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

II The 1970s

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

1 Workers

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

A first wave of cases

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

service. Once a worker was admitted to public service, discriminatory treatment was no longer an option (para. 4). Moreover, whether national law categorized the employment as public or private was irrelevant (paras 5). Whether the separation allowance was mandatory or optional was also immaterial. Either way, it came within the concept of 'conditions of employment' in article 7 Regulation 1612/68 (para. 8).

Commission v. France (maritime worker quota), 1974 was the first infringement procedure in persons and the first of a series of cases that occupied the Court with ship crews. It established that the Treaty freedoms also applied in the sea transport sector, in particular the directly effective article 48 and Regulation 1612/68. Measures that violated those provisions had to be formally abolished, else a state of uncertainty continued to exist. That in itself amounted to an unlawful obstacle to free movement regardless of the secondary importance of that obstacle (paras 46-7). In *Casagrande, 1974* the Court implicitly built on *Michel S, 1973* to find that educational grants had to be awarded on an equal basis to the children of migrant workers, as with all 'general measures intended to facilitate educational attendance' under article 12 Regulation 1612/68 (para. 9). Moreover, the member states' educational policies were not removed from the influence of the Treaty freedoms, regardless of whether they had been adopted on the regional or the national level of a state (para. 12).

Van Duyn, 1974 was the first preliminary ruling in free movement of persons and services asked by a court in the United Kingdom. Faced with the situation of a migrant worker who had been refused leave to enter the United Kingdom because she had intended to work for a religious organization, the Court confirmed the direct effect of free movement of workers and dealt with the public policy derogation for the first time. The Court held that the provisions of a directive such as Directive 64/221 were in principle capable of having direct effect. Although the public policy derogation had to be interpreted narrowly, the member states had some discretion in public policy, since it could vary in time and space (para. 18). As long as a state had adopted certain measures to counter socially harmful behaviour, it was not required for the public policy derogation to apply that the behaviour was unlawful in the state (para. 23). A state could not adopt some measures, such as expulsion, against its own nationals. Nonetheless it could adopt such measures against nationals of other member states (para. 20-2).

In *Walrave, 1974*, a judgment that concerned free movement of workers as well as services, the Court then dealt with sport as an economic activity for the first time. The Court refused to remove sport from the grasp of Community law. According to the Court, the rules of sporting associations, like all 'rules of any nature aimed at regulating in a collective manner gainful employment and the provision of services' (para. 17), had to refrain from discrimination based on nationality. However, the sporting activity in national teams was not, according to the Court, an economic activity (paras 8-9). Worldwide sporting activities were caught by non-discrimination, if they were connected to the Community either

through the place where the legal relationship had been established or where it took effect (para. 28).

The year 1975

The Court began the year 1975 by expressly confirming *Casagrande, 1974* in *Alaimo, 1975*. The Court then ruled in *Bonsignore, 1975* that grounds of a general preventive nature were not capable of justifying the expulsion of a national of a member state under the public policy and security exception; only the personal conduct of an individual in a specific case could be a ground of justification (para. 7). In *Cristini, 1975* the Court interpreted the term social advantages in article 7(2) Regulation 1612/68 so as to include a family card issued to the widow of migrant worker by the French national transport company, even though the benefit was not in any way connected to an employment contract. In *Rutili, 1975* the Court added to *Bonsignore, 1975* that for the public policy exception to be applicable a genuine and sufficiently serious threat was required (para. 28). The freedom to move had to be respected by individual decisions, too. Such decisions had to comply with fundamental rights as laid down in the European Convention of Human Rights. The right to notification, statement of grounds, and appeal had to be respected (paras 37-8). Moreover, public security measures could only be applied with regard to the entire territory of a member state, when 'regional' measures could not be imposed on nationals of the member state concerned (paras 48-9).

The remaining years of the decade

The remaining years of the decade added seven more cases in free movement of workers. All three judgments of the year 1976 were based on free movement of persons as well as services. In *Royer, 1976* the Court again dealt with expulsion on grounds of public policy and security. The Court confirmed the direct effect of articles 48, 52, and 59 Treaty, despite the possibility to derogate from them (para. 23). National residence permits were merely of declaratory nature (paras 32-3). Consequently, the failure to comply with administrative formalities did not justify expulsion (para. 38-9). Other suitable sanctions remained possible, though (para. 42), while a foreigner could only be deprived of her or his liberty, if expulsion was lawful under Community law (para. 44). An expulsion decision could have immediate effect only under very restrictive conditions (para. 53-62). The standstill clauses in articles 53 and 62 Treaty prevented the member states from adopting less liberal measures than those in force when the Treaty became effective, when they implemented Community law. Implementation, in turn, had to be effectuated by means of the most appropriate forms and methods (paras 65-73). Next, the Court in *Watson and Belmann, 1976* dealt with the obligation to report the presence of nationals of other member states. A reasonable time period had to be granted for this purpose and sanctions in case of failure to do so needed to be proportionate (paras 19-21). The judgment in *Donà, 1976* validat-

ed the Court's ruling in *Walrave, 1974* for professional football players. It was unlawful to discriminate against them on the basis of nationality.

Sagulo 1977 again dealt with the formal requirements of residence. A general residence permit beyond the permit provided by Directive 68/360 could not be required. Valid identification was necessary though, and failure to produce it could be sanctioned appropriately even though a state could not impose such sanctions on its own nationals. In the judgment in *Bouchereau, 1977* the Court implicitly elaborated on *Bonsignore, 1975* and expulsion on grounds of public policy. A recommendation to expel a national of a member state was subject to the requirements of Community law, even though a recommendation might not be binding (paras 17-23). Prior criminal convictions could be factored into the expulsion decision in each specific case, but only insofar as they constituted a present threat evidenced by a propensity to act in the same way in the future (paras 27-30). For the public policy derogation to bite, the normal perturbation involved with any criminal act was not sufficient; rather, the fundamental interests of society had to be seriously and genuinely threatened (para. 35).

The decade ended in free movement of persons with two decisions. First, *Choquet, 1978* tabled driving licences for the first time. The decision watered down the conditions for the recognition of licences issued abroad in other member states. While a state could impose requirements to ensure road safety as long as harmonization had not taken place, charges were not to be excessive, linguistic barriers had to be taken account of, and tests could not simply be duplicated, else obstacles to the worker, service, and establishment freedom would arise (para. 8). Second, in *Saunders, 1979*, the Court refused to address the worker freedom, because the case concerned a situation wholly internal to the United Kingdom (paras 11-2).

Finally, two more judgments concerned free movement of workers, although both, strictly speaking, belong to social security (i. e. Regulation 1408/71). On the one hand, *Inzirillo, 1976* included benefits for the handicapped son of a migrant worker in article 7(2) Regulation 1612/68 (para. 19). With *Inzirillo, 1976* – and *Cristini, 1975* – thus began the line of authority which allowed the family members of migrant workers to claim benefits by reason of article 7(2) Regulation 1612/68. Previously, their rights had been assessed under article 12 Regulation 1612/68, notably in *Michel S, 1973*; *Casagrande, 1974*; and *Alaimo, 1975*. On the other hand, *Even, 1979* completed the definition begun in *Inzirillo, 1976* of social advantages in article 7(2) Regulation 1612/68: '[…] all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other member state therefore seems suitable to facilitate their mobility within the Community' (*Even, 1979*, para. 22). Yet the Court found in *Even, 1979* that benefit for victims of war did not come within this definition.

2 Establishment

The Court handed down only a handful of judgments in freedom of establishment during the 1970s. *Reyners, 1974* established the direct effect of equal treatment for those who had exercised the freedom of establishment (para. 25). Direct effect could be invoked, although the implementing provisions mentioned in the Treaty had not yet been adopted. The judgment also restricted the scope of the public service exception to activities that were directly and specifically connected to the exercise of public authority. The derogation had to be examined for each member state separately. A whole profession could only be excluded from the freedom, if otherwise a member state would have to tolerate the exercise, even though only occasionally, of public authority. If possible the exercise of public authority had to be separated from the rest of the activities of the profession (paras 45-9). The exception did not cover the activities of lawyers, even though they were in contact with courts (paras 51-3).

In *Thieffry, 1977* the Court ruled that the admission to practice as a lawyer could not be refused when a foreign diploma had been recognised as equivalent to a domestic university degree and the local bar exam had been passed. The Court also acknowledged to some extent a distinction between an academic and a civil effect of the recognition of a qualification, but left this distinction to the national court for assessment (para. 24). *Patrick, 1977* followed up by ruling that the requirement to possess certain qualifications to be allowed to exercise a profession constituted a restriction of freedom of establishment (para. 16). Though the implementing directives had not yet been adopted as required by the Treaty, the admission to a profession could not be made subject to an exceptional authorization once the national conditions to become established were satisfied. Hence, French law could not make recognition of the British qualification as an architect dependent on a convention establishing reciprocity (paras. 10-7). In *Razanatsimba, 1977* the Court made it plain that the ruling in *Reyners, 1974* as to equal treatment did not apply to third country nationals. The Lomé Convention was not to be read in a similar way as the Treaty pursuant to *Reyners, 1974* (para. 14), nor did the Treaty require a member state to apply a most favoured nation rule to nationals of third countries (para. 19).

Auer, 1979 and *Knoors, 1979* were handed down on the same day. Both concerned diploma recognition. In *Knoors, 1979* the Court decided that a national returning to his 'home' state after having practised a profession in another member state remained within the scope of the diploma directive (Directive 64/427 on certain industries and small craft industries), because he had exercised his freedom of establishment (paras 18-20). However, the Court also acknowledged as legitimate the interest of a member state to prevent abuse of rights through Community law. Under the Directive such abuse was not conceivable though (paras 25-7). In *Auer, 1979* the Court also held that a national returning to his home state with a diploma in veterinary medicine awarded abroad was within the scope of freedom of establishment (paras 20-6). Moreover, the point in time

at which the nationality of the member state concerned had been acquired was irrelevant, provided that the person concerned had it at the point in time when he relied on Community law (para. 28-9). However, the recognition of a diploma acquired abroad could not be effected on the basis of article 52 ECT alone. The national provisions had to be complied with until the provisions of Community law which regulated the matter were transposed into national law. Finally, *Van Ameyde, 1977* was a highly specific case which concerned the so-called green card system for accident insurance of motor vehicles. The Court in essence found that the national measures adopted to implement the system established by various Community instruments did not violate freedom of establishment or services, although those measures reserved certain functions to certain bodies (paras 29-30). In a similar way as in *Walrave, 1974* the Court found that freedom of establishment applied to any 'rules of whatever kind which [sought] to govern collectively the carrying on of the business in question' (para. 28). (The judgment also dealt with competition law.)

3 Social security

In the 1970s, the Court first handed down the first ruling concerning posted workers, *Manpower, 1970*. In this judgment the Court applied the exception to article 12 Regulation 3 in article 13(a) resulting in the application of French law to workers posted to Germany by a company established in France. According to the Court, this rule prevented the company posting workers abroad and the worker being posted from suffering disadvantages by reason of the host state's law becoming applicable. It was irrelevant that the company employed the workers for the sole reason of posting them abroad. Since the company was established in France and conducted business there, it was also irrelevant that its only business consisted in offering the temporary service of workers. Moreover, the posted workers only had a contract with the company posting them, they only answered to that company, and they received their salary from it (paras 10-9).

Aggregation and apportionment

The Court then became deeply involved again in aggregation and apportionment. In *La Marca, 1970* the Court limited the possibility for the authorities to disregard short periods of insurance pursuant to article 28(2) Regulation 4, which implemented Regulation 3. The authorities could only disregard periods of insurance of less than six months completed under 'their' social security scheme, if there was another member state to take account of them. If that was not the case because no sufficient period had been completed abroad, the administration had to apply the regular rules of articles 26 to 28 Regulation 3 (paras 11-3). Three aggregation judgments handed down on the same day, 10 November 1972, concerned similar constellations under Regulation 3. In *Gross, 1971* and the identical judgment in *Höhn, 1971* the Court dealt with different cat-

egories of old-age pensions pursuant to French law that depended on the length of insurance periods completed; moreover the ceiling for insurance periods completed under French law which (the ceiling) was set at 120 months was at issue. *Keller, 1971* concerned the same rules though in somewhat different factual circumstances. The Court essentially explained what it meant for the French rules that migrant workers had to be granted the benefit that was most favourable after a comparison of calculations solely under national law on the one hand and under the Community rules on the other. In essence, aggregation had to be applied to bring the migrant worker concerned within the most favourable group of benefits pursuant to national law (*Gross, 1971*, para. 9); the apportioned benefit was to be calculated by reference to the aggregated periods completed in all member states involved, rather than the maximum period provided by the law of the member state under which the benefit was calculated, i. e. the ceiling under French law (*Gross, 1971*, para. 11-2). In *Keller, 1971* the Court clarified that a pension was not to be awarded on the basis of aggregation and apportionment, if the calculation of the benefit based on national law alone and the periods completed exclusively in the state concerned was more favourable (para. 12).

Another triplet followed in 1972: *Heinze, 1972; Land Niedersachsen, 1972; Ortskrankenkasse Hamburg, 1972*. All of them concerned the same benefit in Germany aiming at prevention of tuberculosis. Aggregation was at issue only implicitly, since German law required completion of a minimum insurance period of 60 months for entitlement to the benefit. The main concern of the judgments was classification of the benefit as a social security benefit rather than social assistance outside the scope of Regulation 3 and as a sickness benefit rather than an invalidity benefit since it did not concern earning capacity. In addition, the Court also rejected under Regulation 3 the obligation of Germany to aggregate periods completed in Switzerland, although Italy was bound to take such periods into account due to a convention it had concluded with Switzerland (*Ortskrankenkasse Hamburg, 1972*, paras 10-1).

Mancuso, 1973 established that aggregation and apportionment were not just linked necessarily for old-age pensions, but also for invalidity pensions. To the latter pensions aggregation and apportionment applied by reason of article 26 Regulation 3 as soon as one type B legislation was involved, i. e. legislation that made the acquisition of benefits dependent on the completion of insurance periods. In other words, if no need arose to aggregate periods of invalidity insurance, the resulting invalidity benefit was not to be apportioned. *Kaufmann, 1974* next threw light on article 11 Regulation 3 which dealt with rules against the overlapping of benefits. Article 11(2) covered all national provisions for suspension or reduction of benefits, irrespective of whether they concerned entitlement to or provision of a benefit (para. 4). That article became applicable as soon as benefits were awarded on the basis of the Regulation; it was the counterpart to the advantages migrant workers drew from the Regulation, e. g. from the aggregation of periods. It was only necessary that the benefits from two states that (the benefits) overlapped were genuinely comparable for the article to apply (para.

15). In case of provisions reducing benefits the correct amount to be taken account of was the amount of the benefits awarded abroad as it was actually paid; the amount awarded abroad before reduction was irrelevant (paras 19-21).

Niemann and Petroni

Niemann, 1974 then foreshadowed the *Petroni, 1975*-judgment, for the Court ruled in a similar vein for Regulation 3 as later on in *Petroni, 1975* with regard to Regulation 1408/71, the Regulation succeeding Regulation 3. The Court in *Niemann, 1974* declared article 28(3) Regulation 3 partly invalid in light of article 51 Treaty. The article enabled national authorities that had calculated a benefit solely on the basis of *national* law to reduce the benefit that resulted from this calculation (paras 6-8). In the case at issue national law allowed extra affiliation to a voluntary insurance scheme and required the national authority to take periods completed under such a scheme into account. The national authorities had then reduced the benefit on the basis of article 28(3) Regulation 3, because it had been higher than the benefit the calculation based on aggregation and apportionment had yielded. In *Petroni, 1975* the Court followed up and declared article 46(3) Regulation 1408/71 invalid in light of article 51 Treaty insofar as it imposed the reduction of a benefit acquired solely on the basis of the national law of a single member state. In both cases the reason for the Court's ruling was that migrant workers were not to lose benefits that were due solely on the basis of national law.

The development of aggregation continued with *Massonet, 1975*. The case under Regulation 3 clarified the need to safeguard benefits due solely pursuant to national law when a benefit was granted in a second member state based on the rules of the Community on aggregation. The judgment namely refused Luxembourg the possibility to rely on Community law to reduce a widow's benefit. That benefit had been increased, because certain periods of child-raising had been factored in, but it had been due solely on the basis of national law. At the same time a widow's benefit had been due in Germany and it had been increased based on those periods of child-raising (para. 3). The Court found that insurance periods were not duplicated; Luxembourg was precluded from applying Community law to reduce 'its' benefit, (para. 25). Apart from that, the Court also made it plain that article 12 Regulation 3 merely determined the applicable legislation. It did not lend itself as a basis to interpret a national provision so as to reduce a benefit due under national law (paras 16-7). *Plaquevent, 1975* next concerned a specific point of aggregation in type A invalidity schemes, i. e. article 28(1)(c) Regulation 3 governing the average wage used to calculate benefits. The judgment made it clear that pro rata calculation/apportionment applied even under schemes where the benefit did not depend on the completion of insurance periods (type A); the article only referred to the way the average wage was to be determined (paras 18-9).

In 1977, a number of cases mainly confirmed the *Petroni, 1975*-ruling. *Strehl, 1977*, three judgments of 13 October 1977 – *Greco, 1977; Manzoni, 1977; Mu-*

ra, 1977 – and just one week later *Giuliani, 1977* did so. *Greco, 1977* added that the obligation of a member state to apply 'its' national rules to calculate a benefit also included the possibility to apply national rules against the overlapping of benefits. In other words, national law was to be applied in its entirety, if it was more favourable than the Community rules. *Mura, 1977*, made it plain that it did not amount to discrimination when migrant workers were better off than non-migrant workers after the *Petroni, 1975*-ruling, because the situations those two types of workers found themselves in were not comparable (paras 9-10). *Giuliani, 1977* spelled out that, when a residence requirement in national law had to be set aside pursuant to article 10 Regulation 1408/71 and a benefit was then granted based on the 'corrected' national law, the calculation of that benefit was still based solely on national law within the sense of *Petroni, 1975*. *Strehl, 1977* added that the invalidity of article 46(3) Regulation 1408/71 also affected decision no. 91 of the administrative commission under Regulation 1408/71.

Thereafter, the judgment in *Schaap, 1978* again confirmed the *Petroni, 1975*-ruling as it had been clarified in *Greco, 1977*. It added that retroactively buying into a German insurance scheme for the periods during which the nazi regime had been in power in Germany equalled voluntary insurance; as such it was to be left out of account when applying article 46(3) Regulation 1408/71 in the calculation of the benefit pursuant to Community law. The Court further elaborated this point in *Schaap II, 1979*. The Court ruled that article 46 Regulation 574/72, which implemented Regulation 1408/71, was pertinent not just when two type B legislations were applicable, but also when one type B and one type A legislation applied. Thus, in both situations the benefit of an insurance period completed voluntarily was maintained. *Boerboom, 1978* again reiterated *Petroni, 1975* and the interpretation given in *Greco, 1977*. *Naselli, 1978* was handed down on the same day as *Schaap, 1978* and *Boerboom, 1978*. *Naselli, 1978* established that the ruling in *Greco, 1977* – that national law had to be applied in its entirety including rules against overlapping – was also applicable to articles 27 and 28 Regulation 3. *Viola, 1978* merely extended this ruling to invalidity benefits to which aggregation and apportionment applied by analogy pursuant to Regulation 3. The same was valid for Regulation 1408/71 according to *Brouwer-Kaune, 1979*. That judgment also dealt with the situation where an invalidity benefit was awarded and converted into an old-age benefit in one state, before an invalidity benefit was awarded in another state. Although articles 40(1) and 43 Regulation 1408/71 did not technically cover this situation, the principles developed in the case-law, i. e. application of national law in its entirety and aggregation/apportionment, applied nonetheless (para. 8). *Mura II, 1979* then attempted to explain the whole calculation to be made pursuant to Regulation 1408/71 and the case-law; essentially it only clarified a point as to which *Mura, 1977* and *Schaap, 1978* had been ambiguous, namely that article 46 Regulation 1408/71 had to be applied in its entirety in the calculation according to the Community rules.

Other aggregation

Not all aggregation cases of the 1970s dealt with questions related to the *Petroni, 1975*-judgment. In *D'Amico, 1975* the Court set some limits to the need to take account of periods completed abroad under Regulation 1408/71. When one condition for receiving early retirement benefits under national law was that the person concerned had been unemployed for a year, periods of unemployment spent in another member state need not have been taken into account. The reason was that the year of unemployment was merely a 'separate additional condition' (para. 11) for the award of the benefit, not a factor influencing the calculation of the benefit; pursuant to national law the benefit was not included in the period of membership with the social security scheme concerned, either. In a similar vein, the Court decided in *Brunori, 1979* that a period of compulsory insurance with a specific old-age insurance scheme was a condition of affiliation to such a scheme, rather than a condition for the acquisition, retention or recovery of rights with which article 45 Regulation 1408/71 was solely concerned. That was why a period of insurance completed in another member state did not count towards that period. Before the judgment in *Brunori, 1979* – and in some contrast to it – the Court in *Warry, 1977* decided that pursuant to Regulation 1408/71 insurance periods completed in Germany had to be taken into account in the United Kingdom. A specific period of sickness insurance was required in the United Kingdom for entitlement to sickness benefits and, as a consequence, to invalidity benefits. In such circumstances, the British authorities were required to take account of periods of sickness insurance completed in Germany when deciding whether to award an invalidity benefit (paras 24-5). Apart from that, the British authorities had to accept a claim for invalidity benefits filed in Germany as a claim for sickness benefits in the United Kingdom (paras 27-9).

A series of further cases dealt with some technical aspects of aggregation. In *Galati, 1975* the Court decided how to bring an incomplete month of insurance to a round figure – essentially by rounding it up (see article 15(3) Regulation 574/72). According to *Borella, 1975* a short period of insurance could not be left out of account based on article 48 Regulation 1408/71, because German law on its own granted a benefit for the short period. *Torri, 1977* concerned the minimum benefit guaranteed pursuant to article 50 Regulation 1408/71. Such a benefit was only available if and to the extent a member state had declared a minimum benefit.

Aggregation and third states

A number of further cases also involved issues of aggregation in a broad sense. However, the questions raised involved third countries which the insurance careers of the claimants touched at one point or another. Algeria figured prominently among those third countries, because it had gained independent from France while Regulation 3 was in force. *Fiege, 1973* was the first such case. The Court in essence ruled that France was obliged to honour pensions rights acquired before Algeria was deleted from the annex to Regulation 3. Besides, the

Court ruled that an invalidity pension could not be transferred (paras 5-7). In *Horst, 1975* the Court added that it was irrelevant that the risk had materialized after Algeria had been deleted from the annex or that the claim had been filed thereafter. Thus periods completed in Algeria had to be taken into account in the calculation of benefits in the member states (paras 7-8). *Hirardin, 1976* continued this line of authority. A Belgian national who had completed periods in Algeria could not be subjected to less advantageous conditions than a French national when both applied for a pension in France (paras 15-9). In *Belbouab, 1978*, moreover, the Court ruled that the condition of having the nationality of a member state for Regulation 1408/71 to apply was to be assessed at the time the relevant insurance periods were completed. An Algerian national who had been a French national at the time he completed an insurance period could therefore rely on the Regulation. *Kaucic, 1977* did not concern Algeria but Austria. In this case, the Court held that periods completed in third states, in this case Austria, need not have been taken into account. Regulation 3, in particular article 11(2), did not apply to periods completed in third states. Hence, Belgium was justified in reducing a benefit by an amount previously awarded in Austria as a benefit. Before *Kaucic, 1977* the judgment in *Merluzzi, 1972* had already in a certain sense concerned insurance in a member state for work in a third state. However, the Court in *Merluzzi, 1972* merely reiterated the conditions included in annex G to Regulation 3, i. e. that nationals of member states other than France could claim affiliation to a specific French scheme only if they worked in a third state, after having at least been affiliated to a French insurance scheme or resided in France for a decade. The Court then left it to the national court to apply that set of rules. *Bozzone, 1977* then concerned an Italian worker whose claim for benefits in Belgium based on insurance periods completed in the former Belgian Congo was rejected for lack of residence in Belgium. However, the Court included the Belgian scheme within 'legislation' pursuant to article 1(j) Regulation 1408/71 and applied article 10 of that Regulation to strike down the residence requirement.

Social security v. social assistance

Aggregation and apportionment was not the only social security topic the Court dealt with. Numerous questions referred to the Court concerned the scope of Regulations 3 and 1408/71. *Frilli, 1972* began the long line of authority that distinguished between social security benefits and social assistance. Benefits of social security usually required 'periods of employment, membership, or contribution' and conferred a 'legally defined position' with a 'right to a benefit'. They were subject to Community rules. In contrast, in case of social assistance the authorities considered each case individually based on criteria such as the needs of the person concerned. Social assistance was *not* subject to Community law (all in para. 14). Yet the Court also recognized the difficulties in drawing the distinction. Therefore, benefits addressing both social security and assistance could be subject to the social security rules of the Community (paras 13-4). *Frilli, 1972*

concerned the guaranteed income of persons of old age under Regulation 3. Three judgments of the same year concerning prevention against tuberculosis, *Heinze, 1972*; *Land Niedersachsen, 1972* and *Ortskrankenkasse Hamburg, 1972* then made it clear that sickness benefits of preventive character could also be considered as social security benefits rather than social assistance. *Mazzier, 1974*; *Callemeyn, 1974* and *F., 1975* then applied the same criteria distinguishing social security from social assistance to a Belgian supplementary benefit for handicapped persons under Regulations 3 and 1408/71. The consequence was that the benefit came within the scope of the Community rules. *Callemeyn, 1974* in addition clarified that Regulation 1408/71 only took precedence over the preceding European interim agreement, if it was more favourable for the migrant worker. *Biason, 1974* again distinguished social security from assistance under Regulation 3 for a French supplementary allowance to an invalidity pension. The allowance was classed as social security. *Inzirillo, 1976* confirmed *Mazzier, 1974* for Regulation 1408/71: the French allowance for handicapped adults was part of social security.

Definitions and scope

With *Fossi, 1977* the Court excluded some discretionary benefits awarded to alleviate certain predicaments stemming from World War II and the nazi regime from the scope of the social security rules of the Community. *Tinelli, 1979* confirmed this decision. Similarly, a French benefit awarded in recognition of the hardships endured during World War II as a 'testimony of national gratitude' was considered to be outside the scope of social security in *Gillard, 1978* (para. 13). Article 4(4) excluded such benefits from the scope of Regulation 1408/71. The Court confirmed this approach in *Even, 1979*. In *Lohmann, 1979* the Court applied the exclusion of special schemes for civil servants in article 4(4) Regulation 1408/71 for the first time. It ruled that such schemes did not come within the term 'legislation' pursuant to article 1(j) Regulation 1408/71 and were therefore outside the scope of the Regulation.

The Court also settled some other definition issues in the 1970s. *Murru, 1972* explained that the national law under which a period was completed determined whether that period constituted a period assimilated to a period of insurance within the sense of article 1(r) Regulation 3. In *Vandeweghe, 1973* the Court qualified a settlement grant as a 'pension' under article 1(t) Regulation 1408/71. In contrast, a death grant did not qualify as a 'pension'. *Blottner, 1977* gave the Court the occasion to interpret the term 'present or future' legislation in article 1(j) Regulation 1408/71 so as to include legislation that had existed in the past (para. 13).

Personal scope

The Court came back to the personal scope of the social security rules in *Janssen, 1971*. The Court revisited *De Cicco, 1968* to find that the Community terms 'wage earners' or 'assimilated workers' in article 4 Regulation 3 were ca-

pable of covering persons whom national law regarded as self-employed persons, although the rules of the Community in principle did not apply to self-employed persons. This body of case-law was further differentiated in *Brack, 1976* because of the transition from Regulation 3 to Regulation 1408/71 and some modifications in annex V to Regulation 1408/71 which applied exclusively to the United Kingdom. The Court in *Brack, 1976* ruled very much on the specifics of the case. It limited the possibility for national law to exclude self-employed persons from having the status of workers within the sense of article 1(a) Regulation 1408/71 who (the workers) were entitled to sickness benefits. Moreover, the Court held in *Brack, 1976* that some persons could still be considered as employed persons, although their employment had ended, because they remained compulsorily insured under the insurance scheme that had covered them while they had been employed (para. 24). *Recq, 1978* again concerned the status of a person under the sickness insurance scheme in the United Kingdom, this time an au pair girl. It was up to the national court to determine whether an au pair girl was obliged to pay sickness insurance contributions as an employed person in the United Kingdom and thus qualified as a worker under Regulation 1408/71 (paras 13-4). Before the judgment in *Recq, 1978* the Court in *Mouthaan, 1976* had stated clearly in a case concerning the Dutch system that the status of a worker under Regulation 1408/71 was not lost just because the person concerned had failed to comply with administrative formalities (paras. 8-10).

In *F., 1975* the Court included a dependent descendant in the members of the family of a worker pursuant to article 2 Regulation 1408/71 when such a descendant, even though he was an adult, did not have any chance whatsoever of entering the employment market given his or her handicap. The Court thus opened up entitlement of family members of workers to benefits for handicapped persons based on non-discrimination in Regulation 1408/71. That move was consequential since the Court's case-law on the social benefits of family members under Regulation 1612/68 converged towards a similar point, notably in *Michel S, 1973*; *Casagrande, 1974*; and *Cristini, 1975*. The approach taken in *F., 1975* was confirmed in *Inzirillo, 1976*. In a similar vein, *Laumann, 1978* broadened the personal scope of Regulation 1408/71. It established that it was sufficient for Regulation 1408/71 to apply that the survivors of a worker moved to reside abroad, even if the worker himself had never made use of his freedom of movement.

Family

The Court did not just address family benefits incidentally, under definitions and scope of the social security rules. It also ruled on the provisions of the Community on family benefits. In *Di Bella, 1970* the Court devoted itself to these rules for the first time. Article 42 Regulation 3 had been amended regarding benefits for orphans. The Court found that the phrase 'came under the legislation' of a member state did not include legislation the application of which was not capable of leading to the acquisition of a right to benefits (para. 14). The Court came back

to the same article 42 Regulation 3 in *Anselmetti, 1975* ruling that it applied to a Belgian invalidity allowance as a 'pension' within the meaning of that article. Moreover, the Court in *Triches, 1976* held that article 42 Regulation 3 did not violate article 51 ECT, although the article did not remove all possible inequalities. In *Saieva, 1976*, the Court ruled that article 42(5) Regulation 3 merely determined the applicable legislation and applied to any family allowance payable by reason of the death of a worker.

Owing to *Laumann, 1978* family benefits in Regulation 1408/71 attracted the Court's attention for the first time. The Court ruled that the suspensory rule against overlapping of benefits in 79(3) Regulation 1408/71 applied only when benefits of the same kind were received by the same person. The benefit of an orphan had to be distinguished from the benefits acquired by others for the purpose of article 79(3). *Ragazzoni, 1978* also concerned a suspensory rule for overlapping entitlements, but this time article 76 Regulation 1408/71. The judgment made clear that entitlements to family allowances in two states only overlapped when all the requirements for the award of the benefit were met in the state where the family resided. In other words, a family benefit was not 'payable' pursuant to article 76 when a mother was not capable of receiving a family benefit because national law did not consider her to be the head of household (paras 9-11). *Rossi, 1979* transposed this ruling to the rule against overlapping of benefits of pensioners in article 79(3) Regulation 1408/71. However, *Rossi, 1979* had an important further dimension. The suspension of benefits according to article 79(3) could apply partially; if the benefits granted originally by a state exceeded the benefits to be paid by another state, the first state had to continue to pay the amount in excess as a supplement.

Unemployment

Kermaschek, 1976 also concerned the members of the family of migrant workers, though with regard to unemployment benefits. The Court in *Kermaschek, 1976* rejected the view that members of the family could claim unemployment benefits under Regulation 1408/71 based solely on their link to the migrant worker. The members of the family of a worker therefore only benefitted from 'derived rights' (para. 7), i. e. they could exclusively claim benefits that national law provided for the members of the family of an unemployed worker. Those benefits provided for the worker him- or herself remained out of reach for them. Moreover, the scheme established by Regulation 1408/71 for unemployment benefits was only available to nationals of the member states. Yet the benefits that were available to family members – 'derived rights' – did not depend on nationality, i. e. third country nationals could also lay claim to them.

Seven more judgments of the ECJ dealt with unemployment benefits in the 1970s. *Bonaffini, 1975* was the first judgment to deal with the exportability of unemployment benefits under article 69 Regulation 1408/71. It made clear that article 69 established a limited possibility for migrant workers to continue to receive unemployment benefits from the state where they last worked while they

sought employment in another state; but that article did not offer any grounds for national authorities to refuse unemployment benefits normally due to 'incoming' migrant workers under domestic law. Yet national authorities were allowed to factor in benefits received in actual fact under the unemployment scheme of another member state. Next, *Mouthaan, 1976* confirmed the right to unemployment benefits of a frontier worker in the state where he or she resided in accordance with that state's legislation pursuant to article 71(1)(b)(II) Regulation 1408/71. The judgment, however, excluded the guarantee of salary arrears due to the employee by a third body in case of insolvency of the employer from the unemployment benefits covered by Regulation 1408/71. Such a guarantee did not correspond to contributions made by the worker during his employment. *Di Paolo, 1977* explained in detail the concept of residence in the situations covered by article 71 Regulation 1408/71. Essentially, the Court required an examination of all the circumstances to establish whether a worker came within the exceptional situation of having residence in a state other than where she or he was employed. Those circumstances included the family situation, the reasons for him or her to move, the character of the work, the duration of the stay, etc. A presumption in favour of residence where the worker was employed applied though (paras 19-20). Basically, it was required for the exceptional situation requirement that the worker retained close ties with the country where she or he had settled and retained habitual residence (para. 12).

In *Beerens, 1977* the Court accepted that the mentioning of a benefit in the declaration required by article 5 Regulation 1408/71 was sufficient proof that it was an unemployment benefit within the ambit of the Regulation. However, a declaration was not indispensable for a benefit to constitute an unemployment benefit. In *Kuyken, 1977* the Court ruled that the unemployment rules were only applicable to those who had been subject to unemployment insurance at some point. A Belgian national who had studied at a university in another member state could therefore not come back to Belgium and claim an unemployment allowance – Belgium's tideover allowance – based on Regulation 1408/71. (The Court also ruled that such a student was outside the scope of free movement of workers and thus the principle of non-discrimination; para. 22.) In *Frangiamore, 1978* the Court held that employment periods completed abroad had to be aggregated for the purpose of fulfilling the reference period of an unemployment benefit in two cases, either when the employment period would have constituted an insurance period had it been completed in the member state where the benefit was claimed, or when the employment period constituted an insurance period under the legislation of the state where it had been completed. *Coccioli, 1979* finally concerned the exceptional situation where the three months exportability period for unemployment benefits could be extended according to article 69(2) Regulation 1408/71. The Court ruled that the application for such an extension need not have been made within the period of three months. But the Court also emphasised that it was up to the national authorities to ensure that proper use was made of the possibility offered by article 69 Regulation 1408/71 (paras 7-8).

Sickness

In the 1970s, the Court also dealt with a number of sickness insurance cases. In *Kunz, 1973* the transition from Regulation 3 to Regulation 1408/71 raised a problem. The Court ruled that article 22(1) Regulation 3 could not be read so as to entitle a pensioner to sickness benefits in the state where he resided, if national law did not grant such a right, although article 28 Regulation 1408/71 had to be understood in this way. The reason was that article 28 Regulation 1408/71 had extended the social security law of the Community (para. 5). However, in the judgment *Aulich, 1976* the Court came back to the allowance that had been at stake in *Kunz, 1973*. The Court held that an allowance which supplemented the sickness contributions paid by the insured person constituted a share in the contributions to sickness insurance which gave rise to the right to benefits, rather than a benefit in its own right under article 27 Regulation 1408/71. That article assumed that a right to benefits already existed and that the risk had already materialized (para. 7).

Pierik I, 1978 was the first case dealing with the authorization to seek treatment abroad. *Pierik I, 1978* established that article 22 Regulation 1408/71 concerned all treatment that was effective against the sickness the person concerned suffered from (para. 15). It also concerned treatment that was more appropriate than the treatment provided in the state normally competent (para. 16). In the latter case, the authorization could not be refused (para. 18). Finally, the provider of the benefits in the host state was allowed under article 22 Regulation 1408/71 to provide all benefits that it was entitled to provide under host state legislation. *Pierik II, 1979* in turn clarified that the competent authority was bound to grant the authorization, once it had been established in the light of objective medical requirements that treatment abroad was effective and necessary. *Pierik II, 1979* also made it clear that article 22 Regulation 1408/71 applied to pensioners; and that once the authorization had been given, the institution in the host state had to provide all benefits it had the power, rather than the duty, to provide. *Kenny, 1978* then clarified in relation to article 22 Regulation 1408/71 that the conditions for the acquisition, retention, loss, or suspension of sickness benefits were laid down by national law; national law had to refrain from discriminating on the basis of nationality though.

Non-discrimination and residence

The principle of non-discrimination was also involved in *Smieja, 1973*. A residence condition had been established in the Netherlands for certain increases in old-age pensions. The Court ruled that non-discrimination did not per se preclude a residence requirement. Yet certain other provisions of Regulations 3 and 1408/71 did, like article 10(1) of each of the Regulations. Owing to those provisions the Dutch pension increase could not be refused to persons residing abroad. A residence requirement was also rejected in *Biason, 1974* for a French supplementary allowance to an invalidity pension under Regulation 3. *Jansen, 1977* concerned the effects of a change of residence on the reimbursement of

contributions paid under an old-age insurance scheme. Article 10(2) Regulation 1408/71 established that contributions paid could not be reimbursed merely because of a cessation of compulsory affiliation to a scheme when a person had changed residence and consequently become compulsorily affiliated to a scheme in another member state. However, a corresponding provision did not exist in Regulation 3. The reimbursement of contributions which was established by national law in case compulsory insurance ceased could therefore not be refused on the basis of Regulation 3. This was valid even though contributions would technically not be lost when reimbursement was refused given that insurance periods completed would later have to be aggregated (para. 12). The Court finally struck down a nationality criterion in *Toia, 1979*. The requirement in French law that an allowance for women with children was only granted, if the children had French nationality, amounted to disguised discrimination which was not properly justified in the specific case.

One legislation

Another principle was at issue in a number of cases in the 1970s, namely the principle that only one legislation can be applicable at a given point in time. The confusion that would be caused, if several legislations were applicable at the same time, made the Court decide in *Bentzinger, 1973* that article 13(1)(c) Regulation 3 did indeed apply when a person was employed by several, instead of just one single employer. Consequently, the legislation of the state where the person concerned was employed and resident was applicable. *Angenieux, 1973* laid down some details of the notion that the legislation of the state where a person was employed was the only legislation applicable. The decisive employment relationship was to be determined by the 'predominant connection' when a person worked in several member states (para. 19). After the amendment of article 13 Regulation 3, which dealt with workers who performed their activities in several member states and resided in one of them, the case was clearer. From then on, the place of permanent residence was decisive for the applicable legislation. The term 'permanent residence' implied that all circumstances were taken account of, namely work, permanent address, centre of interests, and nationality of the person concerned (paras 29-31). *Andlau, 1975* confirmed this interpretation of article 13 Regulation 3. The Court added that German legislation was applicable to musicians residing in Germany if they performed occasionally, rather than habitually, in France, provided that they were affiliated to a German scheme. The employer in France, as a consequence, had to pay the contributions in Germany relating to the occasional work in France (paras 15-7). In case of an accident in France, the French institutions provided benefits in kind under their French legislation at the expense of the German institutions (paras 19-23). In *Perenboom, 1977* the Court finally held that the fact that only one single legislation was to be applied during a certain period of time also excluded the levying of contributions twice over the same period of time. Mr Perenboom had earned income that had been subject to contributions in Germany and when he ceased work in Ger-

many was again made subject to contributions in the Netherlands where he resided, although he had only been insured under one scheme at a time.

Transition and technicalities

The rest of the social security cases of the 1970s either concerned issues of transitional application or technicalities. *Brock, 1970* established that, bar explicit exceptions, amended legislation applied to events that had taken place before the amendment in so far as the continuing effects of such events were concerned (para. 7). The Court also ruled that benefits awarded previously could basically be reconsidered automatically in the light of amendments of Community rules if the outcome of such reconsideration was more favourable for the recipient of the benefit (paras 13-5). *Saieva, 1976* confirmed this ruling for the transition from Regulation 3 to Regulation 1408/71 (paras 15-7). *Walder, 1973* confirmed that articles 5 and 6 Regulation 3 and articles 6 and 7 Regulation 1408/71 had replaced existing social security conventions between member states – except when the annexes provided otherwise – even if their application would have been more advantageous for the persons concerned than the Community rules.

In *Merola, 1972* the Court decided that the ruling in *Guerra, 1967* regarding the language of documents submitted to administrative courts also applied to other courts. *Maris, 1977* continued that social security claims under the Community rules – and only such claims – could be submitted in any official language of a member state, even if domestic law required them to be drafted in a national language, in this case Flemish.

The judgment in *de Waal, 1973* added to the subrogation case-law, which had begun with *Bertholet, 1965*. It ruled that the substance of the claim into which an insurer was subrogated was determined by the national law governing the rights of the victim to compensation. *Töpfer, 1977*, however, limited the subrogation in light of the wording of article 52 Regulation 3 to the injury, i. e. to the damage caused by the accident. It thus excluded any other compensation for (non-)material or personal damage from subrogation.

Rzepa, 1974 clarified that national social security law rather than Community law laid down the statute of limitation for claims aiming at repayment of benefits that had been advanced (paras 12-3). *Costers, 1974* elaborated on the submission of documents to national authorities other than those for whom they were destined. The possibility pursuant to article 47 Regulation 3 to submit documents to the authorities of another member state also applied to the filing of an appeal. *Farrauto, 1975* allowed the direct notification of a social security decision via postal or telecommunication services to the recipient. However, the Court reminded the national authorities that they had to take care that the recipient understood the language of the decision (para. 6). *Balsamo, 1976* pertained to the formal submission of claims for benefits in several jurisdictions. Once a claim was submitted correctly in the member state of residence, the authorities of another member state were precluded from applying further formal conditions. However, material conditions, such as the cessation of work, had to be satisfied

at the time the decision was adopted. *Koschniske, 1979* dealt with the interpretation of the notion of a female spouse in article 10(1)(b) Regulation 574/72 in the Dutch version in the light of the other official language versions of the Regulation. The Court concluded that the notion included male spouses as well.

Three more social security judgments were handed down in the 1970s. *Pennartz, 1979* was about the average salary that had to be applied according to article 18(1) Regulation 3. According to the Court, the French authorities were right to focus exclusively on the salary received in France. *Liegeois, 1977* dealt with an option to buy-in retroactively study periods. Such an option amounted to continued voluntary or optional insurance within the meaning of article 9(2) Regulation 1408/71. In *Villano, 1979* the Court ruled that the concept of previous accidents in article 30(1) Regulation 3 and article 61(5) Regulation 1408/71 was not amenable to an interpretation that included subsequent accidents.

4 Services

It took the Court until 1974 to hand down the first judgments in freedom of services. *Van Binsbergen, 1974* was the first true services judgement. Previously, *Sacchi, 1974* had concerned services only to some limited extent, while the focus was on competition and goods. The Court ruled with regard to services only in eight other judgments in the 1970s: on the one hand, *Coenen, 1975; Koestler, 1978; Van Wesemael, 1979*, and on the other hand the judgments that were already mentioned, *Walrave, 1974*; *Royer, 1976*; *Watson and Belmann, 1976*; *Donà, 1976* and *Van Ameyde, 1977*. In the latter cases the rulings regarding the free movement of workers or establishment, as the case may be, also applied to services.

Sacchi, 1974 dealt with the monopoly of the national television broadcaster in Italy. The Court held that TV broadcasting including advertisements constituted services. It was thus subject to the freedom of services rather than the free movement of goods (para. 6). In contrast, trade in films, sound recordings, etc. was subject to free movement of goods (para. 7). Since broadcasting constituted a service, Article 37 ECT on the adjustment of monopolies was not applicable to the broadcasting monopoly in Italy (para. 10). (The monopoly did not fall foul of the rules on goods or competition. However, owing to non-discrimination the Italian TV broadcaster was not allowed to discriminate against nationals of other member states; para. 20.)

In *Van Binsbergen, 1974*, the first pure services case, the Court recognized the direct effect of the freedom of services in the Treaty as regarded discrimination based on nationality and residence (paras 20-7). Furthermore, the Court differentiated with regard to a residence requirement for lawyers. While such a requirement generally failed to comply with the freedom of services, the professional rules of the host state had to be observed. Any lawyer could be required to

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

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

III The 1980s

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

1 Workers

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