prohibit the bundling of several telecommunication services certain providers offered to the consumer. According to *Commission v. Poland (broadband internet), 2010*, Poland had violated the same Directives by fixing the prices of broadband internet access services without having analysed the market first. The transitory provision in the Framework Directive that maintained the measures enacted under the previous telecommunication regime pursuant to Directive 98/10, which it had repealed, was not to be interpreted to cover the Polish measure. According to *Polska Telefonia, 2010*, the national authority had to take into account under the Universal Service Directive the cost caused by the transfer of a phone number to another service provider and balance it with the possible disincentives for a user to make use of number portability. The authority could then impose a maximum limit to the fee chargeable to the consumer for the transfer of a number.

*Commission v. Portugal (universal service), 2010* ruled that Portugal violated the Universal Service Directive by not conducting an objective and transparent procedure to determine the universal service provider; instead Portugal had just maintained the licence of the national telecommunication service provider. *Base, 2010* established that it was not *per se* excluded that the national legislature exercised the functions of the national regulatory authority under Directives

2002/21 and 2002/22, provided though that it met the requirements as to competence, independence, impartiality, and transparency. Moreover, the questions whether a universal service provider bore an 'unfair burden' and which compensation was due as a result had to be answered on a case-by-case basis. The latter ruling was the same as in *Commission v. Belgium (universal service), 2010* which was handed on the same day as *Base, 2010*. In addition, the Court established in *Commission v. Belgium (universal service), 2010* how the net cost of the provision of universal services was to be calculated, while particularly taking account of intangible benefits.

In *Esposito, 2010* the Court decided in an order that the Framework Directive 2002/21 and the Authorization Directive 2002/20 did not deal with a tax that was levied from a consumer who had concluded a mobile phone contract with a telecommunication service provider. *The Number, 2011* established that article 8(1) Universal Service Directive only covered services provided by the universal service provider itself to the end-user. Provision of data on directories by the universal service provider to competitors was not part of the universal service.

In *Commission v. Belgium (must-carry), 2011* the Court held that Belgian law did not clearly state the criteria for selecting the television broadcasters benefitting from must-carry status, as required by *United Pan-Europe, 2007* and henceforth article 31(1) Universal Service Directive. It remained unclear whether the selected broadcasters offered content which in its entirety met cultural policy objectives. Hence, the freedom of services and the Directive were infringed (paras 49-55). Moreover, the applicable criteria were not transparent and non-discriminatory, either (paras 59-70), and the criterion of a sufficient number of end-users was disregarded (paras 71-5).

In *Deutsche Telekom, 2011* the Court established that 'external data', i. e. data a telecommunication company obtained through the conclusion of contracts with other companies assigning phone numbers to subscribers rather than when it assigned phone numbers itself, was not covered by article 25(2) Universal Service Directive. Consequently, an obligation to pass on that data to competitors offering directory services did not exist under Union law. Yet as the Directive only partially harmonised the law with regard to consumer protection, the member states remained free to impose such an obligation (paras 29-46). In *Vodafone España, 2012* the Court decided that article 13 Authorisation Directive 2002/20 allowed only the levying of charges from the holder of rights who was also the proprietor of telecommunication facilities installed on, above or under ground. That article, moreover, had direct effect. According to *Belgacom, 2013* a renewal of the authorization for mobile telecommunication service providers to use certain bandwidths had to be subject to the same rules under the Authorisation Directive 2002/20 as the first award of such an authorization, in particular with regard to one-off fees. Amendments with regard to fees had to respect the first paragraph of article 14, rather than the second.

In *Eleftheri tileorasi, 2011* the Court ruled that a programme aired could be qualified as intentional 'surreptitious advertising', which was prohibited pur-

suant to article 1(d) of the television without frontiers directive 89/552, even when a payment for consideration had not been made. In *Mesopotamia, 2011* Germany prohibited all activities of a Danish broadcaster in Germany, because it retransmitted television content that was biased towards the terrorist group PKK, inter alia by portraying the PKK's fighters as heroes and martyrs. Denmark, in contrast, did not find any issue with the content broadcast. According to the Court, under Directive 89/552 it was up to the state having jurisdiction, in this case Denmark, to address public order concerns raised by programmes. Thus, Denmark had to decide whether to apply the clause in article 22a which *inter alia* allowed a prohibition on the ground of inciting hatred based on nationality and thus included 'principles of international understanding' as they were at issue in the case at hand (paras 39-45). However, based on its general legislation on associations and in accordance with the logic of *De Agostini, 1997*, Germany was free to prohibit any activity of the company concerned in Germany, such as productions, screenings, etc., provided that the retransmission of programmes which Denmark had not prohibited was not hindered (paras 50-3).

In *Premier League, 2011* the association that filmed the premier league football games in the United Kingdom and marketed the television broadcasting of the games granted licences to broadcasters. Those licences were always by contract territorially bound, i. e. each licence granted the right to broadcast in one member state. The signal was encrypted. The end-user used a decoder to decrypt the signal. Some owners of public houses in the United Kingdom concluded contracts with the exclusive broadcaster in Greece under false names and addresses in Greece and used the decoder thus received in the United Kingdom to decrypt the 'Greek' signal and broadcast the game in the public houses in the United Kingdom. They were prosecuted, because British law prohibited importing decoders that served to decrypt a signal unlawfully. After having found that the Conditional Access Directive 98/84 did not apply, for the decoders brought from Greece were not illicit devices given that they had been obtained with the authorization of the Greek broadcaster, the Court found that the freedom of services was unlawfully restricted. That freedom was exclusively applicable, because the goods imported, i. e. the decoders, only served to receive the services (paras 78-82). It was restricted, because the British legislation conferred protection on the contractual arrangements that provided for territorial exclusivity (paras 86-9). While the United Kingdom was free to protect the football matches in a way akin to intellectual property rights and thus create a ground of justification, the restriction went beyond what that protection required. The remuneration paid for the licence reflected the territorial exclusivity, which in turn entrenched the division of the markets along the borders of the member states. It was precisely that division which was to be abolished by the common market (paras 115-6 and 94-119). The aim of making crowds go to the stadiums in the United Kingdom could justify a restriction, though not the territorial exclusivity, because the closed times in the United Kingdom during which the games were not

to be broadcast, could also be agreed upon in the licence agreements with the Greek licence holder (paras 122-4). The facts that false names and addresses had been used to receive 'Greek' decoders and that the games were shown for commercial purposes in the United Kingdom did not change that assessment (paras 126-31). (The rest of the judgment dealt with competition law, which was violated as well, and the copyrights directive 2001/29, which essentially precluded the broadcasting of the games in such circumstances in public.)

In *Commission v. Spain (TV ads), 2011* the Court confirmed that any type of advertisement broadcast between or during programmes was to be qualified as advertisement spots, unless it was clear that the limits Directive 89/552 set to their duration were such that those broadcasts were disadvantaged. Spain had therefore failed to fulfil its obligations by regularly classifying a set of advertisements as 'other advertisements' to which the limits applicable to advertisement spots did not apply.

In *Sky Österreich, 2013* the public broadcaster in Austria, ORF, requested Sky Österreich, the holder of the contractual exclusive right to broadcast Europa League football matches in Austria, to provide access to footage free of charge for the purpose of short news reports. Sky challenged the validity of article 15(3) Directive 2010/13, on which ORF based its claim, in the light of the fundamental rights to property and to conduct business freely. (Directive 2010/13 had replaced the television without frontier Directive 89/552.) The Court found that the right to property in article 17 Charter of Fundamental Rights was not affected, because Sky did not hold an established right. Its exclusive right had always been subject to the obligation to provide footage for short news reports, since Directive 2007/65 had amended Directive 89/552 (paras 33-9). However, the freedom to conduct business pursuant to article 16 Charter was affected, because under article 15(3) Directive 2010/13 only the cost directly arising from the access to the material could be charged and the contract could not lawfully be refused for events of high public interest. The core of that right was not affected, though. Further, the restriction of that right was justified by the need to guarantee the right to access information and media pluralism pursuant to article 11 Charter. If cost proportionate to what the holder of the exclusive right had paid could be charged, broadcasters would be prevented from reporting on events of high public interest. The Union legislature had struck a proper balance between the fundamental rights at issue. It had precisely defined what could be broadcast, namely only reports on high interest events which (the reports) were not longer than 90 seconds; only reports in news broadcast were allowed; if possible the logo of the exclusive rights holder had to be shown (paras 42-67).

### *Public service concession*

*Wall, 2010* was one of several public service concession cases. The Court elaborated in this case on the obligation of transparency derived from the freedom of services and establishment. After having held that the substitution of a subcontractor could exceptionally amount to a substantial amendment of essential pro-

visions of the concession contract so that the award of the contract had to be reopened for competition, notably when the subcontractor had been a decisive factor in the conclusion of the contract (paras 37-42), the Court explained why the awardee concerned was not itself, as a public authority, bound by the obligation of transparency. Inspired by Directive 92/50, the Court found that the awardee was not effectively controlled by a public authority solely because it appointed four out of 16 board members and held 51 per cent of the shares when a three quarter majority was needed to adopt decisions. Moreover, the awardee also pursued other business in competition on the market (paras 47-57).

In *Loutraki, 2010*, Greece partially privatised a casino business it owned via call for tenders. The Court found that the contract concluded based on the tender constituted a mixed contract, an indivisible whole made up of inseparably linked parts, the main object of which determined which rules, namely the public contracts directives or the market freedoms, were applicable. In the case at issue the main object was the sale of shares, while the works and services aspects were ancillary. As such a sale of shares was not within the purview of the public contracts directives, the market freedoms applied exclusively (paras 46-63).

*Commission v. Ireland (award criteria), 2010* was a case in which Directive 2004/18 did not apply, because according to its annex the translation services for which Ireland publicly called for tenders were not within its scope. Instead, transparency and equal treatment applied on the basis of the freedom of services and establishment, given that the contract had a certain cross-border interest (paras 29-33). Those principles did not require that the criteria that had been published and on the basis of which the contract was awarded were not attributed certain weightings at the date when the call was closed (paras 40-9). However, they did require that the criteria and the way they were weighted were not changed after the persons in charge of deciding on the award of the contract had examined the offers. From that moment on, the criteria and the weightings had to remain the same and had to be interpreted in the same way throughout the procedure (paras 57-64).

In *Stadler, 2011* the Court clearly distinguished the public service contracts to which Directive 2004/18 did apply from public service concessions to which only the fundamental rules of the Treaty were applicable. The award of a contract in Bavaria for ambulance transports constituted a service concession, for the contractor was not remunerated by the contracting authority, but rather by a third entity which collected part of the fees on behalf of the contractor. In addition, the contractor bore a minimal part of the risk of the economic activity which sufficed in particular in cases of public service utilities (paras 27-49). In contrast, in *Norma-A, 2011* a bus transport service provider did not bear a significant part of the risk. The contract concluded was thus a public service contract (paras 39-58). In *Strong Segurança, 2011* the Court confirmed that the 'non-priority' services included in annex II B Directive 2004/18, to which not all provisions of the Directive applied, remained subject to the requirements of transparency and equal treatment flowing from the freedom of services in cases of cross-border

interest. However, from those principles an obligation analogous to article 47(2) Directive 2004/18, viz. the obligation to prove the necessary resources when relying on the capacities of other entities in a tender, could not be derived for non-priority services (paras 35-45).

*Econord, 2012* further developed the in-house exception to the obligation to tender contracts publicly. The Court first reiterated that for that exception to apply *inter alia* the degree of control over an entity had to be similar as in the case of a department of the controlling authority itself. Joint control by several public authorities was an option. The Court then clarified that joint control over an entity was not given when only the public authority holding the majority of the shares in an entity had control over it, while the position of the other shareholding public authorities was purely formal. If the in-house exception had applied even when the possibility for the minor partner to participate in the control over the entity had been slight, the way to circumvent the obligation to tender contracts publicly would have been open. The national court thus had to verify whether a shareholders' agreement allowing for consultation, the appointment of a member of the supervisory council, and the joint nomination of one member of the managing board provided a possibility to contribute effectively to the control over the entity concerned so as to warrant application of the in-house exception (paras 30-2).

In *Azienda Sanitaria, 2012* the Court decided that a contract between a public authority and a university based on which a study of the seismic vulnerability of hospitals was to be conducted could not escape the rules on public procurement, be it Directive 2004/18 or transparency and equal treatment on the basis of the market freedoms, depending *inter alia* on the volume of the contract. The study was not about the pursuit of a public aim by two entities. Private undertakings, engineers and architects normally provided such services as those inherent in the study. Private operators could possibly gain an advantage from the conduct of the study (paras 34-8).

### *Non-discrimination*

Non-discrimination in services in general occupied the Court in quite a few decisions. In *Commission v. Portugal (construction sector), 2010* Portugal imposed all requirements which companies established in Portugal and operating in the construction industry had to meet on foreign companies wishing to provide construction services in Portugal. That notably included a prior authorization from the Portuguese authorities, but also stringent requirements as to the company structure, police records, etc. The Court found that Portugal's approach restricted the freedom of services (para. 86). The services Directive 2006/123 was not yet applicable. In any event, it incorporated the principles on market access based on non-discrimination and objective justification which flowed from the freedom of services (paras 87-8). The arguments Portugal put forward in justification of the restriction, namely consumer protection, the safety of building, and the protection of the environment, were already sufficiently addressed by Direc-

tive 2005/36 on recognition of professional qualifications. It was irrelevant that Portugal's approach aimed at the entire economic activity of construction companies, while the Directive only concerned professional qualifications. Moreover, Portugal's requirements duplicated the conditions companies met in the 'home' state already (paras 89-107).

*Josemans, 2010* dealt with a Dutch local measure that allowed only residents of the Netherlands to have access to so-called coffee shops where, in addition to non-alcoholic drinks and food, cannabis was lawfully offered for consumption. A proprietor of a coffee shop had admitted non-resident Union citizens and was sanctioned. For the Court, the proprietor could not lawfully rely on the freedom of services with regard to the sale of cannabis, because that substance was not lawfully tradable in all member states, except for medical purposes. That purpose, however, was not at issue in the case at hand (paras 41-3). Yet, since he was incidentally prevented from offering other regular restaurant services to nationals of other member states, the freedom of services was affected nonetheless (paras 30-49). The restriction imposed by the residence condition (paras 57-9) was justified, though, by the aim of combating drug tourism which was related to public order and health concerns. That aim was pursued in a consistent and systematic way as well. The consumption of soft drugs could not be likened to prostitution, as the latter was tolerated in most member states. The reasoning in *Adoui, 1982* was therefore not transposable. The discriminatory nature of the measure on its own did not imply that the aim was pursued in an inconsistent way. Moreover, other means had been tested and proven ineffective previously and measures had to be easily manageable and controllable (paras 66-83).

In *Peñarroja Fa, 2011* a translator established in Spain who had worked for courts there sought to become enrolled in the registers of expert translators the French courts kept. The French judges had recourse to those registers when they needed expert translators. The requirements imposed for registration mainly related to professional experience. In particular, for the register with the *cour de cassation*, three years of experience in translating for the French lower courts was required. According to the Court, those translators provided services within the scope of the freedom of services, although the consideration was set by a public authority and the work was carried out under the direction of the judges (paras 38-9). The existence of registers resulted in a restriction of the service freedom, as courts were inclined to appoint translators from the registers, although they were in principle free to appoint any translator (paras 51-3). The restriction was justified by the need to protect litigants and to administer justice soundly. However, experience acquired abroad had to be taken into account and a reasoned decision in that regard was to be given which was subject to judicial review (paras 55-64). In particular for the highest courts, the member states had the discretion to set the level of experience required with the lower courts to three years. However, professional experience acquired abroad in working with courts, particularly the highest courts, had to be factored in (paras 69-77).

In *Commission v. Portugal (real estate agents), 2011* the Court rejected a series of conditions Portugal imposed on companies and natural persons applying for a licence to pursue the activity of real estate agency. Were namely incompatible with the freedom of services the requirements (i) to be established in Portugal, as it embodied the very negation of the freedom of services and a convincing argument in favour of justification on grounds of public order or consumer protection had not been put forward (paras 71-5); (ii) to be fully registered in Portugal, to have full insurance coverage in Portugal, to have capital within the meaning of Portugal's regulation, and to submit fully to disciplinary control in Portugal, because 'home' state regulation was not taken into account (paras 77-84); (iii) to pursue exclusively the activity of real estate agency (para. 85). The latter requirement (iii) was also incompatible with the freedom of establishment. In a similar vein, the Court in *Commission v. Austria (fiscal representative), 2011* rejected Austria's requirement of fiscal representatives to be established or at least present in Austria. The case concerned proofs to be delivered for the purpose of taxation of certain distributions made by funds. The Court rejected the requirement as amounting to the very negation of the freedom of services (paras 23-5). It was not justified by the need to ensure that fiscal representatives had the professional qualifications required or to protect consumers, since an establishment in Austria did not guarantee that a fiscal representative had the knowledge of Austrian law required (paras 27-32).

*Duomo, 2012* concerned an amendment in Italian law that required companies to have a minimum paid-up share capital of ten million Euro to be admitted as a service provider for the collection of local taxes on behalf of Italian municipalities. Some Italian companies that had provided that service previously were excluded from certain public tenders for the services after the threshold had been introduced. The Court entered the merits although the situation was confined to Italy, because it was 'far from inconceivable' (para. 27) that the legislation would apply to companies established in other member states and because reverse discrimination would possibly have to be excluded. Moreover, the national court had indicated that compliance with Union law was required for national legislation to be lawful (para. 28). The measure restricted the freedom of services and establishment, although it was indistinctly applicable. It required entities to incorporate and to increase their paid-up share capital (paras 37-8). Justification by the need to protect the public authorities against non-performance by the concession holder given the considerable sums involved – if admissible at all as a ground for justification – did not succeed. Less restrictive measures were available. Italian law already required compliance with the conditions in the public tender as to the technical and financial capacity and solidity and the threshold of paid-up capital could possibly be adapted in the light of the volume of the contract to be awarded (paras 40-4).

In *Volksbank România, 2012* Romanian legislation prohibited certain charges in the context of consumer credits secured by mortgages. As a consequence, Volksbank România adapted its contracts by re-labelling the 'risk charge' levied

of 0.2 per cent per month to 'administrative charge'. The Romanian authorities intervened. According to the Court, Romania was not prevented by Directive 2008/48 on consumer credits from adopting such a measure, because the Directive did not apply to such contracts. The freedom of services did not preclude the measure, either. While the freedom of services did apply, because cross-border credit contracts were concerned, the measure did not establish a restriction. It was applicable indistinctly and foreign banks did not have to adapt their commercial policy to gain access to the Romanian market or to compete in it. The measure did not concern the approval of foreign banks in Romania. The foreign banks' freedom to contract was not affected, either. The amounts chargeable or the interest rates in general were not restricted. The measure was, in sum, too uncertain and indirect to hinder the freedom to provide cross-border services (paras 76-81).

In *Commission v. Beligum (Limosa), 2012* Belgium introduced a one-stop shop system pursuant to which self-employed persons established abroad who intended to provide services in Belgium had to file a prior electronic declaration containing information as to the date, duration, place, and nature of the service as well as the identity of the service recipient. It had to be made each time a new service was provided. Failure to comply resulted in penalties. Such a system, according to the Court, established a restriction of the freedom to provide services (paras 39-42). For justification it did not matter that the obligation was only imposed on service providers abroad, for those providers were not in a situation that was objectively comparable to resident service providers. It was not necessary to impose entirely equivalent requirements. The information exchange mechanisms were either limited in scope under Directive 2006/123 or not yet in place regarding Directive 883/2004. While the prevention of social security fraud and social dumping as well as the protection of workers were valid grounds, a general presumption of fraud was not to be applied. Belgium had, in particular, failed to show why it needed information on so many details (paras 45-55).

In *DKV, 2013* the Court screened Belgium's system to manage certain insurance premiums. In Belgium, premiums once they were set when the contract was concluded could only be increased based on several indices, save when the authorities granted an authorization because losses were looming for the insurance undertaking concerned. In the case at issue, an increase of premiums for certain contracts insuring hospitalization was at stake. While Belgium's system was in keeping with the freedom to set premiums under the third non-life insurance Directive 92/49, it constituted a restriction of the freedom of services and establishment. It required foreign insurers to adapt their commercial policies and premium structures to be able to offer services in Belgium (paras 34-6). Hence, they were dissuaded from offering their services. The protection of consumers, however, justified the restriction. Consumers were protected from sharp and unexpected premium increases, in particular when they became older and the risk of hospitalization was more likely to realize itself. The possibility to carry out an

authorized increase in extraordinary circumstances also took the edge off the system (paras 40-7).

### *Maritime transport*

Maritime services came to the Court again in some cases in the 2010s. In *Commission v. Spain (port charge), 2010* the Court confirmed Spain's infringement of the freedom of services and Regulation 4055/86 on maritime cabotage. Spain had not contested that the charges levied at its ports, the amount of which varied based on the origin or destination of the goods in archipelagos, member states, or third countries, were unlawful. The Court then rejected the Commission's case in *Commission v. Malta (ferry), 2010*. Malta had concluded a contract right before accession concerning ferry services within Malta without having called for tenders or demonstrated a real public service need. The Court, however, was not in a position to address a potential effect of Regulation 3577/92 before accession, for lack of the Commission having argued the point, or the maintenance of the contract in force after accession, as the Commission had not raised the point in the reasoned opinion.

In *Navtiliaki Etairia Thasou, 2011* two companies submitted ferry schedules they intended to operate on different routes between Greek islands, but the authorities amended their schedules and allocated them different time slots for certain ports. The Court found that approach to amount to a prior authorization procedure which restricted the freedom of services (paras 41 and 44). As such it had to abide by the authorization case-law, i. e. it had to be based on objective, non-discriminatory criteria known in advance which circumscribed the authorities discretion. Apart from that, though, the allocation of certain time slots was a suitable and necessary means of ensuring port safety and avoiding the presence of several ships at the same time (paras 45-50). In addition, as for public service obligations, article 4(2) Regulation 3577/92 exhaustively listed the public service requirements. The authorities could only rely on that article once it was shown that the services for each route would be inadequate without the imposition of a public service obligation (paras 52-62).

### *Air transport*

Air transport was raised only in one case, namely *Neukirchinger, 2011*. It concerned air transport of passengers by hot-air balloon. Austria fined a German national, who held the necessary licence in Germany, for transporting passengers in Austria in a balloon without having an Austrian licence. That licence was subject to residence/seat in Austria as well as the same substantive requirements as the German licence. The Court reiterated that the freedom of services was not applicable as such in the transport sector. However, the Union legislature had adopted a common air transport policy. That policy did not cover passenger transport via hot-air balloons. Yet the objectives of that policy applied nonetheless. Hence, the general principle of non-discrimination pursuant to article 12 Treaty was applicable (paras 22-9). The residence requirement amounted to dis-

crimination based on nationality and was thus precluded. The need to obtain a new licence in Austria for the granting of which the same conditions as in Germany applied came down to discrimination, too, which moreover was not justified by the need to protect the health of passengers, because it was disproportionate not to take account of 'home' state regulation (paras 32-43).

*The Services Directive*

The services Directive 2006/123 was at issue in *Société fiduciaire, 2011*. The case was about a prohibition in French law of canvassing for certified accountants. Canvassing was not defined by the Directive, but under French law it involved the accountant seeking contact to potential customers, who had not solicited the contact, with a view to providing services. The Court qualified canvassing as a commercial communication within the meaning of the Directive, as it was a method of direct marketing (paras 32-8). Given the objective of the Directive, which was to abolish restrictions to service provision, and the aim of article 24(1), which required the member states to abolish all total prohibitions of commercial communications by members of the regulated professions (paras 26-30), the French prohibition fell foul of that article. The prohibition was 'total' within the meaning of that article, since it deprived service providers of an effective means of penetrating the national market as established in *Alpine Investments, 1995* and thus constituted a restriction (paras 40-3). Since article 24(1) was violated, the total prohibition could not be justified, on the basis of overriding reasons relating to public interests and proportionality, by the possibilities contained in article 24(2) for the member states to regulate the content and methods of commercial communications by members of regulated professions, even though the French prohibition was indistinctly applicable (paras 44-5).

*Switzerland*

In *Hengartner, 2010* the Court dealt with services under the Agreement on free movement of persons with Switzerland. Two Swiss citizens leased a right to hunt on a ground in Austria for leisurely purposes. They were charged taxes at the rate applying to third country nationals for leases of hunting-grounds in Austria, while the rate for Union citizens and Austrian nationals was lower. According to the Court, a lease of a right to hunt was a service. The hunters did not establish themselves in Austria. In any event, they were not entitled to rely on the internal market freedom of establishment as third country nationals (paras 25-6). Accordingly, the question referred concerned the free movement of services under the Agreement with Switzerland (paras 31-4). However, the Agreement only provided for a limited liberalization of short-term services. It did not contain a provision that allowed service receivers to benefit from fiscal non-discrimination (paras 37-43). Hence, the higher tax rate was in accordance with the Agreement.

### *Secondary law*

The Court also decided some cases on the basis of other secondary law designed to implement the freedom of services in the 2010s. In *Commission v. Belgium (funds), 2010* the Court confirmed that the third non-life insurance directive, i. e. Directives 73/239 and 92/49, applied to the Belgian funds called *mutualités* as far as they offered supplementary sickness insurance. Belgium had not contested that it had not yet adopted the implementing provisions. In *Commission v. Ireland (direct insurance), 2011* the Court ruled that an exemption from the first non-life insurance Directive 73/239 did not apply any longer, because the functions of the insurance body concerned had been expanded by Irish legislation. In *Commission v. Slovenia (direct insurance), 2012* it was held that Slovenia violated the first non-life insurance Directive and the third non-life insurance directive 92/49 by requiring prior authorization for the general conditions of supplementary sickness insurance and systematic notification in case they were amended, as well as by insisting on a confirmation in case premiums were increased. A further plea that the freedom of services was violated, because an agent had to be appointed in Slovenia, was not addressed for procedural reasons.

In *Commission v. Greece (postal services), 2010* the Court confirmed that a new ministerial decision violated Directive 97/67 on postal services in that it required certain express postal service providers to reconstitute themselves as independent providers and in that it prevented them from using trucks beyond a certain size for their services. Greece had not contested the infringement. In *Nilas, 2012* the Court held that a market run by an operator that merged with a market operator running a 'regulated market' within the meaning of Directive 2004/39 on markets in financial instruments did not become (the market) a 'regulated market' itself by reason of the merger. Rather, a separate authorization was required. However, inclusion in the list of 'regulated markets' was not a constitutive element for being such a market. In *Grilc, 2013* the Court ruled that the victim of a car accident was entitled to bring a claim, in court if necessary, against the body established pursuant to article 6 of the fourth Directive 2000/26 on car insurance, after the claim had not been met by the insurer. In *RVS, 2013* the Court gave preference to a dynamic interpretation of article 50 Directive 2002/83 on direct life assurance. Accordingly, the state having the power to levy indirect charges on life assurance contracts was the state where the person assured had actual residence, rather than where she had had residence at the time the contract had been concluded.

### *Purely internal situations*

Two more cases concerned purely internal situations in the 2010s. In *Sbarigia, 2010* the owner of a pharmacy situated in the pedestrian zone in Rome sought exemption from the opening hours and holidays the law imposed. The Court declared the question inadmissible, because the situation was confined in all aspects to Italy and reverse discrimination of service providers was not at issue. The freedom of establishment was not concerned, either (paras 23-8). In *Omalet,*

*2010* the Court for the same reasons, namely the situation being purely internal and a lack of reverse discrimination, declined to enter the merits of the case. Omalet, a Belgian company had failed to withhold social security contributions and was held liable jointly and severally, after its Belgian subcontractor had gone out of business.

*Further cases*

For completeness, two more cases must be mentioned. In *Dijkman, 2010* the Court only examined the free movement of capital. A heavier tax burden on foreign-sourced than on domestic dividends could in that case only be avoided by appointing a domestic intermediary who channelled the foreign-sourced dividends to the domestic recipient. The restriction of the free movement of services that consisted in the disadvantage foreign intermediaries suffered was entirely secondary to the restriction of the freedom of capital. In *Commission v. Belgium (OPCVM), 2012* the Court declined to enter the freedom of services under the European Economic Area Agreement, because the free movement of capital was violated by a distinction Belgian law drew in investments in fund-like entities based on their place of establishment (para. 21).

## C The evolution of interpretive formulas

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

## I 'Broad'

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

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