II 'Coordinated'

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

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

The origin of 'simply coordinated'

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

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

mented, if necessary, by Community law' (all on p. 234).[93] In a judgment handed down on the same day, *De Moor, 1967*, the Court made use of this consideration in a slight variation to underpin the conclusion that proportional calculation pursuant to article 28(1) Regulation 3 could not lawfully be applied, if a benefit was due solely on the basis of national law, i. e. without the need to aggregate periods first. According to the Court, a common system did not exist under which the migrant worker held a single entitlement which was simply apportioned between the states. Rather, separate claims arose against separate institutions under separate systems (p. 207). The Court then continued to find that an improper plurality of benefits did not result from this reading, hence ruling in favour of the migrant worker. Thus, the idea of 'simple coordination' according to *Keller, 1971* was implied by the 'separate systems' remaining in existence according to *Colditz, 1967* and *De Moor, 1967*.

The passage from *Keller, 1971*, in turn, was reapplied in the exact same words – at least in the French text – in *Mancuso, 1973*. It served the Court to underpin its finding, which was obviously related to that in *Keller, 1971*, that an invalidity pension awarded solely on the basis of national law without prior aggregation of periods was not to be reduced, either, based on apportionment pursuant to article 28(1) Regulation 3, like an old age pension. Any resulting cumulation of benefits awarded in several member states favouring migrant workers was the consequence of 'simple coordination' of national legislations which had not been harmonized (para. 17).

From justifying advantages to distributing powers …

Next, *Rzepa, 1974* applied the passage from *Keller, 1971* in a shortened version. Belgium wanted to apply article 34(4) Regulation 4, which concerned the advance payment of pensions, to a benefit awarded solely on the basis of national law. In particular, the statute of limitation for a re-claim of benefits paid in advance was at issue. The Court answered that article 34(4) was not to be applied to a benefit that had been due by reason of national law only, i. e. without previous aggregation of periods completed in several states. In any event, the Court continued, had the benefit been based on aggregation, even then the statute of limitation would have been governed by national law, since the 'system embodied in Regulation […] 3 and 4 rest[ed] on mere coordination' (para. 12; 'simple coordination' in French as in *Keller, 1971*). Any benefit paid in application of Community law was based on both national and Community law, with national law always governing the statute of limitation. Hence, Community law need not have laid down such a limitation. Thus, whereas the 'simple coordination'-passage in *Keller, 1971* and *Mancuso, 1973* had served to explain why a cumulation of benefits in favour of migrant workers was lawful, in *Rzepa, 1974* 'simple co-

93 The Court then continued that the Community system could not, in the absence of an express provision, be interpreted in a way that a worker was deprived of the benefit of part of the legislation of a member state (p. 234). That approach later on fed into the judgment in *Petroni, 1975*, under the name of which it became known. Interesting as it may be, this formula is not in the focus of this chapter.

ordination' in a shortened version moved away from justifying an advantage for migrant workers. It rather served to distribute powers between the Community and the member states.

… and back to justifying advantages

In *Massonet, 1975*, the Court returned to the more favourable treatment of migrant workers as put into practice by *Keller, 1971* by means of the 'simple coordination'-passage. The case concerned the situation where a widow received a pension based solely on Luxembourg law which (the pension) was increased by reason of her having raised her children. Simultaneously she received a pension in Germany into which certain notional periods were factored, again owing to her having raising children, but which (the German pension) finally came about as a result of aggregation and apportionment. The Court again sided with the migrant worker, or rather his surviving wife, holding that the Luxembourg pension due solely pursuant to national law could not lawfully be reduced by applying aggregation pursuant to Community law. The notional periods were not truly overlapping. Any advantage drawn exclusively by migrant workers was due to 'simple coordination' within the sense of *Keller, 1971* (para. 27).

The complexity of coordination

Besides the above six judgments, coordination played an important role in two more judgments in the narrative of social security during the early years.[94] Firstly, in *Guissart, 1967*, shortly after the Court had laid the foundation for the *Keller, 1971*-ruling in *Colditz, 1967* and *De Moor, 1967*, the Court dealt with the question whether insurance periods completed in another member state were to be taken into account as notional years in Belgium. In keeping with *De Moor, 1967* the Court stated that aggregation applied only in specific cases determined by Community law. If the aim of Community law was achieved on the basis of national law alone, there was no room for aggregation. Yet, 'the complexity of the problems posed by the co-ordination of national legislative systems prevent[ed] this interpretation from becoming an absolute principle' (p. 434). This meant, in particular, that periods completed in one state, which gave rise to benefits in that state, were not to be considered as notional periods in another.

94 In this chapter, the footnotes at least in part serve to complete the picture of coordination in the case-law of the Court. The judgments in which coordination (or 'coordinated', etc.) is mentioned, though without attributing any argumentative function to the notion, are briefly noted in roughly chronological order. In this regard several judgments must be mentioned now. In *Bonsignore, 1975*, para. 5, the Court stated that the objective of Directive 64/221 on public policy, security, and health measures was to coordinate those measures in order to reconcile them with the free movement of persons and the prohibition of discrimination. However, that those measures were *coordinated* was not subject to further consideration. In *Petroni, 1975*, para. 20, the Court also referred to coordination, though only for the powers of the Council to coordinate national social security systems pursuant to article 51 Treaty. The role of the term was thus wholly inconsequential in this judgment. The same is valid for *Triches, 1976*, para. 17. The Court only mentioned the 'system for co-ordinating family allowances'. In *Reyners, 1974* the Court used the term 'coordination of laws' in the context of the measures to be adopted to implement the freedom of establishment (para. 20). However, the term was only mentioned in passing and no argument was developed on the basis of it. The same is valid for *Van Binsbergen, 1974*, para. 21, with regard to the freedom of services.

By this ruling the Court conceded that Community law was unable, because of complexity, to foresee the consequences it had for all social security situations. Beyond that, 'the complexity of […] coordination' served to qualify aggregation and render it less cogent. In this case the aspect prevailed that, with an approach relying on coordination, periods of insurance were not to be taken account of twice.[95]

The shift of Regulation 1408/71

The other judgment in which coordination played a certain role was *Kunz, 1973*. This judgment, in a sense, was symbolic of the change Regulation 1408/71 was about to bring in terms of coordination. The Court ruled that article 22(1) Regulation 3 was not to be interpreted against the grain of the wording in the sense that the pensioner concerned was to receive sickness benefits in kind in the Netherlands, although he did not have an entitlement under Dutch law to such benefits. In particular, an argument could not be drawn from the new Regulation 1408/71 which established just such an entitlement. The reason for that argument being inadmissible was that Regulation 1408/71 extended 'the Community's social law, which until then was limited to coordinating national laws regarding social security' (para. 5). This dictum, in turn, implied that the reason why article 22(1) Regulation 3 did not create an entitlement to benefits in kind in the Netherlands was that it merely coordinated the national laws.[96]

Spin

What about the power of 'coordinated'? In all the above judgments we can observe the spin of the interpretive formula, as we did with broad interpretation in the previous chapter. Spin in that sense first occurred in the two precursors to *Keller, 1971*. In *Colditz, 1967* the idea that later crystallized in *Keller, 1971* spun the decision to a considerable extent. The 'separate claims …'-passage was instrumental in the Court's finding that an application for a pension in one state

95 On a different note, a statement in Advocate General Dutheillet Lamothe's common opinion to *Keller, 1971*, *Gross*, *1971*, and *Höhn*, *1971*, is confusing. In the original version in French the third point the Advocate General made begins as follows: 'Jusqu'à la coordination, qui apparaît de plus en plus nécessaire, des différents régimes nationaux de sécurité sociale […]'. The German version also reads: 'Bis zur Koordinierung der verschiedenen nationalen Systeme der sozialen Sicherheit, die sich immer mehr als notwendig erweist […]'; the Italian version: 'Fino al coordinamento, che s'impone sempre più, dei regimi previdenziali nazionali […]'; and the Dutch version: 'Zolang het niet is gekomen tot de met de dag urgenter wordende coördinatie van de verschillende nationale regelingen inzake de social zekerheid […]' (each passage is on p. 883). Obviously, when the opinion was translated into English the faux pas was corrected. It reads: 'Until such time as the different national social security systems are *harmonized*, which appears increasingly necessary […]' (p. 882, emphasis added).

96 This reading is supported by Advocate General Roemer's opinion which gives the following reason why the relevant article in Regulation 3 did not create any entitlement to benefits in the Netherlands: 'First, it is material that the object of Regulation No 3 is only to coordinate national insurance schemes. From this it follows that where there is any doubt one cannot proceed from the assumption that basic changes in national law were intended; at least one cannot bring about such changes by way of analogy or filling of omissions.' (P. 1037) While the Court in result followed the Advocate General, the Court failed to include the argument put forward by the Advocate General. Indeed, the Court expressly accepted only the second point of the Advocate General – which is not in the above quote – namely that only article 28 Regulation 1408/71 created a direct claim to benefits based on Community law.

did not necessarily trigger the award of a pension in another state. In *De Moor, 1967*, in contrast, spin was relatively limited. The 'separate claims …'-passage followed upon the Court's point that apportionment was not of general application, which is indicative of an absence of spin. Yet, the passage exerted some spin, in particular with regard to the rejection that an improper plurality of benefits occurred. In *Guissart, 1967* 'the complexity of […] coordination' was instrumental in the Court's decision to eschew the consequences of a strict application of aggregation. It turned aggregation into a relative principle, one that could be overruled by the need to avoid situations where an insurance period gave rise to rights under the national schemes of two states. In contrast, in *Keller, 1971*, the judgment that crystallized 'simple coordination', that passage did not exert any spin on the Court's decision. Rather, it served to justify at the end of the judgment why the more favourable treatment of migrant workers in contrast to workers who had spent their entire career in one member state was justified. The same is true of *Mancuso, 1973*. In *Kunz, 1973*, spin cannot be discerned, either. In *Rzepa, 1974* 'simple coordination' in an abbreviated version provided the spin needed to answer *eventualiter* that national law, in any case, governed the statute of limitation of claims aiming at repayment of benefits advanced. Finally, in *Massonet, 1975* in a similar vein as in *Keller, 1971* the 'simple coordination'-passage functioned as an *ex post* justification underpinning the Court's conclusion. We conclude that only in *Colditz, 1967*; *Guissart, 1967* and to a limited extent in *De Moor, 1967* and *Rzepa, 1974* the relevant passages spun the decision.

Some conclusions from the period

During the foundational period of the Court's case-law, *Keller, 1971* crystallized an interpretation which had been inherent in *Colditz, 1967* and *De Moor, 1967*. It drew on the 'simple coordination' of national social security schemes. 'Simple coordination' served the Court to underpin its conclusions, notably to justify why the favourable treatment migrant workers enjoyed in contrast to purely domestic workers, namely the possibility to cumulate benefits under various national systems, was lawful. This was explicit in *Keller, 1971*, *Mancuso, 1973*, and *Massonet, 1975* and implicit in *Colditz, 1967* and *De Moor, 1967*. In *Rzepa, 1974*, moreover, 'simple coordination' served to divide the powers between the Community and the member states, awarding to the latter the power to regulate the statute of limitation of repayments of benefits advanced. In two more judgments, *Guissart, 1967* and *Kunz, 1973*, the idea of coordination was applied in two slightly different contexts, namely in the sense of the 'complexity of […] coordination' and as a criterion allowing to draw a distinction between Regulation 3 and Regulation 1408/71. As to the power of the passages concerned – 'spin' – the conclusion from the early days is that it was rather limited. Only in two decisions spin was clearly discernible, while in two more decisions spin was there to a lesser degree.

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

a) Occurrence of 'coordinated' – 'simple coordination' under Regulation 1408/71

'Simple coordination' appeared for the first time during the next 15 years in *Mura, 1977*.[97] This judgment is crucial, because it transposed the idea of 'simple coordination' to the new Regulation 1408/71. This was not self-evident, in particular in the light of the distinction drawn in *Kunz, 1973* between Regulation 3 and Regulation 1408/71, with the latter extending the Community's social law beyond the coordination of national laws.[98] The Court in *Mura, 1977* began with the simple coordination-passage from *Keller, 1971*[99] to explain why a more favourable treatment of migrant workers in contrast to purely domestic workers needed to be accepted (para. 10). However, the Court continued, if a benefit was based on national law alone, that law could be applied in its entirety. The benefit could notably be reduced on the basis of purely national rules against the overlapping of benefits pursuant to article 12 Regulation 1408/71. The only condition was that the Community rules on aggregation and apportionment of benefits would have been applied, if they had been more favourable for the migrant worker.

97 A number of further decisions deserve to be mentioned at this point. In *Hirardin*, *1976* Advocate General Trabucchi had argued that the Court would better not ground its decision in acquired rights, because that risked creating a substantive norm, whereas the Community provision in Regulation 3 merely coordinated the national schemes (pp. 566-7). The Court reflected none of these concerns in its judgment and based it on the idea of acquired rights. In *Kermaschek*, *1976* the Court mentioned that article 67 to 70 Regulation 1408/71 pursued only one purpose, namely that of coordinating rights to unemployment benefits based on national law for employed persons who were nationals of a member state (para. 9). However, that statement was made not in the context of *coordination*, but rather to explain why family members of migrant workers were not entitled to claim unemployment benefits under the Regulation, while the migrant workers concerned themselves were. In *Strehl*, *1977*, para. 14, the Court again, like in *Petroni*, *1975*, mentioned the powers of the Council pursuant to article 51 Treaty to lay down provisions to coordinate the national social security systems. Further consequence was not attached to the notion of coordination, though. The same is true of the identical reference in *Manzoni*, *1977*, para. 11. In *Kuyken*, *1977*, para. 11, the Court merely mentioned that Regulation 1408/71 concerned the coordination of the laws of the member states as to unemployment benefits. In *Thieffry*, *1977*, para. 11, the Court referred to coordination in a similar, unobtrusive way as in *Reyners*, *1974*: the Council had the duty under article 57 Treaty to issue directives to coordinate national provisions on self-employment. Later on, the reference to coordination in *Klopp*, *1984*, para. 9, was similar. In *Bouchereau*, *1977*, para. 15, the Court again, after *Bonsignore*, *1975*, inconspicuously referred to coordination with regard to Directive 64/221.

98 This extension becomes more than evident in *Blottner*, *1977* which was handed down more than four months before *Mura*, *1977*. In *Blottner*, *1977* the Court held that article 45(3) Regulation 1408/71 had to be applied, even though a migrant worker had not been subject to type A legislation, because she had moved away before the relevant legislation was changed from type A to type B. The Court justified that interpretation *contra legem* as follows: 'The structure of the system of harmonization of national legislation established by the regulation is based upon the principle that a worker must not be deprived of the right to benefits merely because of an alteration in the type of legislation in force in a Member State.' (para. 16) Obviously, *Blottner*, *1977*, must be seen as an antagonist to the continuing line of authority relying on 'mere coordination'. Interestingly, the Court only referred to *Blottner*, *1977*, once, in *Derks*, *1984*. However, the reference did not involve the harmonization-passage in any way.

99 The relevant passage in *Mura*, *1977* in French was worded slightly differently, though the content was identical to the passage in *Keller*, *1971*. The English version further altered the wording, in particular it mentioned 'mere co-ordination', instead of 'simple coordination' as in *Keller*, *1971*.

Coordination to the disadvantage of migrant workers

The year 1979 then produced two unexpected developments. First, in *Brunori, 1979* the Court acceded to the Commission's argument alleging that the aggregation of periods of insurance was not to be applied in the context of the obligation provided by German law for stonemasons to remain compulsorily insured under a special insurance scheme for 216 months, since the exclusive aim of Regulation 1408/71 was to coordinate national legal systems (para. 5). It was for national law to determine the conditions of affiliation. This ruling comes as a surprise, at least to some extent, as it marked the first time that the idea of mere/simple coordination had the effect of disadvantaging migrant workers. Previously, the 'simple coordination'-passage had consistently been cited to the effect of favouring migrant workers, in particular over purely domestic workers. Perhaps this was the reason why the Court in *Brunori, 1979* refrained from referring to the characteristic wording of the 'simple coordination'-passage, preferring to state the Commission's argument instead and acceding to it.

'Separate claims'

The second unexpected development took place in *Rossi, 1979*. This judgment went back to the origin of the *Keller, 1971*-passage, namely *Colditz, 1967* and *De Moor, 1967*. The Court had recourse to the 'separate claims'- rather than the 'simple coordination'-phrase, thus at the same time reviving 'separate claims' after almost twelve years and transposing it to Regulation 1408/71 (para. 13).[100] The Court then adduced *Petroni, 1975*-logic and went on to create the supplement to be paid by the state the social security scheme of which awarded a higher benefit under article 79(3) Regulation 1408/71. The tale of the 'separate claims'-phrase continued with *Laterza, 1980* and *Gravina, 1980*. In these cases, the Court expanded and generalized the conclusion drawn in *Rossi, 1979* as to the payment of a supplement. As in *Rossi, 1979*, the Court justified this approach by the argument of coordination in the disguise of the 'separate claims'-phrase (para. 8 and 7, respectively) in combination with *Petroni, 1975*-logic.

Inversing simple coordination

The Court in *Testa, 1980*, in a sense, inversed the 'simple coordination'-logic, thus epitomising the novelty of Regulation 1408/71. The Court ruled that article 69 Regulation 1408/71 was not 'simply a measure to co-ordinate national laws' (para. 5). Rather, the article created an autonomous entitlement rooted in Community law to export unemployment benefits for three months. As a consequence, after those three months had passed, falling back on national law was not an option, irrespective of what national law provided. A migrant job seeker who failed to return in time to the state providing the benefits forfeited the right to continue to receive benefits, except in the circumstances provided by article

100 The relevant passages in *Colditz, 1967*, and *Rossi, 1979*, in the French versions are identical, apart from a minor specification related to the facts of *Colditz, 1967*.

69(2). Thus, the antagonist of 'simple coordination', harmonization, worked to the disadvantage of the migrant job seeker concerned.

Simple coordination, in effect a (dis)advantage for migrant workers

'Simple coordination' then disappeared from view for more than five years.[101] It came back prominently in *Pinna, 1986* in which the Court declared void the special regime article 73(2) Regulation 1408/71 had established for the benefit of France. That article had exempted French family benefits – and only French family benefits – from the exportability laid down in article 73(1). The Court began by stating that article 51 Treaty provided for 'the coordination, not the harmonization' of national law (para. 20). Consequently, differences in the national schemes and the rights granted thereunder remained unaffected. Nonetheless, the Court continued, a high degree of similarity in social security rules was beneficial for the free movement of workers. Hence, Community law had to refrain from adding to the disparities that already existed between the member states' schemes – which was exactly what article 73(2) had done. Non-discrimination fed into this consideration and the Court struck down the second paragraph of article 73. The formula used in *Pinna, 1986* can be considered to have amalgamated the previously used 'simple coordination'-passage with the 'separate claims'-phrase. Moreover, 'coordination, not harmonization' was put forward in a case that ultimately turned out, by making French benefits exportable, to the advantage of the migrant worker, like it had been initially the case when the coordination-passages had been applied. Yet the situation was not the same. The Court in *Pinna, 1986* ruled to the advantage of the migrant worker, *despite* the mere coordination of national schemes, rather than *because of* it.[102] That twist

101 Some more decisions need to be discussed briefly. In *Galinsky*, *1981*, p. 952, the Commission had argued against considering a self-employed person who had been compulsorily insured in that capacity in the United Kingdom as a worker under article 1(a) Regulation 1408/71 for the purposes of British benefits merely because he had been subsequently insured as a worker in the Netherlands. The Commission had argued that Regulation 1408/71 was by nature an 'exercise in coordination'. To treat such a person as a worker in the United Kingdom would mean to harmonise the legislations of the member states (p. 952). The Court tacitly rejected that argument and considered the person concerned a worker under article 1(a), while ignoring the argument based on coordination. The Court dismissed the claim based on another ground, though. (The Court referred to coordination in passing in para. 12 by mentioning 'the rules on the coordination of national legislative systems relating to social security'.) In *Baccini*, *1982* the Commission had argued that the Community rules as to social security pursued three aims, one of which was the fundamental principle that migrant workers were not to suffer a disadvantage by reason of the national social security schemes being merely coordinated and not yet harmonized (p. 1073). The Commission made this statement nota bene with regard to Regulation 1408/71. The Court only implicitly included those considerations (paras 13-4). In *Castelli*, *1984* the Commission had argued that to recognize Ms Castelli's right under Regulation 1408/71 to a minimum pension available in Belgium for the elderly would mean to create a right under the Regulation, thus bidding farewell to the Regulation's approach of mere coordination (p. 3207). The Court eschewed that problem by recognizing a right under article 7(2) Regulation 1612/68.

102 Again, some further cases deserve to be mentioned in the interest of completeness. In *De Jong*, *1986*, on p. 674, Advocate General Mancini in a preliminary remark recalled the basis of 'mere coordination' of the Community rules and the consequent power of the member states to determine conditions of insurance affiliation. The Court in the judgment itself only referred to this power of the member states as reiterated in *Coonan*, *1980* (para. 13). Nonetheless, it cannot be denied that a certain affinity exists between the *Coonan*, *1980*-line of authority granting member states the power to

was, however, counteracted in *Burchell, 1987* in which the Court advanced the 'coordination, not harmonization' formula from *Pinna, 1986* (para. 17 of *Burchell, 1987*) to come to the conclusion that the rule against the overlapping of benefits in article 10(1)(a) Regulation 574/72 was not to be applied when a family benefit was due in any event on the basis of national law, notably without recourse to article 73 Regulation 1408/71. Quite the contrary, because of mere coordination article 10(1)(a) was only applicable to benefits awarded on the basis of article 73. 'Coordination' thus went back to working for, rather than against migrant workers.

Lenoir, 1988 tied in with *Pinna, 1986*. The non-exportability of certain benefits, including some French benefits, pursuant to article 77 Regulation 1408/71 was challenged in that case in a similar way as in *Pinna, 1986*. The Court reiterated 'coordination, not harmonization' as established in *Pinna, 1986* (para. 13 of *Lenoir, 1988*), but in contrast to *Pinna, 1986* did not put the formula into perspective subsequently. More specifically, the Court refused to invalidate the article of the Regulation, because it did not add to the disparities between the schemes of the member states. Rather, those disparities had already been in existence. The article applied according to objective criteria. The French benefits at issue, moreover, were tied to the social environment. It thus became evident from *Lenoir, 1988* that 'coordination' also functioned to the disadvantage of migrant workers, in this case pensioners. What could have already been suspected from *Brunori, 1979* and *Pinna, 1986*, hence became certain with *Lenoir, 1988*, namely that 'coordination' was not a one-dimensional driver of advantages for free movers. It was also liable to turn against them.

determine conditions of affiliation and the 'coordination'-case-law. Note therefore that *Kits van Heijningen*, *1990* and *De Paep*, *1991* later on limited the power of the member states in this regard to a certain extent. On a different note, the Court in *Miethe*, *1986* denied a wholly unemployed frontier worker the option to choose where to receive unemployment benefits solely because the national law of the state not competent pursuant to Regulation 1408/71 would have granted such benefits. To grant such an option would run counter the scope of the Regulation which intended to coordinate the national social security schemes (para. 11). The same passage was later on reiterated in *Rebmann*, *1988*, para. 9, and 'the rules relating to coordination' were also mentioned in para. 12. In both judgments coordination was mentioned only in passing. Apart from that, the Court in a series of judgments dealing with (co-)insurance mentioned coordination. The direct applicability of the freedom of services did not depend on coordination or harmonization of the laws of the member states (para. 25 of *Commission v. Germany (insurance)*, *1986*); the relevant directives were the 'coordination directives' (*inter alia* para. 40), which had established 'minimum coordination' (para. 65). However, all these references to coordination did not serve the Court to build an argument on the basis of that term. The same is true for the three other judgments delivered on the same day, namely *Commission v. France (co-insurance)*, *1986*; *Commission v. Ireland (co-insurance)*, *1986*; *Commission v. Denmark (co-insurance)*, *1986*, though for the latter to a lesser extent. In *Bertini*, *1986*, para. 11, the Court held that the obligation for a member state to modify the regulation of the medical profession exercised by its own nationals could only arise from directives to coordinate the national rules. Further consequences was not attached to the term coordination. Finally, in *Van Roosmalen*, *1986*, para. 19, the Court referred to the preamble of Regulation 1390/81 according to which the coordination of the national social security schemes was necessary for self-employed persons. Coordination was only mentioned en passant, though.

Obfuscation of the origins of 'simple coordination'

Borowitz, 1988, in contrast, followed up on *Brunori, 1979*; *Laterza, 1980*; and *Gravina, 1980*. Seized with the question of whether the calculation pursuant to article 46(1) Regulation 1408/71 allowed Germany to take account of periods of insurance in accordance with a bilateral social security convention with Poland, the Court answered with the 'sole objective of coordination' of the Community rules (para. 23). Hence, Germany was free to take heed of such periods. Yet other member states were not required to do so. That integrated approach happened to secure an advantage for the migrant worker concerned. It is noteworthy, furthermore, that the Court referred to *Brunori, 1979*, in which the wording of the coordination-passage could not be attributed with full certainty to the characteristic *Keller, 1971*-passage, and to *Laterza, 1980* and *Gravina, 1980* which had used the separate claims-phrase. Moreover, *Pinna, 1986* was not cited at all. We thus observe in *Borowitz, 1988* what had been adumbrated in preceding judgments, namely that the origins of 'coordination' have been obfuscated. 'Simple coordination' was being dissociated from specific judgments to become something like an abstract idea without a root that is clearly attributable to a specific judgment.[103]

Further simple coordination cases

In *Jordan, 1989* French legislation had limited a newly introduced benefit. It only applied to pensions calculated after a certain date, thus excluding recalculation of benefits awarded before that date. The Court referred to *Pinna, 1986* to underscore the argument that article 51 Treaty only provided for coordination, while leaving differences in the national schemes unaffected (para. 13). Accordingly, it was for the member states to decide when a change in the criteria for the award of a benefit would take effect. Article 51 Regulation 1408/71 was not applicable, which was a result to the detriment of the migrant worker concerned.[104] Next, *Cabras, 1990* referred to mere coordination without, however, citing any case-law. Thus, 'coordination' as an idea justified the inconveniences that arose for a migrant worker because a pension was split between two states, i. e. because two bodies concurrently paid benefits, which could be subject to separate readjustment, while the total amount of the benefit was subject to the ceiling in article 46(3) (para. 31). The Court expressly accepted the disadvantage that migrant workers suffered relative to purely domestic workers in this regard (para. 30). In *Rönfeldt, 1991* 'coordination' by reference to *Pinna, 1986* and

103 For completeness: In *Roviello*, *1988*, para. 17, the Court incidentally used the term coordination: 'Point 15 is not of such a nature as to guarantee the equal treatment required by Article 48 of the Treaty and therefore has no place in the coordination of national laws provided for in Article 51 of the Treaty […]'.

104 For the sake of completeness it must be mentioned that *Pinna II*, *1989* reiterated the ruling in *Pinna*, *1986* and in that context mentioned coordination, too (para. 12). Moreover, in *Echternach*, *1989*, para. 21, the Court mentioned that there was no coordination of school diplomas in the specific case, but did not attach any further consequence to the notion of coordination. In *Van de Bijl*, *1989*, para. 14, the Court also referred incidentally to the coordination of national laws in the context of recognition of professional qualifications.

Borowitz, 1988 dispatched the preliminary point that the different schemes of the member states relied on different age limits for retirement (para. 12). 'Coordination' implied that this difference was to be accepted.

'Coordination' and the 'stability of the system'

In *Newton, 1991* the idea of coordination served in a new capacity. The Court ruled that a British benefit for handicapped persons was not to be exportable for handicapped persons who had previously been subject exclusively to the social security scheme of a member state other than the United Kingdom. For them, the relevant allowance constituted social assistance which was not subject to Community rules. To rule otherwise would have meant to interpret the Community rules which merely coordinated national social security schemes in a way that would have upset schemes such as the British (para. 18). 'Mere coordination' thus served as a reason why 'the stability of the system instituted by national legislation' (para. 17) was not to be upset, to the disadvantage of the person concerned *nota bene*.

For and against migrant workers

In *Paraschi, 1991* the Court ruled that the extension of a reference period relevant for the acquisition of an invalidity benefit could not lawfully be granted only for sickness that occurred in the state concerned, else migrant workers who tended to return home when sick were disadvantaged. The Court arrived at this conclusion despite the mere coordination of national schemes (para. 22). *Paraschi, 1991* thus was a decision to the advantage of migrant workers, but on a close reading of the text it had that effect *in spite of* 'coordination'. *Paraschi, 1991*, therefore, added further weight to the argument that the idea of coordination, in principle, worked to the detriment of migrant workers. In *Durighello, 1991*, 'coordination' finally came back to the aid of migrant workers. The Court conceded that Regulation 1408/71 did not address benefits for dependent spouses of pensioners. That was why Italy had refused a pensioner drawing a pension in application of the Regulation such a benefit. However, the Court countered, national schemes were merely coordinated, as ruled in *Rossi, 1979* in the context of family benefits (para. 14). Adding in *Petroni, 1975*-logic, the Court decided that national law had to be applied fully even when a pension was drawn on the basis of Regulation 1408/71. Hence, the Italian benefit was due to the person concerned.[105]

b) Spin

In which judgments did 'mere coordination' spin the Court's decisions? To be again clear, this question is not the same as the question whether 'simple/mere

105 Again for the sake of completeness, in *Les Assurances du crédit, 1991* the Court referred repeatedly to coordination in the context of the direct insurance Directive 73/239. However, none of these references made use of coordination as an argument or a substantial concept. That is equally true for *Karella, 1991* in which the Court mentioned the coordination of safeguards under Directive 77/91 on, to put it briefly, shareholder protection (para. 25).

coordination' works in favour of migrant workers. 'Spin' asks whether a formula or an idea was instrumental in the Court having reached a specific decision; the question of the benefit of a decision for migrant workers is interested in the substantive outcome, the result of the use of a formula or an idea for a specific group.

In *Mura, 1977*, the first judgment in the period in which the 'simple coordination'-passage was used, it is subject to doubt whether spin occurred. Arguably, the Court began its judgment with the passage, but this was owed to the way the national court had asked the question. Besides the Court also had to clarify that a more favourable treatment of migrant workers was still not unlawful, in spite of the new Regulation 1408/71 having become applicable. The Court did this by reference to 'simple coordination' and the fact that the situations of migrant and purely domestic workers were not comparable. However, the hard issue to be solved was then to some extent disconnected from the 'simple coordination'-passage, with the Court ruling that national law could be applied in its entirety, viz. including national rules against overlapping. Perhaps this disconnection occurred, because the Court first professed the more favourable treatment of migrant workers underpinned by 'mere coordination', but then in substance ruled against that more favourable treatment by allowing the reduction of benefits on the basis of national rules against overlapping. One can therefore validly consider that an element of empty spin was inherent in *Mura, 1977*, though it was not very patent.

In *Rossi, 1979* the revived *Colditz, 1967*/*De Moor, 1967*-phrase of 'separate claims' together with *Petroni, 1975*-logic spun the Court's decision towards the disruptive finding that the higher benefit pursuant to national law had to be safeguarded, resulting in the obligation of the state that provided for the higher amount of benefit to pay a supplement. In *Brunori, 1979* 'coordination' in the Commission's argument, which was accepted in brief by the Court, provided the necessary spin to come to the conclusion that the requirement to be affiliated for 216 months to a specific insurance scheme constituted a condition of affiliation to which aggregation of periods was not applicable. In *Laterza, 1980* and *Gravina, 1980* the 'separate claims'-phrase exerted strong spin. It functioned as the main argument together with *Petroni, 1975*-logic to establish a right to receive the greatest amount of benefit the law of one of the member state involved provided.

Negative spin

Testa, 1980 was an interesting case from the perspective of 'coordination' spinning the Court's decision. In that judgment harmonization- rather than coordination-logic provided the spin for the Court to sanction a job seeker returning late to the state sponsoring his unemployment benefits. Seen from the inverse point of view, it could thus be said that 'simple coordination' negatively exerted spin.

Empty spin

Next, in the disruptive ruling *Pinna, 1986* 'coordination, not harmonization' led the way. However, in spite of what the formula would have indicated – i. e. that article 73(2) simply recorded disparities that existed anyway by reason of mere coordination – the Court ruled that the article was invalid, because it added to the disparities and violated non-discrimination. Hence, *Pinna, 1986* must be regarded as the first clear case of empty spin of 'coordination'. Remember that empty spin occurred for the first time in *broad* interpretation in *De Jong, 1986*, i. e. a little more than one month after *Pinna, 1986* had been handed down. This can be seen as a testimony to the verity of empty spin. In *Paraschi, 1991* the Court's decision that certain events taking place abroad had to be taken into account for the purpose of extending the reference period was heavily influenced by non-discrimination. The idea of 'mere coordination' was stated, but the Court chose to ignore it. Hence, *Paraschi, 1991* can be seen as the second clear case of empty spin in 'coordination'.

More 'un-empty' spin

In *Burchell, 1987* spin was very strong. The *Pinna, 1986*-formula was the only argument the Court advanced to come to the conclusion that article 10(1)(a) Regulation 574/72 could not lawfully be applied in the context of the case. In *Borowitz, 1988* 'coordination' was again instrumental for the Court to allow an integrated approach to the calculation pursuant to article 46(1) Regulation 1408/71 including periods of insurance recognized as such by a German-Polish convention. In *Lenoir, 1988* 'coordination, not harmonization' again spun the Court's decision. It legitimized the finding that article 77 Regulation 1408/71 was in accordance with article 51 Treaty and, implicitly, that France's residence requirement for the family benefits at issue was lawful. In *Jordan, 1989* the reference to 'coordination' in *Pinna, 1986* catalyzed the decision to enable the member states to determine the point in time from which an amendment to a benefit would apply and thus to influence which pensions had to be recalculated. In *Rönfeldt, 1991* the idea of coordination spurred the Court's decision towards acceptance of the different age limits for retirement existing in the member states. Arguably though, this was a minor and quite evident point in the judgment. Finally, in *Durighello, 1991* 'mere coordination' led the Court to direct the national authorities to apply national law fully, although the person concerned received a pension on the basis of Regulation 1408/71. The spin of 'coordination' was, however, soft, since *Petroni, 1975*-logic provided most of the momentum needed to arrive at this conclusion.

c) Some conclusions from the period

Three interesting aspects should be mentioned with regard to the period from 1976 to 1991. First, 'coordination' grew from two passages firmly rooted in two origins, namely 'sole coordination' stemming from *Keller, 1971*, and 'separate claims' from *Colditz, 1967* and *De Moor, 1967*, into a more abstract idea of

which the root in case-law was no longer evident. *Pinna, 1986* certainly played a key role in this regard juxtaposing 'coordination' and 'harmonization'. The judgment which was disruptive also in other respects, namely by invalidating article 73(2) Regulation 1408/71, dissociated 'coordination' from its origins and made it less context-dependent. The following judgments then relied more on this abstract idea. Some of them, in particular *Borowitz, 1988*, cited a seemingly random collection of judgments, or no source at all, namely *Cabras, 1990* and *Newton, 1991*. Again others, namely *Jordan, 1989* and *Rönfeldt, 1991*, simply referred to *Pinna, 1986*. *Paraschi, 1991* in turn referred to just the latest judgments. *Durighello, 1991* referred to a judgment in which 'coordination' was relevant in a similar context.

Second, the function of the idea of coordination changed. It turned from a reason to rule in favour of migrant workers into an excuse for some disadvantages they suffered. This evolution was not entirely linear, but it was definitely there. The first judgment in this new twist of 'coordination' was *Brunori, 1979*. *Pinna, 1986* was also a key judgment in this regard, with the Court ruling in favour of migrant workers *despite* 'mere coordination'. *Pinna, 1986* marked the turning point. After *Pinna, 1986*, in five out of nine judgments the idea of 'coordination' had a detrimental effect on migrant workers, namely *Lenoir, 1988*, *Jordan, 1989*, *Cabras, 1990*, *Rönfeldt, 1991*, and *Newton, 1991*, with *Cabras, 1990* being the most illustrative case. In *Cabras, 1990*, like in the early social security judgments such as *Keller, 1971* and *Mancuso, 1973*, the Court underpinned at the very end of the judgment the conclusion it had reached by the idea of 'mere coordination'. Yet the idea in *Cabras, 1990* functioned in a way that was diametrically opposed to the way the same idea had worked in *Keller, 1971* and *Mancuso, 1973*. In *Cabras, 1990* the reference to 'mere coordination' served to explain why migrant workers had to accept that they were put in a less advantageous position vis-à-vis purely domestic workers, while in *Keller, 1971* and *Mancuso, 1973* it had served to explain the inverse, viz. why migrant workers deserved to be treated more favourably. In *Newton, 1991* the evolution was also relatively patent. 'Mere coordination' was used as a ground to prop up the British system which would have been put in jeopardy had the Court ruled in favour of the migrant worker concerned.[106] After *Pinna, 1986* only *Burchell, 1987*; *Borowitz, 1988*; and *Durighello, 1991* came down in favour of migrant workers. In *Paraschi, 1991* the Court, moreover, ruled to the advantage of migrant workers, but did so in spite of coordination like in *Pinna, 1986*. The evolution of 'mere coordination' from a force working for the good of migrant workers into a power they had to struggle with seems almost ironic in view of the Commission having floated the idea in *Baccini, 1982* that one of three principles governing the Community's social security law was that migrant workers were

106 Interestingly, the Court had already reserved the stability of the national system in *Frilli, 1972* (para. 21). Yet *Frilli, 1972* was not discussed under this aspect in *Newton, 1991*. Advocate General Darmon mentioned the judgment, but only to explain that the difference between social security and social assistance was not clear-cut (para. 11).

not to suffer a disadvantage by reason of the national social security schemes being merely coordinated and not yet harmonized (see footnote 101 above). Apart from that, the evolution was probably related, to a certain extent, to the shift from Regulation 3 which had only coordinated national schemes to Regulation 1408/71 which had harmonized some limited aspects of them. To be sure though, the new use of 'mere coordination' contra migrant workers was clearly not limited to domains which Regulation 1408/71 had harmonised. On a different note, it can be remarked that the evolution, interestingly, developed largely in parallel with the abstraction of 'coordination' into an idea. Perhaps 'coordination' was abstracted to mask the functional change.

Third, though one should be prudent with simple conclusions as to the power of 'coordination', spin definitely occurred on a very regular basis with 'coordination'. The idea of 'mere coordination' clearly spun a large number of the Court's decision. At the same time 'empty spin' emerged. Apart from the debatable precursor in *Mura, 1977*, empty spin became very clear in *Pinna, 1986* and *Paraschi, 1991*. The occurrence therefore largely coincided with the first appearance of empty spin in broad interpretation in *De Jong, 1986*. Lastly, it is also noteworthy that 'coordination' in *Testa, 1980* again shifted its form in terms of spin and occurred in a new variant: negative spin.

3 During the age of Maastricht

a) Occurrence of 'coordinated' – the beginning of the age

At the beginning of the age of Maastricht the idea of 'coordination' figured prominently in a series of judgments. *Levatino, 1993* was the first in it.[107] 'Coordination' occurred in two parts of the judgment. Asked to clarify whether article 51(1) or (2) Regulation 1408/71 was to be applied to adjust a benefit that was granted in Belgium to bring the combined pensions paid in Belgium and Italy up to the Belgian minimum income, the Court answered with *Rönfeldt, 1991* that mere coordination was the aim of Regulation 1408/71; the rights granted to migrant workers were not to lead to the disruption of a national system as held in *Frilli, 1972* (paras 30-1). That was not the case, however, since article 51(2) was applicable for the purposes of the Belgian benefit whenever the pension paid in Italy was increased. Consequently, the Belgian authorities always had to recalculate the benefit that guaranteed a minimum income as soon as a pension paid abroad was increased. As a result, migrant workers were not treated more

107 Strictly speaking, *Levatino*, *1993* was not the first judgment to mention coordination in the age of Maastricht. In *Commission v. Belgium (insurance taxation)*, *1992*, para. 19, and in *Bachmann*, *1992*, para. 26, the Court in essence stated that 'coordinating or harmonising measures' would have been necessary to match contributions and the advantages they yielded in terms of taxation. However, the Court did not use coordination as a substantive argument. Moreover, in *Sindesmos Melon*, *1992*, para. 32, like in *Karella*, *1991*, the Court referred to the aim of coordination of Directive 77/91 on shareholder protection, without turning it into an argument though.

favourably than purely domestic workers. If that had been the case, in any event, it would have been the result of mere coordination of national schemes as held in *Mura, 1977* (para. 49 of *Levatino, 1993*). Despite this last passage, 'mere coordination' in combination with the need to prevent the disruption of a national scheme ended up working against migrant workers.

Next, in *Lepore, 1993* the Court answered the third – and least contentious – question by reference to 'mere coordination' (para. 34). In the light of that, Community rules did not contain any provision which precluded national authorities from applying the same method of calculation for notional periods as for the previously awarded invalidity pension – a result that proved disadvantageous for the migrant worker.[108]

In *McLachlan, 1994* 'coordination' loomed large. According to the Court, the 'separate claims'-phrase in *Rossi, 1979* (para. 29) justified that periods completed abroad were only taken into account to determine the acquisition and the rate of a benefit, but not for its calculation, even when differences in the age limit for retirement existed between national schemes. Eventual disadvantages for migrant workers were inherent in the system which relied on separate claims against separate institutions. As such they were the consequence of mere coordination and the lack of a common system (paras 37-8).

In *Van Munster, 1994* the Court shortened the passage used in *Rönfeldt, 1991*, leaving out the word 'coordination', but conveying the same message (para. 18). The Court used this passage to explain why Belgium's application of a household rate to pensions, while the Netherlands had abolished that system, was in accordance with article 51. The Court then also juxtaposed the idea of 'mere coordination' with *Petroni, 1975*-logic (para. 27), and adduced the aim of creating a unified pension career for the migrant worker based on coordination, rather than harmonisation (para. 29). Then the Court ruled that the Belgian authorities would have been obliged to take into account the fact that the overall amount of pension the married couple received had not changed by reason of the award in the Netherlands of a separate pension to the spouse who had never worked. While the judgment was, obviously, strongly beneficial for migrant workers, this was the case more *despite* 'mere coordination', than owing to it; in essence, it was *Petroni, 1975*-logic that proved advantageous for migrant workers.[109]

108 Two further decisions need to be mentioned here. In *Baglieri, 1993* the Court rejected the claim that compulsory insurance affiliation in the host state necessarily had to result in the right of a national returning to her home state to be affiliated to a voluntary insurance scheme in the home state. According to the Court, such a right presupposed the harmonization of national schemes, which had not yet taken place (para. 17). In *Grana-Novoa, 1993*, para. 22, the Court en passant referred to the coordination of national social security schemes by Regulation 1408/71, but did not attribute any significance to the term.

109 For the sake of completeness, some further cases need to be mentioned. In *Haim, 1994*, para. 3, the Court in passing used the notion of coordination. It stated that the coordination of provisions concerning the activities of dental practitioners was ensured by Directive 78/687. The same passage was included in *Tawil-Albertini, 1994*, para. 3. In this judgment, the Court also used the term coordination incidentally in para. 12. Moreover, in *Commission v. Spain (doctors), 1994* the Court repeatedly referred to coordination with regard to the 'coordination directive' 75/363 concerning doctors. Yet

Coordination and derived rights

The Court put the derived rights approach into perspective in *Cabanis-Issarte, 1996*.[110] Non-discrimination prevented the Netherlands from applying a different rate for the spouse of a migrant worker to determine the amount payable to buy in certain insurance periods. In that context, the Court confirmed that the sole aim of the provisions on unemployment benefits in articles 67 to 70 Regulation 1408/71 was the coordination of the national schemes relating to unemployment benefits of workers (para. 23). This meant that the spouse of a migrant worker could not lawfully rely on those articles. Yet, the emphasis in this passage was clearly on opposing workers to family members, rather than on mere coordination in contrast to harmonization (The part restricting that approach for other benefits did not rely on 'coordination'.)[111]

Six decisions in 1997

In the year 1997, the Court had recourse to 'coordination' in six decisions. In *De Jaeck, 1997* the Court granted the member states the power to define both the terms 'employed/self-employed person' and 'person who is employed/self-employed', with the latter being used only in title II of Regulation 1408/71. The Court justified this by the 'coordination, not harmonization'-formula stemming from *Pinna, 1986* (paras 18 and 28) – which ultimately worked to the detriment of at least the migrant worker concerned. In *Hervein I, 1997* the *Pinna, 1986*-formula was used in an identical way and for an identical purpose (para. 16). Next, in *Stöber and Pereira, 1997*, after having declared the definition of 'self-employed person' in the annex relevant for German law, the Court stated that Germany was entitled to restrict a benefit to those who belonged to a solidarity system of old age insurance, since Regulation 1408/71 merely coordinated national laws (para. 36). Despite that, Germany could not lawfully rely on the resi-

coordination was never substantively used as an argument, not even in para. 13. In *Vougioukas*, *1995* the Court in a similar way used the word 'coordination' a number of times, as in para. 19: 'Article 4(4) of Regulation No 1408/71 excludes, in general terms, special schemes for civil servants and persons treated as such from the coordination of social security schemes under that regulation.' (See also paras. 13, 26, 31, 32, 33, 34, 35, and 36.) Moreover, *Drake*, *1994*, in para. 12, fleetingly referred to the primary purpose of Regulation 1408/71 and Regulation 574/72 of coordinating the various national laws.

110 In the year 1995, the Court referred to coordination in a number of judgments without however attributing the concept any argumentative significance. In *Leclerc-Siplec*, *1995* 'the fields coordinated' by the television without frontiers Directive 89/552 were mentioned twice (paras 30 and 32); in *Moscato*, *1995*, para. 28, the Court referred to the 'Community coordination of social security schemes in the Member States'; and in *Gebhard*, *1995*, para. 36, the Court again referred to the duty of the Council to issue directives coordinating national provisions concerning self-employed activities.

111 In *Pafitis*, *1996*, para. 38, and *Siemens*, *1996*, para. 13, the Court again employed the term coordination with regard to Directive 77/91 on shareholder protection, but without attributing any substance to it. The same is valid for coordination in *Tomberger*, *1996*, para. 17, with regard to Directive 78/660 on annual accounts; and for coordination as used several times in *Commission v. Belgium (TV broadcasting)*, *1996* with regard to Directive 89/552 on television without frontiers. In *Taflan-Met*, *1996* the Court mentioned the term 'coordinate' a number of times with regard to Decision 3/80 and Regulation 1408/71, but again no substance was behind the use of the term (paras 3, 5, 26, and 27).

dence of the children of a migrant self-employed person, because that would mean to discriminate that person. While 'mere coordination' would have negatively affected migrant workers, non-discrimination ensured that the outcome was to their benefit. In *Merino García, 1997* the Court was seized with the same German legislation. However, the Court left out the solidarity-consideration and 'coordination' stated in that context in *Stöber and Pereira, 1997*. Instead, 'coordination, not harmonization' (*Pinna, 1986*) was put forward to justify the compatibility of the solution in the annex for Germany with the Treaty provisions (para. 27). In *Cirotti, 1997* the Court was seized with a situation akin to that at issue in *Levatino, 1993*. However, this time a straightforward Belgian pension was at issue, to which article 51(1) rather than (2) Regulation 1408/71 had to be applied. Any possible advantage for migrant workers was justified by a lack of comparability with non-migrant workers and the idea of 'mere coordination' combined with the lack of a common system as held in *Mura, 1977* (para. 33). Finally, in *Snares, 1997* the Court justified the newly introduced article 10a Regulation 1408/71, which exempted certain benefits from the waiver of residence requirements, by reference to 'coordination'. That a benefit, such as the British benefit at issue, could be made subject to a residence requirement was the consequence of a lack of harmonization (para. 45) as was the resulting reduction in means for the migrant worker concerned (para. 51). Thus, the absence of harmonization, i. e. the negative equivalent of 'coordination', in essence worked at least against the migrant worker concerned.[112]

112 The Court in *Snares*, *1997* in addition mentioned the term 'coordination' several times in the judgment. However, in these parts the term was used inconspicuously in a descriptive way, like to describe 'the system of coordination established by the said article 10a' Regulation 1408/71 (para. 27; similarly in paras 29, 32, 33, 37, 40, 46, and 49). The same is valid for *Partridge*, *1998*, which dealt with the same British benefit, but included transitional issues (see paras 28, 30, 33, and 34). In a similar vein, in *France v. Commission (pension funds)*, *1997*, para. 24, the Court held that the Council was exclusively competent to issue directives for the coordination of the member states' law concerning self-employed activities. Coordination, hence, was again inconspicuous. It was so, too, in: *Germany v. Parliament and Council (deposit guarantee)*, *1997* in which the Court mentioned coordination several times with regard to Directive 94/19 on deposit guarantee schemes; *Futura*, *1997*, paras 34 and 35, with regard to article 54(3)(g) Treaty and potential coordinating rules for annual accounts; *Saldanha*, *1997*, para. 23, *Daihatsu*, *1997*, paras 15 and 18, and *Rabobank*, *1997*, paras 19, 22, and 25, with regard to article 54(3)(g) Treaty and the powers of the Council and the directives to coordinate shareholder protection; and *Denuit*, *1997*, para. 33, with regard to the fields coordinated by the television without frontiers Directive 89/552. In some contrast, the Court in *De Agostini*, *1997* mentioned the coordination by this directive in several paragraphs (paras 24, 25, 27, and 32) and, based on the idea that coordination was only partial, found that the member state in which a programme from another member state was retransmitted could lawfully take some measures to protect consumers. In the year 1999, the Court also mentioned coordination in several judgments without attributing the term a proper argumentative dimension. In *Swaddling*, *1999* the coordination rules in article 10a Regulation 1408/71 were mentioned several times (paras 23, 24, and 32). In *Nijhuis*, *1999* Community coordination measures and techniques were mentioned repeatedly (paras 29-32). The same is true of *Sürül*, *1999* with regard to Decision 3/80 under the Ankara Agreement with Turkey (paras 53-55, and 58). In *Romanelli*, *1999*, para. 12, the Court referred to the 'measures taken to coordinate credit institutions' (para. 12) in the context of Directives 77/780 and 89/646 on banks. In *Carbonari*, *1999* the Court interpreted the 'coordination directive' 75/363 on activities of doctors. The Court used the term 'coordination directive' throughout the judgment. However, coordination as a concept did not play a role, even in the Court's statement that the coordination directive introduced some harmonisation (para. 38).

Come-back in 2000

The idea of 'coordination' then disappeared from view for almost three years.[113] It came back in *Movrin, 2000*. In this judgment, the Court qualified a German supplementary allowance as an old age benefit which was exportable. In response to the German argument alleging that the former migrant worker, now pensioner concerned was better off in terms of the amount of sickness insurance contributions he had to pay than non-migrant workers turned pensioners, the Court simply referred to the idea of 'mere coordination' of national schemes which had not been harmonised as ruled in *Keller, 1971* and *Mura, 1977*. Any advantages migrant workers possibly drew were a consequence of the lack of a common system (para. 51). *Movrin, 2000* thus clearly ended up favouring migrant workers. In *Engelbrecht, 2000*, essentially the same constellation as in *Van Munster, 1994* was at issue in almost identical legal circumstances. The Court ruled in the same ways as in *Van Munster, 1994*, making use of the same shortened coordination-passage in the same way (para. 37). The judgment in spite of that passage, but owing to *Petroni, 1975*-logic, again was strongly beneficial for migrant workers.[114]

113 A number of decisions should also be mentioned. In *Kohll*, *1998* the Court in para. 47 only referred to 'several coordinating or harmonising directives' that had been adopted in the context of recognition of professional medical qualifications. That statement served to weaken the argument of public health put forward as a justification, but coordination hardly played an argumentative role in it. On a different note, in *Decker*, *1998* the 'absence of harmonisation' led the Court to reiterate that the member states had the power to determine the conditions of insurance as well as entitlement (para. 23). Yet that did not remove the national provisions relating thereto from the scope of the free movement of goods. In *Decker*, *1998* the Court *inter alia* referred to *Coonan*, *1980*, to underline the passage including the 'absence of harmonization'. Thus the note made above, in footnote 102, equally applies to *Decker*, *1998*. *Terhoeve*, *1999* tied in with *Decker*, *1998* in this regard and expressly so (para. 34). Moreover, in *Terhoeve*, *1999*, the Court referred to coordination ('coordinating' in para. 44), but it seems that this occurred in relation to the power of a member state to coordinate the levying of social security contributions and taxes within its own national legal system. Moreover, the Court in passing referred to coordination in social security in *Kulzer*, *1998*, para. 30, and *Grajera Rodríguez*, *1998*, para. 26. In *Bellone*, *1998*, para. 10, the Court simply mentioned the intention of Directive 86/653 to coordinate national laws on agency contracts. In *Gemeente Arnhem*, *1998*, para. 41, the Court with regard to Directive 92/50 on public service contracts referred to the purpose of coordinating at the Community level the national award procedures, which (the purpose) was to eliminate barriers to the freedom of services and thereby protect the interests of economic operators established in other member states. However, it was the freedom of services upon which the Court built its argument rather than the fact of coordination. The same is true of *University of Cambridge*, *2000*, para. 16, in which the same passage was reiterated.

114 Four more decisions of the year 2000 need to be discussed briefly with regard to coordination. In *Hocsman*, *2000* the Court also referred to 'harmonisation or coordination', if only in an inconspicuous way: 'While that principle [i. e. the principle of recognition stemming from *Vlassopoulou*, *1991*] was indeed applied in cases concerning professions for the practice of which there were no harmonisation or coordination measures in existence at the time, its legal ambit cannot be reduced as a result of the adoption of directives on mutual recognition of diplomas.' (Para. 31.) Later on, the Court in *Tennah-Durez*, *2003* also explained the system put in place for professional qualifications of medical doctors in terms of coordination and harmonisation in a preliminary remark: 'Hence, Community law makes the award of a doctor's diploma by Member States subject to certain specific requirements, in order that the diploma is capable of being recognised automatically and unconditionally in all the Member States. Those requirements entail a degree of harmonisation and coordination at Community level of both basic and specialist medical training (the harmonisation aspect) and of the rules for taking up and pursuing the activities of a doctor in the Member States (the coordination aspect).' (Para. 31) In the answer to the questions, the Court also relied on the idea of harmonisation, namely in order to hold that a member state could not lawfully award a doctor diploma which

Two judgments in 2001

In *Commission v. Germany (artists' contribution), 2001* the Court declared Germany's legislation compatible with the principle that only one legislation was to be applied to one and the same worker. Germany required German undertakings to levy certain contributions on the services provided by artists and journalists, be they established in Germany or abroad. The Court began by the objectives of Regulation 1408/71 and the fact that it established 'only a system of coordination' (para. 22). The Court then went on to validate the German legislation based on other arguments, notably the prohibition for German undertakings to pass on the levy to the artists. The Court in particular sanctioned that the ultimate level of contributions artists and journalists bore could differ, even depending on the system they were insured with. For the Court that was 'inherent in the mechanism of straightforward co-ordination' (para. 29). Thus, in a sense, *Commission v. Germany (artists' contribution), 2001* again was a judgment in which 'coordination' had a disadvantageous effect on migrant workers. In *Ruhr, 2001* the Court confirmed the ruling in *Cabanis-Issarte, 1996*. The main aim of article 67 to 71a Regulation 1408/71 was solely to coordinate unemployment benefits for workers, not for their family members.[115]

Inverse 'mere coordination'

Next, in *Rydergård, 2002* the Court came back to *Testa, 1980* where it had turned around 'mere coordination'. The Court reiterated that article 69 Regulation 1408/71, which regulated the export of unemployment benefits, did not merely coordinate national laws, but set up an 'independent body of rules' which allowed migrant jobseekers to claim benefits independently of national law. That body of rules had to be interpreted uniformly (para. 18). In spite of that, nation-

did not comply with the requirements of Directive 93/16 (in para. 54); and in order to hold that the degree of harmonisation this Directive achieved was not such as to make unnecessary all verification of the training in case of transfer from one institution to another (para. 59). The preliminary remark also justified the rejection of reasoning *per analogiam* with Directive 89/48 and 92/51 (para. 65) and the binding effect of a diploma on the authorities of other member states (para. 75). On a different note, one party in *Vogler, 2000* argued that the Community had the power 'only to coordinate, but not harmonise, the social security systems of the member states' (para. 14). The Court reflected none of that argument in its order rejecting the challenge of the validity of articles 13(1) and 14a(2) Regulation 1408/71. (The mentioning of 'coordinate' in para. 23 was inconspicuous.) In *Luxembourg v. Parliament (lawyer directive), 2000*, para. 32, the Court referred to a situation of 'absence of coordination' which entitled the member states to adopt certain measures. The term coordination, however, did not serve as a basis for an argument.

115 For completeness: In *Khalil, 2001* the Court in passing referred to coordination. The Court ruled that article 51 Treaty had been the right legal basis for the adoption of Regulation 1408/71 and that third country nationals who came directly from a third state to a member state were not entitled to rely on that Regulation. In ruling so, the Court referred to coordination twice. First, article 51 Treaty provided for the technique of coordination to achieve the aim of establishing as complete a freedom as possible, which (the technique) would be ineffective if it applied solely to migrant workers moving within the Community (para. 55). Second, the Court recalled the aim of article 51 Treaty, which was to coordinate national regimes, in order to begin the passage refusing third country nationals who remained in one member state the benefit of Regulation 1408/71 (para. 66). Besides, the Court in *SIAC, 2001*, para. 32, and *HI, 2002*, para. 43, reiterated the passage including the term coordination which had been stated in *Gemeente Arnhem, 1998*. In *Leclere, 2001*, para. 29, the Court en passant mentioned the coordination provisions of Regulation 1408/71.

al law played a certain role, notably, by determining whether a migrant jobseeker had been available for four weeks as article 69(1)(a) required. That solution turned out to the disadvantage of Ms Rydergård, because she had not received unemployment benefits for four straight weeks after she had drawn a benefit available pursuant to Swedish law, because her child had fallen sick.

The 'return' of 'complexity'

After that, in *Hervein II, 2002* the situation at issue in *Hervein I, 1997* returned to the Court, this time for an assessment of the validity under the Treaty of the application of two national legislations at the same time when a person was simultaneously employed in one state while being self-employed in another. The Court repeatedly relied on 'coordination'. It first drew on 'coordination, not harmonisation' in *Pinna, 1986* (para. 50) and deduced from that that Community law did not offer a guarantee that activities pursued in several states were neutral in terms of social security contributions (para. 51). Hence, any resulting disadvantage in comparison to purely domestic workers was acceptable under articles 48 and 52 Treaty, provided in essence that contributions were not paid without any potential return. The Court then reiterated 'mere coordination' which had the consequence that different levels of contributions existed depending on where an activity was pursued (para. 52). From that the Court inferred that the validity of article 14c(b) could only be assessed *in abstracto*. That assessment, essentially, yielded that it could sometimes be more complicated to be subject to two legislations simultaneously. However, in the absence of harmonisation Community law did not guarantee 'neutrality as regards […] complexity' (para. 58), either. The Court concluded that the Council fulfilled its function to establish a working system, in particular it made sure that equality of treatment for migrant workers was ensured, in spite of mere coordination (para. 60). Thus article 14c(b) was valid. But the states concerned had to make sure that contributions paid resulted in additional social security cover and that the benefit of previous conventions were safeguarded. In essence, the Court relied on 'coordination' several times to justify a solution, which was at least cumbersome for migrant workers.[116]

The two decisions relying on 'coordination' that followed were less spectacular. The Court began *Pasquini, 2003* with 'mere coordination' of national laws, referring somewhat inexplicably to *Lenoir, 1988* (para. 52). As a consequence, national law governed the statute of limitation applicable to claims seeking repayment of pensions paid in excess of what had been due. Ultimately though, the procedural principles of equivalence and effectiveness came to the aid of the migrant worker by, in essence, limiting the period of recovery of sums paid in ex-

116 The Court in a further decision used the term coordination, while not attributing any significant substance to it, namely in *Axa Royale, 2002*, para. 20. The Court pointed at the aim of the third life assurance Directive 92/96 of coordinating minimum provisions.

cess to one year.[117] After that came *Adanez-Vega, 2004*. In that judgment the Court decided a minor point by reference to 'coordination'. Owing to the idea of mere coordination, it was up to national law to determine the concept of 'employment' in article 71(1) Regulation 1408/71 (para. 33).[118]

Advance statement of case-law

Finally, two judgments made use of the idea of coordination in the year 2006. First, *Piatkowski, 2006* was the first clear case in which the idea of 'mere coordination' was part of an advance statement of case-law. The occurrence of that phenomenon by and large corresponds to the advance statements of case-law that emerged in broad interpretation, notably first in *Kurz, 2002* and *Ninni-Orasche, 2003*. The Court in *Piatkowski, 2006* reiterated as part of a preliminary statement that Regulation 1408/71 put in place merely a system of coordination as held in *Hervein II, 2002* (para. 20). The decision itself was then only loosely connected to that and other ideas advanced preliminarily. The Court later on in the judgment concluded that the Netherlands had the power to subject a certain amount paid to meet a debt to social security contributions as income of the person concerned. The second case, *Nikula, 2006*, did not involve an advance statement. Mere coordination with reference to *Piatkowski, 2006* (para. 20 of *Nikula, 2006*) set the tone for the judgment, while it was not directly linked to the first point at issue which was rather decided by articles 27 and 33(1) Regulation 1408/71. Those articles determined that the state of residence was competent to levy contributions from resident pensioners and to grant them benefits in kind. However, 'in the absence of harmonisation' (para. 24) the member state concerned also had the power, within certain confines, to determine the income subject to contributions.[119]

117 In *BIAO, 2003*, paras 69 and 73, the Court in the context of Directive 78/660 on annual accounts referred in passing to the coordination of national provisions and valuation methods.

118 Several judgments in the years 2004 and 2005 referred to coordination, while not relying on it as a substantive concept. In *Paul, 2004*, para. 43, the Court in the context of the banking directives 77/780, 89/299, and 89/646 and article 57(2) Treaty stated as follows: 'However, the coordination of the national rules on the liability of national authorities in respect of depositors in the event of defective supervision does not appear to be necessary to secure the results described in the preceding paragraph.' Although it may seem so from the pure wording of that passage, the Court did not argue on the basis of coordination. This is obvious from the preceding paragraph in the judgment. In *Bacardi, 2004*, para. 25, the Court again mentioned the 'fields coordinated' by the television without frontier directive 89/552 as in *Leclerc-Siplec, 1995*. In *Skalka, 2004*, para. 31, again the coordinating provisions laid down in article 10a Regulation 1408/71 were mentioned like in *Swaddling, 1999*. In *Epikouriko Kefalaio, 2004*, paras 24 and 25, the Court mentioned the coordinating rules and the coordination of national provisions in the context of Directive 73/239 and 79/267 on direct insurance and life assurance. In *Salgado, 2005*, para. 29, the Court mentioned the 'Community coordination of social security schemes'. In *Commission v. Austria (dentists), 2005* the Court again repeatedly used the term 'coordination directive' for Directive 78/687 on dental practitioners.

119 In *Honyvem, 2006* relating to Directive 86/653 on commercial agents the Court mentioned the aim of the Directive of coordinating the laws of the member states as regarded agency contracts (para. 18), as in *Bellone, 1998*. In *Centrosteel, 2000* the Court had stated the same passage, except that it said that the Directive intended to *harmonise* the laws of the Member States (para. 13). In the French versions of the judgments the Court consistently used the word 'harmoniser'. In any case the Court used the term(s) in an inconspicuous way. In *Commission v. France (performing artists), 2006*, para. 48, the Court again mentioned en passant the coordination of social security. In *Kersbergen, 2006*,

b) Spin – and advance statement of case-law

When did 'coordination' spin the decision? Before addressing this question, a remark on the advance statement of case-law is in order. It is noteworthy that the advance statement of case-law observed in broad interpretation also came in use for 'mere coordination' late in the age of Maastricht, notably in *Piatkowski, 2006*. This judgment, however, remained the only occurrence of an advance statement of case-law within 'coordination'. Obviously, the advance statement of case-law neutralised any spin 'coordination' could have had in *Piatkowski, 2006*.

Apart from that, though, spin regularly occurred with 'mere coordination'. In *Levatino, 1993* the idea of 'the sole purpose being to secure coordination' when it first occurred in the judgment was combined with the need to avoid disruption of the national scheme. This led to the conclusion that the Belgian benefit guaranteeing a minimum income had to be recalculated whenever the pension paid abroad had been adjusted. Spin was thus strong, in particular since it enabled an interpretation which, judged by the wording of article 51 Regulation 1408/71, was quite counter-intuitive. In *Lepore, 1993* 'mere coordination' spun the decision in the – minor – question of how to calculate remuneration for notional periods under national law. In *McLachlan, 1994* the 'separate claims'-phrase which had re-emerged provided spin to justify why periods completed abroad were not factored into the calculation of a benefit. The second reiteration of the phrase together with 'mere coordination', however, merely explained the resulting disadvantages *ex post*. However, in aggregate, although 'coordination' loomed large in this judgment, spin was soft at best, because the real argument put forward by Mr McLachlan was one of consistency between unemployment and old age benefits. That argument, in a way, was eschewed by the Court pointing out the obvious on the basis of 'coordination'. In *Van Munster, 1994* the Court repeatedly relied on 'mere coordination'. While in the first question spin could not be ascertained, in the second question 'mere coordination' could have created some spin. Yet the 'mere coordination'-passage was preceded by the negative qualifier '[w]hile it is true…', which *ab initio* cancelled any spin possible. *Petroni, 1975*-logic followed to become the essential reason why national authorities were obliged to interpret national law in view of the implications of another member state's law with regard to household pensions. The same is true for *Engelbrecht, 2000*. In *De Jaeck, 1997* the *Pinna, 1986*-formula framed the Court's consideration. It was mentioned both at the beginning and towards the middle of the judgment. The formula spun the Court's decision in the direction of granting member states the power to define the terms at issue, namely employed/self-employed persons. In *Hervein I, 1997*, the formula was used only once, but for an identical purpose and with the same spin.

para. 23, again the Court simply referred to the coordinating regime established by article 10a Regulation 1408/71.

The return of empty spin

Then came *Stöber and Pereira, 1997* and with it empty spin returned. 'Mere coordination' seemed to spin the Court's decision towards validating Germany's approach relying on the residence of a migrant self-employed person's children. However, non-discrimination intervened and cancelled out the momentum 'mere coordination' had provided. The spin given did not, therefore, prevail in the end. In *Merino García, 1997*, in the same legal context as in *Stöber and Pereira, 1997*, 'coordination, not harmonization' provided the momentum to clear the annex regarding Germany of any suspicion of incompatibility with the Treaty. However, the element of empty spin present in *Stöber and Pereira, 1997* did not occur in *Merino García, 1997*. I took until 2002 for the next case of empty spin to occur with *Rydergård, 2002*, with the inverse of 'mere coordination' nota bene. Although article 69 Regulation 1408/71 had not merely coordinated national laws as to unemployment benefits – an idea that exerted spin – national law determined when a jobseeker had been available for four weeks within the meaning of article 69(1)(a). Next, in *Pasquini, 2003* 'mere coordination' initially spun the decision towards awarding the power to regulate the statute of limitation applicable to the recovery of sums overpaid to the member states. That spin was cancelled though by the principles of equivalence and effectiveness which had the effect of fixing the statute of limitation to one year. Hence, it was just an element of empty spin that occurred in *Pasquini, 2003*.

Regular spin

In the meanwhile regular spin continued to occur. In *Snares, 1997* the 'absence of harmonization', when it was mentioned for the first time, was part of a whole number of considerations that led the Court to the decision to sanction the exemption from the waiver of residence clauses in article 10a and the British residence requirement. Hence, spin was very mild at best. In *Commission v. Germany (artists' contribution), 2001* the idea of mere coordination then again clearly spun the Court's decision. The Court put 'coordination' forward right at the beginning of the judgment and thus set the tone to validate Germany's contributions levied on artists and journalists. Moreover, 'coordination' also served to validate the differing levels of contributions that resulted.

Hervein II, 2002 certainly was the pinnacle in terms of spin by 'mere coordination'. The Court repeatedly referred to the idea of coordination to justify the simultaneous application of two national legislations to one and the same person, because he was at the same time employed in one state and self-employed in another. More specifically, 'mere coordination' spun the decision towards accepting that no neutrality as to contributions and their levels could exist when activities were pursued in two states at the same time. It also spurred the decision on to accept a lack of neutrality in terms of complexity. 'Coordination' thus drove the entire decision.

In *Adanez-Vega, 2004* 'mere coordination' spun a minor part of the decision. It motivated the Court to leave it to national law to determine the concept of

'employment' in article 71(1) Regulation 1408/71. Finally, in *Nikula, 2006* 'mere coordination' and the 'absence of harmonisation' provided some spin, at least for the Court to grant Finland the power to determine the income of resident pensioners relevant for social security contributions.

c) Some conclusions from the period

The idea of 'mere coordination' was applied in a wide variety of cases and circumstances during the age of Maastricht. The abstraction of the idea we noted in the previous period was confirmed in the age of Maastricht. A single root in case-law has no longer been discernible. The Court referred to the latest judgment applying the idea of 'mere coordination' or to the last judgment deploying the idea in a similar legal context.

We also note that the turn 'mere coordination' had taken during the preceding period was confirmed in the age of Maastricht. 'Mere coordination' in the majority of cases worked to the detriment of migrant workers. *Levatino, 1993*, *Lepore, 1993*, and *McLachlan, 1994* were clear in this regard; *Cabanis-Issarte, 1996* and *De Jaeck, 1997* less obviously so, but still migrant workers did not emerge unscathed from those judgments. In *Stöber and Pereira, 1997* 'coordination' seemed to work to the detriment of migrant workers, but the resulting judgment was largely advantageous *qua* non-discrimination. *Merino García, 1997* is difficult to classify in this regard, while in *Snares, 1997* 'coordination' was clearly detrimental to workers. In *Pasquini, 2003* 'coordination' functioned disadvantageously, but equivalence and effectiveness cancelled the effect. The detrimental role of 'coordination' was rather clear in *Hervein II, 2002*. In *Van Munster, 1994* and the related *Engelbrecht, 2000* 'coordination' seemed to work to the detriment of migrant workers, but *Petroni, 1975*-logic intervened and gave the judgments the strongly advantageous twist for migrant workers. In some contrast, the inverse was the case in *Rydergård, 2002*: the decision worked to the disadvantage of migrant workers although 'no mere coordination', viz. harmonisation, had been achieved by article 69 Regulation 1408/71. Thus, *Rydergård, 2002* with some imagination could be read inversely, so that 'mere coordination' would have advantaged migrant workers. Despite that, the initial function which 'mere coordination' had of supporting migrant workers by securing them an advantage over purely domestic workers – a function it had fulfilled most prominently in the earliest case-law – almost vanished. It was only apparent in two judgments, namely *Cirotti, 1997* and *Movrin, 2000*.[120] Hence, in the vast majority of cases in which the Court applied the idea of 'mere coordination' that idea had a negative effect on migrant workers.

Again, the question whether 'mere coordination' favours or disfavours migrant workers needs to be distinguished from the power, the spin of the interpretive formula. 'Mere coordination' continued to spin the Court's decisions regu-

120 Two judgments can be considered to be neutral with regard to the effect of 'coordination' on migrant workers, namely *Adanez-Vega, 2004* and *Piatkowski, 2006*.

larly during the 'age of Maastricht' – sometimes even strongly – while empty spin remained rather rare. Moreover, a clear advance statement of case-law, which almost by nature neutralizes any possible spin, occurred only in one case for 'mere coordination'. Beyond those rather general conclusions, the above examination offers further details.

4 The present

a) Occurrence of 'coordinated' – frequent use

The present again witnessed regular use of the idea of mere coordination. The first judgment in the present in which 'coordination' played a role was *Derouin, 2008*. Seized with the question whether the competent state pursuant to Regulation 1408/71 was free or obliged to levy certain contributions on income gained abroad, the Court *inter alia* answered with 'mere coordination' (paras 20 and 26). As a consequence, the member state concerned was free to determine the tax base relevant for such contributions and thus to include or forgo the income concerned, provided that the insured person enjoyed all of the benefits under that state's legislation. The member state enjoyed that freedom to the detriment of the migrant worker concerned.[121] In contrast, *Chuck, 2008* was largely beneficial for migrant workers. The Court began with strong 'mere coordination'-logic (paras 26-7), but counteracted it with broad interpretation on the 'greatest possible freedom'. Based on the objectives of article 51 Treaty, the

121 In the context of the posted workers Directive 96/71 several judgments referred to coordination. After the Court had referred to coordination already in *Arblade*, *1999* – the 'Community directives providing for coordination or a minimum degree of harmonisation in respect of the information necessary for the protection of workers' (para. 67) – the Court in *Commission v. Germany (posted workers)*, *2007* stated: 'Directive 96/71 seeks to coordinate the laws of the Member States by establishing a list of national rules that a member state must apply […].' (Para. 17) In *Laval*, *2007* the Court held: 'It follows from recital 13 to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there.' (Para. 59) The Court then went on to state that nonetheless the material content of those rules was not harmonised and could be freely determined by the member states (para. 60). This has been the only situation in the context of Directive 96/71 in which the Court actually used coordination to some limited extent as an argument rather than mentioning it as a mere fact without attaching any consequences to it. In *Commission v. Luxembourg (posted workers)*, *2008* the Court in a preliminary observation in para. 24 reiterated para. 59 of *Laval*, *2007*, when assessing Luxembourg's public policy provisions. However, that reference to coordination was of little significance. Rather, the reasoning based on public policy and broad interpretation drove the Court's considerations. In *Santos Palhota*, *2010*, para. 26, the Court again in passing cited coordination: 'Directive 96/71 seeks to coordinate the substantive national rules on the terms and conditions of employment of posted workers, independently of the ancillary administrative rules designed to enable compliance with those terms and conditions to be monitored.' From that the Court concluded that the member states were free to lay down those latter rules, provided they complied with the Treaty. On a different note, the Court also mentioned coordination en passant in a few other judgments in 2007. In *El Youssfi*, *2007*, para. 39, the Court mentioned the coordination of social security systems; in *Hendrix*, *2007*, the coordinating provision of article 10a Regulation 1408/71 (para. 38) and 'a coordinating regulation such as Regulation 1408/71' (para. 51). In *Commission v. Ireland (An Post)*, *2007*, para. 27, finally, the Court rehearsed the passage from *Gemeente Arnhem*, *1998*, including 'coordinating'.

Court found that residence outside the territory of the Union did not prevent aggregation of insurance periods completed within the Union pursuant to Regulation 1408/71. In *Baesen, 2010* the Court applied 'mere coordination' in what had by then become the standard way: It reiterated 'mere coordination' to lead up to the finding that national law determined who was a 'civil servant' for the purpose of article 13(2)(d) Regulation 1408/71 (paras 22 and 25). At least for the migrant worker concerned, this finding constituted a disadvantage.[122]

Absence of harmonisation as a proxy

The Court in *Klöppel, 2008* referred to the 'absence of harmonisation' in social security and inferred from that the power of the member states to determine the conditions of social security benefits, subject to compliance with the Treaty (para. 16). In this context,[123] 'absence of harmonisation' stood in for 'mere coordination' and fulfilled the same role. However, the Court resorted to non-discrimination in article 3(1) Regulation 1408/71 to make Austria include periods during which a partner had drawn a childcare allowance abroad for the purpose of an allowance in Austria. Hence, despite 'coordination' in the form of 'no harmonisation', a result in favour of migrant workers was reached. In *Elchinov, 2010* the Court again resorted to 'absence of harmonisation' as a proxy for 'mere coordination', like in *Klöppel, 2008*, this time in the context of article 22 Regulation 1408/71 (para. 57). 'Mere coordination' in this case served the Court to hand on the task to the national court to determine whether a specific treatment was listed pursuant to national legislation and thus covered.

'Coordination' v. free movement

The Court in *Petersen, 2008* rehearsed 'mere coordination' (para. 41) after having qualified the Austrian benefit at issue as an unemployment benefit. 'Mere coordination' was then juxtaposed with *Petroni, 1975*-logic. From that logic the Court concluded that the compatibility of the Austrian legislation with the free movement of workers had to be examined. That examination yielded that Austria's residence requirement was not in accordance with the free movement of workers. Obviously, that result was to the advantage of migrant workers, though it was so *despite* coordination rather than owing to it. In *Leyman, 2009* the Court applied almost the same approach. After having found that Belgium's way of calculating an invalidity benefit as per the end of a one-year period of incapacity complied technically with article 40 Regulation 1408/71, the Court examined the free movement of workers. That examination began with the shortened version of 'mere coordination' based on *Rönfeldt, 1991* and *Van Munster,*

122 The Court mentioned coordination in some other decisions, too, though without attributing any significance to the term. In *Commission v. Spain (hospital pharmacists), 2008*, para. 42, the Court mentioned coordination in the context of article 47(3) Treaty and Directive 89/48 on diploma recognition. In *Bosmann, 2008*, para. 30, the Court referred to the coordination of national social security legislations. In *Commission v. Spain, 2008*, para. 23, the Court mentioned coordination with regard to Directive 77/91 on shareholder protection, like in *Siemens, 1996*.

123 See below the note in footnote 127.

1994 (para. 40) and *Petroni, 1975*-logic immediately followed. That logic was disregarded in that Belgian law had the effect that the person concerned had paid contributions for a year, but failed to receive any return. The resulting disadvantage was contrary to the freedom of workers, although no guarantee existed for a move to another state to be neutral in terms of social security. Thus, *Petroni, 1975*-logic again intervened in favour of the migrant worker, although 'mere coordination' had suggested the contrary.[124]

No guarantee of neutrality

In *Von Chamier-Glisczinski, 2009* the Court also relied on 'mere coordination' (para. 84). It served to put into perspective the less favourable treatment the Union citizen concerned suffered, because sickness insurance pursuant to German legislation and in accordance with Regulation 1408/71 did not cover the care allowance in kind provided in Austria. That disadvantage was the consequence of 'mere coordination'. A guarantee that a move to another state would be neutral in terms of social security did not exist (para. 85). Hence, article 18 Treaty did not render the relevant German legislation invalid, to the obvious distress of migrant workers. In quite a similar way the Court in *Van Delft, 2010* came back to 'mere coordination' (para. 99) combined with the no neutrality-guarantee. Again that approach held out against the challenges put forward by the migrant pensioners on the basis of Union citizenship. They, in particular, had to accept that a change in Dutch legislation had the effect of entitling them, as pensioners receiving a pension in the Netherlands, to draw benefits in the host state where they resided, while the voluntary Dutch sickness insurance contracts they had concluded under the old Dutch scheme were *eo ipso* terminated. The only condition was that the new insurance contracts that all pensioners had to conclude in that context were not less advantageous for them than for pensioners residing in the Netherlands.

'Coordination' under medical services

The Court in *Commission v. Spain (Chollet), 2010* used 'mere coordination' again together with 'no neutrality' to distinguish the case of unplanned hospital treatment in the host state from the *Vanbraekel, 2001*-constellation of planned hospital treatment abroad. Interestingly, the Court applied 'mere coordination'-logic within the context of the freedom of medical services which was the only provision at issue, while article 22 Regulation 1408/71 was not directly involved.

124 In *Eschig, 2009*, the Court dealt with Directive 87/344 on the coordination of legal expenses insurance. In the context of a contractual restriction to choose the lawyer representing the insured in proceeding involving group claims the Court added that the Directive did 'not seek to completely harmonise' the national rules on legal expenses insurance, but that the member states remained free to determine the applicable rules, while respecting Community law (paras 65-6). However, a further consequence was not drawn from that. In *Semen, 2009*, para. 14, the Court again stated simply that Directive 86/653 sought to coordinate the laws of the member states on agency contracts, like in *Honyvem, 2006*. In *Rüffler, 2009*, moreover, the Court mentioned the 'coordination of social security schemes' (para. 79) and 'rules of secondary legislation coordinating the social security systems' (para. 81). However, coordination was inconsequential in those passages.

The Court relied on 'mere coordination' (para. 61) to explain why the 'home' state did not have to provide supplementary cover to help the service receiver meet the cost encountered by reason of unplanned medical treatment in the host state where the sickness insurance scheme provided less coverage than in the 'home state'. Again the judgment worked to the disadvantage of migrant workers.[125]

Advance statement

The Court again referred to 'mere coordination' in *Tomaszewska, 2011*. The reference was part of an advance statement of practice (para. 25), after which the Court found that Poland was required to take account of periods of insurance completed abroad when determining the maximum number of periods of non-contribution allowed to count towards the thirty years of contribution needed to acquire a pension in Poland.[126] Next, in *Da Silva Martins, 2011* 'mere coordination' (para. 71) and the no neutrality-clause joined the broad interpretation of the 'greatest possible freedom', again in an advance statement of case-law. From this the Court concluded that the German care allowance was to be exportable in the circumstances of the case. That decision was very much informed by the free movement of workers and the idea that contributions paid were not to remain without return. Both judgments, *Tomaszewska, 2011* and *Da Silva Martins, 2011* were favourable for migrant workers. In *Stewart, 2011* the Court again recited 'mere coordination' as part of an advance statement of case-law (para. 75)[127] when examining the compatibility of the condition to have been

125 The Court in *Pérez and Gómez*, *2010*, para. 50, stated the following: 'That finding is supported, furthermore, by recital 26 in the preamble to Directive 2005/36 [on professional qualifications], pursuant to which the directive does not coordinate all the conditions for access to activities in the field of pharmacy, so that the territorial distribution of pharmacies, in particular, remains a matter for the Member States.' Although it was not very explicit, the Court in this passage relied on the coordination of only certain conditions in Directive 2005/36 to justify in part why certain powers remained with the member states. Besides, in *Rani*, *2010*, para. 34, the Court mentioned the direct applicability of article 49 Treaty without that any harmonising or coordinating provisions were necessary, like in *Commission v. Germany (insurance)*, *1986*. No further consequences were attached to the notion 'coordinating provisions'. In *Idrima Tipou*, *2010*, para. 38, article 50(2)(g) Treaty was mentioned according to which the Union legislature was to adopt directives to coordinate the protection of the interests of certain members of companies; accordingly, Directive 68/161 pursued the aim of coordinating national provisions in this regard (para. 39). In both passages coordination did not have any further significance. Finally, in *Commission v. Ireland (award criteria)*, *2010*, para. 30, the Court again reiterated the passage stemming from *Gemeente Arnhem*, *1998*, including 'coordinating'.

126 In *Stark*, *2011* the Court again applied Directive 87/344 on the coordination of legal expenses insurance. Referring to *Eschig*, *2009* the Court deduced from the lack of complete harmonisation (para. 31) that the parties to an insurance contract were free within certain limits to determine what the contract covered.

127 In *Stewart*, *2011* 'mere coordination' was immediately followed by the following passage: 'Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits', followed by a reference to *Kohll*, *1998*. The Court has routinely put that passage, or one that is similar, forward at the beginning of medical services judgments, see *Smits*, *2001*, para. 45, or *Commission v. France (Vanbraekel)*, *2010*, para. 29. It also appeared in some form or another in social security judgments (see footnote 102 above). In *Stöber and Pereira*, *1997*, which was discussed above under 'mere coordination', the member states' power to determine the conditions for entitlement was explained by the merely coordinating role that Regulation 1408/71 played (para. 36). Thus, there is an obvious affinity between

present for 26 out of 52 weeks to be entitled to a benefit in the United Kingdom. The Court ultimately accepted the argument that the criterion was not representative of a genuine link with the British society. Thus it fell afoul of the requirements of Union citizenship.[128]

'No neutrality' and 'coordination', again

In *Hudzinski, 2012* the Court also reiterated 'mere coordination' together with the resulting power of member states to determine the criteria for social security

'mere coordination' and 'in the absence of harmonisation', as is also evidenced above in *Rydergård*, *2002*, and *Nikula*, *2006*. However, 'absence of harmonisation' can only be treated as a substitute for 'mere coordination', if there *are* coordinating provisions, i. e. typically in social security (see *Klöppel*, *2008*, para. 16). Thus, the use of 'absence of harmonisation' in medical services judgments which were handed down exclusively on the basis of the freedom of services is of little interest for this chapter. 'Absence of harmonisation' in those cases merely stands for 'there are no Community rules' and hence the member states retain the corresponding power. See para. 100 of *Müller-Fauré*, *2003*; para. 17 of *Inizan*, *2003*; para 92 of *Watts*, *2006*; para. 23 of *Stamatelaki*, *2007*; para. 29 of *Commission v. France (Vanbraekel)*, *2010*; para. 53 of *Commission v. Spain (Chollet)*, *2010*; para. 47 of *Commission v. Portugal (medical treatment)*, *2011*; or para. 49 of *Commission v. Germany (care insurance)*, *2012*. Admittedly though, it was not always obvious whether the Court reasoned on the basis of the freedom of medical services or the provisions of social security: see *Kohll*, *1998* (para. 18), and *Elchinov*, *2010*, para. 40. *Xhymshiti*, *2010*, was a borderline case in that regard. The Court ruled that Regulation 1408/71 was not applicable, essentially because only Germany was concerned and Switzerland could not be considered a member state, since the extension of the scope of Regulation 1408/71 to cover third country nationals had not been transposed under the Agreement on Free Movement with Switzerland. Hence the reference of the Court in para. 43 to the 'absence of harmonisation' could not be understood to stand for 'mere coordination', for there was no coordination in that situation for third country nationals. The difference becomes much clearer in *tax* judgments such as *Gilly*, *1998*. In this judgment the Court repeatedly pointed to the absence of harmonisation: 'no unifying or harmonising measure for the elimination of double taxation has yet been adopted at Community level' (para 23); 'in the absence of any Community legislation in the field, the determination of those [tax] scales is a matter for the Member States' (para. 47). It is obvious that those passages cannot be read inversely so as to substitute for 'mere coordination'. Hence, such passages in tax judgments are of little interest for 'coordination' as an interpretive formula, which is the subject of this chapter. Nonetheless, it would certainly be interesting to examine the narrative of the idea of 'absence of harmonisation' in the medical services and tax case-law, in particular through the prism of 'spin'.

128 In *Commission v. Ireland (direct insurance)*, *2011* the Court applied Directive 73/239 on direct insurance. The Court began the judgment by referring to coordination: '[T]he First Directive is intended to facilitate the taking-up and pursuit of direct insurance other than life insurance by removing variations between national laws on controls and by coordinating, in particular, legal provisions on the financial guarantees required of the insurance undertakings.' (Para. 2) However, the Court did not draw any apparent conclusion from that reference to coordination, in contrast to the broad interpretation that came to be applied in the same judgment. In *Perez Garcia*, *2011*, para. 51, the Court also mentioned coordination unobtrusively in the context of the social security rules. Similarly, in *Commission v. Portugal (medical treatment)*, *2011*, para. 81, coordination was mentioned inconspicuously in the context of an argument on the quality of medical services ('several coordinating or harmonising directives'). In *Bergström*, *2011*, para. 33, the Court ruled that the Agreement on Free Movement with Switzerland had to be applicable to a Swedish national who had worked in Switzerland, but then returned to Sweden, else the coordination between the Swiss system and the system of Sweden as a member state would be precluded in 'a not insignificant number of situations'. Coordination did not play an argumentative role in that context, though. In a similar way, the Court in *Akdas*, *2011*, para. 70, referred to the 'technical provisions for the coordination of the different national laws on social security'. In *Mesopotamia*, *2011*, moreover, the Court again referred a number of times to the 'fields coordinated' by Directive 89/552 on television without frontiers. In para. 32, in addition, the Court stated that the fields coordinated by the Directive were only coordinated in so far as television broadcasting was concerned. In none of these references did coordination as a concept play a role of any significance. In a similar vein, the Court in *Premier League*, *2011* mentioned several times the 'fields coordinated' by the Conditional Access Directive 98/84 (paras 69-74).

benefits (para. 42). The 'no neutrality-guarantee' fed into this consideration for the Court to reach the preliminary result that the workers concerned were in principle entitled exclusively to family benefits in Poland. However, the Court then put that result into perspective, partly based on broad interpretation. Regulation 1408/71 was not to be understood so as to deprive a migrant worker of child benefits national law conferred. Moreover a national rule against the overlapping of benefits was not to be applied, either, in the circumstances of one of the cases at issue. Thus, in *Hudzinski, 2012* again 'mere coordination' would have resulted in a disadvantage for migrant workers, but the freedom of workers neutralised its push. Hence the outcome strongly benefitted migrant workers. Next, in *Commission v. Germany (care insurance), 2012* the Court resorted to 'mere coordination' pursuant to article 48 Treaty (para. 57) and the resulting 'no neutrality-guarantee' for movements in application of the freedom of medical services. The passage, however, was only one argument in many which led the Court to refuse to transpose in general the medical services case-law under the free movement of services to the reliance on care. Nonetheless, 'mere coordination' contributed to a decision that was detrimental for migrant workers.

The latest cases

In *Commission v. Austria (transport fare), 2012* the Court rejected Austria's argument drawn from the fact that the reduced transport fare constituted a family benefit subject to Regulation 1408/71. The Court held that non-discrimination was to be complied with irrespective of whether Regulation 1408/71 applied. In that context the Court reiterated that Regulation 1408/71 merely coordinated national schemes (para. 46) and the member states remained at liberty to determine the conditions for entitlement and the right or duty to be insured, provided they complied with the Treaty freedoms.[129]

In *Dumont, 2013* the Court made use of 'mere coordination' together with the 'different claims…'-passage (read: 'separate claims', para. 41), and combined it with the power of the states to lay down the conditions of benefits to explain why articles 78(2) and 79(1) Regulation 1408/71 merely determined the applicable legislation rather than the conditions of social security benefits. As a consequence, if the applicable national law provided for orphan's benefits, those benefits had to be granted, if necessary after aggregation of periods. The result of the application of 'mere coordination' was thus favourable for migrant workers. Next, in *Salgado González, 2013* 'mere coordination' (para. 35) again together with the member states' power to define the conditions for entitlement to benefits was part of a short advance statement of case-law. Ultimately, the Court

129 In the action for interim relief in *United Kingdom v. Council*, *2012* the Court in para. 41 referred to coordination: 'With regard to the damage alleged by the United Kingdom resulting from rights definitively acquired by individuals in the area of coordination of social security over the course of the period during which the decision of the Joint Committee applying the contested decision remains in force, it must be held that this is damage which is essentially pecuniary in nature.' Obviously, the idea of coordination did not have any impact on the reasoning of the Court. The same is valid for the reference to coordination in para. 29 of *Reichel, 2012*.

concluded that the Spanish average contribution basis had to be calculated by reference to the periods completed in Spain only, but that conclusion favouring migrant workers was strongly based on an interpretation of the relevant articles of Regulation 1408/71.

Finally, in *Jeltes, 2013* 'mere coordination' appeared twice. First, it served to explain why the new regime for unemployment benefits of frontier workers under Regulation 883/2004, which broke with *Miethe, 1986*, was in accordance with the free movement of workers. Arguably, the amount of unemployment benefits the state of employment would have awarded would have been higher in the case at issue than the amount granted in application of the new regime by the state of residence. However, that was the consequence of 'mere coordination' together with the 'no neutrality-guarantee' (para. 43) and the lack of harmonisation (para. 45). Second, 'mere coordination' implied that the term 'unchanged situation' in article 87(8) Regulation 883/2004 was to be determined by national law (para. 59). In both occurrences, the migrant workers concerned had to accept a disadvantage owing to 'mere coordination', though in the first occurrence the disadvantage was clearer.

b) Spin

When was the idea of 'mere coordination' instrumental for the Court's decision? In which judgments did it exert spin? In *Derouin, 2008* 'mere coordination' clearly provided the spin needed to arrive at the conclusion that the competent member state pursuant to Regulation 1408/71 was free to include or ignore certain income gained abroad when levying social security contributions. In *Commission v. Spain (Chollet), 2010* 'mere coordination' to some limited extent spun the decision not to oblige the 'home' state to meet the cost that host state legislation did not cover in cases of unplanned treatment, while such cost would have been covered had the treatment been provided in the 'home' state. Curiously, 'mere coordination' served as justification in the context of the freedom to receive services.

In *Elchinov, 2010* the 'absence of harmonisation' substituted for 'mere coordination' in the context of article 22 Regulation 1408/71. It provided the spin necessary to hand on the decision whether a specific treatment was covered to the national court. In *Van Delft, 2010* coordination-logic spun the Court's decision very strongly. It provided the momentum for the Court to find that the effects of the change in Dutch legislation on pensioners living abroad were in accordance with Union citizenship. The only proviso was that the national court did not find any discriminatory treatment in the conclusion of the new insurance contracts which had become necessary as a consequence of the change in legislation. In *Baesen, 2010* 'mere coordination' prompted the Court to grant the power to fill the notion 'civil servant' with content to the member states.

In *Commission v. Austria (transport fare), 2012* 'mere coordination' provided some limited spin to decide the minor issue that non-discrimination applied even though a benefit was possibly within the scope of Regulation 1408/71. In *Du-*

mont, 2013 'mere coordination' spun the Court's decision towards ignoring the wording of article 78(2)(b) Regulation 1408/71. The Court held that the norm merely identified the applicable legislation by means of connecting factors, while the national law thus identified determined the substantive conditions. The rest of the judgment, however, did not result from 'coordination', but was largely unrelated to it. In that part the spin exerted by broad interpretation in the form of the 'greatest possible freedom' was more dominant. In *Jeltes, 2013*, finally, the second occurrence of 'mere coordination' clearly spun the decision towards accepting the power of the member states to define the term 'unchanged situation'. In the first occurrence, in contrast, it merely served to explain why the consequence of the new regime established by Regulation 883/2004 – that the amount of unemployment benefits paid *in concreto* was lower than under the old regime of Regulation 1408/71 – was in accordance with free movement of workers. In that regard 'mere coordination' could only be considered to have exerted very limited spin.

Empty spin

In a quite surprising number of decisions the phenomenon of empty spin occurred in the present. In *Klöppel, 2008* 'absence of harmonisation' as a proxy for 'mere coordination' initially seemed to spin the decision. It seemed that the Court would accept that Austria would not take account of periods during which a childcare allowance was paid abroad. However, non-discrimination stepped in and turned around the decision, emptying the spin the 'absence of harmonisation' had created. *Chuck, 2008* again was a case of empty spin of 'mere coordination'. The Court first referred to 'mere coordination', implying that aggregation was subject to the laws of the member states in case the person concerned resided outside the Union. However, that spin was countered by the broad interpretation formula of the 'greatest possible freedom'. Hence, the spin of 'mere coordination' was counter-spun by broad interpretation. In *Petersen, 2008* 'mere coordination' in a similar way spun emptily. 'Mere coordination' would have implied that Austria's residence requirement was lawful, but *Petroni, 1975*-logic intervened to justify the examination under article 39 Treaty. The outcome of that examination was that the residence requirement was not in accordance with the free movement of workers. The spin 'mere coordination' had initially provided was thus cancelled. The same can be said of *Leyman, 2009*. 'Mere coordination' would have indicated that the disadvantage resulting from Belgian legislation would have been acceptable. However, the free movement of workers stepped in to neutralize that spin. In the perspective of the freedom of workers, the disadvantage that would have resulted was unacceptable, since social security contributions would have been paid in vain. As a result, the spin provided by 'mere coordination' did not prevail, but became empty. *Hudzinski, 2012* again was a clear case of empty spin. The Court first reached the preliminary conclusion that Poland was competent for the family benefits of the persons concerned based on 'mere coordination', but then this conclusion was neutral-

ized. It did not mean that German law could not under any circumstances award benefits. Moreover, despite the preliminary conclusion, the national rule against overlapping could not be applied, either. Thus, the clear spin 'mere coordination' had initially brought to bear ran empty. The final decision went against the grain of what 'mere coordination' had indicated.

Advance statement cancelling out spin

In *Tomaszewska, 2011* 'mere coordination' could possibly have exerted spin, but it was part of a long advance statement of practice which made spin impossible to detect. The same is valid for *Da Silva Martins, 2011*, in which 'mere coordination' together with the 'greatest possible freedom'-formula was part of an advance statement of practice. This made it difficult to determine any spin, including empty spin. In *Stewart, 2011* 'mere coordination' was again part of an advance statement of case-law. Hence, any spin 'coordination' might have exerted was shrouded.

Compliance with the Treaty freedoms obscuring spin

In *Salgado González, 2013* 'mere coordination' was again enveloped in an advance statement of case-law, though it was a short statement. However, a tendency of the Court which has been discernible in the latest judgments in the present became certain in *Salgado González, 2013*, namely that the Court has moved to combine 'mere coordination' with the member states' power to determine the conditions of entitlement to social security and then to put those two considerations into perspective right away by emphasizing the need to comply with the Treaty freedoms. This firm combination of three partly conflicting elements – 'mere coordination', the power of the member states, the Treaty freedoms – has further worked to obscure the spin 'mere coordination' potentially could have.

c) Some conclusions from the period

In the present, the idea of 'mere coordination' regularly occurred in the judgments of the Court. The negative twist it had taken in the period leading up to the 'Maastricht moment' has broadly been confirmed. In most judgments, 'mere coordination' erected an obstacle for migrant workers, though in some it succumbed to other arguments. In *Derouin, 2008*, *Von Chamier-Glisczinski, 2009*, *Van Delft, 2010*, *Baesen, 2010*, *Commission v. Germany (care insurance), 2012*, and *Jeltes, 2013* 'mere coordination' rather patently worked to the disadvantage of migrant workers. *Klöppel, 2008*, *Petersen, 2008*, *Leyman, 2009* and *Hudzinski, 2012* all worked to the advantage of migrant workers, but the decisions did so *in spite of* 'mere coordination'. Hence, these judgments confirm the role of 'mere coordination' as an obstacle migrant workers have to overcome. *Chuck, 2008*, *Tomaszewska, 2011*, *Da Silva Martins, 2011*, *Stewart, 2011*, and *Salgado González, 2013* were counter-indicative of that trend in that they broadly turned out in favour of migrant workers. At the same time, the idea of 'mere coordina-

tion' played a very limited role in those judgments. *Dumont, 2013* thus remains as the only judgment in which the use of 'mere coordination' clearly resulted in an advantage for migrant workers.[130] Apart from that, the present confirmed the abstraction of 'mere coordination'. The idea has been used as an abstract concept a clear root of which is no longer discernible.

From the way the Court has handled 'coordination' and from the spin it exerted in the present we see that various factors continue to attenuate spin. Certainly, 'mere coordination' has lost some of its power because of the practice of advance statement of case-law. That practice had already emerged during the age of Maastricht, but it has become more frequent in the present, though being far from omnipresent. The practice has come along with the recent tendency of the Court to encapsulate 'mere coordination' in a fixed set of considerations with the power of the member states to define conditions of benefits and the need to respect the Treaty. That tendency together with the practice of advance statement of case-law has buried spin in a number of cases. Moreover, empty spin of 'mere coordination' has become a more regular occurrence in the present than in the previous age of Maastricht, numbering five out of about 50 judgments handed down in total on the basis of social security in the six and a half years of the present. That empty spin has become frequent is perhaps best explained by the Court's relatively liberal admission, in the present, of arguments based on the fundamental freedoms, in particular Union citizenship, in social security. Overall, the conclusion emerges – if a conclusion in one sentence is admissible at all given the complexity of the topic – that the idea of 'mere coordination' has lost some of the power it had in earlier cases to spin social security decisions.

It remains to be added that outside social security the idea of 'mere coordination' has never had any power in the first place. This chapter has clearly shown this, notably in the footnotes. The only non-social security judgments in which the idea of coordination played a role were *De Agostini, 1997*; *Laval, 2007*; and *Pérez and Gómez, 2010*. Even in those judgments the use of 'coordination' never came close to exerting spin like in the social security judgments. This comes as quite a surprise, given that several other Union measures in our domain have coordinated national laws. Think only of directive 64/221 on the *coordination* of measures justified on grounds of public policy, security, or health measures, directive 86/653 on the *coordination* of laws relating to self-employed commercial agents, or directive 89/552 on the *coordination* of laws relating to the pursuit of television broadcasting activities.

130 *Elchinov*, *2010* and *Commission v. Austria (transport fare)*, *2012* defy any categorization in this regard.

III 'Fundamental'

In the judgment in *Grzelczyk, 2001* the Court in paragraph 31 famously came up with the idea that Union citizenship was 'destined to be the fundamental status of nationals of the member states'. This chapter looks at the career this idea of the 'fundamental status' made in the Court's case-law. Like in the previous chapters on 'broad' and 'coordinated' the questions to be answered are: What was the role the formula of the 'fundamental status' played in the case-law? When did the formula crop up? When was it crucial for the Court's decisions, when did it spin decisions?

Despite the similar investigative thrust, the following chapter is structured somewhat differently than the previous two. Given that the 'fundamental status' of Union citizenship only emerged after the turn of the millennium, the newer case-law of the Court obviously is most relevant. However, hierarchical approaches such as that inherent in the notion of the 'fundamental status' are as old as the Court's case-law. Hence, this chapter first looks at other terms the Court had identified as 'fundamental' (section 1) and as a 'status' (section 2) before arriving at the 'fundamental status'. A more complete picture thus emerges of what the Court implies when it qualifies a notion, such as a status, as 'fundamental'. The details of spin need not be explored in this regard though.[131] The chapter then moves on to the 'fundamental status' as such and explores the occurrences of the term in case-law and the power it wields ('spin') (sections 3 and 4).

1 Previously existing 'fundamental' notions

The 'fundamental' freedoms and non-discrimination

When looking for precursors of the 'fundamental status' in terms of hierarchy, the 'fundamental' freedoms and, closely linked to them, the 'fundamental' principles of non-discrimination or equality of treatment are the obvious candidates. In the case-law under scrutiny in this book, the *Court* – as in the Court's reasoning, not in the parties' arguments – qualified one of the market freedoms or non-discrimination with the adjective 'fundamental' in more than three hundred judgments.[132] Occasionally the Court used the word 'basic' rather than 'funda-

131 The sheer number of times the Court made use of such hierarchical terms makes a qualitative analysis of the spin they brought to bear impossible, at least for this book.

132 *Frilli, 1972*, para. 19; *Van Duyn, 1974*, para. 13 and 18; *Reyners, 1974*, paras 24 and 43; *Sotgiu, 1974*, paras 4 and 11; *Walrave, 1974*, para. 18; *F., 1975*, para. 15; *Rutili, 1975*, para. 27; *Watson and Belmann, 1976*, para. 16; *Inzirillo, 1976*, para. 14; *Patrick, 1977*, para. 9; *Bouchereau, 1977*, paras 30 and 33; *Knoors, 1979*, para. 20; *Webb, 1981*, para. 17; *Beeck, 1981*, para. 12; *Broekmeulen, 1981*, para. 20; *Levin, 1982*, para. 13; *Forcheri, 1983*, para. 11; *Auer II, 1983*, para. 19; *Rienks, 1983*, para. 9; *Fearon, 1984*, para. 7; *Hoeckx, 1985*, para. 23; *Frascogna, 1985*, para. 23; *Kromhout, 1985*, para. 21; *Steinhauser, 1985*, para. 14; *Kempf, 1986*, para. 13; *Lawrie-Blum, 1986*, paras 16 and 26; *Spruyt, 1986*, para. 25; *Commission v. France (tax credit), 1986*, para. 13 and 25;