## 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;

*Gül*, *1986*, para. 14; *Segers*, *1986*, para. 12; *Commission v. Germany (insurance)*, *1986*, paras 27 and 54; *Commission v. France (co-insurance)*, *1986*, para. 17; *Commission v. Denmark (co-insurance)*, *1986*, para. 17; *Commission v. Ireland (co-insurance)*, *1986*, para. 17; *Commission v. Italy (research council)*, *1987*, para. 7; *Frascogna II*, *1987*, para. 6; *Heylens*, *1987*, paras 8, 12, 14, and 15; *Commission v. Italy (social housing)*, *1988*, para. 19; *Gullung*, *1988*, para. 12; *Commission v. Germany (lawyers)*, *1988*, para. 12; *Commission v. Greece (vocational schools)*, *1988*, para. 7; *Lair*, *1988*, paras 18 and 19; *Ledoux*, *1988*, para. 11; *Cowan*, *1989*, para. 19; *Commission v. Belgium (border control)*, *1989*, para. 15; *Commission v. Greece (real estate)*, *1989*, para. 26; *Bettray*, *1989*, para. 11; *Groener*, *1989*, para. 19; *Corsica Ferries*, *1989*, para. 8; *Noij*, *1991*, para. 13; *Commission v. France (tourist guides)*, *1991*, para. 14; *Commission v. Italy (tourist guides)*, *1991*, para. 17; *Commission v. Greece (tourist guides)*, *1991*, para. 18; *ASTI*, *1991*, para. 11; *Säger*, *1991*, para. 15; *Micheletti*, *1992*, para. 10; *Singh*, *1992*, para. 15; *Kus*, *1992*, para. 34; *Konstantinidis*, *1993*, para. 12; *Kraus*, *1993*, paras 16, 28, 29, 32, 35, 40, and 41; *Ramrath*, *1993*, para. 29; *Commission v. Greece (vehicles)*, *1993*, para. 31; *Vander Elst*, *1994*, para. 16; *Vougioukas*, *1995*, para. 42; *Gebhard*, *1995*, para. 37; *Esso*, *1995*, para. 12; *Bosman*, *1995*, paras 78, 93, and 129; *Guiot*, *1996*, para. 11; *Cabanis-Issarte*, *1996*, paras 26 and 34; *O'Flynn*, *1996*, para. 21; *Commission v. Italy (securities dealing)*, *1996*, para. 12; *Data Delecta*, *1996*, paras 12 and 22; *France v. Commission (pension funds)*, *1997*, paras 8 and 9; *Hayes*, *1997*, paras 13 and 25; *Futura*, *1997*, para. 31; *SETTG*, *1997*, paras 21 and 23; *Shingara*, *1997*, para. 40; *Sodemare*, *1997*, para. 19; *Parodi*, *1997*, para. 21; *Iurlaro*, *1997*, para. 30; *Saldanha*, *1997*, paras 17, 19, and 21; *Schöning*, *1998*, para. 12; *Decker*, *1998*, 19 and 39; *Kohll*, *1998*, paras 15, 20, 41 and 46; *ICI*, *1998*, para. 29; *Commission v. Spain (private security guards)*, *1998*, para. 34; *De Castro*, *1998*, para. 34; *Bickel*, *1998*, para. 17; *Calfa*, *1999*, paras 16, 17, 18, and 23; *Terhoeve*, *1999*, paras 36, 44, and 45; *El-Yassini*, *1999*, para. 45; *Centros*, *1999*, paras 34 and 37; *Royal Bank of Scotland*, *1999*, para. 22; *Sürül*, *1999*, para. 68; *Gómez Rivero*, *1999*, para. 26; *Commission v. Belgium (associations)*, *1999*, para. 12; *De Bobadilla*, *1999*, para. 11; *Baxter*, *1999*, para. 18; *Saint-Gobain*, *1999*, para. 34; *ARD*, *1999*, para. 29; *Vestergaard*, *1999*, para. 23; *Arblade*, *1999*, paras 34 and 37; *Nazli*, *2000*, para. 58; *Commission v. France (social debt repayment)*, *2000*, para. 49; *Commission v. France (general social contribution)*, *2000*, para. 46; *Commission v. Belgium (security firms)*, *2000*, para. 28 and 37; *Deliège*, *2000*, para. 52; *Lehtonen*, *2000*, para. 42; *Baars*, *2000*, paras 27 and 37; *Angonese*, *2000*, para. 35; *Sehrer*, *2000*, para. 31; *Haim II*, *2000*, para. 57; *Centrosteel*, *2000*, para. 13; *Hocsman*, *2000*, para. 24 (it is unclear whether the Court speaks itself or merely restates a party's argument); *Erpelding*, *2000*, para. 30; *Commission v. France (public tender)*, *2000*, para. 50; *Corsten*, *2000*, paras 35 and 42; *Ferlini*, *2000*, para. 50; *Luxembourg v. Parliament (lawyer directive)*, *2000*, paras 23 and 43; *Yiadom*, *2000*, para. 25; *Mac Quen*, *2001*, para. 26; *Analir*, *2001*, paras 25, 37, and 38; *Metallgesellschaft*, *2001*, para. 41, 59, and 67; *Mazzoleni*, *2001*, para. 25; *Fahmi and Amado*, *2001*, para. 51; *Commission v. Italy (transport consultants)*, *2001*, para. 23; *Commission v. Italy (language assistants)*, *2001*, para. 28; *Smits*, *2001*, para. 54 and 90; *Vanbraekel*, *2001*, para. 42; *Grzelczyk*, *2001*, para. 33; *Finalarte*, *2001*, para. 31; *Commission v. Germany (contract labour)*, *2001*, para. 19; *Jany*, *2001*, para. 64; *Gottardo*, *2002*, para. 34; *Canal Satélite*, *2002*, paras 28, 31, 34, 35, and 41; *Dreessen II*, *2002*, para. 25; *Commission v. Italy (temporary labour)*, *2002*, paras 18 and 33; *Cura Anlagen*, *2002*, para. 31; *Sea-Land*, *2002*, para. 39; *HI*, *2002*, paras 42 and 47; *D'Hoop*, *2002*, para. 29; *Carpenter*, *2002*, paras 38 and 39; *Paracelsus*, *2002*, paras 39 and 55; *MRAX*, *2002*, para. 53; *Mertens*, *2002*, para. 26 and 37; *Payroll*, *2002*, para. 31; *X and Y*, *2002*, paras 51, 52, and 62; *Olazabal*, *2002*, para. 43; *Lankhorst*, *2002*, para. 36; *De Groot*, *2002*, paras 97, 103, 106, 114, and 115; *Commission v. Italy (local museums)*, *2003*, paras 22 and 23; *Commission v. Italy (patent services)*, *2003*, para. 28; *Wählergruppe Gemeinsam*, *2003*, paras 75, 85, 86, 87, and 92; *Müller-Fauré*, *2003*, paras 72, 84, 85, 92, 95, and 102; *Pasquini*, *2003*, para. 70; *Commission v. Netherlands (driving licence)*, *2003*, para. 67; *Burbaud*, *2003*, para. 95; *Anomar*, *2003*, para. 39; *Bosal*, *2003*, para. 26; *Inspire Art*, *2003*, para. 133; *Köbler*, *2003*, para. 102; *Marina Mercante*, *2003*, para. 41; *Anker*, *2003*, para. 60; *Garcia Avello*, *2003*, paras 24 and 28; *Abatay*, *2003*, para. 111; *Inizan*, *2003*, para. 57; *Schilling*, *2003*, paras 40 and 41; *Neri*, *2003*, paras 40 and 46; *Commission v. France (fixed levy)*, *2004*, para. 27; *De Lasteyrie du Saillant*, *2004*, paras 40, 51, 60; *Collins*, *2004*, para. 63; *Kapper*, *2004*, para. 72; *Orfanopoulos*, *2004*, para. 96 and 98; *Pusa*, *2004*, para. 17; *Trojani*, *2004*, para. 40; *Commission v. Austria (trade unions)*, *2004*, para. 39; *Springer*, *2004*, para. 66; *Caixa-Bank*, *2004*, para. 21; *Wolff & Müller*, *2004*, para. 30; *Omega*, *2004*, paras 23, 26, 30, and 35; *Zhu and Chen*, *2004*, paras 31, 33, 39, and 40; *Commission v. Greece (cabotage)*, *2004*, para. 32; *Fournier*, *2005*, paras 20 and 24; *Bidar*, *2005*, paras 33 and 46; *Kranemann*, *2005*, paras 27 and 34; *Commission v. Spain (visa prior to entry)*, *2005*, para. 26; *Commission v. Greece (opticians)*, *2005*, para. 34; *Burmanjer*, *2005*, para. 35; *Allard*, *2005*, paras 30 and 32; *Commission v. Austria (university)*, *2005*, para. 63; *Schempp*, *2005*, para. 18; *Coname*, *2005*, paras 16 and 20; *Commission v. Denmark (car registration)*, *2005*, paras 80 and 81; *Parking Brixen*, *2005*,

para. 46; *Commission v. France (project delegation)*, *2005*, para. 32; *Contse*, *2005*, paras 23, 24, 25, and 26; *Marks & Spencer*, *2005*, para. 44; *Colegio*, *2006*, para. 21; *Commission v. Spain (Schengen alert)*, *2006*, paras 41 and 45; *Rockler*, *2006*, para. 22; *Öberg*, *2006*, para. 19; *CLT-UFA*, *2006*, para. 12; *Keller Holding*, *2006*, paras 24, 40, and 45; *Commission v. Spain (Vigo)*, *2006*, para. 45; *Commission v. Belgium (own resources)*, *2006*, paras 40 and 41; *Servizi ausiliari*, *2006*, para. 45; *ANAV*, *2006*, para. 18; *Commission v. Germany (expulsion)*, *2006*, paras 34, 108, and 109; *Watts*, *2006*, paras 115, 116, and 121; *N*, *2006*, paras 40, 49, and 51; *Cadbury Schweppes*, *2006*, para. 50; *Wilson*, *2006*, para. 69; *Commission v. Luxembourg (lawyers)*, *2006*, para. 39; *Fidium Finanz*, *2006*, para. 33; *Commission v. Greece (gaming)*, *2006*, para. 49; *Commission v. Portugal (capital gains deduction)*, *2006*, paras 24 and 29; *Commission v. Belgium (contractors)*, *2006*, para. 35; *Turpeinen*, *2006*, para. 19; *FII Group*, *2006*, para. 46; *ITC*, *2007*, paras 40 and 41; *Commission v. Sweden (tax deferral)*, *2007*, paras 25 and 26; *Commission v. Denmark (insurance taxation)*, *2007*, paras 46, 51, and 58; *Placanica*, *2007*, para. 68; *Thin Cap*, *2007*, paras 68 and 73; *Rewe*, *2007*, para. 62; *Talotta*, *2007*, para. 35; *Alevizos*, *2007*, para. 69; *Commission v. Netherlands (automatic expulsion)*, *2007*, para. 42; *Commission v. Belgium (tax matters)*, *2007*, para. 47; *Commission v. Germany (posted workers)*, *2007*, para. 64 (and para. 21); *Geven*, *2007*, para. 27; *Lakebrink*, *2007*, para. 24; *Gootjes-Schwarz*, *2007*, para. 87; *Commission v. Germany (private schools)*, *2007*, paras 120 and 126; *Commission v. Italy (horse races)*, *2007*, paras 22 and 35; *Polat*, *2007*, para. 33; *Morgan*, *2007*, para. 23; *Geurts*, *2007*, para. 14; *Commission v. Ireland (An Post)*, *2007*, para. 26; *Commission v. Austria (bio inspections)*, *2007*, para. 35; *Commission v. Germany (bio inspections)*, *2007*, para. 37; *Commission v. Germany (psychotherapists)*, *2007*, paras 49 and 70; *Eind*, *2007*, para. 44; *Viking*, *2007*, paras 45, 51, 52, 58, 59, 68, and 77; *Commission v. Italy (private security)*, *2007*, paras 18 and 49; *United Pan-Europe*, *2007*, paras 39 and 45; *Laval*, *2007*, paras 93, 101, and 103; *Asociación Profesional*, *2007*, para. 71; *Jundt*, *2007*, paras 61 and 67; *Commission v. Germany (housing subsidy)*, *2008*, para. 26; *Lammers*, *2008*, para. 27; *Commission v. Italy (public works)*, *2008*, paras 69 and 81; *Deutsche Shell*, *2008*, para. 37; *French Community*, *2008*, paras 35, 45, 52, and 55; *Rüffert*, *2008*, para. 36; *Commission v. Spain (hospital pharmacists)*, *2008*, para. 37; *Secap*, *2008*, paras 18, 20, 21, 29, and 35; *Delay*, *2008*, para. 29; *Nerkowska*, *2008*, para. 26; *Commission v. Luxembourg (posted workers)*, *2008*, paras 30, 43, 49, and 50; *Jipa*, *2008*, paras 18, 23, and 24; *Commission v. France (insemination)*, *2008*, paras 56 and 93; *Brescia*, *2008*, para. 58; *Raccanelli*, *2008*, para. 45; *Metock*, *2008*, para. 56; *Bauer Verlag*, *2008*, paras 37 and 40; *Renneberg*, *2008*, para. 81; *Commission v. Spain (diploma)*, *2008*, para. 72; *Coditel*, *2008*, para. 25; *Förster*, *2008*, paras 37 and 43; *Papillon*, *2008*, para. 41; *Khatzithanasis*, *2008*, para. 32; *Zablocka-Weyhermüller*, *2008*, para. 29; *Jobra*, *2008*, paras 18 and 37; *Cartesio*, *2008*, para. 109; *Huber*, *2008*, para. 71; *Commission v. Austria (self-employment)*, *2008*, para. 35; *Commission v. Spain (R&D)*, *2008*, paras 32 and 34; *Commission v. Italy (ship officers)*, *2008*, para. 15; *Uteca*, *2009*, para. 18, 20, 21, 22, 24, 25, and 33; *Hartlauer*, *2009*, para. 64; *Rüffler*, *2009*, para. 63; *Aberdeen Alpha*, *2009*; *Liga Portuguesa and Bwin*, *2009*, para. 47; *Sea*, *2009*, para. 38; *Eurawasser*, *2009*, para. 44; *Acoset*, *2009*, para. 46; *Commission v. Portugal (vehicle inspection)*, *2009*, para. 34; *Presidente*, *2009*, paras 42 and 47; *Filipiak*, *2009*, para. 72; *Pesla*, *2009*, paras 35, 36, 38, and 51; *Rubino*, *2009*, para. 34; *Serrantoni*, *2009*, paras 22, 23, and 24; *Mariano*, *2009*, para. 21 *Commission v. Austria (patent lawyers)*, *2009*, para. 31; *Commission v. Austria (bank account)*, *2009*, para. 46; *Commission v. Greece (ship officers)*, *2009*, para. 29; *Commission v. Germany (posted workers)*, *2010*, para. 51; *Attanasio*, *2010*, paras 23, 50, 51, and 55; *Wall*, *2010*, para. 33; *Ciba*, *2010*, para. 45; *Metin Bozkurt*, *2010*, para. 56; *Zanotti*, *2010*, para. 69; *Pérez and Gómez*, *2010*, paras 40, 43, 45, 63, and 68; *Sporting Exchange*, *2010*, paras 39, 49, 50, and 59; *Ladbrokes*, *2010*, para. 40; *Sjöberg*, *2010*, para. 49; *Carmen Media*, *2010*, paras 86 and 87; *Engelmann*, *2010*, paras 47, 49, 54, and 55; *Lassal*, *2010*, para. 29; *Commission v. Portugal (construction sector)*, *2010*, para. 107; *Commission v. Ireland (award criteria)*, *2010*, para. 29; *Vandorou*, *2010*, para. 66; *Josemans*, *2010*, paras 50 and 66; *Sayn-Wittgenstein*, *2010*, paras 86 and 90; *Yellow Cab*, *2010*, paras 51 and 53; *Rani*, *2010*, para. 53; *Bejan*, *2010*, para. 41; *Commission v. Greece (transfer tax)*, *2011*, paras 14 and 51; *Commission v. Luxembourg (lab analyses)*, *2011*, para. 45; *Commission v. Belgium (must-carry)*, *2011*, para. 43; *Stadler*, *2011*, para. 49; *Casteels*, *2011*, para. 22; *Navtiliaki Etairia Thasou*, *2011*, para. 48; *McCarthy*, *2011*, para. 27; *Runevič-Vardyn*, *2011*, paras 62, 88, and 90; *Commission v. Belgium (notaries)*, *2011*, paras 77 and 84; *Commission v. France (notaries)*, *2011*, paras 67 and 74; *Commission v. Luxembourg (notaries)*, *2011*, paras 77 and 84; *Commission v. Austria (notaries)*, *2011*, paras 76 and 83; *Commission v. Germany (notaries)*, *2011*, paras 78 and 85; *Commission v. Greece (notaries)*, *2011*, paras 69 and 76; *Zeturf*, *2011*, para. 48; *Commission v. Portugal (real estate agents)*, *2011*, paras 64, 66, 67, and 72; *Stewart*, *2011*, para. 81; *Dickinger*, *2011*, paras 30, 31, 33, 82, and 87; *National Grid*, *2011*, paras 26 and 84; *Premier League*, *2011*, paras 78, 79, 93, and 123; *Graf*, *2011*, para. 33; *Commission v. Portugal (medical treatment)*, *2011*, paras 76 and 80; *Aladzhov*, *2011*, paras 25 and 34; *Gaydarov*, *2011*, paras 25 and 32; *Commission v. Hungary (proper-*

mental'.[133] (In the French versions of these judgments the Court consistently used the adjective 'fondamentale', except in one of them.[134]) In the domain this book analyses the Court used the qualifier 'fundamental' for the market freedoms or non-discrimination/equality of treatment altogether 610 times.

### *'Fundamental' rights*

While the qualification of one of the market freedoms or non-discrimination as 'fundamental' manifestly serves to put the freedom inherent in the Treaty in a hierarchical position vis-à-vis other norms of primary or secondary law, the qualification of a *right* as 'fundamental' is somewhat different. The term 'fundamental rights' is more or less synonymous with 'human rights', while perhaps emphasizing more the constitutional, domestic quality of the norm. Fundamental rights were not intrinsic to the Treaty, in contrast to the market freedoms. They joined the Treaty by judicial fiat in *Internationale Handelsgesellschaft, 1970*, after indications to that effect in *Stauder, 1969*. Obviously, to qualify a right as fundamental, as with the *fundamental* right to property or the *fundamental* right not to be tortured, means to rank the right and put it into a hierarchical position vis-à-vis other norms. In that aspect fundamental rights are at least similar to the fundamental market freedoms. In the case-law this book examines, fundamental rights were mentioned for the first time in *Rutili, 1975* (para. 32). From then on 'fundamental human rights', as the Court called them in *Belbouab, 1978* (para. 10), played a role in numerous decisions by the Court in our domain. If we disregard procedural fundamental rights for the sake of simplicity, fundamental rights played a more or less significant role in 66 of the Court's decisions in this book's

*ty tax)*, *2011*, paras 69, 71, and 87; *Commission v. Netherlands (notaries)*, *2011*, paras 50 and 57; *Ziebell*, *2011*, para. 81; *Costa and Cifone*, *2012*, paras 54, 59, and 61; *Duomo*, *2012*, paras 26 and 42; *P. I.*, *2012*, para. 23; *Hudzinski*, *2012*, para. 82; *Commission v. Netherlands (portable funding)*, *2012*, para. 58 and 73; *Susisalo*, *2012*, paras 27 and 37; *SIAT*, *2012*, para. 38; *Commission v. Spain (income tax)*, *2012*, paras 62, 64, 72, 84, and 91; *Vale*, *2012*, para. 28; *Volksbank România*, *2012*, para. 70; *GarkaIns*, *2012*, para. 21; *A Oy*, *2012*, para. 32; *DIVI*, *2012*, para. 50; *Byankov*, *2012*, para. 31; *Prete*, *2012*, para. 25; *X NV*, *2012*, para. 30 and 31; *Caves Krier*, *2012*, para. 52; *Azienda Sanitaria*, *2012*, paras 23 and 24; *Stanleybet*, *2013*, paras 25 and 47; *L.N.*, *2013*, para. 28; *Petersen*, *2013*, para. 28; *Van den Booren*, *2013*, para. 43 and 44; *Las*, *2013*, paras 20, 23 and 28.

133 *Commission v. France (maritime worker quota)*, *1974*, para. 21; *Bonsignore*, *1975*, para. 5; *Bouchereau*, *1977*, para. 15; *De Castro*, *1998*, para. 23; *Commission v. Italy (resources)*, *2000*, para. 35; *Corsten*, *2000*, para. 31; *Mac Quen*, *2001*, para. 24; *Paracelsus*, *2002*, para. 26; *Commission v. France (bio-medical labs)*, *2004*, para. 55; *Colegio*, *2006*, para. 29; *Commission v. Spain (private security)*, *2006*, para. 23; *Commission v. Greece (gaming)*, *2006*, para. 47; *Commission v. Austria (boilers)*, *2006*, para. 18 (not available in English, but with reference to *Commission v. Spain (private security)*, *2006*, para. 23); *Jia*, *2007*, para. 40; *Commission v. Austria (bio inspections)*, *2007*, para. 29; *Commission v. Germany (bio inspections)*, *2007*, para. 31; *Commission v. Germany (psychotherapists)*, *2007*, para. 48; *Commission v. Italy (private security)*, *2007*, para. 16; *Dermoestética*, *2008*, paras 31 and 34; *Commission v. Portugal (vehicle inspection)*, *2009*, para. 27; *Serrantoni*, *2009*, para. 23; *Loutraki*, *2010*, para. 63; *Commission v. Luxembourg (lab analyses)*, *2011*, para. 36; *Commission v. Portugal (medical treatment)*, *2011*, para. 50.

134 In the French version of *Serrantoni*, *2009*, para. 23, the Court mentioned 'les règles de base du traité' rather than 'les règles fondamentales du traité'.

domain.[135] The Charter of Fundamental Rights brought fundamental market freedoms and fundamental human rights together, at least to some extent.[136]

### *'Fundamental interests of society' and other 'fundamental' notions*

There are two more varieties of fundamental logic. Firstly, the Court required that certain public interests needed to touch on the 'fundamental interests' of society to justify a derogation from the market freedoms. In the case-law under scrutiny, this variety is principally, but not exclusively, connected to the expulsion of migrant persons from the host state. The term 'fundamental interests' obviously serves to qualify certain interests of states vis-à-vis other such interests. However, the assessment needed to distinguish between 'fundamental interests' and other interests is usually left to the national court. This variety of fundamental logic appeared for the first time in our domain in *Bouchereau, 1977* where the Court stated in para. 35: 'the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.[137] After that, the Court had recourse to this variety of fundamental logic in 36 cases in the case-law this book examines.[138] In those cases, the Court

135 This number does not include decisions in which only the parties or the referring courts argued on the basis of fundamental rights. The 66 decisions were the following: *Rutili*, *1975*, para. 32; *Belbouab*, *1978*, para. 10; *Testa*, *1980*, paras 18-22; *Demirel*, *1987*, para. 28; *Bond*, *1988*. Paras 40-1; *Commission v. Germany (adequate housing)*, *1989*, para. 10; *ERT AE*, *1991*, paras 41-6; *Gouda*, *1991*, para. 23; *Commission v. Netherlands (broadcasting)*, *1991*, para. 30; *Grogan*, *1991*, paras 26 and 30-1; *Singh*, *1992*, para. 22; *Veronica*, *1993*, para. 9; *TV10*, *1994*, paras 23-6; *Bosman*, *1995*, paras 79-80; *Commission v. Belgium (TV broadcasting)*, *1996*, paras 43-5; *Kremzow*, *1997*, paras 14-9; *Gloszczuk*, *2001*, para. 85; *Kondova*, *2001*, para. 90; *Carpenter*, *2002*, paras 40-5; *Baumbast*, *2002*, para. 72; *Rinke*, *2003*, paras 25-8 and 32-42; *Akrich*, *2003*, paras 58-60; *RTL*, *2003*, paras 67-73; *Orfanopoulos*, *2004*, paras 97-99; *Springer*, *2004*, paras 47-58; *Omega*, *2004*, paras 33-40; *Berlusconi*, *2005*, paras 66-78; *Commission v. Spain (Schengen alert)*, *2006*, para. 47; *Commission v. Germany (expulsion)*, *2006*, para. 107-113; *Echouikh*, *2006*, paras 64-5; *Derin*, *2007*, para. 64; *Spain v. United Kingdom (Gibraltar)*, *2006*, para. 60, 64, 90, and 94-6; *Eman and Sevinger*, *2006*, para. 48 and 54; *El Youssfi*, *2007*, para. 75; *Viking*, *2007*, paras 43-7 and 86; *United Pan-Europe*, *2007*, paras 41-2; *Laval*, *2007*, paras 90-5; *Centro Europa 7*, *2008*, paras 117-21; *Metock*, *2008*, para. 79; *Kabel Deuschland*, *2008*, paras 33-8; *Mariano*, *2009*, para. 29; *Pignataro*, *2009*, paras 21-3; *Bressol*, *2010*, paras 83-8; *Metin Bozkurt*, *2010*, para. 60; *Pérez and Gómez*, *2010*, para. 65; *Lassal*, *2010*, para. 29; *Tsakouridis*, *2010*, para. 52; *Sayn-Wittgenstein*, *2010*, paras 52 and 89-91; *Commission v. Belgium (must-carry)*, *2011*, paras 53-5; *McCarthy*, *2011*, paras 27 and 29; *Runevič-Vardyn*, *2011*, paras 66 and 89; *Deutsche Telekom*, *2011*, paras 49-66; *Mesopotamia*, *2011*, para. 33; *Dereci*, *2011*, paras 69-74; *Köppl*, *2011*, para. 53; *Ziebell*, *2011*, para. 82; *Costa and Cifone*, *2012*, para. 86; *Kahveci*, *2012*, para. 40; *Kamberaj*, *2012*, para. 92; *P. I.*, *2012*, para. 26; *Susisalo*, *2012*, para. 37; *Erny*, *2012*, para. 50; *Dülger*, *2012*, paras 53 and 62; *Byankov*, *2012*, para. 46-7; *Iida*, *2012*, paras 78-81; *O and S*, *2012*, paras 59 and 75-80; *Las*, *2013*, para. 26; *Sky Österreich*, *2013*, paras 31-67.

136 See *Lassal*, *2010*, para. 29, discussing article 45 of the Charter.

137 In *Rutili*, *1975*, para. 28, the term 'fundamental interests' had not yet been used.

138 *Adoui*, *1982*, para. 8; *Commission v. Germany (adequate housing)*, *1989*, para. 17; *Clean Car*, *1998*, para. 40; *Commission v. Spain (private security guards)*, *1998*, para. 46; *Calfa*, *1999*, paras 21 and 25; *Nazli*, *2000*, para. 57; *Commission v. Belgium (security firms)*, *2000*, para. 28; *Jany*, *2001*, para. 59; *Commission v. United Kingdom (open skies)*, *2002*, para. 57; *Commission v. Denmark (open skies)*, *2002*, para. 135; *Commission v. Germany (open skies)*, *2002*, para. 157; *Olazabal*, *2002*, para. 39; *Orfanopoulos*, *2004*, para. 66; *Omega*, *2004*, para. 30; *Commission v. Spain (Schengen alert)*, *2006*, paras 46, 52, 53, 55, and 59; *Commission v. Germany (expulsion)*, *2006*, paras 35, 54, 70, 74, and 100; *Commission v. Austria (posted workers)*, *2006*, para. 64; *Gattoussi*,

mentioned the 'fundamental interests' 67 times. Secondly, there is a pool of cases including decisions in which the Court used the qualifier 'fundamental' – or in a similar vein 'basic' – in largely heterogeneous circumstances. Another 42 decisions belong to this pool.[139]

*2006*, para. 41; *Commission v. Austria (boilers)*, *2006*, paras 25-6; *Commission v. Netherlands (automatic expulsion)*, *2007*, para. 43; *Polat*, *2007*, paras 28, 34, and 39; *Commission v. Italy (private security)*, *2007*, paras 49 and 50; *Commission v. Luxembourg (posted workers)*, *2008*, para. 50; *Jipa*, *2008*, paras 23, 26, and 30; *Commission v. Austria (self-employment)*, *2008*, paras 35 and 37; *Commission v. Germany (posted workers)*, *2010*, paras 49 and 51; *Tsakouridis*, *2010*, para. 48; *Metin Bozkurt*, *2010*, paras 57 and 61; *Sayn-Wittgenstein*, *2010*, para. 86; *Commission v. Portugal (real estate agents)*, *2011*, paras 67 and 73; *Dickinger*, *2011*, para. 82; *Aladzhov*, *2011*, paras 35, 37, 40, 42, and 47; *Gaydarov*, *2011*, paras 33, 38, and 42; *Ziebell*, *2011*, paras 82, 84, 85, and 86; *P. I.*, *2012*, paras 28, 30, 33, and 34; *Byankov*, *2012*, paras 40 and 42.

139 *Torrekens*, *1969*, para. 10: the 'fundamental principles' laid down in article 51 Treaty; *Heinze*, *1972*, para. 4: the 'fundamental aim' of article 51 Treaty (the same in *Land Niedersachsen*, *1972*, para. 4, and *Ortskrankenkasse Hamburg*, *1972*, para. 4); *Mancuso*, *1973*, para. 14: a 'fundamental difference' between system of old-age pension and invalidity pensions; *Commission v. France (maritime worker quota)*, *1974*, paras 24 ('fundamental provisions') and 25 ('fundamental rules'); *Balsamo*, *1976*, para. 12: the 'fundamental conditions' necessary to be able to claim the advantage of the benefit; *Laterza*, *1980*, para. 8: the 'fundamental principle that the rules of coordination must guarantee to migrant workers all the benefits which have accrued to them in different member states (the same in *Gravina*, *1980*, para. 7); *Commission v. Belgium (public service)*, *1980*, para. 19: the rule of unity and efficacy of Community law 'which is fundamental to the existence of the Community must also apply in determining the scope and bounds of article 48(4)' Treaty; *Piscitello*, *1983*, para. 11: lack of means as the 'fundamental criterion'; *Forcheri*, *1983*, para. 16: certain 'fundamental objectives' of the common vocational training policy; *Patteri*, *1984*, and *Campana*, *1987*, para. 8, respectively: the 'fundamental aim' of article 51 Treaty; *Commission v. Italy (lottery machinery interim I)*, *1992*, para. 28: breach of 'fundamental rules' in the Treaties; *Paletta*, *1992*, para. 16: the 'fundamental characteristics' of a benefit, and para. 24: the greatest possible freedom of movement for workers as one of the 'fundamental principles' of the Community; *Cabanis-Issarte*, *1996*, para. 31: the 'fundamental Community law requirement' that rules should be applied uniformly; *Taflan-Met*, *1996*, para. 31: the 'fundamental principle' of aggregation of periods; *Germany v. Parliament and Council (deposit guarantee)*, *1997*, para. 41: the 'fundamental differences' between deposit guarantee schemes in the member states; *Sürül*, *1999*, para. 54, again the 'fundamental principle' of aggregation; *Konle*, *1999*, para. 38: article 222 does not exempt a state's system of property from the 'fundamental rules' of the Treaty; *Movrin*, *2000*, para. 38: the 'fundamental characteristics' of a benefit; *BIAO*, *2003*, para. 72: the 'fundamental principle' that annual accounts must be given a true and fair view; *Givane*, *2003*, para. 29: the 'fundamental condition' for the right to remain in the host state; *Commission v. Netherlands (frontier worker)*, *2003*, para. 32: the 'fundamental competence' of a member state; *Commission v. Greece (architects)*, *2004*, para. 18: the 'fundamental obligation' in a national decree; *Berlusconi*, *2005*, para. 54: the 'fundamental principle' of true and fair view, and para. 62: the fundamental role played by the publication of annual accounts; *Sedef*, *2006*, para. 45: the 'fundamental distinction' between the phases when rights are being acquired and when they have already been acquired; *Commission v. France (performing artists)*, *2006*, para. 51: one of the 'most fundamental characteristic rights' of salaried employment; *Perez Naranjo*, *2007*, para. 34: the 'fundamental importance' of personal needs; *Habelt*, *2007*, para. 82: the 'fundamental objective' of the Union to encourage movement of persons and their integration in the host state; *Metock*, *2008*, para. 89: the 'fundamental right of residence' of Union citizens; *Gaz de France*, *2009*, para. 38: the 'fundamental principle of legal certainty'; *Sayn-Wittgenstein*, *2010*, para. 93: the 'fundamental constitutional objective' pursued by Austria; *Premier League*, *2011*, para. 115: the 'fundamental aim' of the Treaty of completion of the internal market; *Kahveci*, *2012*, para. 33: the 'fundamental objective' of consolidating the position of a family member; *Commission v. Estonia (tax allowance)*, *2012*, para. 64: the 'fundamental principles' of the Treaty; *Dülger*, *2012*, para. 40: the 'fundamental objective' of consolidating the position of a family member. The Court referred to the 'basic principles' in article 48 to 51 Treaty in *Villano*, *1979*, para. 9; and to the rule of aggregation of periods as one of the 'basic principles' of social security coordination in *Moscato*, *1995*, para. 28, and the same in *Salgado*, *2005*, para. 29, and *Tomaszewska*, *2011*, para. 30.

*Conclusions*

The idea of a 'fundamental status' put forward in *Grzelczyk, 2001* did not come out of the blue. The Court's case-law this book examines shows a strong tradition of reasoning in terms of hierarchy. The market freedoms and non-discrimination are routinely qualified as 'fundamental' by the Court. Fundamental (human) rights, of which the origin is in the Court's case-law (at least for the Union), also embody a hierarchical approach that is similar to the approach inherent in the 'fundamental status'. Finally, a number of other notions have emerged from the Court's case-law as 'fundamental'. Most prominent among them are the 'fundamental interests of society'.

## 2 The 'status', linking to Union citizenship

The fundamental status-formula used for the first time in *Grzelczyk, 2001* is invariably linked to Union citizenship. The Court had never mentioned a fundamental status *expressis verbis* before the advent of Union citizenship with the Maastricht Treaty. However, it would be wrong to think that Union citizenship and with it the 'fundamental status' started on a blank page with the statement in *Grzelczyk, 2001*, even if we ignore the other hierarchical approaches described above. Indeed, several precursors of the status of Union citizenship manifested themselves in the Court's case-law, long before Union citizenship arrived.

*The origins: the 'Community national' …*

The most prominent of the precursors of the 'Union citizen' is the notion of a 'Community national'. In the case-law this book focuses on this term made its first appearance in *Fiege, 1973* where the Court stated with regard to pensions in the context of the independence of Algeria: 'Such a worker was assimilated to the persons of French nationality mentioned in Annex A to Regulation no 3, placed in similar circumstances, and is thus a Community national subject to a French institution' (para. 26). The term then disappeared for some time, only to come back in *Choquet, 1978* where the Court in the paragraph introducing the judgment mentioned the mutual recognition of 'driving licences for the benefit of Community nationals' (para. 1). In *Pieck, 1980*, the Court in a similar vein mentioned an 'EEC national' in the 'whether' (para. 11).[140] In *Prodest, 1984* the Court referred to the 'advantages enjoyed by Community nationals' pursuant to article 7(2) Regulation 1612/68 (para. 8). In *Commission v. Belgium (pension deductions I), 1985* the Court mentioned 'Community nationals residing in another Member State' in the declaration for failure to have fulfilled Community obligations (para. 11).

140 In French: 'ressortissant communautaire'.

### … And the 'Community citizen'

During the same time span it can be observed that the Court used a similar term in the English versions of the judgments: the term 'Community citizen'. In the case-law on persons and services, the Court mentioned that term for the first time in the 'whether' in *Hirardin, 1976* (para. 3).[141] Similarly, the Court referred to 'citizens of the EEC' in the 'whether' in *Jansen, 1977* (para. 11). *Sagulo 1977* mentioned the right of residence for 'Community citizens' in the terms right at the beginning of the entry of the judgment in the Court reports, so did *Pieck, 1980*. In point 2 of the ruling in *Adoui, 1982* the Court mentioned 'citizens of the Community', while in the corresponding summary of the ruling the term 'citizens of member states of the Community' was mentioned.

In *Commission v. Germany (nurses), 1985*, paras 4 and 6, the Court summarized articles 4, 11, and 12 Directive 77/452 on nurses and in doing so 'reverted' to 'Community nationals', although those articles of the Directive, in fact the entire Directive, knew no such term.[142] In *Gül, 1986* the Court recounted the facts and mentioned 'Community national' (para. 6). In *Commission v. Italy (tourism), 1986*, para. 14, the Court then again mentioned 'Community citizens' twice. In the French version of the judgment the Court in this paragraph used the term 'citoyen communautaire', while in the French versions of all the above judgments which mentioned 'Community citizen' in English – or some variation of it – the Court consistently used the terms 'ressortissant(s) de la Communauté' or 'ressortissant(s) communautaire(s)' in French.

### *The parties/national courts driving the 'Community national'*

It thus becomes evident that by the time the Single European Act came into force the term 'Community national' had already crept into the vocabulary of the Court. This was no coincidence. Whereas the Court used the term sparingly and perhaps somewhat reluctantly – as the above references show – the parties and the referring courts much more liberally spoke of 'Community nationals' and 'Community citizens' (in French 'ressortissants communautaires' or 'ressortissants de la Communauté' if not indicated otherwise below). This is evident in the Court's citing of their arguments/questions. In *Bonsignore, 1975* the national Court mentioned an 'EEC national, who ha[d] been convicted of an offence' (para. 4, in the second question).[143] In *Hirardin, 1976* the parties referred to

141 To complete the picture two judgments should be briefly mentioned, although they are not part of the free movement of persons and services. In the German version of the agriculture judgment *Balkan-Import-Export*, *1976*, para. 14, the Court used the term 'Marktbürger'. The English version used the word 'trader', the French 'opérateurs économiques'. In *Rewe*, *1976*, a goods case, the Court used the term 'Community citizen' in the 'whether' (para. 3); the German version again used 'Marktbürger', the French 'justiciable de la Communauté'.

142 The French version of the judgment mentioned 'ressortissants communautaires', but only in para. 4.

143 Yet in the French version the same term reads: 'ressortissant d'un État membre de la Communauté'. In *Mazzier*, *1974*, the referring court also mentioned 'Community nationals', as is evident from the 'Facts' (p. 1253; 'ressortissants de la Communauté' in French). In the famous judgment in *Dassonville*, *1974*, para. 5, the Court also mentioned 'all Community nationals' ('tous leur ressortissants' in French). The case is obviously outside of persons and services.

'Community citizen[s]' (p. 556) and 'Community nationals' (p. 557) and the referring court to 'Community citizen' (p. 555).[144] In *Jansen, 1977* the referring court questioned about 'citizens of the EEC' (p. 832); in *Choquet, 1978* about 'citizens of the Community' (para. 3).[145] In *Auer, 1979*, the Commission referred to 'Community nationals' (p. 443). In *Mialocq, 1983*, the French government mentioned '[a]ny Community national' (p. 2068). In *Rienks, 1983* the referring court mentioned 'Community national' three times in its questions (p. 4236 and para. 5). In *Luisi and Carbone, 1984* the referring court mentioned 'Community nationals' (p. 384 and para. 7),[146] so did one party in *Prodest, 1984* (para. 3). In *Meade, 1984* the Commission put forward the 'status of Community nationals' and suggested an answer that referred to 'Community nationals' (pp. 2634 and 2635, respectively). It again referred to 'Community nationals' in *Fearon, 1984* (p. 3682). In *Hoeckx, 1985*, the referring court mentioned 'Community nationals' (para. 5). In *Commission v. Belgium (pension deductions I), 1985* the subject of the application mentioned 'Community nationals' (p. 1100). In *Mutsch, 1985*, the referring court's question referred to a 'German-speaking EEC national' (para. 5).[147] In *Commission v. Belgium (vocational training, interim), 1985*, the Commission argued on the basis of the term 'Community nationals' (para. 13). In *Reed, 1986* the Netherlands' argument mentioned 'EEC nationals' (para. 19).[148] In *Lawrie-Blum, 1986* the applicant referred to 'Community citizens' (para. 12). In *Commission v. Italy (tourism), 1986* the Italian government argued on the basis of the terms 'Community nationals' (para. 8) and 'citizen of the Community' (para. 9).[149]

It were therefore for a very large part the parties – individuals and the Commission, sometimes the member states – and the referring courts that pushed the term 'Community national' onto the agenda of the Court. This is evident from the eleven decision mentioned above in which it was exclusively them who spoke of 'Community nationals' and not the Court. Moreover, it is evident from the decisions in *Hirardin, 1976*; *Jansen, 1977*; *Choquet, 1978*; *Prodest, 1984*; *Commission v. Belgium (pension deductions I), 1985*; and *Commission v. Italy (tourism), 1986*. In these judgments the Court itself only mentioned the term, after either a party or the referring court had done so. The Court mentioned the term on its own initiative only in *Fiege, 1973*; *Sagulo 1977*; *Pieck, 1980*; *Adoui, 1982*, *Commission v. Germany (nurses), 1985*; and *Gül, 1986*. Indeed, of those six decisions only in *Fiege, 1973* the term was properly part of the reasoning of the Court. In *Sagulo 1977* the term was mentioned in the introductory terms; in *Pieck, 1980* it was mentioned in the introductory terms, too, and in the 'whether'; in *Adoui, 1982* it popped up in the final ruling; in *Commission v.*

144 'Ressortissants communautaires' or 'ressortissants de la Communauté' in French.
145 'Ressortissants de la Communauté' and 'ressortissants communautaires' in French.
146 In French: 'sujets de l'ordre communautaire' in para. 7.
147 In French: 'un individu s'exprimant en langue allemande, ressortissant de la CEE'.
148 In French: 'ressortissants de la CEE'.
149 In para. 9 the French version used the term 'citoyen communautaire'.

*Germany (nurses), 1985* it was part of an advance statement of the law, and in *Gül, 1986* of the description of the facts. We can thus conclude that the term 'Community national' was driven by those who came to the Court rather than by the Court itself. It was them who pushed the term from the 1970s to the mid-1980s.

### *The 'Community national' becoming current*

From the advent of the Single European Act on, the term 'Community national', or its equivalents, came to appear much more regularly in the Court's own reasoning. Until the Maastricht Treaty went into force, the Court itself, in its reasoning or at least the summary or the ruling, mentioned the term in many judgments.[150] The decisions in which the parties or the referring court exclusively spoke of 'Community nationals' and the Court implicitly refused to use the term became comparatively rare.[151] So by the time the Maastricht Treaty came around and with it true 'Community nationality', viz. Union citizenship, the term 'Community national' had become current at the Court. It was not any longer shy about using it.

Interestingly, the Court continued to use the term 'Community national' despite the advent of Union citizenship with the Maastricht Treaty. Indeed, it fur-

150 *Commission v. Italy (social housing)*, *1988*: in the summary; *Pesca Valentia*, *1988*: 'EEC national' in para. 11, but also in the facts in para. 3, in the questions in paras 5 and 16; 'Community nationals' in two answers in paras 15 and 21, and the ruling; *Stanton*, *1988*: 'Community citizens' in para. 11 and the summary; *Wolf*, *1988*: 'Community citizens' in para. 13 and the summary; *Daily Mail*, *1988* in para. 15; *Steymann*, *1988*: 'EEC national' though only in the description of the facts in para. 5; *Echternach*, *1989* in para. 11; *Commission v. Belgium (border control)*, *1989* in the description of the facts in para. 4; *Lopes da Veiga*, *1989* 'EEC national' in explaining national law in para. 3; *Groener*, *1989*, para. 13; *Agegate*, *1989* in para. 20 and 'Community citizen' in the keywords and 'EEC national' in the re-statement of British law and the question asked; *Dzodzi*, *1990* in paras 12, 13, 24, 26, and 44 and in the questions in para. 7, the 'whether' in para. 11, the Commission's argument in para. 16, 'Community citizen' also in the questions asked; *Roux*, *1991* in summary 4, question 4 in para. 6, the 'whether' in para. 25, in paras 27 and 32, and ruling 4; *Antonissen*, *1991* in paras 14 and 21, but also in the parties' arguments in paras 4 and 9; *Giagounidis*, *1991*: 'Community subject' in para. 20, 'ressortissant communautaire' in French; *Vlassopoulou*, *1991* again the same term 'Community subject' in paras 22, 23, the summary and the ruling, and 'Community national' in the question asked in para. 5; *Barr and Montrose*, *1991* in paras 18, 19, 20 and in the keywords, summary, the 'whether' in para. 15, as well as the second 'whether' in para. 21, the second answer in para. 24 and the ruling; *Commission v. Belgium (pension deductions II)*, *1992* in the summary, in the application, and the facts in para. 3; *Gray*, *1992* in para. 10 and the summary; *Borrell*, *1992* in paras 15, 18, and 19; *Micheletti*, *1992* in para. 11 and the facts in para. 4; *Singh*, *1992* in para. 23, the question in para. 9, and the United Kingdom's argument in para. 14, and 'Community citizen' in para. 16 and the summary; *Koua Poirrez*, *1992* in the reply in para. 15 and the ruling, and 'EEC national' in the question in para. 8; *Kus*, *1992* in para. 35 and in Germany's argument in para. 32; *Kraus*, *1993* in paras 23, 32, and 40, as well as in the summary and the facts in para. 4; *Ramrath*, *1993* in paras 28, 29, and 31; *Schmid*, *1993* in para. 20; *Grana-Novoa*, *1993* in para. 22. 'Community nationals' was mentioned just in the introductory terms of the decision in *Bettray*, *1989*.

151 *Zaoui*, *1987* in para. 5, 'Community citizen' was used in the introductory terms though; *Commission v. Belgium (vocational training)*, *1988* in para. 2; *Commission v. Germany (adequate housing)*, *1989* in the Commission's translation of the title of the German act in para. 2; *Nino*, *1990* in question 2 in para. 5; *Commission v. France (allowance)*, *1991* in para. 12; *ERT AE*, *1991* with 'Community citizens' in the second question in para. 5; *Bachmann*, *1992* in para. 12; *Bauer*, *1992* in para. 5; *Di Crescenzo*, *1992* in para. 9; *Commission v. United Kingdom (fishing licences)*, *1992* with 'EEC nationals' in para. 6; *Werner*, *1993* with 'EEC nationals' in para. 8; and *Acciardi*, *1993* in paras 8 and 20.

ther ballooned until the 'fundamental status' was first mentioned in *Grzelczyk, 2001*. The Court, moreover, narrowed it down to the term 'Community national', dropping 'EEC national' and 'Community citizen' almost completely.[152]

### *Three decades of 'Community nationality' – and more*

So, when *Grzelczyk, 2001* arrived and declared Union citizenship as the 'fundamental status', the unofficial status of 'Community nationality' had been leading a covert life in the case-law of the Court for almost three decades. For the sake of completeness it is worth mentioning that the Court continued to refer to 'Community nationals' after *Grzelczyk, 2001*. Indeed in *Grzelczyk, 2001* itself it was mentioned (para. 28).[153] Thereafter, the Court mentioned it in its reasoning in 99 judgments.[154] In addition the parties or the descriptions of the facts or the

152 The Court in its own reasoning referred to 'Community nationals' in the following judgments: *Haim*, *1994* in paras 12, 16, 25; *Scholz*, *1994* in paras 9 and 12; *Commission v. Spain (museum admission)*, *1994* in para. 10; *Commission v. Spain (tourist guides)*, *1994* in paras 9 and 14; *Commission v. Belgium (minerval)*, *1994* in paras 12 and 19 and in the law in para. 2; *Van Munster*, *1994* in para. 23; *Eroglu*, *1994* in para. 21; *Schumacker*, *1995* in paras 46, 49, and 58; *Vougioukas*, *1995* in paras 38 and 39; *Gebhard*, *1995* in paras 20 and 25; *Bosman*, *1995* with 'Community citizen' in para. 94; *Cabanis-Issarte*, *1996* in para. 21; *Reisebüro Broede*, *1996* in para. 20; *Commission v. Belgium (residence permits)*, *1997* in para. 17; *Merino García*, *1997* in para. 30; *Shingara*, *1997* in paras 39, 40, and 41; *Dafeki*, *1997* in paras 8 and 21; *Pereira Roque*, *1998* in para. 36; *De Castro*, *1998* in paras 18 and 35; *Awoyemi*, *1998* in para. 30; *Calfa*, *1999* in para. 25; *Terhoeve*, *1999* in para. 27 and 37; *Centros*, *1999* in para. 19; *Commission v. Belgium (aircraft registration)*, *1999* in para. 12; *Commission v. France (social debt repayment)*, *2000* in para. 32; *Commission v. France (general social contribution)*, *2000* in para. 30; *Commission v. Italy (register)*, *2000* in paras 12 and 14; *Sehrer*, *2000* in para. 32; *Hocsman*, *2000* in paras 23, 35, and 40; *Erpelding*, *2000* in paras 24 and 26; *Borawitz*, *2000* in paras 18 and 35; *Ferlini*, *2000* in para. 42; *Yiadom*, *2000* in paras 25, 27, 33, 36, 40, and 43; and *Elsen*, *2000* in para. 34. In these judgments the references to 'Community national' in the introductory terms, keywords, summaries, rulings or by the parties or referring courts are not mentioned; in other words, only the paragraphs in which the Court itself speaks to the audience are listed. In the following decisions just the parties or the referring court mentioned 'Community nationals' or the term was only mentioned in the facts or national legislation: *Krid*, *1995* with 'EEC national' in paras 13 and 14; *Gaal*, *1995* in para. 5; *Commission v. France (ship registration)*, *1996* in para. 29; *Asscher*, *1996* in the 'whether' in para. 35; *Commission v. Belgium (unemployment)*, *1996* in para. 22 and 32; *Commission v. Germany (directives)*, *1997* in para. 10; *Commission v. Ireland (ship registration)*, *1997* in para. 8 and 9; *Commission v. Germany (ID checks)*, *1998* in para. 2; *Commission v. Greece (large families)*, *1998* in paras 9, 14, 22, and 31; *Gschwind*, *1999* with 'Community citizen' in para. 12; and *Graf*, *2000* in para. 21. 'Community national' was mentioned only in the keywords and the summary in *Gallagher*, *1995*; and merely in the introductory terms in *Uecker and Jacquet*, *1997*.

153 The nexus between the terms 'Community national' and 'Union citizen' is further illustrated in Advocate General Jacobs' opinion in *Khalil*, *2001*, para. 19, where he stated: '[…] it is settled law that that provision [article 48 Treaty] guarantees free movement only to Community nationals (now citizens of the Union)'.

154 *Kondova*, *2001* (para. 80); *Gloszczuk*, *2001* (para. 75); *Khalil*, *2001* (para. 40); *Ruhr*, *2001* (para. 19); *Dreessen II*, *2002* (paras 24, 27, and 31); *Kauer*, *2002* (para. 44); *Hervein II*, *2002* ('Community citizens' in para. 47); *Commission v. Spain (doctors)*, *2002* (paras 18, 24, 26, and 54); *Mertens*, *2002* (paras 26 and 37); *Ueberseering*, *2002* (para. 56); *De Groot*, *2002* (paras 76 and 77); *Commission v. Italy (patent services)*, *2003* (para. 22); *Commission v. Netherlands (driving licence)*, *2003* (para. 66); *Burbaud*, *2003* (para. 108); *Van Lent*, *2003* (paras 14 and 15); *Ninni-Orasche*, *2003* (paras 33 and 48); *Schilling*, *2003* (paras 23, 24, and 28); *Commission v. France (bio-medical labs)*, *2004* (para. 58); *Collins*, *2004* (paras 37 and 39); *Weigel*, *2004* ('Community citizens' in para. 52); *Kapper*, *2004* (para. 27); *Orfanopoulos*, *2004* (paras 83 and 98); *Beuttenmüller*, *2004* (para. 53 and 'Community citizens' in paras 36 and 63); *Commission v. Netherlands (ships)*, *2004* (paras 15, 16, and 32); *Commission v. Luxembourg (posted workers)*, *2004* (para. 43); *My*, *2004* (para. 37 and 'Community citizen' in para. 49); *Laurin Effing*, *2005* (para. 52); *Oulane*, *2005* (para. 24 and 49); *Kranemann*, *2005* (para. 25); *Commission v. Spain (visa prior to entry)*, *2005* (paras 35, 37, 38, and

law, though not the Court in its reasoning, mentioned the term in four more decisions.[155]

### *The end of the 'Community national'*

After the Lisbon Treaty abolished the pillar structure by merging the Community with the Union the terms 'Community national' or 'Community citizen' were no longer used, except at one occasion.[156] Instead, the Court preferred the term 'European Union national', mentioning it in its reasoning in a few decisions.[157]

### *Conclusions*

By the time *Grzelczyk, 2001* came around to pinpoint Union citizenship as the 'fundamental status', the Court – driven by the referring national courts as well as the parties – established a routine of referring to the 'Community national'.

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46); *Commission v. Greece (opticians)*, *2005* (para. 27 and 34); *Commission v. Italy (teaching experience)*, *2005* (paras 13, 14, 16, 17, and 21); *Aslanidou*, *2005* ('Community citizens' in para. 35); *Commission v. Denmark (car registration)*, *2005* (para. 34); *Marks & Spencer*, *2005* (para. 30); *Nadin and Durré*, *2005* (para. 34); *Rockler*, *2006* (paras 14 and 15 and 'Community citizens' in para. 17); *Öberg*, *2006* (paras 11 and 12 and 'Community citizens' in para. 14); *Ritter-Coulais*, *2006* (paras 31 and 33); *Keller Holding*, *2006* (para. 29); *Commission v. Finland (car registration)*, *2006* (para. 38); *Commission v. Spain (work experience)*, *2006* (para. 14, 16, and 19); *Mattern and Cikotic*, *2006* (paras 17, 24, and 28); *Commission v. Germany (expulsion)*, *2006* (paras 36, 38, 72, 84, 95, and 109); *N*, *2006* (paras 26, 27, 28 and 30); *Spain v. United Kingdom (Gibraltar)*, *2006* (para. 80); *Cadbury Schweppes*, *2006* (paras 36, 41, and 53); *Commission v. Italy (work experience)*, *2006* (paras 16, 18, 19, and 21); *Commission v. Portugal (capital gains deduction)*, *2006* ('Community citizens' in para. 15); *Turpeinen*, *2006* (para. 14); *Chateignier*, *2006* (para. 26); *ACT Group*, *2006* (para. 42); *FII Group*, *2006* (para. 39); *Denkavit*, *2006* (para. 20); *Jia*, *2007* (para. 25, 30, 33, 35, 37, 42, and 43); *Lyyski*, *2007* (para. 31 and 35); *ITC*, *2007* (para. 31); *Commission v. Sweden (tax deferral)*, *2007* (para. 17); *Thin Cap*, *2007* (para. 36); *Rewe*, *2007* (para. 25); *Alevizos*, *2007* (para. 65, 72, and 74); *A and B*, *2007* (para. 23); *Commission v. Netherlands (automatic expulsion)*, *2007* (para. 36); *Oy AA*, *2007* (para. 29); *Derin*, *2007* (para. 67); *Lakebrink*, *2007* (paras 12, 15, 17, and 36); *Commission v. Germany (private schools)*, *2007* (para. 114); *Viking*, *2007* (para. 68); *Geurts*, *2007* (para. 14); *Commission v. Germany (psychotherapists)*, *2007* (para. 49); *Commission v. Germany (housing subsidy)*, *2008* (para. 21); *Lammers*, *2008*; *Mayeur*, *2008* (paras 19 and 20); *French Community*, *2008* (paras 44 and 45); *Commission v. Spain (hospital pharmacists)*, *2008* (para. 41); *Burda*, *2008* (para. 76); *Jipa*, *2008* (para. 25); *Commission v. France (insemination)*, *2008* (para. 56); *Renneberg*, *2008* (paras 33, 36, 37, 43, 44, 84, and 'Community citizens' in para. 44); *Zablocka-Weyhermüller*, *2008* (paras 35, 36, and 37); *Commission v. Austria (self-employment)*, *2008* (paras 24, 27, and 30); *Truck Center*, *2008* (para. 31); *Soysal*, *2009* (paras 55 and 61); *Hartlauer*, *2009* (para. 33); *Commission v. Greece (dividends)*, *2009* (para. 36); *Rüffler*, *2009* (para. 66); *Apothekerkammer*, *2009* (para. 22); *Commission v. Italy (pharmacies)*, *2009* (para. 43); *Aberdeen Alpha*, *2009* (para. 37); *Sahin*, *2009* (paras 47, 67, 69, 71, 72, 73, and 75); *Glaxo*, *2009* (paras 45 and 46); *Wolzenburg*, *2009* (para. 68); *Filipiak*, *2009* (para. 52, 58, and 59); *Serrantoni*, *2009* (para. 41); *SGI*, *2010* (para. 38); *X Holding*, *2010* (para. 17); *Winner Wetten*, *2010* (para. 46); and *Stoß*, *2010* (para. 59). The paragraphs in which in addition the Court merely mentioned the terms 'Community national' or 'Community citizen' as part of the summary or the introductory terms, keywords, or ruling or in which the parties referred to the terms are not mentioned in the list in this footnote.

155 *D'Hoop*, *2002* (para. 22); *Baumbast*, *2002* (paras 23 and 66); *Commission v. Greece (architects)*, *2004* (paras 1 and 8 and the Court in the ruling); and *Eman and Sevinger*, *2006* (para. 6). In addition, 'Community nationals' was mentioned in the summary in *Metock*, *2008*.

156 *Serrantoni*, *2009*, para. 41, was the only decision in persons and services in which the Court used the term 'Community nationals' after the Lisbon Treaty had entered into force on 1 December 2009.

157 *Bejan*, *2010* in para. 41; *Akdas*, *2011* in paras 87, 88, and 95; *Commission v. Netherlands (notaries)*, *2011* in para. 51; *Notermans*, *2012* in paras 23 and 24; *A Oy*, *2012* in para. 24; and *Petersen*, *2013* in paras 35 and 37. In addition, the referring court mentioned the term European Union national in *Rahman*, *2012* (see para. 17) and *Prete*, *2012* (see para. 13).

This notion thrived in the case-law of the Court for almost three decades. While obviously no direct connection can be drawn to the 'fundamental status', the existence in case-law of an 'unofficial' status delivers at least some explanation for the Court's ease in *Grzelczyk, 2001* in declaring Union citizenship as the 'fundamental status'.

## 3 The evolution of the 'fundamental status'

After this separate, but largely parallel evolution of 'fundamental' and status-based notions, the 'fundamental status' of Union citizens finally made its first appearance in *Grzelczyk, 2001*. In the following, the evolution of this 'fundamental status' after its first appearance is explored.

### *a) Occurrence – in the 2000s*

The Court again referred to the fundamental status in *D'Hoop, 2002* (para. 28). Belgium had refused the tideover allowance to a Belgian national who had studied in Belgium, because she had passed her secondary education in France. The Court rejected that criterion as discriminatory of Union citizens who had made use of their freedom to move. Only a real link to a state's society could lawfully be required. Next, in *Baumbast, 2002* the fundamental status (para. 82) preceded the Court's conferring a direct right of residence of Union citizens on the basis of article 18 Treaty. This time the Court omitted the consideration on equal treatment which had followed the fundamental status-passage in *Grzelczyk, 2001* and *D'Hoop, 2002*.

In *Garcia Avello, 2003* the Court began its reasoning on the refusal in Belgian law to admit Spanish double-barrelled surnames by the fundamental status formula (para. 22), which it supplemented in the following paragraph by considerations on equal treatment. Ultimately, this led the Court to reject the serious inconvenience caused for Union citizens, because it amounted to discrimination.

In *Collins, 2004* the fundamental status-formula was again referred to (para. 61). In the following the Court ruled that a jobseeker's allowance was not to be withheld any longer from Union citizens who had genuinely sought work in the host state for a reasonable period. Next, the Court cited the fundamental status-formula in *Orfanopoulos, 2004* (para. 65). The Court left aside the aspect of equal treatment, though. Rather, the formula in this case underpinned the Court's reasoning that a very strict interpretation of derogations from the free movement of workers was required. Ultimately, the Court rejected any automatism in the expulsion of nationals of other member states who benefitted from the free movement of persons or services. In *Pusa, 2004* the Court put the fundamental status-formula including the equal treatment passage right at the beginning of the judgment (para. 16). The Court then rejected Finland's refusal to take into account taxes due in another member state in the calculation of the attachable part of a pension paid in Finland. In *Zhu and Chen, 2004* the Court

mentioned the 'fundamental status' – without any hint at equal treatment – when it found that a minor child who was a Union citizen had a right of residence based on the Treaty subject to certain conditions (para. 25).

In *Bidar, 2005* the Court then mentioned the fundamental status-formula together with equal treatment at the beginning of the reasoning (para. 31). The ultimate consequence was that the member states could not any longer withhold maintenance grants from migrant Union citizen students as such. They were only allowed to require a real link with the host state's society. In *Commission v. Austria (university), 2005* the Court found that Austria's requirement for access to university education, i. e. proof of access in the 'home' state, amounted to indirect discrimination and underpinned this finding with the 'fundamental status' and equal treatment (para. 45). Thereafter, the Court mentioned the 'fundamental status' together with equal treatment in *Schempp, 2005* (para. 15). The Court then ruled that it did not violate non-discrimination or the rights of Union citizens to move freely that maintenance payments to a recipient abroad were not tax deductible in Germany.

Next, Spain argued on the basis of the fundamental status-formula in *Spain v. United Kingdom (Gibraltar), 2006*. However, the Court rejected the argument that the fundamental status-formula implied that only Union citizens could vote and stand in the elections of the European Parliament (para. 74). Hence, the United Kingdom was free to include certain persons who were closely affiliated with the United Kingdom in the electorate. In *Turpeinen, 2006* the Court began its consideration of article 18 Treaty with the fundamental status-formula including equal treatment (para. 18). Ultimately, this led the Court to find that a Finnish pensioner who had moved to Spain was treated less favourably in terms of taxation than a pensioner who had remained in Finland.

Then in *Commission v. Netherlands (automatic expulsion), 2007* the Court began to address the issue whether Union citizens who were not lawfully resident in the host state could rely nonetheless on Directive 64/221 by referring to the fundamental status of Union citizenship (para. 32). The Court left aside equal treatment, though. It concluded that such Union citizens could indeed rely on the Directive. In *Gootjes-Schwarz, 2007* the Court again began the part on Union citizenship by the fundamental status-formula including the passage on equal treatment (para. 86), after having found that Germany's refusal to allow the deduction of private school fees paid abroad violated the free provision of services. Under citizenship the same conclusion was then reached as under services. The same is true of *Commission v. Germany (private schools), 2007*, which concerned the same German provisions. The fundamental status-formula was referred to in the same way (para. 125). Thereafter the Court mentioned the fundamental status-formula in *Eind, 2007* (para. 32) when it awarded the third country national daughter of a returning migrant worker, who was a Union citi-

zen, the right to reside with her father although he was not economically active.[158]

In *Huber, 2008* the Court opened its considerations on Germany's register of foreigners in relation to the purpose of fighting crime by the fundamental status-formula including equal treatment (para. 69). In the following the Court found that the situations of German nationals and other Union citizens did not differ with regard to fighting crime. Hence, it was not justified to keep a separate data register just for Union citizens who were not German nationals.

*Mariano, 2009* was the next case in which the 'fundamental status' including equal treatment was mentioned (para. 18). The Court then refused to enter the substance of the argument put forward, because all aspects of the situation were confined to Italy. After that, the fundamental status-formula including equal treatment came up in *Rüffler, 2009* (para. 62). In this case the Court then found that Poland had to allow a pensioner to deduct sickness insurance contributions made in Germany for the purposes of direct taxation in Poland. The next case in which the fundamental status-formula was mentioned together with equal treatment was *Gottwald, 2009* (para. 23). The Court introduced its reasoning by the formula. In the end, it found lawful Austria's relying on residence or regular presence of disabled persons for them to receive a toll disc allowing free use of highways.

### *Occurrence in the early 2010s*

In *Rottmann, 2010* the Court again put forward the fundamental status-formula, though without mentioning equal treatment (para. 43). The formula in part justified why the withdrawal of national citizenship came within the scope of Union law and why a member state was not at complete liberty to withdraw the nationality from one of 'its' nationals. The next case was *Zanotti, 2010*. The fundamental status-formula was mentioned in para. 68 together with equal treatment. The Court then reproduced for Union citizenship the considerations put forward in the first part of the judgment as to services. Ultimately, this meant that a discriminatory approach to tax deductibility of tuition fees was precluded, while a purely territorial or quantitative approach was lawful.

In *Ruiz Zambrano, 2011* the Court also had recourse to the fundamental status-formula without mentioning the equal treatment aspect (para. 41). The Court concluded that a father who was a third country national could lawfully derive a right of residence from his minor children who were Union citizens, even in the state of which the children were nationals. In *McCarthy, 2011* the fundamental status-formula was also mentioned, again without the phrase concerning equal treatment (para. 47). In some contrast to *Ruiz Zambrano, 2011*,

158 In *Metock*, *2008*, para. 4, the Court recounted the legal context which included the preambular clause of the citizenship Directive 2004/38 stating that 'Union citizenship should be the fundamental status of nationals of the Member states […]'. The same is valid for *Ibrahim*, *2010*, para. 8; *Teixeira*, *2010*, para. 8; *Bressol*, *2010*, para. 5; *Lassal*, *2010*, para. 4; *Tsakouridis*, *2010*, para. 3; and *Ziolkowski*, *2011*, para. 3.

however, a right of residence could not be derived from the Union citizen in her 'home' state for the benefit of her husband who was a third country national. No link was established with any situation governed by Union law. The fundamental status-formula was used next in *Runevič-Vardyn, 2011* (para. 60) again together with equal treatment. The Court then basically left it to the national court to decide whether a serious inconvenience was caused for the Union citizens concerned. In *Stewart, 2011* the Court then mentioned the fundamental status-formula together with the equal treatment aspect (para. 80) and in the following invalidated the United Kingdom's requirement for the award of an invalidity benefit to have been present in the country in the past. In *Dereci, 2011* the Court then clarified that a Union citizen in his 'home' state could not require family reunification with a third country national on the pure basis of Union citizenship, despite the fact that Union citizenship was the 'fundamental status' (para. 62). The Court next mentioned the fundamental status-formula in *Ziebell, 2011* in the context of the Ankara Agreement with Turkey (para. 73). However, the Court refused to interpret Decision 1/80 in the same way as the Union's provisions on expulsion of Union citizens.

Thereafter, the fundamental status-formula was used again in *Commission v. Austria (transport fare), 2012* in combination with the passage on equal treatment (para. 38 and indirectly para. 51). Ultimately, the Court rejected Austria's relying on parents' receiving income allowance in Austria for their descendants to benefit from reduced student transport fares. The receipt of income allowance was not necessarily representative of a genuine link with Austria. The fundamental status-formula, excluding the equal treatment aspect, was also mentioned in *Hungary v. Slovakia, 2012* (para. 40). The Court eventually decided that the visit of a head of state who was a Union citizen was not governed by the rules on Union citizenship, but by international law. *Prete, 2012* was next. The Court mentioned the 'fundamental status' including equal treatment in para. 24. It then went on to find that a period of six years of studies in the host state was not to be considered as solely representative of a real link to the employment market in the host state. Then, the fundamental status-formula was mentioned, without the part on equal treatment, in *O and S, 2012* (para. 44). The Court ruled that, subject to the referring court's assessment, the effectiveness of Union citizenship was not hampered by the refusal to grant a third country national a residence permit.

Finally, in *L.N., 2013* the Court referred to the 'fundamental status', too, including the equal treatment clause (para. 27). Following that reference, the Court in essence rejected the idea that the Union citizen concerned could not rely on his rights as a worker, because he had intended to study in the host state from the outset.

### *The blessings of the 'fundamental status'*

Almost all of the above decisions in which the Court took recourse to the fundamental status-formula turned out favourably for Union citizens. This is certainly valid for *Grzelczyk, 2001*; *D'Hoop, 2002*; *Baumbast, 2002*; *Garcia Avello,*

*2003*; *Collins, 2004*; *Orfanopoulos, 2004*, at least for the part in which the fundamental status-formula was mentioned; *Pusa, 2004* in that the Court essentially required Finland's authorities to factor in tax due in Spain; *Zhu and Chen, 2004*; *Bidar, 2005*; *Commission v. Austria (university), 2005*; *Turpeinen, 2006*; *Commission v. Netherlands (automatic expulsion), 2007*; *Gootjes-Schwarz, 2007*; *Commission v. Germany (private schools), 2007*; *Eind, 2007*; *Huber, 2008*; *Rüffler, 2009*; *Rottmann, 2010* in that the formula served to limit the power to withdraw citizenship; *Ruiz Zambrano, 2011* in that the Union citizens did not have to leave the Union with their father; *Stewart, 2011*; *Prete, 2012*; and *L.N., 2013*.

In only a handful of the cases in which the fundamental status-formula was mentioned Union citizens ended up with a less favourable position. That is certainly true for *Schempp, 2005*; *Mariano, 2009* in that the Court refused to extend Union citizenship to cover purely internal situation; *Gottwald, 2009*; *Hungary v. Slovakia, 2012* in that the provisions on Union citizenship were overruled by international law; and *O and S, 2012* though only to a certain extent, since the Court left most of the assessment to the national court.

Besides these clear decisions, a small number of decisions defy categorization in terms of how favourable or unfavourable they were for Union citizens. In *Spain v. United Kingdom (Gibraltar), 2006*, Spain had argued that the fundamental status-formula implied that only Union citizens were to have a right to vote in the elections to the European Parliament, but the Court rejected that argument. In *Zanotti, 2010* the Court drew a factual distinction between quantitative/territorial limitations to the deductible amount and discriminatory limitations and left it to the national court to categorize the case at hand. In *McCarthy, 2011* and *Dereci, 2011* the Court refused generally to class the situation of a Union citizen in his or her 'home' state as purely internal, though it turned out that the cases at issue *were* purely internal to a member state. In *Runevič-Vardyn, 2011* the decision was unclear in that the issue to be resolved was left to the referring court. Finally, in *Ziebell, 2011* the Court refused to extend the case-law on the expulsion of Union citizens to Turkish nationals, so that Union citizenship was not truly concerned by the decision.

### *b) Spin*

That so many decisions mentioning the fundamental status-formula turned out favourably for Union citizens is an indication of the strength of the formula. However, did the formula in these cases indeed spin the Court's decisions? How instrumental was it in the Court's decisions? Spin is examined in the following.

In *Grzelczyk, 2001* itself, which was the origin of the fundamental status-formula, that formula contributed some spin for the Court to reach the decision that the Belgian benefit could not lawfully be refused in situations such as that at issue. The formula set the tune for the Court to reach its disruptive decision. Then, in *D'Hoop, 2002* the 'fundamental status' of Union citizenship, followed by the equal treatment clause, clearly spun the decision, bringing the Court to

the conclusion that Belgium's requirement to have passed secondary education in Belgium fell foul of the Treaty. In *Baumbast, 2002* the fundamental status-formula provided the justification for the Court to reject the idea that article 18 Treaty did not confer a direct right of residence.

In *Collins, 2004* the fundamental status-formula served the Court to put into perspective some established case-law. That case-law had held that those seeking employment in the host state could have benefitted from equal treatment exclusively with regard to access to employment. The formula provided the spin needed to reduce the criterion allowed as a condition for a jobseeker's allowance to a genuine link with the host state's employment market. In *Orfanopoulos, 2004* the fundamental status-formula provided some decisive spin. It was instrumental at least in part for the rejection of any automatism forcing a national authority to order the expulsion of a national of a member state. In *Zhu and Chen, 2004* again the 'fundamental status' commenced the Court's consideration of the right of residence of a minor Union citizen. It provided the impetus necessary for the Court to reject arguments based on the source of the means to support the minor and on abuse of rights.

In *Bidar, 2005* the fundamental status-formula at the beginning of the decision created the momentum for the Court to include maintenance grants within the scope of the Treaty and, more specifically, Union citizenship. Together with other case-law it notably led the Court to rescind *Brown, 1988* and *Lair, 1988*. In *Turpeinen, 2006* spin by the 'fundamental status' was obvious. It initiated the Court's rejection of Finland's difference in tax treatment of pensioners depending on whether they lived in Finland or abroad.

In *Commission v. Netherlands (automatic expulsion), 2007* the fundamental status-formula again clearly spun the Court's decision. It was put forward right at the beginning of the Court's reasoning and led it towards the conclusion that even Union citizens who were unlawfully resident in the host state could rely on Directive 64/221. In *Gootjes-Schwarz, 2007* the fundamental status-formula exerted some spin. The spin was limited, though, because the Court essentially transposed the assessment made previously under the free movement of services to citizenship. The same is true for *Commission v. Germany (private schools), 2007* which concerned the very same German rules.

In *Huber, 2008* the fundamental status-formula delivered the thrust necessary to reject Germany's separate register for Union citizens who were not German nationals. Then, in *Rottmann, 2010* the fundamental status-formula served to limit the power of the member states to withdraw nationality from a Union citizen. In this function it exerted considerable spin.

In *Ruiz Zambrano, 2011* the spin of the fundamental status-formula was again very strong. It drove the Court towards the decision of granting the third country national concerned a right of residence derived from his children. In *Stewart, 2011* the fundamental status-formula exerted some spin, although it was embedded in other case-law. In part, it made room for the Court to invali-

date the United Kingdom's condition for the award of a benefit which consisted in the need to have been present in the United Kingdom in the past.

In *Commission v. Austria (transport fare), 2012* merely some limited spin can be discerned. The Court included the fundamental status-formula in the beginning of its considerations and embedded it in other case-law. Moreover, the final result to reject the income allowance as not representative of a connection with Austria appeared quite removed from the formula. Finally, in *L.N., 2013* the fundamental status-formula was mentioned at the beginning of the judgment. It noticeably spun the Court's decision towards considering a student as a worker.

*Empty spin*

While the 'fundamental status' regularly spun decisions, empty spin – a phenomenon that was also observed in the previous chapters with 'broad' and 'coordinated' interpretation – also occurred, notably in the following four, or five, decisions. *Schempp, 2005* was the first case with an element of empty spin. The Court started out with the 'fundamental status', embedded it in other case-law, and then found that the relevant tax situations in Austria and Germany were not comparable. The 'fundamental status' thus ran empty. Neither non-discrimination nor the right of Union citizens to move were violated by Germany's refusal to allow the deductibility of maintenance payments to a recipient established in Austria. *Mariano, 2009* was the second case in which the fundamental status-formula spun empty. The Court first mentioned the 'fundamental status'. Yet it turned against the thrust of the formula to hold that Union citizenship could not extend the scope of the Treaty. Hence, the 'fundamental status' fizzled and Ms Mariano's claim that she was discriminated on the ground that she had not been married went unheard. In *Gottwald, 2009* again the fundamental status-formula's spin was empty. The Court introduced its considerations with the formula, but then found Austria's restriction of the freedom of Union citizens to be justified. In *Dereci, 2011* empty spin could, with some imagination, be considered to have occurred. However, the decision merely clarified what the Court had laid out in *Ruiz Zambrano, 2011* and *McCarthy, 2011*, which the Court routinely reiterated. Finally, in *Hungary v. Slovakia, 2012* spin was again empty. The Court began its considerations with the fundamental status-formula, but then turned against the moment of the formula and decided against the thrust of Union citizenship. The visits of heads of state were governed by international law rather than Union citizenship.

*No spin, advance statement*

In some cases no spin occurred. In some of them this was because the 'fundamental status' was included in an advance statement of case-law. These are the following decisions. In *Pusa, 2004* the Court put the fundamental status-formula right at the beginning of the judgment, thus setting the tone for the decision. However, other case-law followed upon the formula in an advance statement of case-law, thus obscuring the formula's potential spin. In *Commission v. Austria*

*(university), 2005* the fundamental status formula did not exactly spin the Court's decision. It rather just underpinned the finding that Austria's approach amounted to indirect discrimination.

In *Spain v. United Kingdom (Gibraltar), 2006* the fundamental status-formula did not exert any spin at all. Spain attempted to inject some spin by relying on the formula and thereby prompt the Court to exclude certain persons who were not Union citizens from the electorate for the European Parliament. But the Court expressly rejected that idea. In *Eind, 2007* the fundamental status-formula hardly provided any spin at all. It was merely mentioned to supplement the complex argument of the Court on why a national returning from a member state to his home state conferred a right of residence to his third country national daughter, although he was not working in his home state.

In *Zanotti, 2010* the fundamental status-formula did not spin the Court's decision, either. The Court's decision in the first part on the freedom of services was simply transposed to the freedom of Union citizens for cases in which the courses offered did not amount to services. In that process, the fundamental status-formula was mentioned merely as a matter of routine. In *Ziebell, 2011* spin again did not occur. The Court mentioned the fundamental status-formula, but only to explain the interpretation it had given to Union citizenship with regard to the member states. For Turkish nationals that interpretation could not apply. Hence, Union citizenship – and with it the 'fundamental status' – was not truly concerned in *Ziebell, 2011*.

In *Prete, 2012* the fundamental status-formula was part of an advance statement of case-law concerning the applicability of the free movement of workers. The Court then discussed the facts with regard to the need to interpret the freedom of workers in the light of Union citizenship. In that discussion the judgments in *Collins, 2004* and *Ioannidis, 2005* informed the Court's decision more than the fundamental status-formula. Consequently, the formula did not exert any spin. In *O and S, 2012* the fundamental status-formula was again part of an advance statement of case-law. Moreover, the Court left the assessment to the referring court, providing it merely with directions. These directions hardly disclose any spin carried over from the advance statement of case-law.

### *Spin uncertain*

In some decisions, it is hard to decide whether the 'fundamental status' exerted any spin. In *Garcia Avello, 2003* the fundamental status appeared at the beginning of the decision and created the mood in which the Court was able to require Belgium to accept Spanish double-barrelled surnames. Yet spin is not obvious in this judgment, since the 'fundamental status' was part of a small advance statement of case-law. In *Rüffler, 2009* the spin the fundamental status-formula could have exerted was tempered by other case-law which was recited. Thus, the short advance statement of case-law obscured most of the spin.

In *McCarthy, 2011* spin is difficult to ascertain. On the one hand, the fundamental status-formula served the Court to rule that the situation of a Union citi-

zen who had never made use of her freedom to move, but rather remained in her home country was not necessarily removed from the grasp of Union law. On the other hand, the Court ruled that Ms McCarthy *was* removed from the grasp of Union law, because she had not been deprived of the substance of her rights as a Union citizen. This second aspect emptied the spin of the fundamental status formula to a certain extent. In *Runevič-Vardyn, 2011* it is again not easy to determine spin. The Court mentioned the fundamental status-formula, but it was in a sort of advance statement of case-law put forward before the Court addressed the restriction and the corresponding justification. Moreover, the Court left it mainly to the national court to assess the degree of inconvenience caused to the Union citizens concerned. Thus, for lack of a clear result of the judgment, spin cannot be determined with certainty.

*c) Conclusions*

The decisions in which the fundamental status-formula materialized turned out in the vast majority of cases in favour of Union citizens. Moreover, when the fundamental status-formula was used it was regularly decisive in the Court's decisions. It very often exerted spin. The cases in which spin was empty were rather rare, though they have become more frequent recently. In some cases spin was buried in an advance statement of case-law. Overall, the essence is that the 'fundamental status' is a formula of great, almost eerie power.

## 4 Counterfactual evidence

The power the 'fundamental status' exerted in the decisions above, in which it was mentioned, can be cross-checked with the decisions in which the formula was *not* mentioned although Union citizenship was at issue. Such counterfactual check is possible for the 'fundamental status', because only a limited number of judgments deal with Union citizenship, with which the 'fundamental status' is inextricably linked. It would obviously not make much sense to check non-citizenship cases on the absence of the 'fundamental status'.

*Before Grzelczyk*

In the judgments that were handed down before *Grzelczyk, 2001*, the fundamental status-formula was not used, although Union citizenship played a role in them. The first of these was *Martínez Sala, 1998*;[159] then came *Bickel, 1998*;[160] *Wijsenbeek, 1999*; *Kaba, 2000*; and *Kaur, 2001*. In the latter three decisions, the

159 In *Skanavi*, *1996*, the Court refused to address Union citizenship, because the freedom of establishment gave specific expression to article 8a Treaty (para. 22). In *Uecker and Jacquet*, *1997*, the Court found that Union citizenship did not extend the scope of Union law to cover purely internal situations. The ruling in *Kremzow*, *1997*, was similar. One could consider *in extremis* that these were unfavourable decisions for Union citizens.

160 In *Bickel*, *1998*, the Court merely supplemented the reasoning on the free movement of services with the free movement of Union citizens (para. 15).

outcome tended to be unfavourable for Union citizens. Yet it would stretch logic quite a bit to draw an *e contrario* argument from that. After all, the fundamental status-formula at that time had not existed.

*After Grzelczyk, non-occurrence in the 2000s*

*After* the Court had established the formula in *Grzelczyk, 2001*, the situation was as follows. In *Olazabal, 2002* the Court refused to address Union citizenship, because the free movement of workers was a specific expression of the freedom of Union citizens (para. 26). In *Stylianakis, 2003* the Court ruled in the same way for freedom of services (paras 18-20). In *Baldinger, 2004* the Court did not mention Union citizenship at all, although Advocate General Ruiz-Jarabo Colomer discussed the 'fundamental status' (in para. 26 of the opinion). According to the Court, the benefit concerned was available only for victims of war and as such not covered by Regulations 1408/71, 1612/68 or article 39(2) Treaty. In *Gaumain-Cerri, 2004* the Court struck down Germany's residence condition for third parties providing care in Germany directly on the basis of Union citizenship. The Court did not use the term 'fundamental status', although it mentioned the 'status of Union citizenship' (para. 34) with reference to paragraph 28 of *D'Hoop, 2002* where the fundamental status-formula had been expressly referred to. Next, in *Lindfors, 2004* the Court under Union citizenship in essence validated Finland's tax on cars imported in connection with a change of residence. Yet the Court left the assessment of whether a disadvantage resulted for Union citizens to the national court.

In *Trojani, 2004* the Court made it clear that the right of residence of Union citizens was conditional on the citizen concerned having sufficient resources. However, when the Union citizen was lawfully resident in the host state, he was not to be denied the benefit of non-discrimination with regard to social assistance. In *Ioannidis, 2005* the Court applied the free movement of workers, but read it in the light of Union citizenship (para. 22) so as to preclude the place where secondary education was passed as a condition for a tideover allowance. Then the Court refused to address Union citizenship on its own. In *Commission v. Belgium (own resources), 2006* the Court struck down Belgium's requirements relating to the sufficient means a Union citizen was to have and the deportation order that was automatically served if he did not have those means. In *De Cuyper, 2006* the Court found a residence requirement for unemployment benefits justified under the freedom of Union citizens to move.[161] In *Eman and Sevinger, 2006* the Court found it discriminatory that Dutch nationals in third states were allowed to stand and vote in the elections to the European Parliament, while Dutch nationals resident in Aruba were not. The Court reached this result on the basis of equal treatment. The same approach was not precluded by Union citizenship as such. In *Tas-Hagen, 2006* the Court found that residence at

161 In *Hosse*, *2006*, para. 19, the national court also asked about the compatibility of the residence requirement in Austrian law with Union citizenship. The Court did not address the question, because the residence requirement fell foul of article 19(2) Regulation 1408/71.

the time an application was submitted was not an appropriate criterion to establish a link with a state's society for the purpose of entitlement to a benefit for victims of war. The freedom of Union citizens to move thus precluded it. In *Commission v. Portugal (capital gains deduction), 2006* the Court invalidated Portugal's provisions on the basis of the freedom of workers and establishment and then transposed that finding to Union citizenship (para. 37). The same is true for *Commission v. Sweden (tax deferral), 2007* (para. 30).[162]

In *Commission v. Belgium (tax matters), 2007* the Court rendered invalid certain Belgian rules concerning insurances and pension funds. The Court first ruled on the basis of the free movement of persons and then transposed the ruling to the freedom of Union citizens (para. 72). In *Morgan, 2007* the Court applied the freedom of Union citizens and invalidated Germany's condition for a grant, which was to have studied for at least a year in Germany and to pursue the same studies abroad.[163]

In *Commission v. Germany (housing subsidy), 2008* the Court again just transposed the ruling concerning the free movement of workers and the freedom of establishment to Union citizenship (para. 30). In *Commission v. Netherlands (own means), 2008* the Court declared unlawful the proof the Netherlands required for 'sufficient means'. In *Nerkowska, 2008* the Court on the basis of Union citizenship invalidated Poland's criterion of continuous residence for a benefit for victims of deportation. In *Jipa, 2008* the Court found that the determination by the host state that a Union citizen had been illegally resident was not sufficient in itself for the 'home' state lawfully to order that citizen not to leave the 'home' state. In *Metock, 2008* the Court enabled direct family reunification with third country nationals on the basis of the citizenship Directive 2004/38. That was confirmed in the order in *Sahin, 2008*. In *Grunkin, 2008* the Court found that a child who was a Union citizen had to be registered under the double-barrelled surname in its 'home' state, when it was so registered lawfully in the state of residence. In *Förster, 2008* the Court sanctioned a requirement of five years of residence for entitlement to maintenance grants. In *Zablocka-Weyhermüller, 2008* the Court struck down Germany's residence requirement for a benefit for victims of war, because it disproportionately interfered with the freedom of Union citizens.[164]

In *Vatsouras, 2009* the Court refused to declare invalid article 24(2) Directive 2004/38, but required that it be interpreted in accordance with the freedom of

162 In *N, 2006*, the Court did not address Union citizenship, because the freedom of establishment was applicable (para. 23).

163 In *ITC, 2007* the Court refused to address Union citizenship given that Germany's approach was at odds with the freedoms of workers and services. In *Alevizos, 2007* the Court also assessed the situation under the free movement of workers and then declined to address Union citizenship (para. 80). The same is true for *Hendrix, 2007* (para. 62). In *Jundt, 2007* Union citizenship only supplemented the assessment made under the freedom of services (para. 62).

164 In *Mayeur, 2008* the Court refused to deal with the substance of the case, because all elements were confined to one member state. The citizenship Directive 2004/38 was thus not applied. The same is valid for *Pignataro, 2009*. In *French Community, 2008* the Court did not discuss Union citizenship, because the rules at issue were contrary to the freedom of workers and establishment (para. 59).

Union citizens and the freedom of workers. In *Von Chamier-Glisczinski, 2009* the Court protected Germany's refusal to export a care allowance. In *Commission v. Germany (savings-pension bonus), 2009* the Court struck down certain German rules on the basis of the free movement of workers and then transposed that ruling to Union citizenship for those who were not economically active (para. 115). In *Wolzenburg, 2009* the Court sanctioned the criterion the Netherlands applied to refuse to surrender persons for the execution of a judgment. It was compatible with Union citizenship to require in that regard a period of five years of residence in the Netherlands.[165]

*Non-occurrence in the early 2010s*

In *Teixeira, 2010* and *Ibrahim, 2010* the Court confirmed the right of residence of the child in education and its primary carer based on article 12 Regulation 1612/68, although the citizenship Directive 2004/38 had repealed articles 10 and 11 Regulation 1612/68. The Court also rejected restrictions on the basis of the age of the dependant and the resources of the carer. In *Bressol, 2010* the Court essentially sent back the case to the national court to assess the proportionality of Belgium's restriction of access to studies in medicine under Union citizenship. In *Lassal, 2010* the Court interpreted Directive 2004/38 liberally so that a Union citizen who had completed five years of residence in the host state before the Directive was to be implemented could be considered to have permanent residence. In *Van Delft, 2010* the Court basically validated the effects a change in the Dutch insurance system had on Union citizens living abroad. In *Tsakouridis, 2010*, the Court essentially left the assessment of the period of presence of ten years and the imperative grounds of public security to the national court, requiring only an overall assessment of the situation and very good reasons for expulsion. In *Sayn-Wittgenstein, 2010*, the Court found it compatible with Union citizenship that the Austrian authorities deleted from their registers a certain part of the surname of a Union citizen to give effect to an amendment of Austria's constitutional law. The Court did not mention the 'fundamental status', although the Commission had used it as an argument (para. 51).

In *Commission v. Greece (transfer tax), 2011* the Court disallowed Greece's taxation of real estate under the free movement of workers and establishment and then transposed that ruling to Union citizenship (para. 60). In *Dias, 2011* the Court held that periods during which insufficient resources were available to a Union citizen in the host state did not constitute periods of legal residence, even if she held a residence permit. Such periods were capable of extinguishing her right to permanent residence. In *Aladzhov, 2011* and *Gaydarov, 2011* the Court left it to the national court to determine whether unsettled tax liabilities of a Union citizen amounted to a threat to public policy within the meaning of the Court's case-law. In *Commission v. Hungary (property tax), 2011* the Court

165 In *Leyman*, *2009* the Court did not address Union citizenship, but the free movement of workers (para. 20). In *Josemans*, *2010* the Court discussed the free movement of services rather than Union citizenship (para. 53).

found Hungary's way of taxing real property in accordance with the freedom of workers and establishment and then transposed that finding to Union citizenship (para. 89). In *Ziolkowski, 2011*, the Court found that the period of lawful residence in the host state, which was necessary to achieve permanent residence in the sense of Directive 2004/38, implied that the persons concerned had sufficient resources and sickness insurance during that period. Periods completed before accession of a member state basically counted towards the five year-period.[166]

In *P. I., 2012* the Court admitted serious crimes against minors as an imperative ground of public security capable of justifying expulsion of a Union citizen. In *Commission v. Spain (income tax), 2012* the Court found it incompatible with the free movement of workers and establishment that taxes became payable upon leaving Spain. The Court then transposed that finding to Union citizenship (para. 93). In *Reichel, 2012* the Court on the basis of Union citizenship required Germany to factor into the calculation of a benefit certain periods during which a Union citizen raised a child abroad. In *Rahman, 2012* the Court granted the member states wide discretion for reunification with third country nationals not belonging to the core family of a Union citizen. In *Czop, 2012* the Court confirmed that pre-accession periods counted toward the five year-period of permanent residence under Directive 2004/38. In *Byankov, 2012* the Court ruled that a prohibition for a Union citizen to leave the country had to be amenable to review after a certain time. Finally, in *Iida, 2012* the Court refused to accede to a claim of a third country national on the basis that he was married to a Union citizen. The Union citizen was not deprived of the genuine enjoyment of her rights.

### *No non-spin, the blessings of the absence of 'fundamental status'*

Logic excludes the possibility to determine the 'non-spin' of the fundamental status-formula in the above decisions where the 'fundamental status' was not mentioned. More specifically, it cannot be gauged how the absence of the formula spun the Court's decision. What can be gauged, though, is whether the above decisions turned out in favour of Union citizens, while spin and favour are obviously not the same.

The picture that emerges with regard to favour is mixed. On the one hand, many decisions proved to be favourable to Union citizens, although the fundamental status-formula was not mentioned, namely the following decisions: *Gaumain-Cerri, 2004*, which was a case in which it seems almost bizarre that the Court did not mention the fundamental status-formula, since the paragraph in

166 In *Commission v. Portugal (tax representative)*, *2011* the Court found it unnecessary to address Union citizenship after having found a violation of the free movement of capital (para. 60). The same is true for *van Putten*, *2012* (para. 55). In *Bartlett*, *2011*, *Schulz-Delzers*, *2011*, and *Caves Krier*, *2012* the Court did not discuss Union citizenship, because it found specific expression in the free movement of workers (para. 41, para. 30, and para. 30, respectively), while the same was true for *Commission v. Belgium (registration duties)*, *2011* with regard to the freedom of capital (para. 30). In *Kamberaj*, *2012* the Court found the questions concerning Union citizenship inadmissible. In *Commission v. Netherlands (certain charges)*, *2012* the Court found it unnecessary to compare charges imposed on third country nationals with those imposed on Union citizens.

*D'Hoop, 2002* to which the Court referred *did* mention it and the decision was in harmony with the typical thrust of the 'fundamental status'; *Ioannidis, 2005* though technically it was a freedom of workers case; *Commission v. Belgium (own resources), 2006*; *Tas-Hagen, 2006*; *Morgan, 2007*; *Commission v. Netherlands (own means), 2008* though directives 68/360, 90/364, and 90/365 were applied rather than article 18 Treaty; *Nerkowska, 2008*; *Jipa, 2008* even though it was left to the 'home' state to assess the grounds of public order justifying a prohibition to leave; *Metock, 2008* and *Sahin, 2008*; *Grunkin, 2008*; *Zablocka-Weyhermüller, 2008*; *Teixeira, 2010* and *Ibrahim, 2010* although the two decisions were based on the free movement of workers; *Bressol, 2010* though the assessment was left to the national court; *Lassal, 2010*; *Tsakouridis, 2010*, though again the assessment was passed back to the national court; *Reichel, 2012*; and *Byankov, 2012*.

A number of further decisions can be considered to belong to this category, though with less certitude. These are decisions that turned out favourably for Union citizens, but the case was less involved with Union citizenship, given that the Court simply transposed the assessment made previously in the same decision under one market freedom to Union citizenship: *Commission v. Belgium (tax matters), 2007*; *Commission v. Sweden (tax deferral), 2007*; *Commission v. Germany (housing subsidy), 2008*; *Commission v. Germany (savings-pension bonus), 2009*; *Commission v. Greece (transfer tax), 2011*; and *Commission v. Spain (income tax), 2012*.

Of all those decisions that were generally favourable for Union citizens, while the Court in its reasoning did not mention the 'fundamental status', six are relative, namely *Metock, 2008*; *Teixeira, 2010* and *Ibrahim, 2010*; *Bressol, 2010*; *Lassal, 2010*; and *Tsakouridis, 2010*. In each one of those the Court in the 'legal context' recited preambular clause 3 of the citizenship Directive 2004/38 which mentions the 'fundamental status'. Therefore, the Court perhaps found it unnecessary to cite the 'fundamental status' again in the reasoning.

### *The curse of the absence of 'fundamental status'*

On the other hand, a series of decisions in which the 'fundamental status' was not mentioned turned out rather unfavourably for Union citizens. The following decisions belong to this category: *Baldinger, 2004*; *Lindfors, 2004* though it was subject to the national court's assessment; *De Cuyper, 2006*; *Mayeur, 2008* and *Pignataro, 2009*, because the Court refused to address purely internal situations; *Förster, 2008*; *Vatsouras, 2009* in a sense because the Court refused to declare invalid article 24(2) Directive 2004/38; *Von Chamier-Glisczinski, 2009* in that the Court protected Germany's refusal to allow a benefit to be exported; *Van Delft, 2010*; *Sayn-Wittgenstein, 2010*; *Dias, 2011*; *Aladzhov, 2011* and *Gaydarov, 2011* though the assessment *in concreto* was left to the national court; *Ziolkowski, 2011* although only with regard to the first and less obvious answer, while the second answer turned out rather favourably for Union citizens; *P. I., 2012*, though only in that a settled, but highly criminal Union citizen was lawful-

ly ordered to leave the 'host' state with the result that the threat the citizen posed was passed on to another member state to whom the citizen did not have any connection bar nationality; *Rahman, 2012* because of the large discretion to assess reunification with certain third country nationals; *Iida, 2012* while the constellation in this case was special, because an application under Directive 2003/109 had not been submitted. Again, to these decisions the judgment in *Commission v. Hungary (property tax), 2011* must be added, because the Court simply transposed the conclusion from the free movement of workers to Union citizenship. Moreover, of these decisions *Ziolkowski, 2011* seems quite particular, because the clause of the preamble of Directive 2004/38 containing the 'fundamental status' was cited under 'legal context'.[167]

*Conclusions*

The conclusion from the appraisal of the decisions in which the Court did *not* mention the fundamental status-formula – the counterfactual evidence, so to speak – is not very clear. The blueprint is not simple. A decision does not always turn out unfavourably for Union citizens if the 'fundamental status' is not mentioned. That, however, hardly invalidates the 'positive' power of the fundamental status-formula. Thus, the outcome for once is quite simple. If the Court mentions the 'fundamental status', the decision tends to favour Union citizens – and the 'fundamental status' usually spins the decision.

167 A number of decisions defy categorization in the above terms, notably the decisions in which the Court expressly refused to discuss Union citizenship (*Olazabal*, *2002*; *Stylianakis*, *2003*; and the decisions mentioned in the footnotes above); *Trojani*, *2004*, which is as hard to categorize as it is to read; *Eman and Sevinger*, *2006*, because the Netherlands' way of determining the franchise was compatible with Union citizenship, but not equal treatment; *Wolzenburg*, *2009*; and *Czop*, *2012*, for merely confirming *Ziolkowski*, *2011*.

## D Conclusion

This book pursues two goals. On the one hand, all decisions the Court of Justice of the European Union has ever handed down in the free movement of persons and services are unearthed. Roughly 1400 decisions come to light. The thick description in the first part of this book contains them all. This part of the book is helpful for practitioners who want to have a complete picture of the case-law and for scholars whom it allows further to build and deepen their own work.

On the other hand, a more scholarly goal is pursued. The evolution of certain interpretive formulas in the body of case-law unlocked in the first part is traced. The account of this enquiry as such has certain value, which again draws to a large measure on the completeness and comprehensiveness of the enquiry. Every single instance within the 1400 decisions in which the interpretive formulas concerned were applied is considered. There is no decision within the large body of case-law examined in which one of the interpretive formulas is applied, but which goes undiscussed in the second part of this book. While this part of the book allows practitioners to hone their argument based on the interpretive formulas concerned for future cases, broader developments and useful conclusions for scholarly purposes also emerge from the enquiry undertaken. They are summarized below.

That the amount of decisions by the Court of Justice involved in one way or another with the free movement of persons and services is so large may come as something of a surprise.[168] The large number of decisions in turn conditions the number of comprehensively traceable interpretive formulas. Three important strands of interpretive formulas are mapped out within the body of case-law: those operationalizing either a broad or restrictive interpretation, an interpretation based on the idea of 'coordination', or an interpretation relying on concepts that are fundamental. Further evidence can thus be found in this book of the Court's structuralism and activism, although the latter notion, which is politically loaded, is clearly not the central concern of this book.

## I Spin and emptiness

Apart from the individual conclusions drawn for each of the interpretive formulas (see below), some general developments and patterns emerge from this book. First, the impact an interpretive formula has in a decision can be assessed. An attempt is made in this book to determine qualitatively the 'spin' a formula exerts

168 At the outset when the enquiry was begun, the expectation had been that no more than 200 decisions would come to light. Yet, after the enquiry is launched, scientific rigour binds the scholar. Hence, once it turned out that the case-law has grown exponentially, a great effort had to be invested to tackle and come to grips with the unexpected number of 1400 decisions. This, in turn, has limited the number of interpretive formulas that could be traced comprehensively in the body of case-law thus established to three.