

tisement by the Dutch national television stations, would comply with the freedom of services (para. 38).

### *Remuneration*

*Humbel*, 1988, a judgment which mainly concerned the *Gravier*, 1985-line of authority, also clarified the term ‘services’ pursuant to article 59 Treaty. The characteristic of remuneration, according to the Court, was that it constituted consideration for a service normally agreed upon between the parties involved. That was not the case with national public education which was normally funded by public means, even though sometimes contributions were required. In public education, the state did not pursue a gainful activity, but rather fulfilled its basic function of providing the population with education (paras 17-9).

### *Transport services*

In *Corsica Ferries*, 1989 the Court refused to apply the freedom of services for the years 1981 and 1982, although higher charges were essentially imposed in case of ferry transports between ports in Corsica and member states (or Africa) than in case of transports between ports in Corsica and France. The reason for the Court’s ruling was that transport services were subject to liberalization through the transport policy. That liberalization was implemented only by Regulation 4055/86 (paras 10-4). However, the Court emphasized that the freedom of services – like the freedoms of goods, persons, and capital – precluded restrictions even if they were only minor. Moreover, a trader’s freedom to provide services could be affected by tax measures (paras 8-9).

### *Tourists*

Finally, *Cowan*, 1989 confirmed that a tourist was a service receiver who enjoyed the freedom of services. Tourists therefore had to be protected from physical harm in equal measure as a state’s own citizens (para. 17). More specifically, when a tourist from the United Kingdom became the victim of a crime in France and claimed compensation under French law France could not refuse such compensation on the sole ground that the victim did not have a French residence permit – in particular when no similar requirement was imposed on French citizens – else French law ran afoul of the prohibition of discrimination on the basis of nationality. The same was valid as to the condition that the state of which the victim was a national had concluded an agreement of reciprocity with France (paras 10-3).

## IV The 1990s

The case-law grew exponentially in the 1990s. During this decade, the Court handed down more decisions in our domain than in the 25 years before: more than 350 decisions. Social security and workers contributed the bulk with almost

140 and more than 80 decisions, respectively. The freedom of services and establishment also came up strong though, with almost 60 decisions and more than 70 decisions, respectively.

## 1 Workers and citizens

### *Worker*

The Court continued the case-law of the previous decades on the term ‘worker’ in the 1990s with the judgment in *Antonissen*, 1991. According to the Court, a job seeker who came to the United Kingdom to find employment continued to be a ‘worker’ under article 48(3) Treaty even after a period of job seeking of six months had expired. The job seeker only had to provide evidence that he continued to seek employment and that he had genuine chances of finding employment (para. 21). *Antonissen*, 1991 was confirmed in *Commission v. Belgium (residence permits)*, 1997. The Court struck down an order to leave Belgium which, in accordance with national law, had been issued automatically after three months of unsuccessful job seeking. In *Merci*, 1991 the Court held that the concept of a ‘worker’ covered persons who were employed by an undertaking and who were linked at the same time to the other persons employed by that undertaking through a relationship of association (para. 13). *Merci*, 1991 was later confirmed in *Becu*, 1999 (para. 28). In *Raulin*, 1992 the Court clarified that a person who had concluded an on-call contract which gave rise to irregular working hours, payment only corresponding these hours, and no obligation to heed calls to work could be considered a ‘worker’. Yet the national court had to assess the ‘purely marginal and ancillary’ nature of the activities. In that assessment it was not required to factor in activities pursued by the person concerned in other member states (paras 18 and 19). On the same day as *Raulin*, 1992, *Bernini*, 1992 repeated *Lawrie-Blum*, 1986 and *Bettray*, 1989 to find that a national court could consider a paid trainee a ‘worker’.

In *Boukhalfa*, 1996 the Court reiterated in accordance with *Prodest*, 1984 and *Lopes da Veiga*, 1989 that Community law was capable of applying outside the territory of the member states. It held that a local employee of a member state’s embassy situated outside the territory of the Community was entitled to rely on non-discrimination, provided that the employment contract established a sufficiently close link to a member state in terms of applicable law, jurisdiction, social security contributions, and taxes (paras 15-6). Thus, a local employee who was a national of a member state could rely on non-discrimination.

In *Asscher*, 1996 the Court found that a person who was employed as a director in a company of which he was the sole owner could not be considered a worker for lack of a relationship of subordination (para. 26). Instead, the freedom of establishment was applicable. This was confirmed in *Meeusen*, 1999. However, the ruling in *Asscher*, 1996 did not necessarily apply to the spouse of

such a company director who (the spouse) was employed in the same company (*Meeusen*, 1999, para. 15-16).

The definition of the term 'worker' finally spilled over into social policy in *Nolte*, 1995 and *Megner*, 1995. These cases concerned gender discrimination. However, the Court applied the definition of a worker developed in the free movement of workers in *Hoekstra*, 1964; *Levin*, 1982; and *Kempf*, 1986 to find that the fact that a person worked during very few hours did not have the effect of excluding a person from the scope of Directive 79/7/EEC on equal treatment between men and women in matters of social security.

### *Advantages*

The Court elaborated on article 7 Regulation 1612/68 in a sequence of cases in the 1990s, beginning with *Le Manoir*, 1991. In this judgment it emerged that indirect effects on the worker could be caught by article 7 Regulation 1612/68. The Court held that the situation where an employer had to pay higher social security contributions for a trainee he employed who pursued vocational training in another member state than for those pursuing 'national' training amounted to covert discrimination. Next, the Court qualified childbirth and maternity allowances as 'social advantages' under article 7(2) Regulation 1612/68 in *Commission v. Luxembourg (childbirth benefit)*, 1993. A residence requirement was therefore ruled out. The Court then in *Schmid*, 1993 declared unlawful a nationality condition for a disability allowance by applying *Lebon*, 1987 with regard to a disabled adult descendant dependent on a migrant worker.

In *De Vos*, 1996 the obligation of the employer to continue to pay contributions to a pension fund while the employee was attending military service was held to constitute neither an employment condition under article 7(1) Regulation 1612/68 nor a social advantage article 7(2), because the state reimbursed the contributions to employers. Rather, the payment of the contributions served as partial compensation by the state for the military service performed, and was thus not a benefit granted on the basis of the work or residence of a worker. *O'Flynn*, 1996 established that it amounted to indirect discrimination in terms of social advantages under article 7(2) Regulation 1612/68 to cover the cost of a decent burial of a family member and the transport cost related thereto only when the burial took place in the United Kingdom. Essentially, the cost of the burial itself were the same abroad, and the transport cost covered were limited under national law in any case to those arising from local transports (para. 28). In *Commission v. Belgium (unemployment)*, 1996 the Court found the Belgian tideover allowance which had already been at issue in *Deak*, 1985 and which was essentially granted only to graduates of educational establishments situated in Belgium to be indirectly discriminatory in the light of article 7(2) Regulation 1612/68, namely in cases of dependent descendants of migrant workers. In the same judgment, however, the Court considered a special unemployment programme under which the Belgian state assumed the costs of employers who employed young workers in their first job to be outside the scope of Regulation

1612/68, in so far as it regarded young nationals of other member states who had received their education abroad, sought access to the employment market in Belgium, and were not members of the families of migrant workers employed in Belgium (paras 36-40). Then in *Meints*, 1997 the Court struck down a residence requirement for a compensatory benefit granted to those farm workers who had become unemployed as a result of farm land having been set aside by their former employer. The benefit constituted a social advantage pursuant to article 7(2) Regulation 1612/68 and the residence condition was indirectly discriminatory (para. 41 and 46, respectively). Frontier workers could also claim the benefit.

*Commission v. France (pension points)*, 1998 dealt with the situation where frontier workers employed in France did not receive supplementary retirement pension points upon dismissal while ordinary workers did. The Court held that the pension point scheme which was mandatory for certain employees and based on a collective agreement rendered compulsory in France came within article 7 Regulation 1612/68. The Court found that the residence requirement violated the prohibition of indirect discrimination. In *Commission v. Greece (large families)*, 1998 the Court declared unlawful Greece's nationality requirement for certain benefits for large families and certain family allowances coming within the scope of article 7(2) Regulation 1612/68.

The Court relied on article 7(2) Regulation 1612/68 as well when it ruled in *Di Leo*, 1990 that educational grants given to enable studies abroad had to be awarded not only to migrant workers according to *Matteucci*, 1988, but also under article 12 Regulation 1612/68 to the children of resident migrant workers, even if they pursued studies in the state of which they were nationals. *Di Leo*, 1990 was confirmed in *Bernini*, 1992. The Court in this case also made it clear that a descendant dependent on a migrant worker could rely on article 7(2) Regulation 1612/68 directly. More specifically, if national law granted educational benefits to students themselves, a descendant of a migrant worker was also entitled to claim the benefits directly, although his rights were technically acquired through the migrant worker and he was only an 'indirect beneficiary' (para. 26). In *Gaal*, 1995 the Court added to *Di Leo*, 1990 that article 12 Regulation 1612/68 also applied to the children of migrant workers who were already 21 years of age or older and who were not any longer dependant on the migrant worker (para. 25). In *Meeusen*, 1999, on the other hand, the Court again relied on article 7(2) Regulation 1612/68 to find that if the domestic law of a member state did not impose a residence requirement on the children of a national of that member state in the award of study finance, the member state was precluded from imposing such a residence requirement on the children of migrant workers or self-employed persons (para. 23).

The rights of family members were also at stake in *Dzodzi*, 1990. However, the question the Belgian court asked related to the rights of a third country national who was the spouse of a Belgian worker. Although the only member state concerned was Belgium, the Court gave an answer, thus putting the approach that had removed purely internal situations from the Court's jurisdiction into

perspective. Yet the answer the Court gave consisted mainly in a reiteration of the Community provisions that would have been applicable had the worker been a national of another member state than Belgium. The Court then left it to the national court to apply these provisions so as to avoid any possible reverse discrimination against Belgian nationals in Belgium. In *Taghavi*, 1992 the rights of a third country national who was the spouse of a national of a member state were also at issue. Yet she was not entitled to rely on article 7(2) Regulation 1612/68 to claim a benefit in Belgium in the light of her handicap, because third country national spouses of Belgian nationals did not have a claim to such a benefit, either. A 'social advantage' for Belgians did therefore not exist (para. 11).

### *Education*

Educational training was also discussed with regard to other norms than article 7 Regulation 1612/68. In the judgment *Kraus*, 1993 the Court dealt with an authorization procedure which one had to undergo pursuant to national law to be allowed to bear an academic title acquired in another member state. Even though everyone was indiscriminately subject to this authorization procedure in the case at hand, the exercise of the freedom of movement was hampered or made less attractive (para. 32). The authorization procedure therefore had to be free, easily accessible, subject to an appeal, and based on a transparent statement of the reasons why the decision adopted. Non-compliance was to entail proportionate sanctions (paras 38-41). The Court essentially adopted these requirements from the diploma recognition case-law (see below).

Next, the Court again dealt with the *Gravier*, 1985 line of authority in two cases. In *Raulin*, 1992 the Court held that *Gravier*, 1985 also applied when financial assistance for students was not only designed to reduce the fees for access to education but in addition to help with the cost of maintenance. In such a case, the part of the assistance relating to access to education had to be earmarked and made available on a non-discriminatory basis (para. 28). Moreover, equal access to education pursuant to *Gravier*, 1985 necessarily implied a right of residence (para. 34). In *Commission v. Belgium (minerval)*, 1994 the Court then held that Belgium's legislation still failed to comply with Community law. It was not sufficient to make applicable the exemption from minerval to students who had already been enrolled in the state of which they were nationals and where they paid fees (para. 12). Moreover, the findings regarding discrimination made in *Commission v. Belgium (students)*, 1988 also applied to universities.

In *Commission v. Greece (teachers)*, 1995 the Court invalidated certain requirements for teachers in private schools that were stricter for nationals of other member states than for Greek nationals, namely the requirements that an authorization and certain documents were necessary and that an exemption from the need to be qualified as a public school teacher was only made for Greek nationals. (Greece had acknowledged the infringement.) Finally, the Court, saw to foreign language assistants again. It confirmed the judgment *Allué I*, 1989 in *Allué II*, 1993, in particular for renewable one-year fixed-term contracts. *Spotti*,

1993 confirmed the discrimination of foreign language assistants in a situation where objective reasons were necessary in each case to justify limiting the contracts of teaching staff in time, while such reasons were presumed to exist in general for foreign language assistants. In *Petrie, 1997*, however, the Court found that foreign language assistants were not discriminated against when they were not admitted to fill certain posts that were only temporarily vacant and open to 'lecturers and established researchers'. The reason was that that category only encompassed persons who had passed a selection procedure, while foreign language assistants were not required to pass such a procedure. Foreign language assistants and established researchers were thus not in comparable situations (para. 52).

### *Taxes*

In the 1990s, the Court initiated the tax case-law in the free movement of persons. The Court had already relied on the free movement of workers in a value added tax case, namely *Ledoux, 1988* (paras 11, 12, and 18). But the first case that was based fully on the free movement of workers was *Biehl, 1990*. The Court found that the way Luxembourg handled the refund of income tax levied at source violated the right to the same tax advantages in article 7(2) Regulation 1612/68, because it was covertly discriminatory. Luxembourg had excluded the refund of income tax levied in excess of the actual tax liability, i. e. in the case of 'overdeduction', when the taxpayer moved to another member state in the course of the year or had moved to Luxembourg in the course of the year. The ruling was later on applied again in *Commission v. Luxembourg (excess tax), 1995* for a similar rule in Luxembourg which required nine months of employment in Luxembourg for a tax adjustment.

The next step in the tax case-law was taken with a pair of judgments of 28 January 1992, *Bachmann, 1992* and *Commission v. Belgium (insurance taxation), 1992*. In these two judgments, the Court considered the refusal by Belgium to deduct from taxable income premiums paid under pension and life insurance contracts taken out with foreign insurers, while those paid under contracts taken out with domestic insurers were fully deductible, as a justified tax discrimination. The reason was that the advantage for persons having a contract with a domestic insurer, viz. the deductibility of premiums, was later offset by the taxation of the income by way of pension awarded on the basis of the insurance contract, while the income received in application of contracts with foreign insurers was not subject to direct taxation in Belgium. In other words the connection between the deductibility of premiums and the taxation of income – 'the cohesion of the tax system' in the words of the Court in *Bachmann, 1992* (para. 21) – justified the distinction between premiums paid under domestic and under foreign contracts.

In *Schumacker, 1995* the Court dealt with the taking into account of the family circumstances of migrant workers, notably frontier workers. The Court ruled that the situations of resident and non-resident taxpayers were, as a rule, not

comparable for the purposes of direct taxation (para. 31). The member state where the worker was employed could therefore draw a distinction based on the place of residence of the taxpayer and refuse to take into account his personal and family circumstances. The reason was that the member state where a worker was resident was normally placed best to take into account the personal and family circumstances of a worker, because the worker's interests were concentrated there (para. 32). However, if a migrant worker gained almost all of his income and the major part of the family income in a member state where he was not resident, the risk arose that the personal and family circumstances of the migrant worker were not taken into account for tax purposes anywhere at all. Then the situations of resident and non-resident taxpayers became comparable and the member state where the income was earned had to factor in the personal and family circumstances. Consequently, in *Gschwind*, 1999, Germany's amended rules that provided that tax splitting for spouses applied to non-resident taxpayers only if they in total gained more than 90 per cent of their income in Germany or their total income gained abroad was less than 24'000 German marks were sanctioned by the Court.

*Wielockx*, 1995 was an establishment case in which the aspects of *Bachmann*, 1992 and *Schumacker*, 1995 came together. The Court ruled that it was contrary to *Schumacker*, 1995 if the Dutch authorities rejected the tax deductibility of contributions made to a Dutch pension reserve to a person who was established in the Netherlands while having residence in Belgium and who gained his entire earnings through self-employment in the Netherlands. However, the *Bachmann*, 1992-justification based on the cohesion of the tax system did not prevail, according to the Court, because the Netherlands had waived taxation of the income generated by the contributions for non-residents in the double taxation convention with Belgium irrespective of the deductibility of contributions. Thus, the Court moved the notion of fiscal cohesion from the level of the individual to the inter-state level (para. 24). The need to preserve the cohesion of the tax system could therefore not justify the refusal to allow deduction of the contributions. In *Asscher*, 1996 a similar constellation was at issue, namely a person who was self-employed in both Belgium and the Netherlands. However, although the *Schumacker*, 1995-requirements were not met in the Netherlands, because less than 90 per cent of the income was generated in the Netherlands, the Dutch authorities were not justified in applying a higher tax rate to non-residents than to residents on the ground that in the Netherlands social security contributions were generally not deductible any longer (para. 54). 'Fiscal cohesion' did not apply, either, because a direct link between the advantage and the disadvantage did not exist, i. e. no benefits were gained by reason of the additional tax paid (para. 60). Moreover the allocation of the competence to levy social security contributions pursuant to Regulation 1408/71 was mandatory and could not be changed indirectly through tax measures (para. 61).

*Gilly*, 1998 was another tax case regarding frontier workers. In this case the Court found that the connecting factors applied in the double taxation conven-



tion between France and Germany to determine the state competent to tax income were not contrary to article 48 Treaty, although they were partly based on the nationality of workers. These connecting factors were established by the member states to allocate powers of taxation and on the basis of an OECD model convention which was not 'unreasonable' (para. 31). They could lead to different levels of taxation (paras 34 and 47). Moreover, the requirements of *Schumacker*, 1995 were respected (paras 49 and 50).

### *Derogations*

In the 1990s, the Court addressed the derogations from the free movement of workers, too. In *Bleis*, 1991 the Court held that employment as a secondary school teacher was not 'public service' within the meaning of article 39(4) Treaty. The Court thus implicitly rejected a nationality condition for competitions for posts as secondary school teachers. In *Commission v. Greece (public service)*, 1996 and *Commission v. Luxembourg (public service)*, 1996 the Court sanctioned the infringement procedure brought by the Commission, as part of a strategy to open national public services in general for nationals of other member states, against Greece's and Luxembourg's withholding of a vast array of posts to their own nationals. The Court held that generally posts 'in the areas of research, health, inland transport, posts and telecommunications and in the water, gas and electricity supply services' were not part of 'public service' (para. 31, *Commission v. Luxembourg (public service)*, 1996). Moreover, primary school teachers were not within the scope of 'public service', either (para. 34, *Commission v. Luxembourg (public service)*, 1996). On the same day as these two judgments were delivered, the Court in *Commission v. Belgium (public service)*, 1996 recalled that the public service derogation did not serve to exclude entire sectors from the scope of the freedom of workers. A violation of the public service derogation was only conceivable, if the state had a controlling authority over an entity. This was not the case for some of the semi-public and private entities affected by the infringement procedure (para. 22).

In *Pereira Roque*, 1998 the Court, next, addressed the public security derogation in the special context of the Channel Islands. The Court held that the protocol relating to the islands, which had been annexed to the Act of Accession of the United Kingdom and which refrained from extending the free movement of persons to the islands, essentially precluded only deportations based on arbitrary distinctions (para. 49). Finally, the Court dealt with some derogations in *Commission v. Spain (private security guards)*, 1998, a case that concerned both the free movement of persons and services. The Court rejected both nationality and residence requirements for private security guards. The companies providing security services were private, so that the public service exception was not applicable; the connection to any official authority was indirect and unspecific (para. 35); the exclusion by reason of the nationality of a guard was too general to be covered by the public security exception (para. 41); a residence requirement was not necessary for the public security aims to be met.



### Non-discrimination

In the 1990s, the Court also dealt with a number of cases on the basis of non-discrimination. *Ramrath*, 1993 was such a case. It concerned the freedom of workers, establishment, and services at the same time. The Court did not distinguish clearly between the freedoms. The Court made it clear that, although the rules of the Community generally left the matter at issue to the member states, a state was not to require an auditor from another member state to be permanently established in its territory when the auditor occasionally came to this member state to audit companies in the service of an auditor authorized in the member state concerned (para. 36). In *Scholz*, 1994 the Court ruled that it was unjustifiably discriminatory not to take into account periods of employment in the public service of another member state when a job advertisement had announced that previous job experience acquired in the public service of the member state concerned would be taken into account in the selection of a candidate. In a similar vein, the Court ruled in *Schöning*, 1998 that periods of employment in a specific profession had to be factored in equally in the categorization of an employee into a salary group, regardless of whether they were completed abroad or not. Different organizational rules of member states' public services could not affect that conclusion. Similarly, in *Commission v. Greece (foreign public service)*, 1998 the Court invalidated a Greek rule that excluded periods of employment in foreign public service from consideration for salary and age benefit purposes.

In the judgment *Bosman*, 1995 the Court built on previous sports case-law, namely *Walrave*, 1974 and *Donà*, 1976, and reiterated that sport did not fall outside the scope of the Treaty freedoms in so far as it was an economic activity. The Court then struck down the elaborate mechanism of the European football associations and their umbrella federation to impose a transfer fee to be paid by the club who acquired the services of a player to the former club of the player, essentially because it hindered the access of the player to the market. Moreover, the Court invalidated the rule which limited the number of players from other member states that clubs could field, as it was discriminatory.

One aspect of the judgment in *Commission v. France (ship registration)*, 1996 concerned the registration of a ship for leisure purposes. (For the main part of the judgment concerning the freedom of establishment, see below.) The Court ruled that the 'access to leisure activities' was a 'corollary' of the freedom of movement (para. 21). Thus, the registration of a ship, even though it would be used for non-economic purposes, was not to be subject to a nationality condition. *Dafeki*, 1997 was a judgment that concerned the probative value of birth certificates. The Court held a German rule to be discriminatory that provided that birth certificates issued in other member states had less probative value than German certificates. Pursuant to that rule in a case in which more than one foreign birth certificate existed because of a rectification, was presumed as valid the certificate which had been issued at the point in time closest to the date of birth, while a German certificate that had been officially rectified was considered valid.

According to the Court, the rule was too abstract to address situations of abuse in which the date of birth had allegedly been moved forward with the intention to benefit from earlier retirement. Instead, such abuse had to be established in each specific case.

In *Clean Car*, 1998 the Court struck down a residence requirement for managers of companies, as it was indirectly discriminatory and thus precluded by article 48 Treaty. It also held that a company itself, as an employer, could rely on the free movement of workers of its managers to attack the residence rule that was addressed to the company (paras 19-24). In the judgment in *Terhoeve*, 1999 residence as a connecting factor was also an issue. *Terhoeve*, 1999 concerned a ceiling that applied to the amount of social security contributions to be paid by residents. The Court found that it amounted to an unjustified obstacle to the free movement of workers to refuse to apply this ceiling to a person who had worked in another member state as a posted worker for a part of the year, it being understood that an additional entitlement to benefits was not created by reason of the amount paid in excess of the ceiling. Conversely, in *Becu*, 1999 discrimination was not found in the requirement to have recourse for port service to officially recognised dock workers. The conditions to be recognised as a dock worker were not based on nationality (para. 33). It was left to the national court though to determine whether an obstacle existed nonetheless, in particular with regard to the freedom of services.

### *Union citizenship*

In the late 1990s the Court was faced with European Union citizenship for the first time. *Uecker and Jacquet*, 1997 was a case involving a purely internal situation. The question being asked whether Union citizenship moved a purely internal situation to within the scope of Community law and whether it precluded reverse discrimination, the Court answered that Union citizenship was not intended to expand the scope *ratione materiae* of Community law (para. 23). Hence, what had been a purely internal situation before the advent of citizenship remained so even after. That *Martínez Sala*, 1998 actually had a citizenship dimension was not very obvious. The problem was that it was unclear whether Ms Martínez Sala was a worker within the meaning of Regulation 1612/68 and an employed person within the sense of Regulation 1408/71. Confronted with this uncertainty, the Court ruled that she came within the scope of Community law by reason of her Union citizenship and for that reason benefitted from non-discrimination with regard to a benefit within the ambit of Community law (para. 61-3). *Wijzenbeek*, 1999 was not a full-blown Union citizenship case, yet his Union citizenship was one of the arguments Mr Wijzenbeek relied upon when he refused to produce a document to prove his identity upon arrival in the Netherlands after a flight from France. The Court, however, ruled that the member states could still require from nationals of the member states that they identify themselves, because the full abolishment of internal border controls required

harmonization. Yet the Court also hinted at the fact that the right of Union citizens to move was unconditional (para. 43).

### Ankara

In the 1990s the Court tackled a first, massive wave of judgments concerning the Ankara Agreement, after it had handed down a first judgment with *Demirel*, 1987. The Court in *Sevince*, 1990 recognized the direct effect of articles 2(1)(b) and 7 Decision 2/76 and articles 6(1) and 13 Decision 1/80 of the association council. However, a temporary employment permit granted for the duration of proceedings with suspensory effect, while necessarily implying the granting of a concomitant residence permit (para. 29), did not amount to legal employment within the meaning of articles 2(1)(b) Decision 2/76 and 6(1) Decision 1/80, because such a permit did not mean that the person concerned was in a 'stable and secure situation as a member of the labour force' (para. 30). This ruling was confirmed in *Kus*, 1992 for the third indent of article 6(1) Decision 1/80 (para. 16). Yet the Court made it clear that an outcome of the pending proceedings in favour of the Turkish worker concerned would mean that the periods completed during the proceedings would have to be counted retroactively as legal employment (para. 17). The reasons why a Turkish worker had been admitted to the labour market of a member state, such as marriage or other reasons, were moreover irrelevant for the purpose of determining whether the time periods laid down by article 6(1) Decision 1/80 had been completed (para. 22). Such reasons were equally irrelevant under article 7 Decision 1/80, as the Court ruled in *Eroglu*, 1994 (para. 22). *Eroglu*, 1994 also extended the ruling that a work permit necessarily implied a residence permit to article 7 Decision 1/80 (para. 20); held article 7(2) Decision 1/80 to be directly effective (para. 20); and established that the first indent of article 6(1) Decision 1/80 only permitted continued work for the first employer after one year of legal employment (para. 13). A person was not allowed to switch back from the second to the first employer under this provision (para. 14). In *Bozkurt*, 1995, the Court ruled that the criteria applied in *Lopes da Veiga*, 1989 to establish a link to a member state that was sufficiently close to warrant application of Community law also had to be fulfilled under the Ankara Agreement, given that the Community principles of the free movement of workers were to be 'transpose[d], so far as is possible' to Decision 1/80 (para. 20). A Turkish lorry driver was therefore subject to the Ankara Agreement in certain circumstances, subject to the assessment of the national court. *Bozkurt*, 1995 established two more points, namely, that the administrative documents issued to Turkish workers only had declaratory force and hence did not influence the rights under the Ankara Agreement (para. 30); and that a right to remain in a member state could not be derived from the Ankara Agreement as such for persons who had definitely left the labour force, such as retired persons and persons totally and permanently incapacitated (para. 39).

In the year 1997 alone, the Court decided six cases based on the Ankara Agreement. *Tetik*, 1997 revealed that Turkish workers who came within the

third indent of article 6(1) Decision 1/80 could not be considered to have left the duly registered labour force when they themselves had terminated their employment contract. Moreover, a reasonable period of time had to be accorded for them to search for new employment in the host member state (para. 30). An argument to the contrary could not be derived from article 6(2) Decision 1/80 (para. 39). *Kadiman*, 1997 established that a member state was in principle entitled to require spouses to live together during the period required in the first indent of article 7(1) Decision 1/80 (para. 40), given that the aim of the article was to favour employment of the worker by the possibility to maintain family links (para. 34). However, neither short periods of absence for reasons of sickness or holiday nor circumstances beyond the power of one of the spouses were capable of influencing the completion of the period. In *Eker*, 1997 the Court held that the first indent of article 6(1) Decision 1/80 required stable and continuous employment with one and the same employer for an entire year (para. 22). Changing employment repeatedly and then at the end of the first year continuing to work for the last employer did not therefore suffice to meet the requirement of the first indent of article 6(1). If the authorities allowed a person to change employment during the first year, a one-year period would thus re-commence anew (para. 25). *Kol*, 1997 established that a 'stable and secure situation as a member of the labour force' for the purpose of the first indent of article 6(1) Decision 1/80 required that the person concerned had not committed fraud to obtain a residence permit (para. 25). The Court in *Ertanir*, 1997 essentially ruled that article 6(3) Decision 1/80 did not allow the member states to impose conditions or limitations additional to those already contained in article 6(1) Decision 1/80, such as a maximum period of work or residence (para. 31). Moreover, the categorization of a specific activity in national law was irrelevant under article 6(1) provided that the economic activity was genuine and effective (para. 43). 'Legal employment' was a Community term which needed to be defined objectively and uniformly (para. 59). In addition, brief spells during which a person did not hold a valid residence or work permit were immaterial under article 6(1) (para. 68). *Günaydin*, 1997 was a judgment of the same day as *Ertanir*, 1997 and essentially ruled in the same way as the latter regarding additional conditions imposed on employees. *Günaydin*, 1997 in addition clarified that work merely intending to prepare a person for work in the Turkish subsidiary of a company established in a member state could also be considered as normal employment for the purpose of article 6(1) Decision 1/80 (para. 33). Moreover, a statement made in the application for a residence permit was not to lead to a loss of the rights pursuant to article 6(1), save when the statement had been made with the sole intention of obtaining a residence permit based on a false premise (para. 60). Yet the Court limited this ruling to the specifics of the case.

The Court then ruled in *Akman*, 1998 that it was not necessary in order to claim a right of access to the employment market pursuant to article 7(2) Decision 1/80 that a parent was still in employment or even present at the time his child sought access to the employment market, provided that the requirements in

article 7(2) were met. Thus, the conditions of article 6(1) Decision 1/80 were not to be imposed on a child in such a situation (para. 48). In *Birden*, 1998, the Court elaborated on the two criteria Turkish nationals had to meet to benefit from article 6(1) Decision 1/80. The temporary or social nature of work did not imply either that an employee was not belonging to the duly registered labour force (para. 39) or that his employment was not legal (para. 64). Moreover, the notion of 'work' used in article 6(1) Decision 1/80 was congruent with the term in the free movement of workers as the Court had interpreted it. Thus, it encompassed employment regardless of where the funds used to finance the employment came from (para. 28). Lastly, the Court refused to transpose the case-law developed in the context of the Ankara Agreement to the Rabat Agreement between the Community and Morocco in *El-Yassini*, 1999 (para. 61), given the differences in the object, purpose, and wording of the two agreements. A member state could therefore lawfully refuse to extend the residence permit of a Moroccan national, even though it could not decline to extend it for a Turkish national in the same situation. However, after a member state had granted a Moroccan national a work permit valid for a certain duration, a residence permit was not to be refused for the same duration (paras 64-6).

### *Technicalities*

The Court addressed a number of technical details of the free movement of workers in the 1990s as well. In *Roux*, 1991, the Court ruled that the issue of a residence permit was not to be made dependent on (i) prior registration with a social security scheme, (ii) classification of an activity as 'employed' or 'self-employed', provided that it was an *economic* activity, or (iii) compliance with social security legislation. *Giagounidis*, 1991 determined that an identity card was valid under Community law for the purposes of identification even when the card had been issued before the accession of the state that had issued the card or when that card in the latter state was not sufficient to leave the territory. Moreover, a migrant worker did not always have to produce the identification document he had used when he immigrated. Migrant workers were allowed to produce either a valid identity card or a valid passport. *Commission v. Netherlands (questions at border)*, 1991 clarified that, apart from situations involving public policy, security, and health issues, questions as to the financial means available and the purpose of a journey were not to be asked when a person entered a member state. That the requirements for residence were met needed to be proved only when a residence permit was applied for. In *ASTI*, 1991 the Court judged that the exclusion of migrant workers from the elections to occupational guilds in which membership was compulsory in Luxembourg violated the rights attached to the membership in trade unions pursuant to article 8(1) Regulation 1612/68. This judgment was confirmed in *Commission v. Luxemburg (ASTI II)*, 1994.

The Court annulled the directive on the right of residence of students in the case *Parliament v. Council (student Directive)*, 1992, because in the light of

*Raulin*, 1992 the directive was wrongly based on article 235 Treaty, rather than article 7(2) Treaty. In *Gallagher*, 1995, the Court laid down further details of the role and composition of the ‘competent authority’ within the meaning of article 9 Directive 64/221. The independent authority need not have been a court, but it was not to be controlled by the authority ordering an expulsion. Technically, it was not precluded that the latter authority appointed the independent authority (para. 24). The notification to the person concerned need not have contained the names and titles of the members of the independent authority (para. 25). Moreover, the opinion pursuant to article 9(1) Directive 64/221 had to be given before the expulsion decision was taken, rather than after the person concerned had objected to an order (para. 20). In *Commission v. Belgium (residence permits)*, 1997 the Court ruled that the total of the charges Belgium levied for the issue of a residence permit was excessive and the procedure to obtain a residence permit too burdensome. Moreover, Belgium could not lawfully demand that persons who came to Belgium in order to work for less than three months obtained a residence permit. *Shingara*, 1997 concerned legal remedies. It established that in an admission procedure of a national of a member state or in a procedure involving a measure to safeguard public order or security, legal remedies did not necessarily have to be identical to those in procedures dealing with a member state’s own nationals’ right of entry. Two more points were clarified by *Shingara*, 1997. First, the conditions for an independent authority to intervene in article 9(1) Directive 64/221 also applied in cases coming within article 9(2). Second, a national of a member state who had been refused entry to another member state had the right to a fresh decision subject to all procedural safeguards after a reasonable period had passed after the first decision, regardless of whether he had exhausted the procedural safeguards available against the initial decision refusing entry. The Court held in *Commission v. Germany (ID checks)*, 1998 that Germany had imposed excessive fines on nationals of other member states when they had failed to produce their residence permits in an identity control in contrast to the fines imposed for similar failures by German nationals. *Awoyemi*, 1998, finally, dealt with the obligation to exchange a driving licence in the host state pursuant to Directive 80/1263. The Court found that third country nationals could not rely on the case-law it had established in *Skaniavi*, 1996 (see below). More specifically, a fine for having failed to exchange a driving licence obtained abroad was not attackable by third country nationals on the ground that it was so disproportionate that it amounted to an obstacle to free movement, because third country nationals did not enjoy rights of free movement (paras 27-30). The provisions of the new Directive 91/439 which had turned the duty to exchange a foreign driving licence into a mere right, moreover, were capable of having direct effect, save when a licence issued in a third state had previously been recognized in a member state (paras 42-4).

### *Purely internal situations*

Purely internal situations gave rise to eleven judgments in the free movement of workers. In *Steen*, 1992 a German national claimed that he was discriminated on the basis of nationality, because he was asked to declare that he would become a civil servant after two years of training with the German postal service, while such a declaration was not asked from nationals of other member states. The Court held the case to concern a purely internal situation without any link to a situation governed by Community law. Community law did therefore not apply. The case, however, came back to the Court in *Steen II*, 1994. The Court answered to the national court that it was free to consider the case in the light of German constitutional law. *Morais*, 1992 also concerned a purely internal situation. There was no connection to the free movement of persons when a Portuguese driving instructor working for a driving school in Portugal was fined for offering driving services beyond the boundary of the municipality where the school was established. In *Koua Poirrez*, 1992 Community law did not apply to the situation where a third country national who had been adopted by a French national who had never made use of his Treaty freedoms was refused a disability benefit on the ground of his nationality. Community law did thus not preclude the refusal. The Court did not enter into the matter, although the national court had stated that the situation possibly involved reverse discrimination of French nationals (para. 8). *USSL No. 47 Di Biella*, 1997 was about two Italian entities that allegedly made a fictitious arrangement for the procurement of labour. As all aspects were confined to Italy, the Court ruled that the case concerned a purely internal situation (para. 22). *Uecker and Jacquet*, 1997 was also rejected for being purely internal to a member state. Two third country nationals who were married to German nationals had sought to rely on the case-law regarding foreign language assistants in Germany. However, since the German nationals had never exercised their freedom of movement, the case did not have any connection to a situation governed by Community law. In *Kremzow*, 1997 an Austrian national claimed that his fundamental rights of due process had been violated by the criminal proceedings conducted against him for murder in Austria and by the ensuing imprisonment. He claimed damages on that ground and claimed that the Court had jurisdiction, since he had been unable to exercise his right of free movement as a citizen of the European Union because of the imprisonment. The Court found that no aspect of the situation was connected to any of the situations contemplated by the Treaty. As he had been sentenced pursuant to national provisions which did not seek to ensure compliance with Community law, the situation was not within the scope of Community law. It was therefore not for the Court to guarantee that fundamental rights had not been violated (paras 15-9). In *Kapasakalis*, 1998 the Court rejected the situation of several Greek nationals as purely internal. They had obtained diplomas in Greece, but never exercised their freedom of movement, and then sought damages from the Greek state for failure of having transposed Directive 89/48, after the Court had ruled to



that effect in *Commission v. Greece*, 1995. The Court ruled that their situation was connected neither to the Treaty freedoms nor to scope of the Directive.

In contrast, the Court refused arguments based on the logic of purely internal situations in *Kraus*, 1993. The fact that Mr Kraus had obtained a university qualification in a member state was sufficient to establish a link to a situation governed by Community law when he applied in his home state for the authorization to bear the title he acquired by the degree (paras 15-22). In *Scholz*, 1994 the Court refuted the logic of a situation being purely internal by holding that Community law applied, although the person concerned had acquired the nationality of the member state in which she lived and from which she requested a benefit. The reason was that before the nationalization the person had held the nationality of another member and made use of her right to free movement to come to the member state concerned. In short, *any* national of a member state who had made use of the freedom of workers to move and had been employed in another member state came within the scope of Community law (para. 9). This approach was corroborated in *Terhoeve*, 1999 where a worker who had been posted to another member state challenged the social security contributions levied upon his return by the member state of which he was a national (para. 27). With *Wijsenbeek*, 1999 the Court admitted the case of a national who returned to his own country by flight from a member state, because he had made use of his freedom to move. He could avail himself of this freedom even against the state of which he was a national (para. 22).

The Court refused to address a question relating to the freedom of workers that a national court had asked in *Grado*, 1997 on a ground that seems different, though related to a matter being purely internal to a member state. In criminal proceedings involving a migrant worker, the public prosecutor had not used the regular German way of addressing a male person, namely 'Herr', for the migrant worker when he gave the written order, whereas seemingly the prosecutor did so when addressing German nationals. The Court ruled that the national court had failed to provide evidence that the court was required to apply provisions implementing Community law in criminal proceedings regarding a fine in the context of a traffic accident (paras 14-5). The case was, according to the Court, outside the Treaty's area of application (paras 13 and 15).

### *Transition and remainders*

In the free movement of workers, the Court was also faced with a few cases that arose because of transition. *Pereira Roque*, 1998 was already mentioned. It concerned the accession of the United Kingdom to the Community and the special situation of the Channel Islands in the light of accession. But even before *Pereira Roque*, 1998, the judgment in *Barr and Montrose*, 1991 had dealt with a similar situation as that of the Channel Islands, namely the situation of the Isle of Man. The Court ruled that the equal treatment clause in the protocol annexed to the Act of Accession, did not preclude the general requirement of a work permit for all types of employment in the Isle of Man, even though some derogations from

that requirement for specific professions had the effect that only nationals of the United Kingdom and Ireland had access to these professions (paras 15-9). *Commission v. United Kingdom (fishing licences)*, 1992 dealt with nationality and residence requirements that the United Kingdom applied to Spanish and Portuguese fishermen during the transitional phase following the accession of Spain and Portugal to the Community. The Court found that the nationality condition deteriorated the situation of Spanish and Portuguese fishermen in contrast to their situation before accession in so far as fishing outside British fishery limits was concerned. In that regard, the condition was therefore precluded by the standstill clause in the Act of Accession (para. 30). More generally, the freedom of establishment precluded the condition for self-employed fishermen (para. 23). The residence requirement was dealt with in the same way as in *Factortame II*, 1991 (see below). In *Tsotras*, 1993 the Court ruled that a person needed to have exercised the freedom to work in another member state in order to benefit from the right to remain in the host state (para. 11). This was not the case with a Greek national who had worked in a member state before the accession of Greece, but had always remained unemployed since the accession.

Finally, for the sake of completeness *Commission v. Germany (directives)*, 1997 must be mentioned. In this case, the Court confirmed that Germany had infringed two directives on the right of residence, viz. Directives 90/364 and 90/365, because implementing legislation had not been adopted.

## 2 Establishment

*Kaefer*, 1990 concerned the French overseas territory in the South Pacific, French Polynesia. Two nationals of member states in vain sought permission to reside there. The Court decided that, in the absence of agreements concluded to address the free movement of workers with French Polynesia pursuant to article 135 Treaty, a freedom to work in French Polynesia could not be recognized (para. 13). As regarded the freedom of establishment and services, article 176 of Council Decision 86/283 had direct effect also in French Polynesia and was to be understood to the effect that French Polynesia's obligations were limited. French Polynesia was merely obliged not to discriminate between French citizens from metropolitan France and nationals of other member states, save for lack of reciprocity. Within that framework, French Polynesia – like any other overseas territory of the member states – had to guarantee the right effectively to pursue self-employed activities and to provide services, including the right of entry and residence (paras 16-9).

### *Ships and aircrafts*

In *Factortame II*, 1991 and later on in *Commission v. United Kingdom (ship registration)*, 1991 the Court dealt with the new British fishing vessel register. In essence, only British nationals or companies that were either established in the

United Kingdom or dominated by British owners were allowed to register a ship flying the flag of the United Kingdom. The Court judged that compliance with Community law was necessary, although the member states could determine the conditions for the award of flags. The analogy between granting citizenship and awarding flag was rejected (para. 27 of *Factortame II*, 1991). Since establishment meant the 'actual pursuit of an economic activity through a fixed establishment in another member state for an indefinite period' (para. 20 of *Factortame II*, 1991), the British registration requirement could affect the freedom of establishment of nationals of other member states when the vessel was a part of their economic activity of establishment (para. 30 of *Factortame II*, 1991 and paras 21-4 and 31 of *Commission v. United Kingdom (ship registration)*, 1991). In contrast, the mere requirement that a ship be directed from within the member state of which the ship was about to fly the flag was compatible with establishment, provided that that requirement was considered to be met by a secondary establishment receiving instructions from abroad (paras 34-5 of *Factortame II*, 1991). The restriction arising from the nationality requirement could not be justified by the Community's national quota system for fishing, as the ship registration legislation was not designed to implement that system (para. 41 of *Factortame II*, 1991). In a similar vein, the Court in *Commission v. Ireland (fishing vessels)*, 1991 struck down the Irish requirement for a fishing vessel owner wanting to obtain a general fishing licence to be either an Irish national or a company established in Ireland. That requirement was discriminating against nationals of other member states who owned and operated a fishing vessel registered in Ireland, because it forced them to found an Irish company to obtain a fishing licence, in contrast to Irish nationals in the same situation (paras 8-11). The freedom of establishment precluded the requirement, for the discrimination could not be justified for the same reason as in *Factortame II*, 1991. In *Commission v. France (ship registration)*, 1996 the Court reiterated the *Factortame II*, 1991-line of authority, since France did not contest the infringement, and added under the freedom of establishment and workers (for the latter, see above) that even when no economic activity was pursued by means of the ship to be registered, but the ship was only used for private leisure purposes establishment precluded the nationality requirements. Such leisure activities were a corollary of the freedom of establishment (paras 21-2). *Commission v. France (ship registration)*, 1996, in turn, was confirmed in *Commission v. Ireland (ship registration)*, 1997 with regard to the corresponding requirements in Irish law. *Commission v. Greece (ship registration)*, 1997 again confirmed it for the corresponding Greek law. The Court added that Greece's power to requisition ships when they were needed for military purposes could lawfully be exercised with regard to any ship flying the Greek flag, irrespective of the owner's nationality. Hence, that power did not justify a requirement for ship registration related to nationality (para. 26). The *Factortame II*, 1991-line of authority was finally applied by analogy in *Commission v. Belgium (aircraft registration)*, 1999. Belgium required nationals of other member states to have had residence for one year in Belgium and legal persons

established in other member states to have had an establishment in Belgium for one year in order to be allowed to register an aircraft in Belgium. The Court found that the registration of an aircraft could not be dissociated from the freedom of establishment when the aircraft constituted a means to exercise an economic activity which involved an establishment in another member state. Belgium's special regime applicable to nationals of other member states and companies established there was discriminatory and impeded the freedom of establishment. Consequently, it was precluded (paras. 12-3).

### *Doctors*

In *Commission v. Luxembourg (single practice)*, 1992 requirements by Luxembourg similar to those at issue in *Commission v. France (doctors)*, 1986 were scrutinized. In a similar way as in the latter judgment, the Court found that Luxembourg's requirement for doctors, dentists, and veterinary surgeons to have only one single practice went against the grain of the freedom of establishment and workers. Employed and self-employed practitioners were entitled to have more than one place of work in one member state. While respect for the professional rules of conduct could lawfully be required so far as necessary for protection of health, Luxembourg law was not to restrict exceptional authorizations to operate more than one practice to Luxembourg nationals (para. 15). Again, the rule proved too absolute and general in nature, as presence for continued care was not always necessary and other elements, such as replacements, would have to be factored in (paras 22-3). In *Micheletti*, 1992 a dentist wanted to establish himself in Spain. Mr Micheletti held both Italian and Argentinean nationalities. Spain refused the prerequisite resident permit arguing that he had effective links only with Argentina, because he had lived there before arriving in Spain. The Court rejected that argument. While a member state was free to determine the conditions for granting nationality, it was not allowed to limit the effects of the nationality granted by another member state when a person exercised a freedom of the Treaty. More specifically, Spain was not allowed to subject the recognition of the Italian nationality of Mr Micheletti to the condition that he entertained effective links with Italy. A person's citizenship of a member state could not be challenged on the ground that that person also held the nationality of a non-member state (paras 10-4).

### *Purely internal situations*

In *Lopez Brea*, 1992 two Spanish nationals who were resident in Spain questioned certain conditions in Spanish law for the exercise of the profession of real estate agent. The Court held that the freedom of establishment did not apply, for the relevant situation was purely internal to Spain and no factor connected it to the situations governed by Community law (paras 8-9). Directive 67/43 on certain activities in self-employment, moreover, did not harmonize those conditions, but only prohibited direct and indirect discrimination. A similar constellation was at issue in *Ferrer Laderer*, 1992. The Court again did not apply the freedom

of establishment, though this time because it was not applicable to a Swiss national acting as an estate agent in Spain. In *Aubertin*, 1995 French nationals who had not obtained any qualification in other member states claimed that a practice of the French authorities was to be applied to them. According to that practice nationals of other member states who had worked as hairdressers in the Community were allowed to work in France, although they did not hold the prerequisite French diploma. The Court did not address the argument put forward on the basis of reverse discrimination. It did not deal with the merits, because the case was confined in all aspects to France (paras 10-1). Moreover, the profession of hairdresser was not harmonised in the Community. In a similar vein, the Court refused to address the case in *Van Buynder*, 1995. In that case, a Belgian national who had not acquired qualification abroad was subject to prosecution in Belgium for having performed some dental operations on horses without having the qualification needed in Belgium. The Court refused to hear the argument that the neighbouring countries of Belgium did not subject that activity to any qualification. The situation was in all aspects confined to Belgium (paras 11-2). In *Esso*, 1995, a Spanish company challenged the obligation contained in the local law of the Canary Islands to supply petroleum to at least four islands of the Canaries Archipelago as a condition to supply petroleum to the Islands at all. The Court declined to enter into arguments based on the freedom of establishment, for the situation was purely internal to Spain and the obligation applied indistinctly (paras 14-6).

In some contrast to this case-law on purely internal situations, the Court did apply the freedom of establishment in *Singh*, 1992. The case concerned a British national who had gone to work in Germany. She was accompanied by her husband who was a third country national. When they returned to the United Kingdom to establish themselves her husband was refused leave to enter and reside. According to the Court, a national of a member state had the right to rely on the freedom of establishment against the state of which she was national after having exercised a freedom of the Treaty. In such a case the same conditions had to apply as in the analogous situations under Regulation 1612/68, Directive 68/360, or Directive 73/148, else the national of a member state could be deterred from using her Treaty freedoms to leave her 'own' state. Abuse of rights could lawfully be counteracted though (paras 19-20). *Werner*, 1993, in contrast, was a tax case in which the Court ultimately held that the situation was purely internal to Germany. Mr Werner was a German national who was established as a dentist in Germany where he had also received his medical training. He was resident with his wife in the Netherlands. Because of his residence abroad the German authorities refused to apply the more favourable income tax regime normally available for spouses. Emphasising that the case at hand was about Germany's tax treatment of a German national, the Court did not find any issue with article 52 Treaty. The situation was confined to Germany in all aspects bar residence. The case was different from *Biehl*, 1990, *Knoors*, 1979, and *Commission v. France (tax credit)*, 1986 (paras 13-7).

## Taxation

*Wielockx, 1995* was the next tax case concerning natural persons. In this case, the Court essentially applied in the freedom of establishment the ruling in *Schumacker, 1995* which had been handed down about six months before. Mr Wielockx was established as a physiotherapist in the Netherlands while he was resident in Belgium. The Dutch authorities refused the regular deduction of sums he had used to constitute a pension reserve from his taxable income, because Mr Wielockx resided in Belgium. In line with *Schumacker, 1995*, since all of his income was earned in the state where he was working, the Court held that he had to be treated like a resident and notably benefit from the same deductions as those resident there (paras 18-22). Significantly, the *Bachmann, 1992*-justification, i. e. the need to ensure the cohesion of the tax system, did not apply. The cohesion of the Dutch tax system was guaranteed by the double taxation convention with Belgium. In that convention each of the state parties had waived the right to levy income tax on pensions paid to persons resident in the other state party. The direct link required by the *Bachmann, 1992*-ground was, therefore, not given with regard to one and the same person. The idea of tax cohesion was thus shifted from the level of the individual to the inter-state level (paras 24-5). Next, in *Asscher, 1996* a distinction established by the Netherlands' tax law was at issue. The Netherlands taxed non-residents at the rate of 25 per cent, if they generated less than 90 per cent of their income in the Netherlands, while residents, even if less than 90 percent of their income was generated in the Netherlands, were taxed at the rate of 13 per cent. Mr Asscher was a Dutch national resident in Belgium who pursued self-employed activities in both the Netherlands and Belgium. He earned less than 90 per cent of his world wide income in the Netherlands. The amount of income generated by his activity in the Netherlands was taxed there, the amount generated in Belgium was taxed in Belgium. In application of Regulation 1408/71 he was affiliated to the social security regime of Belgium and paid contributions there. His income in the Netherlands was taxed at the rate of 25 per cent, because he did not reside in the Netherlands. Even though Mr Asscher challenged the taxation by the state of which he was a national the Court accepted the case, because he had made use of his freedom of establishment (paras 32-3). After having reiterated the *Schumacker, 1995*-ruling, the Court held the situations of residents and non-residents to be comparable. The higher tax rate could not be based on the need for progressive taxation, since the double taxation convention between Belgium and the Netherlands provided that the entire income generated by activities within the state parties could be factored in to determine the tax rate. The situations of residents and non-residents were therefore comparable (paras 47-9). The indirect discrimination could not be justified. Where he was affiliated to the social security system was immaterial to determine the tax rate (para. 54). The *Bachmann, 1992*-ground, i. e. cohesion of the tax system, did not apply, either, since a link did not exist between the higher tax rate, viz. the disadvantage, and the fact that social security contri-

butions were not levied on the income generated in the Netherlands, viz. the advantage (paras 59-60). The higher tax rate did not afford any additional social security protection. The allocation of powers in social security by Regulation 1408/71, moreover, was not to be counteracted by means of taxation (paras 61-2).

### *Official authority*

*Commission v. Greece (transport)*, 1991 concerned the alleged non-transposition of Directive 82/470, which essentially dealt with some aspects of transport and travel agencies as well as storage and warehousing. The Court decided in this case that an opinion of a traffic accident expert delivered in a court did not come within the purview of the exercise of official authority pursuant to article 55 Treaty, as in that particular case the opinion did not bind the courts (paras 6-7). In *Thijssen*, 1993, article 55 Treaty did not apply, either. The activities of an approved commissioner who supervised insurance companies was not directly and specifically connected to the exercise of official authority. Although such a commissioner held a suspensory veto over certain decisions of insurance companies, ultimately, the responsibility of supervision lay with the public authority in charge. Nationality could therefore not be a requirement for an appointment as an approved commissioner.

### *Names*

In *Konstantinidis*, 1993 a Greek national was established in Germany. Based on an international norm the German authorities translated his name from his birth certificate in Greek into Roman characters. Mr Konstantinidis claimed that the translation distorted his name. The Court ceded to that argument. While Greek names could be transcribed in principle into Roman characters, the freedom of establishment was violated when a transcription caused an established person such a degree of inconvenience that he was disadvantaged, because the pronunciation of his name was distorted and confusion as to his person was caused (paras 14-6).

### *Gebhard*

In 1995, the Court decided the case *Gebhard*, 1995. Mr Gebhard, a German national admitted to the bar in Germany, practised law in Milano. He founded his own chambers there and mainly advised German-speaking clients in Italy and Italian clients in Germany. He was prosecuted for having practised law in Italy under the title of an Italian lawyer, without being admitted to the Italian bar. The Court first distinguished establishment from services. Establishment meant participation on a stable and continuous basis in the economic life of the host state (para. 25). In contrast, services were always temporary. Whether they were temporary was to be determined in the concrete case in the light of their duration, regularity, periodicity, and continuity. Sometimes services also involved having infrastructure in the host state (paras 26-7). Since Mr Gebhard had prac-



tised continuously for some years, the freedom of establishment applied. The fact that a professional activity was subject to admission to a professional organization in the host state did not mean that the freedom of establishment was only exercised once the person concerned had been admitted. In other words, membership in such an organization was never constitutive for the freedom of establishment (para. 31). The professional rules of the host state had to be complied with, in particular where a specific qualification or admission to an organization was required. Yet, in case national measures were liable to hinder or make less attractive the exercise of the freedom of establishment, as in the case at issue, a four-pronged test had to be applied to find out whether the obstacle was compatible with the freedom of establishment. The relevant measure had to apply indistinctly and be suitable and necessary to ensure that an imperative requirement in the general interest was attained (para. 37). Moreover, when a person was lacking the qualification of the host state, the latter had to make the comparison of qualifications required by *Vlassopoulou*, 1991 (see below).

### *Driving licences*

In *Skanavi*, 1996 a Greek national had failed to exchange her Greek driving licence within one year after having taken residence in Germany, as Directive 80/1263 would have required. She and her husband were established in Germany. Shortly thereafter, the new Directive 91/439 would have removed the obligation to exchange the licence. However, although driving affected the pursuit of establishment, the obligation to exchange the driving licence before entry into force of the new directive did not contravene the freedom of establishment, since the Council had the power to harmonize driving licences progressively (para. 27). The driving licence of the host state was not constitutive of the right to drive. In analogy to the case-law as to residence permits, sanctions for having violated the obligation to exchange the licence had to be proportionate to the gravity of the infringement. The person concerned therefore was not to be treated as if she did not have a valid licence at all and be subject to criminal penalties or heavy fines (para. 34-8). Apart from that, the Court saw no need to address the freedom of Union citizens to move and reside within the Union which had been newly introduced by the Maastricht Treaty in article 8a, since it found specific expression in the freedom of establishment (para. 2).

### *Sunday trading*

*Semeraro Casa Uno*, 1996 then concerned the prohibition to open shops on Sundays, which was primarily addressed under the free movement of goods in keeping with the Sunday trading case-law of the Court. However, the allegations that the freedom of establishment was violated by the prohibition to trade on Sundays was rejected by the Court. The measure applied indistinctly to all traders on the national territory. Its purpose was not to regulate establishment. Any restrictive effect it might have was 'too uncertain and indirect' for the measure to hinder the exercise of the freedom (para. 32).

### *Non-profit*

*Sodemare*, 1997 dealt with a requirement for the reimbursement of expenses in Italy's social security law. Only private non-profit organizations received the authorization to provide certain health care-related services, such as offering services in nursery homes. Accordingly, only their expenses were eligible for reimbursement. According to the Court, rules of the kind at issue were not affected by the exclusion of not-for-profit companies from the part of the Treaty on establishment (para. 25). A member state was free to organize its social security system and to decide that only private non-profiters guaranteed that the social aims were attained. Italy's welfare system was based on solidarity (paras 29-2). Non-profiters from Italy and the member states were treated alike under the Italian system (para. 33). A Luxembourg company which had established a number of for-profit companies in Italy could therefore not successfully challenge the Italian system under the freedom of establishment.

### *Austria*

*Konle*, 1999 and *Beck*, 1999 both concerned similar transitional issues which arose because of the accession of Austria. Since the Court found in *Konle*, 1999 that the free movement of capital was violated, it was not necessary any longer for the Court to deal with the freedom of establishment (para. 55) – thus rendering the reasoning under capital applicable under establishment, at least potentially. The reasoning in *Konle*, 1999 was the following. The new authorization procedure for the acquisition of secondary homes in Austria was at stake. Essentially, the procedure had been streamlined after accession to remove a second track which had applied only to nationals of other member states. The Act of Accession concerning Austria contained a clause which for five years froze the restrictions on the acquisition of secondary homes in Austria which (the restrictions) existed at the time of accession. The Court ruled that the new authorization procedure was a discriminatory restriction of the free movement of capital (para 39). Austrians notably benefitted from an accelerated procedure and the examination of the requirements to be met to be allowed to acquire a secondary home was more thorough for non-Austrians. Moreover, the authorities had considerable discretion (para. 41). Even under the assumption that the needs of town planning and of maintaining a certain amount of activities unrelated to tourism were capable of justifying such discrimination, a prior authorization scheme was unnecessary. A prior declaration scheme coupled with sanctions, such as penalties, nullity of the contract, etc., in case the requirements were not met was an alternative (para. 46-7). Since the new authorization procedure had introduced a different approach and a new procedure in comparison to the legislation existing at the time of accession, the freezing clause in the Act of Accession did not cover it (para. 53). The free movement of capital was thus violated. In contrast, in *Beck*, 1999 the Court decided that certain Austrian provisions concerning fictitious or fraudulent real estate transactions constituted existing legislation covered by the freezing clause, since the various amendments of the legislative act

concerned had not changed the substance of the provisions at stake (para. 36). More generally, amendments that rendered provisions less restrictive of the rights provided by Community law did not remove the amended legislation from the scope of the freezing clause (para. 34 of *Beck*, 1999; para 54 of *Konle*, 1999).

### *Non-discrimination*

In *Saldanha*, 1997 the Court essentially transposed the case-law developed under the free movement of goods for the judicial enforcement of claims related to cross-border trade in goods and transport, viz. *Data Delecta*, 1996, *Pastors*, 1997 and *Hayes*, 1997, to the freedom of establishment. When a claim that was within the scope of the Treaty, because it was related to the freedom of establishment – such as the claim of a shareholder who was a national of one member state against the company established in another member state of which he held shares – was enforced in the courts of a member state, the procedural rules applicable were not allowed to discriminate on the basis of nationality pursuant to article 6 Treaty (para. 23-4). Austrian law could notably not lawfully require claimants resident abroad who were nationals of another member state to lodge security to cover the costs of the proceedings, while Austrian nationals, irrespective of where they resided and whether they held assets in Austria, were not required to do so (paras 26 and 29). In *Commission v. Belgium (associations)*, 1999 article 6 Treaty was also applied in a context related to establishment. Belgian laws required for an association to be recognized as having legal personality that a minimum number of the persons involved were of Belgian nationality. In the administration of certain associations at least one person had to be Belgian and a minimum number of the members of certain associations had to be Belgian as well. The provisions concerned ‘regulate[d] the right to form, in Belgium, associations with legal personality’ (para. 12). Hence, the provisions concerned ‘one of the fundamental freedoms guaranteed by the Treaty’ (para. 12) and came within its ambit. As they discriminated on the basis of nationality, they contravened article 6 Treaty (para. 13). Advocate General Cosmas had argued that at least some of the associations concerned provided services against remuneration and thereby participated in economic life. Therefore, the freedom of establishment was concerned and the exception for non-profit companies (article 58(2) Treaty) did not apply (paras 11-4 of the opinion).

### *Legal persons*

In *Centros*, 1999 the establishment of a company by natural persons was at issue. Two Danish nationals had established a company in the United Kingdom which was to do business exclusively via a branch in Denmark. The minimum capital requirements for the establishment of a company were considerably more permissive in the United Kingdom than in Denmark. It was undisputed that the two Danish nationals wanted to profit from that advantage. The Court decided that the Danish authorities had unlawfully refused the registration of the branch.

The refusal was an obstacle to the freedom of establishment. While abuse of Community rights to circumvent national law could be prevented on a case-by-case basis, an abuse of the freedom of establishment was not to be inferred from the fact that the two Danish nationals eschewed the application of the Danish minimum requirements for the formation of a company (para. 24). The four requirements of the *Gebhard*, 1995-test were, moreover, not met. Neither the protection of creditors and the public nor the combat against fraud required the refusal to register the branch (paras 35-8).

Even before *Centros*, 1999 the Court had addressed the freedom of establishment of companies in a series of decisions in the 1990s. They were as follows. In *Commerzbank*, 1993 the Court found a violation of the freedom of establishment in that the United Kingdom paid interest on tax levied in excess only when the company concerned had fiscal residence in the United Kingdom. More specifically, a German company's branch that had received interest payments from loan agreements with companies in the United States and paid tax on those interests in the United Kingdom was entitled to the same supplement on the reimbursement of tax overpaid as companies having tax residence in the United Kingdom, else the German company would unlawfully be discriminated. It was irrelevant that the concrete refund of the tax overpaid was only available to non-resident companies. With *Halliburton*, 1994 taxation of intra-group transfers of real estate came under scrutiny in the light of freedom of establishment. The Court decided, in essence, that the Netherlands could not lawfully limit the exemption from a tax on real estate transfers within a group to transfers between 'daughter' companies constituted as limited companies under Dutch law; rather, tax relief had to be granted equally when one of the 'daughter' companies involved in the real estate transfer was constituted as a limited company pursuant to the law of another member state and operated via a permanent establishment in the Netherlands, although the effect on the foreign company as transferor was indirect, since technically the Dutch company as transferee was liable for the tax (paras 17-20). In *Commission v. Italy (securities dealing)*, 1996 the Court invalidated Italy's requirement of companies to be established in Italy in order to be authorized to deal in securities. Operation via a branch or an agency had to be allowed, though it could be subjected to certain requirements, such as financial guarantees, checks, etc. (paras 20-4). The requirement was thus contrary to the freedom of establishment and services. *Futura*, 1997 sanctioned Luxembourg's approach to profit taxation which limited the carrying forward to those losses by branches in Luxembourg which had an economic link to the profits generated and subject to profit taxation in Luxembourg. It was in keeping with fiscal territoriality and did not give rise to discrimination (para. 22). The effectiveness of fiscal supervision did not justify the requirement to keep separate book accounts in Luxembourg, though. Other means had to be admitted to prove losses.

In *ICI*, 1998 legislation of the United Kingdom was found to violate the freedom of establishment, because the setting-off of losses incurred by a subsidiary held by a holding which was in turn held by a consortium was allowed for a

partner in the consortium who was subject to taxation in the United Kingdom only when the majority of subsidiaries controlled by the holding was established in the United Kingdom. With *Royal Bank of Scotland, 1999* the Court ruled, relying on *Asscher, 1996*, that a tax rate that was sometimes higher for the profits of the Greek branches of companies established in other member states than for the profits of companies established in Greece was contrary to the freedom of establishment. In *Pfeiffer, 1999* the Court decided that the lawful protection of a trade name in Austria justified a restriction of the freedom of establishment. The German company that was lawfully using the term 'Plus' in Germany had to accept that it could not lawfully use that term in Austria due to a risk of confusion with a trade name lawfully protected in Austria and had to put up with the resulting hindrances, such as changes in its corporate identity for the Austrian market. In *Baxter, 1999* it was only the cost of research conducted in France that was factored out of the calculation of a special levy payable by companies producing medicinal products. According to the Court, the cost of research done in another member state by a company established there which had a secondary place of business in France had to be treated in the same way as research conducted in France, else indirect discrimination contrary to the freedom of establishment arose (paras 12-3).

In *Saint-Gobain, 1999* the Court declared incompatible with the freedom of establishment that Germany granted certain tax concessions – which were designed to avoid that dividends received from companies established abroad which had been taxed abroad were taxed again in Germany (para. 24) – to companies established in Germany, while it denied them to the permanent establishments in Germany of companies established in other member states. In *X and Y, 1999* the Court decided that a distinction in Swedish tax law for the purpose of tax relief violated the freedom of establishment. Swedish tax law distinguished between certain intra-group transfers depending on whether the seats of the subsidiaries concerned by the transfer were in a single member state other than Sweden or in several other member states other than Sweden. According to the Court, such a distinction entailed a difference in treatment according to the subsidiaries' seats which was not justified.

### Technicalities

In the interest of completeness, a number of further cases which mostly concerned rather technical details of secondary legislation must be mentioned. *Commission v. Greece (vehicles), 1993* was about car imports and the compatibility of the Greek system with certain directives, namely Directives 83/182, 83/183, and 73/148. The Court found that the Greek practice of stamping the passport with the number of the vehicle imported so that it could be tracked how long the vehicle was in Greece complied with the free movement of persons as implemented by article 2(1) and 3(1) Directive 73/148 (paras. 34-8). In *Commission v. United Kingdom (TV broadcasting), 1996*, the Court essentially applied the concept of establishment under the 'television without frontiers' directive, i. e. Direc-

tive 89/552 (para. 42). The Court rejected an argument based on the freedom of establishment made by the United Kingdom in the context of that directive (paras 57-8). *RTI*, 1996 and *Denuit*, 1997 applied the provisions of Directive 89/552 without any further elaboration on the freedom of establishment. In *VT4*, 1997 the Court confirmed *Commission v. United Kingdom (TV broadcasting)*, 1996 and implicitly rejected the argument that the establishment in one member state with the aim of broadcasting exclusively towards another member state under Directive 89/552 necessarily constituted an abuse of a Treaty freedom. In *Kontogeorgas*, 1996 and *Bellone*, 1998 the Court applied the directive on self-employed commercial agents, Directive 86/653. In *France v. Commission (pension funds)*, 1997 the Court found that the Commission could not lawfully issue a Communication containing new rights and duties just because the negotiations in the Council in the topic concerned, namely pension funds, had been deadlocked. The freedom of establishment, services, and capital did not necessarily contain the obligations to be laid down in secondary legislation (paras 20-4).

### *Secondary law as to companies and further technicalities*

A series of judgments concerned the secondary law of the Community adopted to implement the freedom of establishment of companies. *Marleasing*, 1990 dealt with the First Council Directive 68/151. (The judgment also established some limited horizontal direct effect of Directives.) So did *Daihatsu*, 1997 and *Rabobank*, 1997. *Karella*, 1991, *Sindesmos Melon*, 1992, *Kerafina*, 1992, *Siemens*, 1996, and *Kefalas*, 1998 all concerned the Second Council Directive 77/91. In *Pafitis*, 1996, the Court *inter alia* rejected again in the context of Directive 77/91 an argument by analogy based on the *Bachmann*, 1992-justification of the cohesion of the tax system which (the argument) had been made to defend the appointment of a temporary administrator for a failing bank in order to save the cohesion of Greece's banking system (paras 47-52). *Tomberger*, 1996 and *DE + ES Bauunternehmung*, 1999 interpreted the Fourth Council Directive 78/660. *Les Assurances du crédit*, 1991 rejected a claim for damages based on the exclusion of certain public export credit insurances from the scope of the direct insurance directive, i. e. Directive 73/239 as amended by Directive 87/343. In *Skandia*, 1999 the Court again interpreted the third non-life insurance directive, i. e. Directive 73/239 as amended, and moreover the third life assurance directive, i. e. Directive 79/267 as amended. *Commission v. France (mutual societies)*, 1999 confirmed that France had not fully implemented those two directives. In *Germany v. Parliament and Council (deposit guarantee)*, 1997 the Court in essence held that Directive 94/19 on deposit-guarantee schemes had been lawfully adopted on the basis of article 57(2) Treaty and that the Directive did not violate that article or the principle of proportionality (paras 41-4). In *EITO*, 1997 Regulation 2137/85 on the European Economic Interest Grouping was interpreted.

## Diploma

The establishment case-law concerning diploma recognition in the 1990s began with *Bouchoucha, 1990* and *Nino, 1990*. In *Bouchoucha, 1990*, the Court addressed the situation of a French national who had obtained the qualification necessary to practice osteopathy in the United Kingdom. He was prosecuted in France later on though for having practised as an osteopath, a practice which France reserved to qualified medical doctors. According to the Court, a definition of a medical act did not exist on the Community level. The member states were therefore free to define that term, subject to non-discrimination (para. 12). The British diploma held by Mr Bouchoucha was, moreover, not the subject of mutual recognition under Community legislation. France could legitimately prevent evasion of its provisions on professional training when the practice in question was reserved to doctors whose qualification in turn enjoyed mutual recognition (para. 15). In *Nino, 1990* the Court rejected a situation as purely internal, given that the Italian nationals concerned had obtained a diploma in Italy and then practised bio- and pranotherapy there, although Italian legislation allowed only qualified medical doctors to practice that kind of therapy (para. 10).

In *Vlassopoulou, 1991* the Court then established based on *Heylens, 1987* the approach to be applied when a type of qualification was not harmonized and hence not the object of express mutual recognition. In *Vlassopoulou, 1991* a Greek lawyer sought admission to the German bar. In that situation a member state had the power to lay down the conditions a person had to meet to be allowed to exercise the profession concerned. However, a member state was required to compare objectively the abilities and the knowledge acquired by the person concerned in another member state as it was evidenced by diplomas with the knowledge and abilities its own legislation required (paras. 15-6). Only if the knowledge and qualification evidenced by diploma and practice were not equivalent was the member state concerned allowed to require additional proof of abilities and knowledge, i. e. impose an exam or a practice period. If they were equivalent, the freedom of establishment required the member state to recognize the qualifications (paras 17 and 19). Differences in legal systems could be factored into the objective comparison required (para. 18). Finally, judicial proceedings had to be made available to challenge the decision adopted concerning recognition. The approach of *Vlassopoulou, 1991* was fully confirmed in *Borrell, 1992* in the context of Directive 67/43 concerning real estate agents. The Court added merely that a failure to seek verification of a diploma could entail criminal sanctions (para. 19).

In *Commission v. Italy (health care auxiliaries), 1991* the Court confirmed that Italy had failed to fulfil its obligations under the freedoms of establishment, workers, and services in that it restricted the recognition of professional qualifications obtained in other member states in the domain of health-care auxiliaries to Italian nationals or subjected it to a condition of reciprocity. Italy in essence did not dispute the infringement (paras 8-11). In *Egle, 1992* the Court interpret-



ed Directive 85/384 on diplomas in architecture to the effect that it covered a diploma obtained from an institute of technology, namely a 'Fachhochschule' in Germany, after four years of studies including integrated practical semesters (paras 9-14). According to *Bauer, 1992* the same interpretation applied for transitional cases, i. e. when the studies had been begun before the directive became applicable (para. 12). In *Dreessen, 1994* the Court held, in contrast, that the transitional arrangement under Directive 85/384 did not cover an engineer's diploma in general construction (paras 9-13).

In *Tawil-Albertini, 1994*, the Court decided in the context of Directives 78/686 and 78/687 on diploma and activities in dentistry that a diploma in dentistry awarded in a non-member state need not have been recognized by a member state even when another member state had previously recognized it as equivalent. The reason was that the minimum training requirements established by Directive 78/687 did not apply in relation to third states. On the same day, the Court in *Haim, 1994* gave essentially the same answer in the case of an Italian national who had obtained a diploma in dentistry in Turkey which had subsequently been recognized as equivalent in Belgium and who then sought recognition in Germany (paras 16-7 and 21). The Court, in addition, confirmed the approach developed in *Vlassopoulou, 1991* (para. 28). In *Commission v. Italy (dentists), 1995* the Court invalidated Italy's implementation of the two Directives that were already at stake in *Tawil-Albertini, 1994*. In violation of the Directives Italy had created a special category of dentists for a transitional period; the dentists within that category were allowed pursuant to Italian law to practice in Italy, but not in other member states (paras 23-4). In *Commission v. Spain (doctors), 1994* the Court held that Spain had to provide adequate remuneration under Directives 75/362 and 75/363 on recognition of diplomas in medicine and activities of doctors, respectively, for the periods of training necessary to obtain a qualification in a medical specialty. In the case at issue the specialty was 'stomatology'.

After having formally confirmed that Greece had failed fully to transpose Directive 89/48 on a general system of recognition for the award of higher-education diplomas in *Commission v. Greece, 1995*, the Court in *Aranitis, 1996* defined the term 'regulated profession' and thus the scope of that Directive. According to the Court, whenever the host state 'create[d] a system under which that professional activity [wa]s expressly reserved to those who fulfil[led] certain conditions and access to it [wa]s prohibited to those who d[id] not fulfil them' (para. 19), then a profession was regulated. Whether that was the case depended on the legal situation rather than on the conditions prevailing on the employment market (para. 23). The profession of 'Diplom-Geologe' (graduate geologist) in Germany which was at stake in *Aranitis, 1996* was not regulated in the sense explained, neither directly nor indirectly. Hence, instead of the Directive only the general approach based on *Vlassopoulou, 1991* was applicable (paras 31-2). In the year 1996, the Court also confirmed that Italy had violated Directive 85/432 on activities in pharmacy in *Commission v. Italy (pharmacy studies), 1996* by

unilaterally extending the time period for transposition and allowing those pharmacy students who had commenced their university studies during that extended period to read for a diploma in pharmacy which would not benefit from mutual recognition under Directive 85/433 on recognition of diplomas in pharmacy (paras 12-4).

In *Garofalo*, 1997 the Court interpreted the transitional provision of Directive 93/16 which had incorporated the transitional provision of Directive 86/457 on doctors' diplomas to the effect that it guaranteed acquired rights of doctors established in general medical practice under Directive 75/362 even if they had not entered into a service relationship at the end of the transitional period (paras. 30-3); beyond that minimum requirement, though, the member states had discretion to recognize acquired rights in other situations (para. 34). In *Fédération Belge*, 1998 the Court accepted that under Directive 93/16, which had codified Directives 75/362 and 75/363 on doctors' diplomas and activities, respectively as well as incorporated Directive 86/457 on training in general medical practice, a person need not have a basic diploma in medicine before commencing training in general medical practice. Indeed, the member states had discretion to allow that training to begin before the award of a basic diploma (paras 28 and 36-7).

In *De Castro*, 1998 the Court again after *Van de Bijl*, 1989 dealt with certificates issued under Dir. 64/427 concerning some activities of self-employed persons in manufacturing and processing industries. A certificate issued by a member state which confirmed that a person had pursued several activities simultaneously was not, according to the Court, to be interpreted by another member state in the sense that the person concerned had pursued only one activity, else the binding nature of such certificates and, as a consequence, the freedom of establishment as well as services would be disregarded (paras 23-4 and 31-4).

*Carbonari*, 1999 dealt with the adequate remuneration for trainees in specialties in medicine under Directives 75/362 and 75/363 which had already been at issue in *Commission v. Spain (doctors)*, 1994. As the provisions concerning remuneration were not unconditional, notably as to the body liable to pay the remuneration, they could not be applied directly after Italy had failed to transpose them properly (paras 38-47). If *interpretation conforme* of national legislation was not possible, Italy would be liable for damages, subject to the regular conditions of liability (paras 48-53). *De Bobadilla*, 1999 once more concerned the interpretation of the term 'regulated profession' in Directive 89/48 and Directive 92/51. The Court decided that a nationwide practice, followed on the basis of collective agreements concluded by the social partners, possibly implied that a profession was 'regulated' (paras 20 and 22). Nonetheless, a single agreement concluded by one employer with its employees would not amount to 'regulation' (para. 23). In any event, if the Directive did not apply for want of a regulated profession, the *Vlassopoulou*, 1991-approach had to be applied, if necessary by the public body acting as a potential employer itself when a national procedure for validation did not exist (paras 34-5). The Court also reiterated that this ap-

proach had to be applied by a state to its own nationals who had obtained a diploma in another member state (para. 30). Finally, for the sake of completeness *Commission v. Italy*, 1991 and *Commission v. France*, 1999 must be mentioned. In *Commission v. Italy*, 1991 the Court confirmed that Italy had failed to transpose Directive 85/384 concerning architects. In *Commission v. France*, 1999 the Court confirmed that France had failed to transpose the articles amending Directives 78/1026 and 78/1027 concerning veterinary surgeons. Neither Italy nor France had disputed the substance of the Commission's allegations.

### 3 Social Security

#### *Scope and definitions*

A large number of judgments in the 1990s clarified the scope of the social security rules of the Community. *Buhari Haji*, 1990 dealt with a British national who had been subject to Belgian social security for his work in the Belgian Congo and who had later on acquired the nationality of Nigeria. Such a person was not within the scope *ratione personae*, because the United Kingdom had not joined the European Community yet when he had worked in the Belgian Congo. At that point in time he did not hold a nationality of a member state. When the United Kingdom joined the Community he was not any longer subject to Belgian social security, because he was not working in the Belgian Congo any more and he did not hold the nationality of the United Kingdom (para. 19). Hence, the necessary link between the person concerned and the free movement of workers was missing (para. 22). Moreover, the Act of Accession did not contain any provision that declared Regulation 1408/71 applicable in such a case (para. 23). Conditions that required reciprocal rights in a convention and nationality of or residence in a member state of the Community were therefore not precluded.

#### *Social security v. assistance*

In *Newton*, 1991, the Court again applied the distinction established between social security and social assistance to a British mobility allowance. That allowance was a flat-rate, not means tested cash benefit granted on a weekly basis which was subject to a residence requirement. Given that the benefit fulfilled a dual function, namely of supplementing the income of handicapped persons subject to social security and of ensuring that those who were entirely outside the social security system had an income (paras 14-5), the Court drew a distinction. The mobility allowance only constituted a social security benefit within the meaning of Regulation 1408/71, an invalidity benefit to be more specific, when it was granted to persons who had not been subject exclusively to the legislation of another member state, else the stability of the social security system of the United Kingdom could be seriously affected (paras 16-8). As a consequence in

those cases only, a residence condition was precluded by article 10(1) Regulation 1408/71. In *Hughes*, 1992 the Court categorized the United Kingdom's family credit as a family benefit within the ambit *ratione materiae* of the Regulation 1408/71. Although need was a criterion for the award of the benefit, the authorities did not have any discretion in their decision to take into account the applicant's personal circumstances other than asset, income, and number and age of the children. Moreover, at least one of the functions of the benefit was to help a worker meet family expenses (paras 17-20). In *Commission v. Luxembourg (childbirth benefit)*, 1993, the Court held that Luxembourg's non-contributory maternity allowance was to be categorised as a maternity benefit under article 4(1)(a) Regulation 1408/71 even before Regulation 1408/71 had been amended, because it was based on a legally defined right and the authorities did not make any individual and discretionary assessment of the personal needs (paras 30-2).

### *Conventions with third states*

*Grana-Novoa*, 1993 concerned the scope of the term 'legislation' pursuant to article 1(j) Regulation 1408/71. The Court decided that social security conventions concluded with third states could not be considered as 'legislation'. Since Regulation 1408/71 regulated expressly conventions between the member states in articles 6-8, it would not be logical to assume that the Regulation covered conventions concluded by one member state with third states although it did not address such conventions expressly. Hence, the principles governing conventions between the member states could not be applied to a convention between a single member state and a third state. Equal treatment did not apply to it, either. The incorporation of such a convention into domestic law by statute was irrelevant in that regard (paras 22-7). Ms Grana-Novoa thus could not successfully challenge certain conditions contained in a convention between Germany and Switzerland, *inter alia* a nationality condition, to have insurance periods completed in Switzerland taken into account in Germany.

### *Further scope*

In *Zinnecker*, 1993 the situation of a person who was self-employed in the Netherlands and at the same time in Germany where he also resided came to the Court. The person concerned was not affiliated with any social security system. In Germany, old age insurance was voluntary for self-employed persons and he did not join the scheme. In the Netherlands, it was subject to a residence requirement. The Court held that it was sufficient in such a situation to bring a self-employed person within the scope of Regulation 1408/71, if the person was merely subject to one of the two relevant legal systems (para. 10). As the definition of self-employed persons for the Netherlands contained in annex I.I did not mention residence as a requirement to have the status of a self-employed person, a person like Mr Zinnecker came within the scope *ratione personae* of the Regulation (paras 12-3). In *Van Poucke*, 1994 the Court held that a person employed by the army as a professional doctor who was subject to the general compulsory

sickness and invalidity insurance scheme in Belgium was covered by Regulation 1408/71. Civil servants were included *ratione personae* according to article 2(3) Regulation 1408/71. The scheme was not 'special' (article 4(4) Regulation 1408/71). It was sufficient to be affiliated only to one branch of a social security system constituting 'legislation' within the scope of Regulation 1408/71 (paras. 7-10). In *Rheinhold & Mahla*, 1995 the Court excluded a particular part of a legislative act from the scope of Regulation 1408/71. Dutch law had introduced one single, harmonized social security contribution for all risks. The law also included the liability of a contractor established in another state for the social security contributions its sub-contractor in the Netherlands had failed to pay. While Regulation 1408/71 encompassed social security schemes in their entirety, i. e. including coordinating and overarching provisions, according to the Court, the specific provision had to be examined to find out whether it was within the scope of Regulation 1408/71. The provision at stake addressed only a question of liability of a third party established in another member state for contributions that had not been paid by a domestic party. For lack of a direct and sufficiently relevant link between the provision concerned and the risks regulated by Regulation 1408/71 such legislation did not come within the scope of the Regulation, save where fraud by the contractor was involved (paras 26-31).

In *Otte*, 1996 the Court found that an adaptation allowance for miners which was designed to bridge unemployment periods until retirement age was reached combined elements of unemployment benefits and old-age benefits. However, a sufficient link between the benefit and either unemployment or old age was not given so that it did not fall within the ambit *ratione materiae* of Regulation 1408/71. The benefit was in essence a measure of employment policy (para. 31). To include it in Regulation 1408/71 would have the consequence that the benefit would be reduced in most cases, because the pro rata calculation would become applicable (para. 34).

### *Scope and applicable legislation*

In *Kits van Heijningen*, 1990 and *Daalmeijer*, 1991 questions of both scope and applicable legislation were raised. In *Kits van Heijningen*, 1990, first, persons who worked only part-time were held to be 'employed persons' within the scope of the Regulation 1408/71. Since no provision of the Regulation 1408/71 relied on the period of working time, a person who worked only for two hours on each of two days of the week was also an 'employed person' (para. 10). As Mr Kits van Heijningen resided in another member state than where he was employed in part-time, article 13(2)(a) determined the legislation of the member state of employment as applicable. That legislation, although it lawfully established the conditions of insurance affiliation, was not to include two points, namely first that a person who was part-time employed was only subject to that legislation during the days he actually worked, but not during the days he did not work (para. 14); second, that a person was only subject to an insurance scheme, if he had residence in the state concerned, else the legislation would have the effect of exclud-

ing persons from its scope to which it in fact had to apply pursuant to article 13(2)(a) Regulation 1408/71. That article had the effect of replacing a residence requirement in national law with the requirement to be employed in the member state concerned (paras 20-1).

### *Ceasing occupation*

*Daalmeijer*, 1991 stood in some contrast to *Kits van Heijningen*, 1990. It concerned the situation of a civil servant who moved residence to another member state only after he had definitely ceased his occupational activities. The Court ruled that, while such a person was within the scope *ratione personae* of the Regulation 1408/71 as a former civil servant, the title on the applicable legislation did not contain any provision that applied to a person who had definitively ceased any occupational activity (paras 12-3). A residence requirement for the affiliation with the social security scheme of the state where the person had worked and resided before was therefore not excluded (para. 14). *Noij*, 1991 repeated the interpretation that title II of Regulation 1408/71 did not declare any legislation applicable to persons who had definitively ceased employment. (For the consideration of title III in *Noij*, 1991, see below.) So did *Commission v. Netherlands (early retirement)*, 1991. In this latter case the Court ruled that a residence clause for family benefits was not precluded when these benefits were claimed by persons in early retirement, because title II and articles 73 et seq. Regulation 1408/71 did not apply to persons who had definitively ceased any occupational activity. That was the case even if such persons were still insured pursuant to national law, because such continued insurance was not the consequence of the application of article 13(2)(a) Regulation 1408/71 (paras 10-3). (The Court did not take into account a second argument based on indirect discrimination, because the Commission had advanced it too late in the infringement proceedings.)

In *Twomey*, 1992 a similar problem as in *Ten Holder*, 1986 was raised: was a person who quit employment in the United Kingdom and moved residence to Ireland still a worker capable of claiming sickness benefits under article 19 Regulation 1408/71, if she fell ill before beginning to work in Ireland? Based on *Ten Holder*, 1986, and *Noij*, 1991 the Court ruled that such a person continued to be subject to the legislation of the member state of employment for the purpose of sickness benefits until she definitively ceased employment. Given that she would still have been able to claim sickness benefits in the United Kingdom had she only maintained residence there, she had a claim to sickness benefits in kind pursuant to article 19 Regulation 1408/71 in Ireland after having moved residence. That approach was not at odds with the system of limited exportability of unemployment benefits and concomitant sickness benefits under Regulation 1408/71 (para. 15). In *Commission v. France (pension deductions)*, 1992 a similar issue as in *Commission v. Belgium (pension deductions I)*, 1985 was brought up, viz. the deduction of sickness insurance contributions from pensions, but this time it concerned supplementary, rather than statutory pensions. The Court judged that the principle that only one legislation was to be applied at a time to

one person pursuant to article 13(1) Regulation 1408/71 was not applicable, again because pensioners had definitively ceased any occupational activity and accordingly were not covered by any of the situations regulated by articles 13(2) to 17 Regulation 1408/71 (paras 13-4). Article 33 Regulation 1408/71 which regulated deductions from pensions for sickness insurance purposes, in turn, did not apply, because the supplementary pensions were based mainly on collective agreements which did not constitute legislation within the meaning of article 1(j) Regulation 1408/71 (paras 19-20). This decision was followed-up by *Commission v. Belgium (pension deductions II)*, 1992 in which the Court ruled in identical terms for the corresponding situation in Belgium. The ruling that collective agreements were not 'legislation' even if they had been rendered compulsory was later on confirmed by *Commission v. France (pension points)*, 1998 (paras 34-5).

In *Kuusijärvi*, 1998 the Court addressed the gap that *Ten Holder*, 1986 had uncovered and which was supposedly filled by an amendment of Regulation 1408/71 in article 13(2)(f). According to this article a person who had ceased any activity became subject to the legislation of the state of residence. *Kuusijärvi*, 1998 raised the question whether a woman who became unemployed in Sweden, gave birth to a child, and then moved residence to Finland could be prevented from claiming a parental benefit in Sweden by a residence clause. After having held that Regulation 1408/71 applied to a person who was receiving unemployment benefits when the Agreement on the European Economic Area entered into force (para. 22), the Court decided that a distinction was not inherent in article 13(2)(f) as to whether a person ceased all employment definitively or only temporarily. If the person ceased employment, then the legislation of the state of residence simply applied, in this case Finnish legislation (paras 39-41). A residence clause in the law of the state where the person had been employed previously was therefore not precluded by article 13(2)(f), in contrast to article 13(2)(a) as established in *Kits van Heijningen*, 1990 (paras 32-33). Article 13(2)(f) was the fallback provision, if no other provision determined the legislation applicable (para. 34). A residence clause in Swedish law was not precluded by articles 73 or 74 Regulation 1408/71, either. True, those articles covered the parental benefit at issue, as it was a family benefit according to *Hoever and Zachow*, 1996 (see below) allowing the parents to devote themselves to raising the child and substituting for a loss of income. However, those articles did not apply in the case at hand, because the person concerned had never been subject to the legislation of a state other than the state where she had resided as a consequence of the application of article 13(2)(f) (para. 71). Hence, the Swedish residence requirement was not precluded.

### *Derived rights*

The Court also developed the approach that family members could only claim rights derived from migrant workers in a series of judgments in the 1990s. In *Taghavi*, 1992 the Court re-applied established case-law. As a Belgian benefit for



a handicapped person was based on a personal right of the worker and as third country nationals who were spouses of Belgian nationals could not claim such a benefit in Belgium, a third country national who was the spouse of migrant worker could not claim such a benefit, either, under articles 2 and 3 Regulation 1408/71 (paras 8-9). This approach was confirmed in *Schmid, 1993* for a migrant worker's descendant who had never worked, was disabled and dependent on the migrant worker, and claimed a disability allowance in Belgium. The descendant of the migrant worker was precluded from relying on articles 2 and 3 Regulation 1408/71 to claim the allowance, because she only enjoyed derived rights (paras 10-2). In contrast, in *Hughes, 1992* a non-working spouse of a migrant worker could claim the family credit the Court had categorised as a family benefit within the scope of Regulation 1408/71 in the same judgment (see above). The Court decided that the spouse of a worker had a derived right to a family benefit under article 73 Regulation 1408/71 when the worker fulfilled the conditions in that article and the benefit was provided for family members under national law (paras 25-7).

With *Cabanis-Issarte, 1996* the Court put the derived rights-approach into a new perspective. Ms Cabanis-Issarte sought to rely on non-discrimination to be allowed to pay-in voluntarily past old-age insurance periods at the same rate as Dutch nationals. She was not a migrant worker herself, but had always accompanied her husband who had been a migrant worker before he had died. The Court expressly limited the derived rights-approach to unemployment benefits as they had been at issue in *Kermaschek, 1976* (paras 24 and 34) in spite of the case-law that had extended it to other benefits. The Court discussed a whole series of arguments, but the essential points were (i) that the free movement of workers would have been hindered, if the derived rights-approach had applied in the circumstances of the case at issue (para. 30); (ii) that the member states would have been in a position to undermine the uniformity of Community law by designating certain benefits as personal and thereby exclude them from Regulation 1408/71 (para. 31) and (iii) that the derived rights-approach would have led to a split within one and the same person regarding the scheme of one and the same member state, because certain of her periods of insurance would have been treated as giving rise to personal acquired rights while others would not have for being only derived rights (para. 32). Moreover, in the specific case of Ms Cabanis-Issarte, she wanted to supplement periods of compulsory insurance she had acquired while accompanying her husband (paras 41-2). Hence, according to the Court, equal treatment pursuant to article 3 Regulation 1408/71 applied with the consequence that the same rate had to be applied to the voluntary insurance contributions. In *Hoefer and Zachow, 1996* the Court next affirmed that the derived rights-approach applied only to unemployment benefits as held in *Kermaschek, 1976*, but not to family benefits such as the child-raising allowance in the case at hand (para. 33). That allowance was a family benefit as it was designed to meet family expenses (para. 23). It would have deterred migrant workers, if the benefit could have been made subject to a residence requirement

for family members (paras 34-6). In addition, it was not tenable to examine single family members in isolation of the family circumstances to determine entitlement to such a family benefit (para. 37). Spouses who were not employed persons could therefore lawfully claim the allowance under article 73 Regulation 1408/71.

### *Special non-contributory benefits, social assistance*

In *Snares, 1997* the Court dealt for the first time with the amended articles 4(2a) and 10a Regulation 1408/71. These amendments were introduced to regulate special non-contributory benefits which had the characteristics of both social security and social assistance and had been categorized by the Court's case-law as social security benefits. Article 10a, in particular, exempted that kind of benefit from exportability, i. e. from the waiver of residence clauses. In *Snares, 1997*, the Court classed the British disability living allowance which had a mobility and a care component as such a special non-contributory benefit, for it was listed in Annex IIa. The sanctioning of residence clauses by article 10a Regulation 1408/71 did not go against the grain of article 51 Treaty. The special non-contributory benefits covered by article 10a Regulation 1408/71 were closely linked to the particular social and economic context where they were granted (para. 43). Hence, article 10a was not invalid. *Partridge, 1998* essentially confirmed *Snares, 1997*. It only added that persons who had been awarded the precursor of the British disability living allowance before entry into force of the amendment of Regulation 1408/71 by articles 4(2a) and 10a were still entitled to benefit from exportability (para. 39).

### *Farming*

In *Meints, 1997* the Court decided that a Dutch benefit was not within the scope *ratione materiae* of Regulation 1408/71. The benefit was provided when farm workers were dismissed, because a farming business set aside arable land. Such a benefit did not address the risk of unemployment covered by Regulation 1408/71. The benefit did not replace the remuneration the worker lost and contribute to his maintenance. It was not recurrent, but a lump sum payment. It had to be repaid in case of re-employment. It did not vary depending on the duration of unemployment. And it cushioned the structural reorganization necessary because of Community legislation (paras. 29-33).

### *(Not) purely internal situations*

In *Petit, 1992*, the Court applied the notion of a situation being purely internal to a member state in circumstances concerning Regulation 1408/71. Mr Petit alleged discrimination in violation of articles 48 and 51 Treaty as well as Regulation 1408/71 in an action against the Belgian pension office, because he was not entitled to submit his claim in French. Since Mr Petit was a Belgian national and all circumstances were confined to Belgium the said articles did not, however, apply to the case at hand (paras 8-9). In *Kulzer, 1998*, the Court applied

Regulation 1408/71 to a retired German civil servant who had never himself made use of his freedom. He had spent his entire working life in Bavaria. However, the fact that he claimed children allowance with regard to his daughter who lived in France was enough to render Regulation 1408/71 applicable (paras 27-30). Apart from that, the Regulation applied to civil servants as well as pensioners, and consequently to retired civil servants (paras 24-6).

### *Monopoly, periods of insurance*

The scope of the social security rules was, in a certain sense, also at issue in *José García*, 1996. According to that judgment, the national statutory social security schemes, including those governed by Regulation 1408/71, did not come within the scope of the third non-life insurance Directive 92/49, because to apply that Directive would have meant to break up the monopoly of the state with regard to those schemes and to jeopardize the solidarity and the compulsory contributions on which the social security schemes were based (para. 14). Lastly, *Vella*, 1990 should be mentioned. It was only summarily published. In this case the Court apparently reiterated *Murru*, 1972 in that, subject to articles 48 to 51 Treaty, the national legislation under which a period had been completed exclusively determined the criteria to be fulfilled for that period to be treated as a period of insurance under Regulation 3 and Regulation 1408/71.

### *Applicable legislation*

In a number of further judgments the Court dealt with the legislation applicable to certain facts. *De Paep*, 1991 concerned the situation where a person residing in Belgium was employed by a Belgian undertaking. The person worked aboard a ship flying the flag of the United Kingdom. According to article 14(2)(c) Regulation 1408/71 the applicable legislation was the legislation of the state of employment, i. e. Belgian legislation in the case at issue. In such a situation, Belgian law was not to require for a survivor's benefit that the ship concerned flew the Belgian flag, because in keeping with *Kits van Heijningen*, 1990 the requirements of an insurance system were not to be such that they excluded persons to whom the system should apply pursuant to the determination of the applicable legislation under Regulation 1408/71 (para. 19). The same applied to national provisions concerning the nullity of a contract of employment in so far as they had the effect of preventing the conflict rules from applying (para. 20). In *Maitland Toosey*, 1994 the Court ruled that when it came to invalidity benefits the state was competent whose legislation was applicable when the invalidity occurred. According to the regular rule in article 13(2)(a) Regulation 1408/71 that was the legislation of the member state of employment. A subsequent change of residence did not change anything in that regard, even if the person went back to the member state where she had originally come from. In particular, it did not render article 71(i)(b)(ii) Regulation 1408/71 applicable (paras 13-6). The authorities of the state where the person has moved to merely needed to forward the application to the state whence she had come from (paras 22-4).

In *Van Poucke*, 1994 the Court clarified which legislation was applicable to a person who was employed in Belgium and at the same time pursued a self-employed activity in the Netherlands. The Court decided that the legislation of the member state where the person was employed was also applicable pursuant to article 14c(1)(a) Regulation 1408/71 to the self-employed activity pursued abroad, as if that activity had been pursued in the member state of employment. That the applicable rules were limited by Regulation 1408/71 to certain branches of social security with regard to the activity as an employed person, did not have an impact on the application of the rules regarding the self-employed activity (para. 25).

In *Aldewereld*, 1994 the Court had to determine the legislation applicable in a case Regulation 1408/71 did not address. Mr Aldewereld was resident in the Netherlands and was employed by a German company which posted him to a third state. Given that there was a sufficiently close link between the employment and the Community as required by *Prodest*, 1984 in that a national of one member state was employed by a company in another member state, the application of Regulation 1408/71 was not per se excluded (para. 14). Having discarded the option for the worker to chose the legislation applicable, the Court fell back on the idea underlying title II of Regulation 1408/71 that the law of the member state of residence only applied, if some professional activity was also pursued there. Hence, the Court opted for the law of the member state where the company was established which employed Mr Aldewereld (paras 22-5).

In *Calle*, 1995 a worker was employed by a company in Germany, while the worker was resident in Denmark. The worker also performed in Denmark regular activities on a minor scale on behalf of his German employer. As those activities in Denmark extended beyond twelve months, he was not a posted worker pursuant to article 14(1)(a) Regulation 1408/71. Instead, the legislation of the member state where he was resident fell to be applied. Article 14(2)(b)(i) Regulation 1408/71 also covered the case when an employee pursued an activity in several states on behalf of one and the same employer (paras 13 and 18). With *De Jaeck*, 1997 one of the few situations in which two legislations were applicable at the same time to one and the same person came before the Court. Article 14c(1)(b) Regulation 1408/71 in conjunction with Annex VII point 1 provided that a person who was employed in a member state other than Luxembourg and who pursued at the same time a self-employed activity in Belgium was to be subject to two legislations, one for each activity. The Court decided that the terms 'employed person' and 'self-employed person' had to be defined by the applicable national social security law, as indicated by articles 1(a) and 2(1) Regulation 1408/71. To be consistent, the terms used in articles 14a and 14c Regulation 1408/71, i. e. 'persons who are employed' and 'persons who are self-employed', equally needed to be determined by national social security law (paras 22 and 30). That interpretation was not at variance with the definition of a worker by Community law under article 48 Treaty (para. 28). It was, moreover, confirmed on the same day as *De Jaeck*, 1997 had been handed down in the judgment

*Hervein I*, 1997. In *De Jaeck*, 1997, the Court, in addition, went on to hold that Article 14c(1)(b) Regulation 1408/71 did not prevent a member state from insuring a person merely against some of the risks governed by the Regulation. Yet, each member state could only levy contributions on the part of the income generated in its territory when two legislations applied.

### *Aggregation*

During the 1990s the Court elaborated its case-law as to aggregation in more than 40 judgments. In two cases, *Pian*, 1990 and *Bianchin*, 1990, the Court merely reiterated the calculation principles pursuant to article 46 Regulation 1408/71 and the case-law relating thereto. The main issue had already been decided in *Di Felice*, 1989, namely that an early retirement pension was of the same kind as an invalidity pension for the purpose of article 12(2) Regulation 1408/71. In *Spits*, 1990 the Court also mainly reapplied the calculation rules in article 46 Regulation 1408/71. National rules against the overlapping of benefits were not to be applied in the calculation of the independent amount pursuant to article 46(1) Regulation 1408/71. That was why the Belgian authorities calculating a retirement pension were not entitled not to apply a certain administrative practice. That practice consisted in factoring in years of work before the 20<sup>th</sup> birthday when a person's insurance record in Belgium was not complete in the sole light of the years of work after the 20<sup>th</sup> birthday. The Belgian authorities had to apply that practice even when that person's insurance record in the Netherlands was complete.

With *Di Prinzio*, 1992 the Court again was seized with the adding of notional years to a miner's insurance record. The case concerned an invalidity pension turned into a retirement pension and then a survivor's pension and the national rule against the overlapping of benefits according to which such notional years were reduced when they corresponded to actual years which gave rise to a pension under another scheme, in particular a foreign scheme. In the case of Ms Di Prinzio her Belgian survivor's pension based on the invalidity turned retirement pension of her late husband was reduced, because one notional year was not granted in the light of her husband's invalidity pension being paid in Italy. Various points raised by this case had already been settled in previous case-law. The Court, however, took this case as an occasion to walk through all the steps to be taken to calculate a pension under article 46 Regulation 1408/71. In addition, the Court clarified four points. (i) The first point arose because the retirement ages differed in Italy and Belgium. Was it possible for the Belgian authorities to calculate the theoretical amount under article 46(2)(a) Regulation 1408/71 when the retirement age had not yet been reached in Italy? The problem was that the Belgian institution normally had to know how long the insurance period completed in Italy was, because only then could it add up all the periods completed in all member states and treat them as if they had all been completed in Belgium which was necessary to arrive at the theoretical amount. In other words, under ordinary circumstances one was not able to know how long an old-age insurance

period was until it was completed by reaching the retirement age. The Court answered that, in the circumstances of the case at hand, it was possible to calculate the theoretical amount, because the worker had the right to a full pension already pursuant to Belgian legislation. Accordingly, it was not necessary to feed into the calculation of the theoretical amount the insurance periods completed in Italy (paras 25-6). (ii) The second point was that the pro rata amount pursuant to article 46(2)(b) Regulation 1408/71 always had to be calculated, even if the person had a right to a full pension under the legislation of the state where the award of a pension was sought (para. 51). (iii) The third point related to the taking into account of notional periods in the calculation of the pro rata benefit under article 46(2)(b) Regulation 1408/71. In clarification of *Menzies, 1980*, those periods were to be taken into account in that calculation when they came to pass before the materialization of the risk (para. 54). (iv) The fourth point had actually already been rather clear. The pension pursuant to *Petroni, 1975*, i. e. the pension on the basis of a calculation based on the entirety of national law, had to be compared with the ‘Community pension’, i. e. the pension based on the calculation pursuant to article 46 Regulation 1408/71, after the latter had been adjusted in application of article 46(3) Regulation 1408/71 to avoid passing the ‘ceiling’ of the highest theoretical amount (paras 64-5). The entire explanation given in *Di Prinzio, 1992* was repeated in *Di Crescenzo, 1992* for the basically identical case of a miner who had also worked in Italy and Belgium. The Court emphasized the separate calculation based on the law of a single member state in its entirety, viz. the *Petroni, 1975*-calculation, the result of which was then to be compared to the outcome of the calculation pursuant to article 46 Regulation 1408/71, because the national Court had doubted that *Petroni, 1975* still applied (para. 11; see the opinion of Advocate General Jacobs, paras 16-7).

With *Marius Larsy, 1993* the Court came back to the interpretation given to article 46(3) Regulation 1408/71 in *Collini, 1987*. The situation in *Marius Larsy, 1993* was new. Mr Larsy had been pursuing a self-employed activity both in Belgium and in France at the same time and had paid contributions for each activity under the respective social security system. The Belgian authorities reduced the Belgian pension awarded in the light of the French pension. The Court replied on the basis that the calculation pursuant to article 46 Regulation 1408/71 was at issue. The situation was different from *Collini, 1987*, because Mr Larsy had been obliged to pay contributions under two systems during one and the same time period, while *Collini, 1987* had concerned notional periods (para. 21). Article 46(3) Regulation 1408/71 was not to be applied to reduce a benefit in those circumstances (para. 19). In *Lepore, 1993* the question was raised whether, in the calculation of an old-age pension under article 46 Regulation 1408/71, Belgian law could lawfully treat as periods of employment only those periods of invalidity that had followed upon employment in Belgium. The Court rejected that approach for both the calculation pursuant to article 46(1) and (2) Regulation 1408/71. In spite of the freedom of the member states to define insurance periods pursuant to article 1(r) Regulation 1408/71 Belgium had to treat invalidity

periods after work in another member state equally as insurance periods in the calculation pursuant to article 46 Regulation 1408/71 (para. 23). The reason was, according to the Court, that the risk of losing the right to have such periods of invalidity taken into account as periods of insurance would deter migrant workers in certain circumstances from making use of their freedom of movement (para. 22).

In *Fabrizii*, 1993 the Court added an element to the calculation of the theoretical amount in accordance with article 46(2)(a) Regulation 1408/71. To determine whether a period completed was a period of insurance and thus had to be factored into the calculation of the theoretical amount, it was not the law of the state that was about to award a pension that had to be examined. Instead, the legislation under which a period was completed determined whether such a period constituted a period of insurance. Thus, if Italian law treated a period of military service in the Italian army as an insurance period, then Belgium had to treat it so as well in the calculation of the theoretical amount. The Belgian authorities were not allowed to object that periods of military service did not constitute periods of insurance according to Belgian law (paras 22 and 25). Furthermore, the Court reiterated how notional periods and provisions against overlapping had to be treated under article 46 Regulation 1408/71. In addition, the Court added that the way the Belgian authorities handled a Belgian provision limiting the total amount of years of insurance to the maximum of years permitted in Belgium implied that the provision came down to a rule against overlapping which was not to be applied in the calculation pursuant to article 46 Regulation 1408/71. Rather, it was to be applied in the calculation under national law alone pursuant to *Petroni*, 1975 (see the opinion of Advocate General Darmon, para. 52; and *Fabrizii*, 1993, paras. 39 et seq.). When it was applied in that latter calculation the national rule did not violate articles 48 to 51 Treaty (see the opinion of Advocate General Darmon, paras 78-80).

In *McLachlan*, 1994 the Court essentially sanctioned France's approach to awarding a retirement pension when a person who was 60 years of age or older was made redundant, i. e. 5 years before the retirement age in France. As indicated by article 49 Regulation 1408/71, in case the respective retirement age had not been reached in all the member states concerned, the member state where it had been reached calculated the pension due under its legislation pursuant to article 46 Regulation 1408/71. According to the regular rules, that state factored in periods of insurance completed in another member state for the purpose of the acquisition of a right to a pension. That state was also entitled to take them into account in the determination of the rate applicable to the pension. However, that state had to leave them out of account in the calculation of the amount of the pension due in that state, i. e. when applying article 46 Regulation 1408/71 (para. 31), which was due to the fact that the migrant worker had separate pension rights under each of the social security systems concerned for each insurance period completed (para. 37). In brief, article 49 Regulation 1408/71 did not modify the regular approach of article 46 Regulation 1408/71. Non-discrimina-



tion was, moreover, not violated by France's approach. Yet because of the way the national court asked the question and due to the substance of the national proceedings, the Court did not address a further aspect of the case (see paras 25 and 35). The taking into account of the 30 quarterly insurance periods completed by Mr McLachlan in the United Kingdom made it possible for the French authorities to award him an early retirement pension rather than unemployment benefits, because he consequently had completed the minimum number of insurance periods required for awarding such a pension, namely 150 quarterly periods with him having completed 120 periods in France and 30 in the United Kingdom. However, since the *rate* of the pension was also determined by taking into account the insurance periods completed in the United Kingdom, merely a partial pension resulted, presumably four fifth of a full pension, corresponding to 120 out of 150 quarterly periods. The amount of that partial pension was lower than the unemployment benefits he would have received had he not been eligible for an early retirement pension at all, viz. had the periods completed in the United Kingdom been totally left out account (see para. 23).

In *Reichling*, 1994, the Court adopted a similar approach for aggregation with invalidity benefits as it had for unemployment benefits in *Fellinger*, 1980. When a type A invalidity benefit came together with a type B benefit the relevant salary on the basis of which the theoretical amount pursuant to article 46(2)(a) Regulation 1408/71 had to be calculated to determine the benefit due under the type A regime was, according to the Court, the salary the person concerned had last received in employment regardless of where in the Community the person had been employed (para. 28). When the worker had been employed in Luxembourg before becoming invalid the remuneration paid in Luxembourg was relevant for the Belgian type A invalidity benefit, even before the amendment of Regulation 1408/71 (paras 26 and 29). To rely on the minimum salary in Belgium in the absence of paid employment there had the effect of depriving a migrant worker of rights because of him having exercised his freedom to move (para. 25).

### *Previous conventions*

In *Rönfeldt*, 1991 the Court had been faced with a tricky challenge, namely the question whether the rights contained in a convention between two member states were replaced by Regulation 1408/71, although those rights went further. The question arose, because a convention between Denmark and Germany had provided that 15 years of insurance completed in Denmark were to be taken into account in the calculation of the benefit in Germany. In other words, 15 years were added to the insurance period completed in Germany, resulting in a significantly higher benefit in Germany than under the *pro rata* approach pursuant to article 46 Regulation 1408/71. The Court ruled that the need to safeguard rights which were granted by the national law of a single member state to the migrant worker and which were more favourable than those provided by Community law was not just pertinent in the case of national law as such pursuant to

*Petroni*, 1975, but also in the case of conventions between member states (para. 27). Hence, the pension had to be awarded based on the more favourable calculation under such conventions, although Regulation 1408/71 had replaced them (para. 14). *Rönfeldt*, 1991 was, however, limited in *Thévenon*, 1995. In this case also, a social security convention that had existed already at the time Regulation 1408/71 entered into force was more favourable for a migrant worker. Mr Thévenon could notably have claimed higher invalidity benefits in Germany based on the convention between Germany and France than on the basis of the pro rata calculation in article 46(2) Regulation 1408/71. However, according to the Court, he did not have a valid claim, since he had exercised his freedom to move to Germany in order to work only *after* Regulation 1408/71 had entered into force and replaced the convention between Germany and France (para. 26). He could, therefore, only rely on Regulation 1408/71, even if the convention would have been more favourable. The approach developed in *Rönfeldt*, 1991 and *Thévenon*, 1995 was confirmed in both *Naranjo Arjona*, 1997 and *Grajera Rodríguez*, 1998. Spanish workers who had moved in order to work abroad before Regulation 1408/71 had entered into force for Spain were entitled to rely on a social security convention that already existed at that time when it was more favourable than the Community rules (para. 27 and para. 29, respectively).

### *Changing circumstances*

The Court in a number of cases dealt with the problem that the circumstances in which a pension had been awarded initially changed later on. In particular, the economic circumstances in Italy that changed rapidly at the time gave rise to a series of judgments. In *Cabras*, 1990 a constellation was at issue in which a type A invalidity benefit was awarded based on Belgian law alone and a type B invalidity benefit in Italy based on the rules of the Community. In such a constellation the full Belgian type A invalidity benefit constituted the highest theoretical amount and thus the ceiling in article 46(3) Regulation 1408/71 (para. 20). That was, according to the Court, in accordance with articles 48 to 51 Treaty, since the Community calculation applied only when the application of national law in its entirety including national rules against overlapping was not more favourable than the application of Community law. As the highest theoretical amount, i. e. the ceiling, in such a constellation did not vary, the substantial adjustments made over time to the pension under the Italian type B legislation due to changing economic circumstances could essentially be cancelled out when the type A benefit was recalculated based on article 51 Regulation 1408/71. These effects were, according to the Court, the *quid pro quo* for the advantages the migrant worker drew from the Community rules (para. 27). The migrant worker concerned had to accept them like the disadvantages arising from the receipt of two different benefits, viz. the ‘splitting’ of benefits and the uncertainty associated with it (para. 30). Furthermore, the amount of benefit that was overpaid since a recalculation was triggered by a revision of national law could be reclaimed from the beneficiary (paras 41-2).

A similar situation as in *Cabras*, 1990 was addressed in *Ravida*, 1990 which was also handed down on 21 March 1990. The difference was that in *Ravida*, 1990 in both Belgium and Italy a retirement pension had been awarded together with a survivor's pension. According to Belgian law a survivor's pension could only be aggregated with retirement pensions and other benefits in Belgium and abroad up to a certain ceiling. In the light of the Italian benefits the Belgian survivor's pension had accordingly been scaled down to the ceiling. When the Italian retirement pension was increased to reflect the changing economic circumstances – in other words when it was revalorized – the Belgian survivor's pension was reconsidered and further reduced to comply with the Belgian ceiling. The Court decided that in such circumstances article 12(2) first sentence Regulation 1408/71 could not simply be applied repeatedly, although the survivor's pension which was adapted was of a different kind than the retirement pension awarded in Italy. The reason was that article 12(2) only applied *in* the calculation (para. 17). However, one first had to determine whether a re-calculation was in order at all. Article 51 Regulation 1408/71 addressed that question exhaustively. Pursuant to that article, however, the mere fact that one of the benefits that had been adjusted to the changing economic circumstances was not of the same kind as the retirement pension did not as such justify a recalculation (para. 23). *Cas-samali*, 1991 was based on facts that were essentially the same as in *Ravida*, 1990. Accordingly, the Court answered in the same terms. It merely added two points: (i) Article 51 had to be applied in all situations, notably also when a pension had been calculated solely pursuant to national law; and (ii) Article 51 was mandatory in the sense that the national authorities were only allowed to recalculate benefits in the cases mentioned in article 51(2) and in no other cases (paras 20-2). The first point (i) was confirmed in *Bogana*, 1993 *mutatis mutandis* for two invalidity benefits. Article 51 Regulation 1408/71 governed the recalculation of benefits, even if the benefit on the basis of article 46 Regulation 1408/71 was the same or less favourable than the benefit calculated on the basis of national law alone including the national rules against overlapping (para. 19). Thus, national rules addressing the recalculation of benefits were excluded even if they were designed to ensure continuous compliance with a ceiling applicable to a benefit (para. 21). In *Levatino*, 1993 the Court nevertheless created an in-road for recalculation due to changing economic circumstances, albeit in a particular case, namely when the income a retired migrant worker received by reason of his pensions in Belgium and Italy had been increased by a Belgian non-contributory old-age pension supplement to reach the minimum means of subsistence. The Court fitted the continuous adjustment of that Belgian supplement, especially in the light of significant increases in the Italian pension, into the changing of personal instead of economic circumstances, i. e. into article 51(2) rather than (1). Essentially, the reason was that the supplement was special, because a dimension of personal circumstances was inherent in it in that it had been designed to guarantee a minimum means of subsistence (paras 33-4 and 42-3). The supplement thus had to be recalculated every year under article 51(2).

That such recalculation was possible for the supplement meant that article 51 did not have the effect of disrupting the system set up by Belgian legislation within the meaning of paragraph 21 of *Frilli*, 1972 (para. 45 of *Levatino*, 1993). Apart from that ruling, the Court reaffirmed that the fact that migrant workers could be better off than workers who had spent their entire working life in one member state was irrelevant, for the two situations were not comparable (para. 49). The Court refused to apply the same reasoning developed in *Levatino*, 1993 as to article 51(2) Regulation 1408/71 in the judgment in *Cirotti*, 1997. In this case the former spouse of a migrant worker received an old-age pension in Belgium on the basis of the insurance of her former husband and an invalidity pension in Italy which was increased significantly based on the economic circumstances. The pension in Belgium did not pursue the same aim as the supplement to the pension that was granted in *Levatino*, 1993 (para. 28). The *Levatino*, 1993-line of reasoning was therefore not pertinent. Article 51(1) instead of (2) Regulation 1408/71 had to be applied. Besides, equal treatment in article 3 Regulation 1408/71 did not concern equality of treatment between spouses (para. 30).

In *Bettaccini*, 1994 the Court clarified that the recalculation pursuant to article 51 Regulation 1408/71 applied only when benefits covered by chapter 3 of title III of Regulation 1408/71 were changed (para. 16). Hence, a change in a family benefit did not give rise to a recalculation of an invalidity benefit. More specifically, a Belgian invalidity pension could not lawfully be re-calculated when the general Italian family allowance which the person concerned was receiving together with an Italian invalidity pension was changed (para. 19). With *Van Munster*, 1994 the Court was faced with exactly the same constellation as in *Bakker*, 1988 (see above). In *Bakker*, 1988, however, the question was exclusively answered with regard to article 12(2) Regulation 1408/71. In *Van Munster*, 1994 the full implications of the situation had to be dealt with, namely what were the consequences of a change in legislation in the Netherlands for the Belgian legislation? The Netherlands had brought their legislation in line with the Directive on gender equality in social security, Directive 79/7, by essentially abolishing old age pensions based on a household rate. Instead two separate pensions were awarded when both spouses reached the retirement age. Belgium's legislation also complied with that Directive owing to an opt-out therein enabling the continued application of a household rate. Could the Belgian authorities switch the basis of the worker's pension in Belgium from the household rate to the single rate – thereby reducing it – because the other spouse, a non-migrant worker who had never worked herself, received upon reaching retirement age her own income in the Netherlands, i. e. her own independent pension? The Court answered that they could not lawfully do so. The aims that articles 48 to 51 Treaty pursued would else be frustrated. The total amount awarded in the Netherlands had not been increased when the non-working spouse reached retirement age. The Belgian authorities were not allowed to apply national legislation literally in the same way to migrant workers as well as non-migrant workers

without regard to the legislation applicable in other member states, else the co-operation in good faith required by article 5 Treaty would not be achieved (paras. 30-4).

*Benefits of the same kind, overlapping*

With the judgment in *Del Grosso*, 1995 the Court clarified two points as to aggregation. First, an apportioned benefit according to article 46(2) Regulation 1408/71 did not become an independent benefit pursuant to article 46(1) merely because its amount was the same owing to a supplement as that of the independent benefit (para. 16). Second, the Court interpreted the second sentence of article 12(2) Regulation 1408/71, which excluded the application of national rules against the overlapping of benefits. For that sentence to be applicable three requirements had to be met, namely two benefits a person received had to be of the same kind; each of these two benefits had to be equivalent to benefits 'in respect of invalidity, old age, death (pension) or occupational disease'; and the benefits had to be awarded pursuant to articles 46, 50, and 51 or article 60(1)(b) Regulation 1408/71 (para. 22). The Court then classified the Belgian benefit at issue as a sickness benefit and the Italian benefit as an invalidity benefit. They were therefore not of the same kind. Moreover, the Belgian benefit failed to meet the second and third requirement. In *Schmidt*, 1995 the Court again had to decide whether two benefits were of the same kind for the purpose of article 12(2) Regulation 1408/71. That was not the case for a Belgian old-age pension a divorced woman received on the basis of insurance periods completed by her former husband and a German old-age pension she received on the basis of the insurance periods she had completed herself. The two benefits did not have the same purpose and had not been completed by the same person (paras 25-6 and 28-9). This interpretation was confirmed in *Cordelle*, 1998. A survivor's pension awarded in Belgium which was based on the insurance periods completed by the late husband was not of the same kind as a French old-age pension based on the insurance periods completed by the survivor herself (para. 21). In *Cordelle*, 1998, the amendment of article 12(2) Regulation 1408/71 did not apply, as the pension had been awarded before the amendment's entry into force and the person concerned had not submitted a request for application of the amended rules (paras 13-7). However, in *Conti*, 1998 the amended articles 12(2) and 46b Regulation 1408/71 did apply. The Court ruled that the case-law relating to article 12(2) continued to apply, since the amendment did not modify the substance of the rules, but rather smoothed them out (para. 19). Belgium's provisions governing miners' benefits had been changed since *Romano*, 1985, namely they did not any longer reduce notional years in the light of a pension awarded abroad, but supplemented a miner's pension when a foreign benefit did not have the effect of bringing that pension up to the full amount available in Belgium. Yet, the Belgian provisions were still at variance with the ruling sent in *Romano*, 1985, although they were seemingly part of the calculation of the benefit. They consti-

tuted rules against the overlapping of benefits that had to be left out of account in the calculation pursuant to article 46 Regulation 1408/71 (paras 24-9).

In *Van Coile, 1999* and *Platbrood, 1999* the Court refused to classify a Belgian rule as a rule against the overlapping of benefits. If a person had been employed at a specific point in time in Belgium during World War II and had paid a minimum amount of contributions there, the Belgian war years presumption treated the rest of the period of World War II from that specific point in time onwards as a period during which contributions had been paid in Belgium. A Belgian pension that was awarded on the basis of that presumption was reduced, however, when another pension was awarded – notably abroad – for the same period. The presumption was then deemed to be rebutted. According to the Court, the mere fact that national law considered the war years presumption as a rule of evidence was irrelevant to determine whether it was a rule against the overlapping of benefits. However, the presumption could not be classed as such a rule against overlapping, since it merely intended to alleviate the damaging consequences of the War on Belgian pension rights (paras 27-8 and 32).

### *Aggregation in Spain*

With *Lafuente Nieto, 1996* the first aggregation case concerning Spain came to the Court. It concerned the particular approach used in Spain to calculate a type A invalidity pension when a type B pension was awarded in another state. Spain relied on the average amount of the bases of social security contributions over a reference period of time, namely 84 months, before invalidity set on. If for a part of that reference period contributions had not been payable, Spain simply took the general minimum basis of contributions to calculate the average amount. As that had the effect that periods of work abroad were always factored in on the basis of that minimum, migrant workers were disadvantaged. Article 47(1)(e) Regulation 1408/71, which was applicable, did not authorize that way of calculating. According to the Court, Spain did not have to take into account social security contributions actually paid abroad, though. But the bases of contributions applicable for the time period during which contributions had been paid in Spain had to be ‘extended’, revalorized, and updated, or in other words taken into account again as if the person had continued to contribute under the Spanish system for the rest of the reference period. Put simply, for the purpose of calculating the average amount a worker had to be treated as if he had continued to work in Spain (paras 35-40). That solution was underpinned by an amendment of the annex provisions concerning Spain, which had not been applicable yet at the time of *Lafuente Nieto, 1996*. Finally, the Court held that article 46(2)(c) Regulation 1408/71 regarding the maximum period was not applicable to type A schemes. The interpretation in *Lafuente Nieto, 1996* was confirmed in *Naranjo Arjona, 1997*. The amended annex was not applicable in *Naranjo Arjona, 1997* in the absence of a request to that effect by the person concerned. In *Grajera Rodríguez, 1998*, the Court confirmed that the interpretation given in *Lafuente Nieto, 1996* was compatible with articles 48 to 51 Treaty. Moreover, the differ-

ences concerning the average amount between the approach applicable according to *Lafuente Nieto*, 1996 and the approach pursuant to annex VI(D)(4), including its amendment, were negligible, since pursuant to *Lafuente Nieto*, 1996 the existing bases of contribution were updated, while the annex revalorized the amount of the pension as such and left out of account the last year before the risk materialized (paras 21 and 25).

### *Aggregation and special non-contributory benefits*

In *Stinco*, 1998 the Court decided that the exclusion of certain special, non-contributory benefits from exportability pursuant to article 10a Regulation 1408/71 did not have an impact on the calculation of the theoretical amount pursuant to article 46(2) Regulation 1408/71 (paras 17-8). A non-contributory supplement to an old-age pension paid in Italy which was intended to bring the pension up to the statutory minimum had to be taken into account in the calculation of the theoretical amount of an Italian old-age pension. That applied even in the calculation of a pension to be awarded to a person residing in another member state than Italy, although the supplement was ultimately not paid to such a person because of article 10a.

### *Differing retirement ages*

In *Lustig*, 1998, the Court was again faced with a problem that arose because retirement ages differed among the member states. Article 49 Regulation 1408/71 had been amended since *McLachlan*, 1994. As a consequence, article 49(1)(b)(ii) allowed a state to ignore for the calculation of an old-age pension pursuant to article 46 Regulation 1408/71 insurance periods completed in another member state until the retirement age was also reached in that other state. However, the Court ruled that periods completed abroad had to be taken into account nevertheless in the specific circumstances of the case in contrast to *McLachlan*, 1994. Ms Lustig only sought to have them taken into account for the purpose of rendering a higher pension rate applicable, i. e. for the purpose of coming into the category of persons eligible for the Belgian guaranteed minimum pension (para. 40, see the opinion of Advocate General Fennelly, para. 20). If the periods were not taken account of in those circumstances, article 48 to 51 Treaty would be violated.

### *Aggregation and civil servants*

In a few cases in the 1990s the Court dealt with the aggregation of periods completed under special insurance schemes for civil servants. Such schemes were excluded from the scope of Regulation 1408/71 by reason of article 4(4). *Olivieri-Coenen*, 1995 concerned Annex VI point 4(a) of section I regarding the Netherlands according to which all periods of paid employment completed before 1967 when the new social security legislation came into force in the Netherlands had to be considered as periods of insurance under the new legislation. The Court held that even periods of paid employment during which a person had been affil-



iated to a special scheme for civil servants before 1967 were covered by Annex VI. As there was no hierarchy between the regular body of Regulation 1408/71 and its annexes and given the aim of freedom of movement, the annex provision had to prevail. Such a period of affiliation to a special scheme for civil servants therefore had to be aggregated pursuant to article 46 Regulation 1408/71 (para. 15). (In a similar vein, though not with regard to special schemes for civil servants, the Court later on in *Grahame*, 1997 ruled that periods of service in the military of the Netherlands before 1967 constituted paid employment for the purpose of annex VI. Such periods therefore had to be aggregated for an invalidity benefit.)

In *Vougioukas*, 1995 the Court again addressed a special scheme for civil servants, albeit not with regard to the Netherlands. According to the Court the restrictive notion of public service in article 48(4) Treaty could not be applied under article 4(4) Regulation 1408/71. Moreover, a scheme need not have been 'special' for article 4(4) to apply. It was enough if it was 'different' from the general social security system (para. 27). Next, the Court found that the Council had failed to discharge its duty pursuant to article 51 Treaty to adopt the measures needed to regulate such special insurance schemes for civil servants (para. 34). Therefore, when the Greek authorities, in the case of Mr Vougioukas, refused on the basis of article 4(4) Regulation 1408/71 to take into account periods of affiliation to an insurance scheme for civil servants in Germany, the Court decided that aggregation had to be granted directly based on article 51 Treaty else the migrant worker would be discriminated. However, the Court implied that its ruling applied only in cases where aggregation was possible despite the lack of implementing provisions (para. 36). When *Nijhuis*, 1999 came to the Court, the amendment of Regulation 1408/71 had taken place. The exemption of special schemes for civil servants had been removed and new articles governing such schemes had been introduced. However, in *Nijhuis*, 1999 the Court decided that the new rules were not applicable to a period before entry into force of the amendment. Moreover, the rules on aggregation in force before the amendment could not be applied by analogy in the case at issue, either, because in contrast to *Vougioukas*, 1995 positive coordinating measures were needed for aggregation (paras 30-2).

### *Broader aggregation*

The Court also dealt with aggregation of periods in a less technical sense than that addressed by article 46 Regulation 1408/71. In *Paraschi*, 1991 German law extended the reference period of insurance relevant for invalidity benefits by certain periods. However, the reference period was only extended when the event or circumstance that gave rise to such a particular period, like sickness or unemployment, was confined to Germany. The Court rejected that approach for being discriminatory. For migrant workers such events and circumstances typically occurred abroad, for they in particular tended to return to their home state in case of sickness or unemployment (para. 24). Germany thus equally had to take into

account such periods occurring in other member states when it came to prolonging the reference period. Apart from that the Court also reconfirmed in *Paraschi, 1991* that the member states were free to establish the conditions to become a member of their social security schemes. Accordingly, the member states could also amend those conditions so as to make them stricter, provided that they respected non-discrimination (para. 16). In *Moscato, 1995* the Court was faced with a problem arising from a requirement for the award of an invalidity benefit in the Netherlands. Dutch law awarded a benefit for invalidity materializing within six months after insurance cover had begun only if it had not been foreseeable at the beginning of insurance cover that the person would become incapable of work. Based on article 51 Treaty and article 38 Regulation 1408/71, which concerned aggregation of insurance periods for the purpose of acquisition of invalidity benefits, the Court ruled that previous insurance cover in another member state had to be taken into account to determine whether the incapacity of work had been foreseeable at the time the insurance cover had begun. When a migrant worker had worked in another member state previously the relevant date could therefore not be set to the beginning of the insurance cover in the Netherlands (paras 29-30). On the same day the Court delivered *Moscato, 1995* the judgment in *Klaus, 1995* was handed down. Based on the aggregation rule for sickness benefits in article 18(1) Regulation 1408/71, the Court in *Klaus, 1995* applied the same reasoning as in *Moscato, 1995* for sickness benefits in Dutch law. Cash sickness benefits were subject to the condition of being fit for work at the beginning of sickness insurance cover. While the condition was not excluded by article 35(3) Regulation 1408/71, the beginning of the insurance cover in another member state had to be taken as the relevant date (para. 24). Moreover, a lapse of a few days between the end of the previous insurance cover and the beginning of the new insurance cover had to be disregarded when setting the relevant date (para. 28).

In *Martínez Losada, 1997*, the Court dealt with an issue of aggregation with regard to a particular benefit granted in Spain to those beyond the age of 52 years. The requirements for the award of the benefits were that a person had contributed to unemployment insurance for at least six years and had a right to a retirement pension based on 15 years of contribution. Ms Martínez Losada had returned to Spain, after having worked abroad, though never in Spain. The Spanish state paid contributions to sickness insurance and family benefits schemes on her behalf while she was receiving unemployment benefits in Spain which were granted as usual to a returning migrant worker. However, she was refused the benefit. That benefit was an unemployment benefit, as Spain had declared it so under article 5 Regulation 1408/71. Article 48 Regulation 1408/71 concerning periods shorter than one year did not apply for lack of a reference in the section relating to unemployment benefits. The key issue, however, namely whether the contributions paid on her behalf by the Spanish state implied that a period of insurance had been last completed in Spain pursuant to article 67(3) Regulation 1408/71 thus triggering aggregation of unemployment insurance pe-

riods completed abroad, and ultimately the right to the Spanish benefit, was left to the national court to decide. It was up to national law to determine 'periods of insurance' pursuant to article 1(r) Regulation 1408/71 and, particularly, whether a period during which the Spanish state paid contributions on behalf of a person who had never been employed in Spain constituted such a period (para. 37). A further issue relating to this Spanish scheme was clarified in *Ferreiro Alvite*, 1999. Another condition of national law for the award of that particular Spanish benefit was that the person had to have contributed to the Spanish social security system during a qualifying period of 15 years. In *Martínez Losada*, 1997 the Spanish government had recognized that periods completed in other member states would be taken into account for the purpose of that qualifying period (para. 41). In *Ferreiro Alvite*, 1999 the Court reaffirmed that Spain was required to do so (para. 25).

*Iurlaro*, 1997 concerned questions that were somewhat similar to those raised in *Martínez Losada*, 1997. Germany extended the reference period for its type B invalidity pensions as regarded the minimum contribution required by periods during which unemployment benefits were drawn and for such periods factored in notional contributions in order to determine the amount of the benefit. Italy counted such periods of unemployment as proper invalidity insurance periods both for the acquisition and the calculation of its own type B invalidity benefits, if contributions had been paid. How were the Italian authorities to deal with periods during which a migrant worker drew unemployment benefits in Germany when they were asked to award an invalidity pension? Italy was not required to extend the Italian reference period by the period of unemployment in Germany, because it did not do so for periods of unemployment in Italy, either. A member state was entitled to lay down in a non-discriminatory fashion the conditions governing the right to become a member of a social security scheme (paras 23-5). However, given that the law under which a period was completed determined whether such a period constituted a 'period of insurance' pursuant to article 1(r) Regulation 1408/71, Italy had to factor in periods of invalidity insurance completed and recognized as such in Germany when determining whether a right to an Italian invalidity benefit was acquired. Italian law could not lawfully require periods to have been completed on the national territory to count towards the minimum period required (para. 29). Yet limiting the recognition of unemployment periods as insurance periods to six months in general was lawful (paras 31-2).

### *Family benefits*

In the 1990s, the Court also dealt with family benefits. *Bronzino*, 1990 rejected a requirement for the children of migrant workers to be registered with the employment office of the host state for migrant workers to be eligible for a particular benefit awarded when children were unemployed. The benefit was a family benefit, as it intended to help parents meet the cost incurred because their children were unemployed. As such it fell within the scope of article 73 Regulation

1408/71. The obligation for the children to hold themselves available to the employment office of the host state could also be fulfilled with the employment office at the place where they resided. Moreover, it was the parents rather than the children who received the benefit (para. 11-4). It seems that the Court gave the same answer in *Gatto*, 1990. (The case was only summarily published.) In *Kracht*, 1990, the Court re-affirmed the case-law that had begun with *Ragazzoni*, 1978, namely that all requirements of substance and form had to be met for a family benefit to be 'payable' within the meaning of article 76 Regulation 1408/71. Only then did the rule against overlapping benefits become applicable. That the migrant worker, or her spouse, was in a position, as a consequence of the case-law, to choose where to receive benefits by ceasing to apply for them in the state of residence, as in the case at hand, did not invalidate that case-law. The amendment of article 76 which targeted specifically an outright refusal to apply for family benefits was moreover not applicable before it entered into force.

#### *After Pinna*

*Yáñez-Campoy*, 1990 was an aftermath of *Pinna*, 1986. Before *Pinna*, 1986 was handed down, the Act of Accession of Spain had relied on the stipulation in article 99 Regulation 1408/71 to find a uniform solution to the situation which article 73(2) Regulation 1408/71 had addressed by means of a derogation for France. In the meanwhile the Act of Accession had established a transitional regime that would have applied until the uniform solution would have been found. According to that regime, article 73(2) Regulation 1408/71 and certain social security conventions applied to Spanish workers. When *Pinna*, 1986 supervened and invalidated the special treatment of France in article 73(2) Regulation 1408/71, the consequences for the transitional regime in the Act of Accession were uncertain. The Court replied that the uniform solution stipulated in article 99 Regulation 1408/71 and taken into account by the Act of Accession had been achieved by *Pinna*, 1986. The transitional regime therefore need not have been applied any longer. Spanish workers therefore were allowed to rely on article 73(1) Regulation 1408/71 (paras 20-1). *Alonso-Pérez*, 1995 confirmed this approach. However, *Alonso-Pérez*, 1995 also made it clear that national procedural law governed the limitation of retroactive applications for family benefits. Thus, even though *Pinna*, 1986 had been handed down and the amendment to Regulation 1408/71 had later on repealed the special treatment of France in article 73(2) Regulation 1408/71 retroactively as per the date of the judgment in *Pinna*, 1986, German law could still impose a six month limitation on retroactive claims for family benefits. More specifically, Germany could limit a migrant worker's retroactive application for family benefits with regard to his non-resident family members to six months counting backward from the time of application, even though the time period between the date of the judgment in *Pinna*, 1986 and the entry into force of the amendment of article 73 Regulation

1408/71 was concerned, provided that such a limitation also applied to purely domestic claims (para. 31).

### *More family benefits*

*Middleburgh, 1991* concerned the right of a self-employed person to child benefits. Mr Middleburgh was first employed and then pursued a self-employed activity in the United Kingdom. However, as article 73 Regulation 1408/71 only applied to *employed* persons for the time relevant in the case – article 73 had been excluded from the extension of Regulation 1408/71 to self-employed persons by Regulation 1319/81 – he could not lawfully rely on that article to attack a residence clause in British law for child benefits as regarded the time during which he had exercised a self-employed activity. The fact that he had a claim to unemployment benefits during that time owing to his prior employment did not make him an employed person entitled to rely on article 73 (para. 8-9). Before the amendment of article 73 as to self-employed persons had entered into force, a residence requirement concerning child benefits for self-employed persons was, moreover, not precluded by article 52 Treaty (para. 15). In *Durighello, 1991* the Italian authorities refused a migrant worker a supplementary benefit for his dependent spouse based on Italian law on the ground that his pension was not due on the basis of Italian law alone, but rather on the basis of Regulation 1408/71. Moreover, that Regulation made no provision for benefits for dependent spouses, but only for dependent children. The Court ruled that those grounds in themselves were not sufficient to refuse a benefit for a dependent spouse which was due under national law, given that under Regulation 1408/71 the national social security systems co-existed and that benefits due under such systems were not to be lost merely because a worker made use of his freedom of movement on the basis of Community law (paras 14-7).

*Imbernon Martínez, 1995* again concerned article 73 Regulation 1408/71 in so far as it precluded a residence requirement for family members, or in other words in so far as it required a member state to treat them as if they had residence – so-called ‘notional residence’ (para. 23). The Court ruled that the article applied regardless of whether a family benefit was refused/reduced on the basis of the act governing the benefit, viz. the social legislation, or as a consequence of a distinction made in the tax law of the member state concerned (para. 23). That also applied where the residence of the spouse of the migrant worker or any family member had an influence on the entitlement to the family benefit or its extent (para. 27). Thus, the entitlement to the family allowance concerned and the amount thereof had to be determined as if the family members, including the spouse, resided in the member state concerned.

*Moreno, 1996* dealt with article 74 Regulation 1408/71. In the case of Mr Moreno unemployment benefits in cash were in a first phase suspended, because he received a compensation from his former employer due to the termination of his contract. In a second phase they were temporarily excluded, because Mr Moreno’s employment contract had been terminated by reason of a fault of his.

For both phases, the Court considered that he was ‘dra[wing] unemployment benefits’ within the meaning of article 74, since the compensation in the first phase was a substitute for unemployment benefits (paras 17-9) and when the payment of unemployment benefits was excluded in the second phase, he was still insured against sickness and accident (para. 23). Article 74 therefore required the state concerned to grant family benefits, as if Mr Moreno’s family members were residing in that state.

In *Stöber and Pereira*, 1997 the Court came back to the factual constellation in *Middleburgh*, 1991 in a changed legal setting. Article 73 Regulation 1408/71 now also applied to self-employed persons by reason of the amendment by Regulation 3427/89. In this case the problem was, however, that the annex relating to Germany now stated that only self-employed persons who were *compulsorily* insured in Germany were ‘self-employed persons’ entitled to German family benefits under chapter 7, title III of Regulation 1408/71. The persons concerned in *Stöber and Pereira*, 1997, however, were only *voluntarily* insured. Article 73 Regulation 1408/71 therefore did not apply to them (para. 34). Yet, the Court ruled in some contrast to *Middleburgh*, 1991 that the requirement that the family members resided in Germany for the migrant self-employed person to have been eligible for the German children’s allowance was excluded by article 52 Treaty, because it was discriminatory. The difference to *Middleburgh*, 1991 was that for the period at stake in *Stöber and Pereira*, 1997 the Community provisions implementing family benefits for self-employed persons had been adopted by Regulation 3427/89. The rules applicable to self-employed persons within the scope of Regulation 1408/71 therefore had to be applied by analogy to the self-employed persons in the case at hand, thus excluding the residence requirement (para. 40). In *Merino García*, 1997 the Court ruled in a very similar vein for ‘employed persons’ with regard to family benefits in article 73 Regulation 1408/71. That article similarly was applicable only to employed persons in Germany, if they were subject to compulsory unemployment insurance pursuant to article 1(a) Regulation 1408/71 in combination with the annex concerned. Mr Merino García had not paid unemployment insurance contributions, but had been subject to sickness insurance during a period of unpaid leave from his employment in Germany. For that period, he was refused family benefits for his children living in Spain. The Court, in keeping with *Stöber and Pereira*, 1997 for article 52 Treaty, found the approach of Regulation 1408/71 based on compulsory unemployment insurance to be in compliance with article 48 Treaty (paras 30-1). The requirement of German legislation, though, that the family members be resident in Germany (para. 9) for a migrant worker, who was on leave and did not pay unemployment insurance contributions but was subject to sickness insurance, to be eligible for family benefits was discriminatory as well as in *Stöber and Pereira*, 1997 and therefore excluded by article 48 Treaty. The Court confirmed the approach to the definition of who was an ‘employed person’ for the purpose of article 73 Regulation 1408/71 as it had been modified by the annex for Germany in *Kulzer*, 1998. As a retired civil servant did not fulfil the re-

quirements in the annex, he could not lawfully rely on article 73 Regulation 1408/71 to claim Germany's child allowance. However, since Mr Kulzer had stayed his entire life in Germany and only his daughter had moved to France, article 48 Treaty did not preclude the residence requirement, in contrast to the rulings in *Stöber and Pereira*, 1997 and *Merino García*, 1997. The question whether Union citizenship had such a preclusive effect was raised by Advocate General Fennelly (para. 62), but the Court did not discuss it.

In *Romero*, 1997 the Court dealt with non-discrimination concerning orphans. When an orphan interrupted educational training to serve in the military of any member state, German law suspended an orphan's entitlement to benefits. It then prolonged the entitlement to the orphan's benefit beyond the usual statutory age limit of 25 years for a time period commensurate with the duration of the military service completed. Yet the prolongation was only granted in the case of service in Germany's armed forces. According to the Court, to refuse that prolongation to an orphan who served in Spain's instead Germany's army was discriminatory, in particular as the prolongation of entitlement constituted deferred payment of the orphan's benefit rather than compensation for the disadvantages of military service (paras 33 and 35).

In *Gómez Rivero*, 1999, the Court dealt with the special situation of a consulate worker who had opted out of the social security legislation of the host state pursuant to article 16(2) Regulation 1408/71. The Court ruled that such an opt out did not impact on the rights of the worker's family members in the host state which were guaranteed by that state irrespective of the insurance cover of the worker (para. 25). If that approach came down to a cumulation of family benefits, the rules against the overlapping of benefits would have to be applied (para. 28).

### *Post Rossi*

The supplement to family benefits to be paid in accordance with the *Rossi*, 1979-line of authority also came up in the 1990s. In *Athanasopoulos*, 1991 the Court mainly clarified two points. (i) The supplement also had to be paid under articles 77 and 78 Regulation 1408/71, if the entitlement to the benefit only arose after the migrant worker had moved residence, because the worker was awarded a pension or the children were born after the change of residence (paras 32-7). (ii) An indiscriminate reduction of the family benefit by the state paying the benefit or the supplement in proportion to the current net annual income of the worker was lawful. To that effect the authorities of both states had to cooperate to establish the income of the migrant worker in the state where she or he resided (paras 43, 46, and 49). *Doriguzzi*, 1992 also concerned a *Rossi*, 1979-supplement to an orphan's benefit. In this case it was doubtful in as how far the benefits granted in the state of residence had to be factored in when calculating the supplement due from the state where the child was not residing. More specifically, Italian law provided for an orphan's benefit together with a family supplement. The role of the latter family supplement in the calculation of the *Rossi*,



1979-supplement due in Germany was at issue. The Court decided that all the benefits due in the state of residence for the maintenance of orphans, regardless of their character or designation, had to be taken into account in the comparison of benefits necessary to determine whether a *Rossi*, 1979-supplement had to be paid (para. 15-7). Essentially, a *Rossi*, 1979-supplement was therefore reduced by the Italian family supplement. *Doriguzzi*, 1992 was confirmed in *Gobbis*, 1993. The Court only added that the increase the surviving spouse received when her total income did not reach Italy's minimum income could lawfully be disregarded in the calculation of the orphan's *Rossi*, 1979-supplement under article 78 Regulation 1408/71, since it did not serve the purpose of maintaining the orphan (para. 19). In contrast, a supplementary family allowance had to be factored in since it helped maintaining the family (para. 20).

In *McMenamin*, 1992 the Court clarified a point as to the suspension of family benefits governed by article 73 Regulation 1408/71. *Robards*, 1983 had extended that suspension to the case of a divorced spouse. Consequently, the Council amended the relevant provision of Regulation 574/72 accordingly, i. e. article 10(1)(b)(i) as to the overlapping of family benefits. In *McMenamin*, 1992 the Court then clarified that the rules of priority established by Regulation 574/72 applied generally and regardless of who was technically entitled to family benefits. In case one of the persons having the care of the children was entitled to family benefits in the state where the family resided, the benefits due in the other member state, i. e. the state where the frontier worker was employed, were to be suspended as far as the benefits overlapped pursuant to *Rossi*, 1979 (paras 25-7).

The Court in *Bastos Moriana*, 1997 then drew a clear limit to the *Rossi*, 1979-supplement case-law. In *Bastos Moriana*, 1997 the question was whether the *Laterza*, 1980- and *Gravina*, 1980-judgments as to the supplements for pensioners and orphans also applied when the pension or the orphan's benefit was not granted on the basis of insurance periods completed in Germany alone, but rather based on the Community rules regarding aggregation. The Court made clear that the case-law was based on *Petroni*, 1975, viz. the right to benefits acquired on the basis of national law alone was not to be lost because of the exercise of the right to free movement. When, however, the pension or the orphan's benefit had not been based solely on national law but on aggregation pursuant to Community law the application of articles 77 and 78 Regulation 1408/71 did not deprive the migrant worker of such a right. The state providing the pension or the orphan's benefit, in this case Germany, was then not required under articles 77(2)(b)(i) or 78(2)(b)(i) Regulation 1408/71 to grant a *Rossi*, 1979-supplement to guarantee the higher amount of benefit to beneficiaries residing abroad (para. 19). The limitation of the supplement-case-law in *Bastos Moriana*, 1997 was confirmed in *Gómez Rodríguez*, 1998. German law was more favourable than Spanish law, because it granted orphan's benefits beyond the age limit of 18 years which applied in Spain. However, an orphan residing in Spain could not lawfully claim the more favourable German benefit as a *Gravina*, 1980-supple-

ment after having reached the age of 18 years when the orphan had not acquired a German benefit by reason of insurance periods completed under German law alone (para. 25). Neither had the orphan a claim to the application of article 78(2)(b)(ii) Regulation 1408/71 after having exhausted the rights with the competent state pursuant to article 78(2)(b)(i) (para. 26). Moreover, the orphan was not allowed to fall back on the social security convention between Spain and Germany, either. While the *Rönfeldt, 1991/Thévenon, 1995*-requirements were met, viz. the convention rather than Regulation 1408/71 had been in force when the worker had completed the insurance periods in Germany, the situation at issue was different. The comparison of the benefits due under the convention with those due under Regulation 1408/71 had already been made upon the award of the orphan's benefit pursuant to article 118(1) Regulation 574/78. It was not to be re-assessed when the benefit under the other instrument, i. e. the instrument based on which the benefit was not awarded, became more favourable later on, as it was the case when the orphan reached the Spanish age limit, else the benefits would have to be re-compared continuously which would cause considerable administrative difficulties (paras 46-7).

### *Unemployment*

In the 1990s, the Court also dealt with unemployment benefits in a series of cases. *Di Conti, 1990* concerned the case of a late returner under the regime established by article 69 Regulation 1408/71. Article 69(2) Regulation 1408/71 established that a worker who returned late after having searched for employment abroad for three months forfeited his rights to unemployment benefits in the competent state. Article 69(4) which required three months of work to re-qualify for benefits after having returned late within the sense of article 69(2) to Belgium from abroad, was a special concession to Belgium for its maintaining entitlement to unemployment benefits for an extra long time. According to the Court, Belgium could therefore not lawfully impose further conditions such as a qualifying period (paras 11-3 and 16). The Court in *Spataro, 1996*, however, clarified that article 69(4) only applied to a returning job seeker asking for re-qualification for unemployment benefits. Conversely, it did not apply when a returning job seeker sought acquisition of a new entitlement to unemployment benefits based on Belgian law (para. 16).

*Van Noorden, 1991* confirmed that the state where the worker had lastly completed periods of employment/insurance was competent for unemployment benefits pursuant to article 67(3) Regulation 1408/71. Beyond the regime established by article 69 Regulation 1408/71 for job seeking abroad Community law did not require another state to pay unemployment benefits to a person who had never worked in that other state (paras 10-1). Article 69 Regulation 1408/71 apart, a state could lawfully refuse those benefits to such a person even if national law by itself granted a claim to benefits. In *Gray, 1992* the Court confirmed that the scheme established by articles 67(3) and 69(1) Regulation 1408/71 complied with article 51 Treaty. The Council was notably allowed to attach condi-

tions to the right to claim unemployment benefits in the state where a person had been employed and to the right to export those benefits (para. 12).

*Acciardi*, 1993 concerned a Dutch benefit that followed upon the regular unemployment benefit. Despite its non-contributory nature, the Court classed it as an unemployment benefit, mainly because it was not subject to a discretionary assessment, addressed the risk of unemployment, was only available to unemployed persons, and was granted exclusively to persons seeking employment (paras 15-8). As the benefit varied when the unemployed person had spouse and children, its amount was linked to the number of family members within the meaning of article 68(2) Regulation 1408/71 (para 24-6). Therefore, in accordance with that article the Netherlands were not to leave the unemployed worker's spouse out of account merely because she resided in another member state.

*Reibold*, 1990 was only published summarily. It seemed to have reiterated *Di Paolo*, 1977 and *Bergemann*, 1988, adding only that 'residence' in article 71(1)(b)(ii) Regulation 1408/71 had to be determined by taking into account that academic work was performed under a university exchange scheme which allowed the worker to return to his accommodation in another member state for prolonged periods every three months (see the summary). In *Knoch*, 1992 article 71 Regulation 1408/71 was also at stake. The Court elaborated a number of details. In application of the criteria developed in *Di Paolo*, 1977 residence in Germany was not lost for the purpose of article 71(1)(b)(ii) when a person had remained registered in Germany while she was working as a university assistant in the United Kingdom for two years and receiving an allowance to support her from Germany (para. 25). Such a person still had the possibility under article 71 to claim unemployment benefits in Germany, even if she had initially opted to claim such benefits and sought work in the United Kingdom (paras 28, 33-4). The provision against the overlapping of benefits in article 12(1) Regulation 1408/71 had to be applied to unemployment benefits, when two benefits were of the same kind. That was the case when they both were granted after employment had been lost, as a substitute for the salary for maintenance purposes, and when the conditions and the bases of calculation of the benefits differed only because of structural differences in the social security systems concerned (paras 43-4). Pursuant to article 12(1) periods of insurance completed and actual benefits paid in one state had to be factored in when the other state determined acquisition of entitlement to benefits and the actual amount of benefits (para. 49). Finally, the Court ruled, after having reiterated that the national authorities were entirely free to appreciate a statement made pursuant to article 84(2) Regulation 574/72, that entitlement under article 71(1)(b)(ii) could only be suspended when all the conditions of article 69 Regulation 1408/71 had in fact been fulfilled (para. 59). Moreover, the duration of entitlement under article 71(1)(b)(ii) was reduced by the number of days during which article 69 applied (para. 62). In *Grisvard*, 1992 the Court clarified a point that had not been addressed in *Fellinger*, 1980. While according to *Fellinger*, 1980 the state where a wholly unemployed frontier worker was resident had to calculate the unemployment benefits due on the basis of

the salary last received in the state of employment, the ceiling which limited unemployment benefits in the member state of employment could not lawfully be applied by the state of residence. According to article 71(a)(ii) Regulation 1408/71, that state had to apply its own legislation as if the frontier worker had been subject to it during his last employment. Moreover, the salary had to be converted based on the official exchange rate applicable on the day of payment (paras 22-3).

*Van Gestel*, 1995 concerned a particular application of article 71 Regulation 1408/71. The authorities of Belgium and the Netherlands had agreed on the basis of article 17 Regulation 1408/71 that Mr van Gestel would continue to be subject to Dutch legislation for a certain time, despite the fact that he worked for a company in Belgium and resided there. After he had become unemployed, the question arose which state was competent for unemployment benefits. The Court replied that article 71(1)(b)(ii) Regulation 1408/71 was applicable, although Mr van Gestel worked in the same state as he resided, namely Belgium. It was sufficient for the article to apply that pursuant to the agreement between the Belgian and Dutch authorities the competent state, viz. the Netherlands, was not the state where the worker resided, viz. Belgium (paras 17 and 25). Moreover, the Court confirmed *Brusse*, 1984 in that an agreement under article 17 was also capable of covering periods in the past.

In *Naruschawicus*, 1996 the Court dealt with an employee of the Belgian army who had been stationed in Germany and in fact resided there, while maintaining her legal residence in Belgium. According to article 13(2)(d) Regulation 1408/71, Belgian law applied, because she was a Belgian civil servant, irrespective of the fact that Belgian law categorized her retroactively as an ordinary employed person. Moreover, article 71(1)(b)(i) Regulation 1408/71 was applicable to a civil servant as to any other employed person. Such a person made herself available to an employment service in the sense of that article by registering with that service. It did not have any impact that she in fact still resided a long distance away in Germany (para. 27).

*Huijbrechts*, 1997 largely confirmed *Cochet*, 1985. When a wholly unemployed frontier worker was receiving unemployment benefits where he resided and then moved to the state where he had been employed, the special rule of article 71(1)(a)(ii) Regulation 1408/71 ceased to be applicable and the general rule that the state of employment was competent became applicable. When providing unemployment benefits pursuant to national law the then competent state would have to take into account the benefits previously granted by the formerly competent state as if it had granted them itself (para. 28).

*Perrotta*, 1995, finally, was at the nexus of unemployment and sickness benefits. It concerned cash sickness benefits for which an unemployed worker applied who had gone to seek employment abroad under the regime of article 69 Regulation 1408/71. Article 25 Regulation 1408/71 provided that in such cases the state of last employment, i. e. the state whence the unemployed person came to seek work, was competent for cash sickness benefits during the period of three

months authorized by article 69(1) Regulation 1408/71. Beyond that period, that state remained liable only in cases of *force majeure* pursuant to article 25(4). The Court held that a sickness having befallen an unemployed person during the three months and extending beyond it could not stretch out the entitlement to cash sickness benefits beyond the three months period (para. 17). A formal application to apply article 25(4) was not required (para. 19-2). Moreover, sickness did not automatically equal *force majeure* under article 25(4) (para. 32). Instead, *force majeure* in this context designated 'abnormal and unforeseeable circumstances, outside the control of the unemployed person, the consequences of which, in spite of the exercise of all due care, could not be avoided except at the cost of excessive sacrifice' (para. 27). Thus, a case-by-case assessment was necessary to establish whether the unemployed person was able to travel back to the competent state (para. 29).

### *Sickness and invalidity*

Sickness and invalidity benefits also came up before the Court during the 1990s. In *Noij, 1991* the Court decided that a state could not lawfully charge a retired migrant worker, who received a pension from another member state, sickness insurance contributions simply because he was a resident when the state which paid the pension was competent for sickness benefits. Article 33 Regulation 1408/71 which was based on the general idea that a state only levied contributions from resident pensioners if it granted them benefits, precluded the levying of such contributions. That applied even if the pensioner had previously worked in that state (paras 14 and 17). (The amended article 33 did state so explicitly, but was not applicable at that time yet.)

*Vidal, 1991* concerned the award of invalidity benefits to a person living abroad. The Court held that article 51(1) Regulation 574/72 was inconclusive as to whether the person could be summoned to the member state concerned and that *Rindone, 1987* which had concerned sickness benefits could not be applied by analogy. The fitness to travel had to be assessed on a case-by-case basis. As a broad range of examinations involving various experts was necessary to determine invalidity and as the conditions varied between states, a person who was, subject to the verification by the competent state, fit to travel could lawfully be required under article 51(1) to travel to the member state concerned, at the expense of the latter (paras 13-6). In *Voeten, 1998*, the Court again applied article 51 Regulation 574/72. The rule laid down in that article applied to frontier workers in the same way as to other workers. A re-assessment of the invalidity of a person because of a change in legislation still came within the purview of article 51 (paras 33-4). The person concerned was, moreover, able to waive his right to be examined first in the state of residence, if he had been properly informed (para. 38). In contrast, under article 40 Regulation 574/72 relating to the first determination of invalidity a prior examination in the member state of residence was not required. Nevertheless, the competent institution had to take into

account documents and reports drawn up previously in the member state of residence or in any other member state (paras 47-9).

*Paletta*, 1992 categorized the obligation of the employer to continue to pay a sick worker's salary for six weeks as a sickness benefit subject to Regulation 1408/71, since the method of financing the benefit was irrelevant. The employer was the competent institution which was bound by the diagnosis of sickness in another member state. As such it was allowed to have the diagnosis verified by a doctor of its choice. *Paletta II*, 1996 clarified that the continued wage payment was a cash sickness benefit pursuant to article 22(1)(a) Regulation 1408/71, although it was only paid with the usual delay for salaries. Moreover, a national approach designed to avoid abuse or fraudulent conduct which required workers in general to bring additional proof that they were sick, i. e. proof beyond the determination required by the Community rules, was not to be applied as such under Regulation 1408/71. However, since abuse could lawfully be counteracted on a case-by-case basis, the employer was allowed to bring evidence before the national court that the worker was not in actual fact sick.

*Delavant*, 1995 was about a worker who did not reside in the state where she worked and about the sickness benefits for her family members. Under article 19 Regulation 1408/71, according to the Court, the legislation of the state of employment was applicable to determine entitlement to sickness benefits. It was then up to the state of residence, subject to a refund, to provide benefits in kind according to its own legislation and within its limits, as if the worker was insured there. According to article 19(2) that also applied by analogy to the family members of the worker, if they were not entitled to benefits under the legislation of the state where they resided. Thus, if French law provided certain sickness benefits for children, the German sickness fund had to grant them to the children of a worker insured in France and residing in Germany, regardless of what German law dictated (para. 18).

In *Molenaar*, 1998 the Court dealt with a new type of social care insurance with certain special characteristics which was introduced by Germany (see para 5-7). Essentially, the benefits provided under care insurance included reimbursement of certain expenses as well as compensation for home care provided to sick persons by third parties. Those benefits were sickness benefits (paras 23-4). Given their characteristics, part of them were to be classified as benefits in kind, while another part, notably the care allowance, was a cash sickness benefit (paras 32-5). Consequently, France provided the benefits in kind in accordance with its own legislation to persons who were resident in France and working in Germany subject to a refund, while Germany had to grant the care allowance, i.e. the cash benefit, to persons insured in Germany, even if they were resident in France. That applied to employed and unemployed persons as well as pensioners all of whom resided in another state than the competent state. Such persons were not to be exempted from paying the contributions required under care insurance, even if they possibly never claimed benefits thereunder. Conversely, if such persons contributed to care insurance, they were basically also entitled to claim the

benefits provided by that insurance when the other conditions, i. e. the conditions complying with Community law, were met (paras 41-3).

### *Non-discrimination and residence*

The Court also dealt with non-discrimination and residence clauses in the 1990s. In *Winter-Lutzius*, 1990, the Court came back to the arrangement the Netherlands had established for the transition to the new old-age insurance system in the year 1957. The Court mainly confirmed *Spruyt*, 1986 and *De Jong*, 1986. The legal situation in brief was as follows. Dutch law equalled periods completed before 1957 with insurance periods under the new system, if a person was resident in the Netherlands after her 65<sup>th</sup> birthday. Such ‘continuing-residence’ (para. 4) in the Netherlands thus had transformative power. Depending on whether the requirement was met, the years before 1957 were ‘gold or dross’ according to the opinion of Advocate General Darmon (para. 14). Given that, the annex to Regulation 1408/71 watered down that requirement for persons who had resided for six years in a member state after their 59<sup>th</sup> birthday. To be more specific, those who were not resident in the Netherlands at the moment of their 65<sup>th</sup> birthday were still entitled to equal periods before 1957 if during those periods there had been a sufficient connection to the Netherlands. This was the ‘second chance’ according to Advocate General Darmon (para. 12). That was the case for periods during which they either resided in the Netherlands or worked in the Netherlands for an employer established in the Netherlands while residing in another member state (see *Spruyt*, 1986 above). According to the Court, that Dutch transitional regime as attenuated by the annex to Regulation 1408/71 was in compliance with the waiving of residence clauses in article 10(1) Regulation 1408/71. In particular, a person who came to the Netherlands after 1957, but then went back to Germany and was resident there on her 65<sup>th</sup> birthday could not rely on article 10(1) to force the Dutch authorities to feed time periods before 1957 into her Dutch pension (para. 19). In *De Wit*, 1993 the Court added a further element to the transitional arrangement. If Dutch law deemed periods of employment for a legal person governed by Dutch public law as giving rise to rights under the transitional arrangement, even though the employee was resident outside the Netherlands – i. e. in case of ‘notional residence’ – that same interpretation had to be applied under the annex of Regulation 1408/71 that adapted the transitional arrangement to the free movement of workers. Periods of employment in the Dutch foreign service before 1957 during which the person concerned had been resident outside the Netherlands therefore had to be taken into account, provided that the other conditions were met, since during those periods a sufficient link to the Netherlands had been established (para. 20-1).

In *Commission v. France (supplementary allowance)*, 1990 the Commission brought infringement proceedings, because France continued to apply the residence requirement to the supplementary allowance which (the residence requirement) the Court had struck down in *Biason*, 1974 and *Giletti*, 1987, and because the negotiations in the Council to solve the issue were stalling. Not having



an ear for the specific economic and social environment in France or practical difficulties, the Court confirmed the infringement. In a similar vein, the Court in *Commission v. France (allowance)*, 1991 struck down a residence and a reciprocity requirement for a French supplementary old-age allowance. Similarly, the Court confirmed an infringement in *Commission v. Belgium (minimex)*, 1992, since residence in Belgium for a certain period of time was required for the award of certain benefits such as *minimex*. Neither France nor Belgium had disputed the infringement in these two cases.

In *Masgio*, 1991 the Court found discriminatory a specific method of calculation used in Germany when an accident pension and an old-age pension were granted at the same time. When both pensions were granted in Germany, German law required the suspension of an overlapping amount of the old-age pension. The overlapping amount was calculated in two ways, namely by reference to the annual earnings based on which the accident pension was calculated and to the basis of calculation of the old-age pension. The lower amount of the two was then suspended. If, however, the accident pension had been awarded abroad, the amount to be suspended was only calculated by reference to the basis of calculation of the old-age pension. As a consequence, the amount suspended in such cases was regularly higher than in cases when the accident pension had also been awarded in Germany. That was contrary to articles 7 and 48 to 51 Treaty and article 3(1) Regulation 1408/71 (paras 20-2).

In *Baglieri*, 1993 the Court mainly confirmed the established case-law as to voluntary or optional continued insurance under article 9(2) Regulation 1408/71. It was up to national law to determine the conditions for the acquisition of rights, provided that periods of insurance completed in other member states were taken into account when periods of a certain length of time were required for admission to voluntary or optional continued insurance pursuant to article 9(2) Regulation 1408/71. Yet a returning migrant worker could not on the ground of having been affiliated to an insurance scheme in another member state lawfully claim admission to a scheme of voluntary continued insurance in Italy for the admission to which prior compulsory insurance affiliation in Italy was required. The Court then rejected a challenge of this approach on the basis of non-discrimination. Italian nationals returning from third states were allowed to be affiliated to social security insurance, while Italian nationals returning from a member state did not have a possibility to join insurance. However, Community law did not preclude Italy from treating its own nationals more favourable when they returned from working in a third state than when they came back from working in a member state (para. 18).

In *Leguaye-Neelsen*, 1993 the Court also rejected a challenge based on non-discrimination. Normally, persons entering the public administration in Germany were reimbursed the compulsory social security contributions they had previously paid under the German social security system, if their contributions did not suffice in themselves to acquire a right to a pension. Ms Leguaye-Neelsen's contributions were not reimbursed though when she entered the

French public service on the ground that she was entitled to voluntary continued insurance in Germany. The Court decided that Regulation 1408/71 applied (para. 12). However, non-discrimination was not violated, since normally contributions were not reimbursed if they were insufficient to acquire a pension; rather, continued insurance was offered. Contributions were only reimbursed when a person joined the German public administration to make up for the fact that continued insurance was not offered. That approach aimed at avoiding the duplication of insurance periods. Germany, however, was not required to prevent such duplication with regard to foreign insurance schemes (paras 13-6).

*Hoorn, 1994* again rejected a claim of discrimination. Based on a convention concluded between the Netherlands and Germany, periods of forced labour of Dutch nationals in Germany during World War II gave rise to pension rights in the Netherlands. The argument that such an approach was discriminatory since pension rights in Germany granted to German forced labourers would have been more favourable was rejected by the Court. The convention, which continued to apply for it was mentioned in the annex to Regulation 1408/71, only determined the legislation applicable. That a German pension would have been more favourable was only the consequence of Germany granting higher pensions to forced labourers than the Netherlands (paras 12-3). There was no discrimination, either, in that those who had continued to work in Germany became subject to the Regulation instead of the convention (para. 16). Furthermore, article 8 Regulation 1408/71, which required the member states to conclude conventions in the spirit of the Regulation, only applied to conventions concluded after the entry into force of Regulation 1408/71 (para. 19).

In *Drake, 1994*, again, the Court did not find any violation of article 48 Treaty. In this case, the Netherlands refused Mr Drake an invalidity pension, because he had not had any income in the year before the onset of invalidity since he had quit working after a certain time after having gone to Germany. The problem was the following. Before the amendment of Regulation 1408/71, which had brought self-employed persons within the scope of the Regulation, a first Dutch act had been applicable with regard to invalidity pursuant to article 45(3) Regulation 1408/71 when a worker had become eligible for benefits in another member state because he had become incapable of work. Article 45(3) declared the materialization of invalidity anywhere in the Community as sufficient for systems, such as the Dutch, which relied on materialization of risk rather than the progressive constitution of rights. After the amendment of Regulation 1408/71, however, pursuant to the annex relating to the Netherlands that first Dutch act applied to employed persons, while another, a second Dutch act, applied to persons who were not employed. It was, therefore, after the amendment not sufficient any longer to be eligible for benefits in another member state to render the first Dutch act applicable; rather, one had to be employed at the time invalidity materialized. Moreover, application of the second act required a person to have some income at the time invalidity overcame (para. 16). The Court found that the new approach in the annex to Regulation 1408/71 relating to the

Netherlands was not invalid in the light of article 48 Treaty. Mainly, rights based on national law were not lost by reason of the movement of the person concerned to another member state. Rather, it was the ceasing of work which had had the consequence that Mr Drake did not receive any benefits under Dutch legislation (para. 24). Moreover, as to the income that was needed pursuant to the annex for the second act, the member states had the power to determine the conditions of the right to become a member of a social security scheme; they could render them stricter, too. Since the condition of having income before becoming incapable of work was not discriminatory, article 48 Treaty was not violated (para. 27-8).

*Kemmler*, 1996 dealt with the social security contributions of a self-employed person before the relevant amendment of Regulation 1408/71 applied. The Court ruled that Belgium was not allowed to require a self-employed lawyer who practised in Belgium as well as in Germany where he was also habitually resident and was subject to social security to pay social security contributions as a self-employed person in Belgium, even if he partly also resided in Belgium. The otherwise resulting restriction of the freedom of establishment in article 52 Treaty was not justified as the contributions did not afford any additional protection (paras 12-3). In *Commission v. Greece (large families)*, 1998 the Court ruled that the nationality condition applied by the Greek authorities when awarding certain sickness and family benefits for large families violated the principle of non-discrimination in article 3(1) Regulation 1408/71 (para. 28). *Swaddling*, 1999, finally, concerned the residence requirement contained in article 10a Regulation 1408/71. The Court held that the notion of 'residence' in that article was a Community term for the application of which all circumstances in a concrete case needed to be taken into account (para. 29). In particular, the United Kingdom could not lawfully consider a British national who returned as a migrant worker from another member state to have 'residence' for the purpose of article 10a only after an appreciable period of time. As the intention to remain in the United Kingdom was clear from the circumstances, such a time limit could not lawfully be applied (para. 30).

### *Third states*

The Court addressed social security in agreements with third countries in a few judgments in the 1990s. *Kziber*, 1991 dealt with the Rabat Cooperation Agreement with Morocco. The Court held based on *Demirel*, 1987 that article 41(1) of that Agreement relating to non-discrimination in social security had direct effect, although implementing measures had not been adopted (para. 19). In analogy to Regulation 1408/71 unemployment benefits were covered. A Moroccan worker who had retired was to be considered a worker under article 41(1). Owing to non-discrimination, his daughter could not be refused an unemployment benefit in Belgium where they both lived because of her Moroccan nationality, if she met all other requirements of national law (para. 28). In a similar vein, the Court rejected a nationality requirement in *Yousfi*, 1994 for a Belgian disability

allowance. Mr Yousfi had fulfilled all the requirements of Belgian law for the award of the allowance after having become disabled because of an accident at work, except that he was a Moroccan national. The Court categorized him as a worker and the Belgian allowance in keeping with the case-law under Regulation 1408/71, namely *Newton*, 1991, as an invalidity benefit despite the dual function of the benefit. Hence, the nationality requirement was precluded by article 41(1) (paras 23-9).

In *Krid*, 1995 the Court essentially extended the approach developed for the Rabat Agreement to the Algiers Cooperation Agreement with Algeria. The Algerian wife of an Algerian worker who (the worker) was deceased had applied for a French supplementary allowance to her survivor's pension. She had never worked herself. Her application was refused on the ground of her nationality. The Court held the non-discrimination clause in article 39(1) Algiers Agreement to be directly effective. As the wife of a former worker, she was covered by the Algiers Agreement. In analogy to *Giletti*, 1987, and *Commission v. France (supplementary allowance)*, 1990 and in the light of the amendment of Regulation 1408/71 which had expressly included special non-contributory benefits in its scope, the supplementary allowance was a social security benefit for the purpose of the Algiers Agreement (para. 33-6). The derived rights-approach developed under Regulation 1408/71, however, was not applicable under the Algiers Agreement, since the scope *ratione personae* of the latter was different (para. 39). The nationality requirement was therefore precluded by the non-discrimination clause in article 39(1). That approach was confirmed later on in *Babahenini*, 1998 for a Belgian disability allowance under the Algiers Agreement. In particular the rejection of the derived rights-approach, which the Court had restricted some time before *Babahenini*, 1998 in *Cabanis-Issarte*, 1996, for the Algiers Agreement was upheld.

*Hallouzi-Choho*, 1996 concerned the transitional arrangement established by the Netherlands for the transition from the old to the new old-age pension legislation in 1957 which had been at issue in the line of case-law that began with *Spruyt*, 1986. In *Hallouzi-Choho*, 1996 that arrangement was at stake in the light of the Rabat Agreement. The Hallouzi-Chohos were Moroccan nationals residing in the Netherlands. The husband had worked, but then retired. The wife had not worked and claimed application of the transitional arrangement. That claim was rejected on the ground of their nationality. The Rabat Agreement did not include an adaptation of the transitional arrangement for migrant workers like the annex to Regulation 1408/71. According to the Court, that was irrelevant, since except for nationality Ms Hallouzi-Choho fulfilled all the requirements of Dutch law for the application of the transitional arrangement, in particular the requirement to have residence in the Netherlands (paras 32-36). Hence, since she was within the scope of the Agreement (para. 30), the non-discrimination clause in article 41(1) of the Agreement precluded the Dutch authorities from relying on her Moroccan nationality to refuse her the benefit of the transi-

tional arrangement (para. 28). Moreover, residence or employment requirements had to be imposed in the same way as for Dutch nationals (para. 37).

In *Mesbah*, 1999 the Court refused to transpose the reasoning in *Micheletti*, 1992, an establishment case in which the effects of dual nationality were in question (see above), to the case at hand which concerned a retired worker who held both Moroccan and Belgian nationality and was resident in Belgium. According to the Court, Belgian law was not precluded from considering such a worker as a Belgian national only. Accordingly it could lawfully refuse to allow him and his family members to rely on the Rabat Agreement (para. 39). Apart from that, the Court also ruled that the term family members in article 41(1) Rabat Agreement included not just the spouse and the children, but also the parents of a worker as well as close relatives related by marriage, such as the parents-in-law if they lived together with the worker (paras 44-6).

### *Ankara*

In *Taflan-Met*, 1996 the Court was faced with Decision 3/80, i. e. the analogon of Regulation 1408/71 which had been adopted by the association council under the Ankara Agreement with Turkey. According to the Court, Decision 3/80 was binding as per its adoption by the association council. Implementing measures by the parties to the Ankara Agreement were not needed for its entry into force (paras 18-21). However, although Decision 3/80 had virtually the same content as Regulation 1408/71 and included some implementing provisions, it did not have direct effect in the absence of an implementing measure governing the details regulated by the 'voluminous' Regulation 574/72 for the Community (para. 28). Without such a measure, which had been pending before the Council at the time, Decision 3/80 could not be applied properly (paras 30-7). In *Sürül*, 1999 the Court put *Taflan-Met*, 1996 in a different perspective. Ms Sürül was the wife of a Turkish student in Germany. He had a limited work permit and he worked, but was only ensured against accidents. She only had a limited residence permit and was insured against old-age for a certain time when she gave birth to their child. She then applied for family allowances, which were refused on the ground of her having only a limited residence permit. The Court ruled that the limitation in *Taflan-Met*, 1996 was not applicable in this case. In contrast to the aggregation at stake in *Taflan-Met*, 1996, implementing provisions were not required for the case at issue. Hence, the prohibition of discrimination in article 3(1) Decision 3/80 had direct effect and applied directly (paras 57-8 and 63). The limitation of the term 'employed person' for the purpose of family benefits awarded in Germany that was contained in the annex to Regulation 1408/71 which was applicable to Decision 3/80 based on a reference, was not to be applied in this constellation, since the chapter on family benefits was not at issue. Only Germany was concerned, while the restrictive definition in the annex was designed to limit the availability of German family benefits pursuant to the chapter on family benefits in situations where two member states were concerned (para. 90). As Mr and Ms Sürül were each ensured against one risk covered by Decision 3/80,

which was sufficient by analogy to the case-law under Regulation 1408/71 (para. 86), Decision 3/80 applied, namely either to her being a family member of a person covered by the Decision himself or to her being insured herself on the basis of old-age insurance due to childbirth (paras 93-4). As a consequence, non-discrimination in article 3 Decision 3/80 precluded Germany from refusing the family allowance on the sole ground that the person concerned only held a limited residence permit (paras 101-3).

### *Technicalities*

A number of technical details of the Community social security rules were also clarified by the Court during the 1990s. In *Iacobelli*, 1993 the Court ruled that it was entirely up to national law to determine whether a person could validly waive an invalidity benefit in favour of an old-age pension, since the member states laid down the conditions for the award of benefits. Articles 44(2) Regulation 1408/71 and 36(4) Regulation 574/72 were purely procedural provisions. In *Picard*, 1996 the Court decided based on article 86 Regulation 1408/71 that benefits had to be awarded in all member states concurrently as per the date of the first claim submitted in any one member state (para. 20). Article 36(1) Regulation 574/72, which required a person to submit the claim to the institution at the place of residence, only simplified the administrative procedure. A failure to comply with it was not to amount to an obstacle to the award of benefits. In *Baldone*, 1997 the Court confirmed that an invalidity pension awarded pursuant to Regulation 1408/71 could only lawfully be re-calculated in the light of the amendment to Regulation 1408/71 by Regulation 1248/92 to the detriment of the person concerned upon that person's explicit request pursuant to article 95a(4) to (6) Regulation 1408/71 which had been introduced by the amending Regulation. Moreover, a benefit had to be considered to have been awarded under Regulation 1408/71 before the amendment when the authorities rectified after the entry into force of the amended Regulation the erroneous calculation made before its entry into force (paras 13 and 15-7). Article 95a(4) to (6) therefore applied fully.

### *Subrogation*

Two judgments in the 1990s concerned subrogation. *DAK*, 1994 was about the subrogation of a German insurance company into the rights of an insured person against the person having caused an accident in Denmark. The Court decided that the nature and the extent of the claim subrogated as well as the question whether a subrogation occurred in the first place was to be determined by the law of the state where the insurance company was established pursuant to article 93(1) Regulation 1408/71, i. e. German law in the case at issue (para. 18). If that law provided for subrogation, all member states had to recognize it and could not rely on their national law to exclude it (para. 22). That was the counterpart for insurers being liable to cover accidents throughout the Community suffered by persons insured with them. The subrogation included the costs that arose in

another member state by reason of transport and hospital treatment. However, the substance of the claim against the person having caused the accident or against the corresponding insurer – in particular, with regard to whether the person was liable for the injury caused – was governed by the legislation applicable pursuant to the rules of private international law of the member state concerned, viz. typically the legislation of the state where the accident had taken place, i. e. in this case Denmark (para. 21). In *Kordel*, 1999 the Court confirmed this interpretation. It merely clarified two points. First, that restrictions of the subrogation in the law of the member state where the institution subrogated was established needed to be taken into account by all member states; and second, that the subrogation was not capable of creating additional rights going beyond those the victim had against the person having caused the accident (para. 23).

### *Social security more broadly*

Finally, three more judgments which were handed down in the 1990s were related to social security. (i) *Faux*, 1991 regarded frontier workers under Regulation 36/63. The Court ruled that a worker retained the status of a frontier within the meaning of Regulation 36/63, although he had become wholly unemployed. Moreover, according to that Regulation and Regulation 1408/71, the member state where a frontier worker had last been employed was competent for both incapacity of work and invalidity benefits. When that state made the acquisition of a right to incapacity of work benefits dependent on the completion of insurance periods and counted periods during which unemployment benefits were paid towards such insurance periods, periods during which unemployment benefits were drawn abroad had to be counted in equally, even though such periods were not regarded as insurance periods in the state of residence (para. 24). The reason was that it was Regulation 36/63 that determined that unemployment benefits had to be granted in the member state of residence (para. 23). If such periods during which unemployment benefits were granted abroad did not count towards periods of insurance for invalidity purposes in the state of employment as article 1(r) Regulation 1408/71 indicated, an unemployed frontier worker would as a consequence never acquire invalidity benefits (para. 26). (ii) A question of social security law was also raised in *Zabala Erasun*, 1995. However, the Court did not address the merits of the case, because it was inadmissible for lack of jurisdiction. (iii) In *Poucet and Pistre*, 1993 the Court rejected a challenge against certain national social security systems on the basis of competition law. Essentially, the Court ruled that the entities involved in the social security systems were not undertakings in the sense of articles 85 and 86 Treaty, for they implemented the law on the basis of solidarity and non-profit. As such, they were not engaged in an economic activity.



## 4 Services

### *Posted workers*

The first judgment in the free movement of services in the 1990s, *Rush Portuguesa, 1990*, concerned services in the context of the Act of Accession of Portugal. Rush Portuguesa was a Portuguese undertaking in the construction business that provided services in France under a contract. For that purpose, Rush brought its own employees to France. The question arose whether the transitional limitations of the free movement of workers in the Act of Accession also applied to the provision of services, which had been liberalized as per accession, through construction workers. According to the Court, the freedom of services itself covered such service provision. Hence, work permits or engagement *in situ* could not lawfully be required (para. 12). The purpose of the limitations in the Act of Accession was, so the Court, to avoid disruption of the employment market (para. 14). The provision of services at issue did not risk such disruption, since the workers came to France only temporarily, did not seek employment, and later on would return to Portugal, all while they were employed and insured against risks by Rush Portuguesa (para. 15). Hence, the limitations in the Act of Accession did not apply. However, the Court adjusted its answer to the services in question, viz. performance of a contract via workers in the construction business (para. 16). France was, moreover, entitled to apply its own labour laws and prevent abuse (paras 17-8).

In *Vander Elst, 1994* the Court came back to posted workers. A company established in Belgium lawfully employed Moroccan workers. The workers had work and residence permits, received regular pay, and were covered by the Belgian social security system. When they were posted to France to execute a project, they had short-stay visas, but France required a work permit for them and the payment of a fee. The Court first re-cited services case-law, emphasizing the right to enter a member state to provide and receive services (para. 13), and then implied that the French rules applied indiscriminately, as French firms also had to comply with them when their employees sought access to France's employment market. Yet the posted workers did not seek access to that market (para. 21). That was why in those circumstances the French requirement to have a work permit and to pay a fee went beyond what was required, as a prerequisite for service provision, to enforce French employment rules, in particular given that the supervision by the Belgian authorities prevented exploitation of the workers. In addition, those workers benefitted from non-discrimination under the Rabat Agreement with Morocco (paras 18-25).

*Guiot, 1996* also dealt with posted workers. The posting of workers by a company established in Luxembourg to Belgium for construction work prompted a charge under Belgium's collective labour agreements payable by the Luxembourg company. The charge was levied to secure construction workers an income, when they were laid off due to bad weather, and an end-of-year premium.

However, the company concerned was already subject to a similar charge in Luxembourg for the workers it employed. According to the Court, although the Belgian charge was indistinctly applicable, the service provider was required to pay two charges with respect to the same workers for the same period. The higher financial burden to be shouldered by the service provider was liable to restrict its freedom (paras 14-5). While the host state was certainly entitled to impose its own legislation on social protection of workers, it could not do so in so far as the workers' interests were already protected as a consequence of the charge in the state where the provider was established. In that regard it was sufficient if the corresponding charge covered the same risks and pursued a similar purpose, whereas the way the charge was levied was immaterial (paras 16-21).

*Arblade*, 1999 again clarified a number of points with regard to workers posted temporarily to another member state. Belgium required companies, such as *Arblade*, posting workers to Belgium to fulfil certain requirements. The Court reiterated that the host state could impose minimum wages applicable in the host state, even when the 'home' state legislation was complied with, provided however that the rules on minimum wages were sufficiently precise, accessible, and clearly communicated (paras 41-3). However, the Belgian loyalty and bad weather stamps were not necessarily part of a minimum remuneration (paras 46-7). Whether contributions to finance those stamps and the requirement to furnish the corresponding documentation could lawfully be imposed depended on whether the posted workers concerned already enjoyed similar protection against the relevant risk in the state where the service provider was established. Even if that was not the case, the freedom of services required that contributions resulted in real additional social protection for those workers (paras 50-5). The keeping of separate social and labour documents on site was a restriction of the freedom of services when the state where the service provider was established already required book-keeping (paras 58-9). However, having documents available was necessary to enable controls at least where Directive 96/71 on posting of workers did not bring the member states' documentation requirements in line. Whether those documents would necessarily have to be drafted in accordance with *host* state legislation as well hinged on the national authorities' and court's assessment of the likeness of the documentations required by the two national legal orders, as assessed in the light of the relevant Community social policy directives (paras 61-70). It could only be required lawfully within certain narrow limits that documents be retained with an agent in Belgium after the posting had come to an end. Documents needed could be forwarded on demand by the authorities. Moreover, Directive 96/71 would make that requirement redundant after its entry into force (paras 76-9).

### *Tourist guides*

In a series of infringement procedures, the Court next dealt with restrictions imposed on services in the context of tour operators working with tourist guides. In *Commission v. Italy (tourist guides)*, 1991 the Court explained that two kinds of

services were involved. Either a service providing tour operator from one state employed a tourist guide and brought her or him along to another member state, or such an operator availed itself of an independent guide. In either case, the freedom of services was involved (paras 5-6), as it always was when a service provider established in one state provided services in another state, irrespective of where the recipient of the service was established (para. 9). Italy's requirement for tourist guides to have an Italian licence, although applicable irrespective of nationality, constituted a restriction of services (paras 15-6). Justification was conceivable as far as the grounds argued were not already covered by 'home' state legislation. A licence requirement, however, went beyond what protecting the consumer and the cultural heritage, though as such legitimate grounds, called for (paras 17-20). Consumers and cultural heritage were sufficiently protected by the competition among and the reputation concerns of tour operators. Moreover, tourists benefited if they were familiar with tourist guides and if they had language options. Those two aspects suffered when the number of tourist guides was low because of a licence requirement (paras 22-4). In *Commission v. France (tourist guides)*, 1991 and *Commission v. Greece (tourist guides)*, 1991 the Court ruled in the same way as in *Commission v. Italy (tourist guides)*, 1991. *Commission v. Spain (tourist guides)*, 1994 later on established that Spain had committed the same infringement of the freedom of services as the other member states in the corresponding cases (paras 21-2). Spain, moreover, failed to open the examination required to qualify as a tourist guide for nationals of other member states, thus violating the free movement of workers and establishment (paras 8-9), and to provide a procedure to examine the equivalence of tourist guide qualifications obtained in other member states (paras 14-7). In *SETTG*, 1997 a different measure in the context of tourist guides was at stake. Based on a settlement of a collective labour dispute, Greece required that tourist guides who held a Greek licence and provided services to a tourist agency, regardless of where that agency was established, in essence had to be given an employment contract subject to social security contributions. That arrangement, according to the Court, concerned the free movement of services, because the provision of services by self-employed tourist guides established in other member states and holding a Greek licence, which they did not need, but could obtain, was affected (paras 12-3). It established an indiscriminately applicable barrier by excluding such service provision (para. 17). Maintaining industrial peace and preventing adverse effects on tourism were economic aims which were not capable of justifying a restriction. In any case, industrial peace did not require that tourist guides established abroad could not provide services in Greece (paras 23-4).

### Lawyers

In *Commission v. France (lawyers)*, 1991 the Court mainly reiterated for France what had already been decided for Germany with regard to the implementation of Directive 77/249 on lawyers in *Commission v. Germany (lawyers)*, 1988. To require a person to retain a lawyer established on site when representation was

compulsory was only allowed within the confines of 'work in conjunction' as elaborated in *Commission v. Germany (lawyers)*, 1988, while it was precluded for administrative proceedings and when representation was not compulsory (paras 15-9 and 28-36). France, moreover, had to recognize French nationals authorized to practise abroad as lawyers in France like nationals of other member states (paras 10-1).

### *Säger*

*Säger*, 1991 was about reminders sent to patent holders indicating that their patents were up for renewal. Such reminders were dispatched by service providers in the United Kingdom who coupled them with the advancement of the patent fees to be paid. In the United Kingdom such a service could be provided freely, while in Germany it was reserved to patent agents who were licensed. The Court decided that the free movement of services was about abolishing all restrictions on cross-border services, regardless of whether those restrictions applied indiscriminately, in particular when a restriction impeded the services provided by a provider established in another member state where that provider offered those services lawfully and when it was not necessary to visit the host state to provide a service (paras 12-3). The German licence requirement was such a restriction which, as all restrictions of services, had to be justified by imperative reasons in the public interest not yet protected by 'home' state legislation and had to apply indiscriminately, while being necessary to meet those imperative reasons (paras 14-5). The protection of the service recipient from unqualified legal advice, while being a valid ground as such, could not justify Germany's licence requirement, as it was unnecessary. No particular legal knowledge was required to send out a patent reminder; and the risk was limited, as the patent office in any case dispatched a reminder later on, charging a higher fee at that point in time though (paras 16-20).

### *Broadcasting*

*ERT AE*, 1991 concerned the television monopoly in Greece. ERT had the exclusive right to produce radio and television programmes in Greece. This included retransmitting in Greece programmes produced abroad. While a broadcasting monopoly was not *per se* incompatible with the free movement of services, the Court held that, in the case of Greece, production and transmission powers were all aggregated in one hand. Consequently, the risk arose that programmes produced abroad would be discriminated against and the programmes ERT AE produced itself were favoured in broadcasting. If the national court found that that was the case, the limitation in numbers of channels available would not justify such discrimination as long as channels were left unused (paras 20-5). Moreover, the freedom of expression as guaranteed by article 10 European Convention of Human Rights would have to be taken into account when assessing justification. According to the Court, a derogation from free movement could only apply, if it was compatible with fundamental rights (para. 43).

In *Gouda, 1991* the Court next addressed the Netherlands' regulation of broadcasting which had been amended after the ruling in *Bond, 1988*. Dutch law in *Gouda, 1991* established certain requirements which applied to foreign companies broadcasting television advertisements in the Netherlands as well as Dutch companies, while advertisements in the Netherlands were still channelled through a Dutch foundation. In a preliminary remark, the Court emphasized that discriminatory requirements were only susceptible to justification by the grounds explicitly mentioned in article 56 Treaty, while indiscriminately applicable requirements could be justified by the broader 'overriding reasons relating to the public interest' (para. 13; paras 10-5). The restriction was twofold in that Dutch cable operators were hindered in broadcasting programmes produced by foreign broadcasters, while foreign broadcasters were hindered in their opportunities. The conditions concerned the structure of broadcasting companies and the advertisements to be broadcast and amounted to restrictions (paras 17-9). The conditions as to the structure of companies could not lawfully be imposed on foreign bodies; to do so was not justified by the needs of cultural policy – which otherwise was a valid ground in particular in the light of the freedom of expression (para. 23) – as there was not any essential connection between the two (paras 24-5). The conditions as to the ads, i. e. as to types of ads, timing, etc., still had the effect of protecting the revenues of the Dutch foundation and could for that reason not be justified, whereas in principle they were capable of being justified by the need to protect the consumer and by cultural policy (paras 27-9). *Commission v. Netherlands (broadcasting), 1991*, handed down on the same day as *Gouda, 1991*, added that the Netherlands were not allowed to require those producers that were allocated broadcasting time in the Netherlands to use the technical facilities of a specific Dutch public company for production. Such a restriction had a protective effect, for it disadvantaged similar companies in other states, and could not be justified by the needs of cultural policy to which it was not connected (paras 22-5 and 31-2).

*Commission v. Belgium (broadcasting), 1992* dealt with the Belgian rules on broadcasting. The Flemish community, in particular, precluded cable operators in the Flemish territory from transmitting programmes of broadcasters established in other member states in languages other than the official language of the member state where the broadcaster was established. In other words, a Dutch broadcaster's programme in Flemish could lawfully be re-transmitted in Belgium by a cable operator, while a German broadcaster's programme in Flemish, e. g. a 'Flemish window', could not. The Court held that regime to be discriminatory. The same restriction did not apply to Belgian national companies and it prevented distribution of foreign programmes in the Flemish territory (paras 5-6). The restriction could not be justified by cultural policy or the needs to maintain media pluralism and the revenue of national broadcasting companies, as those grounds were not explicitly mentioned in article 56 Treaty. Therefore, they could not justify discriminatory restrictions. Moreover, to safeguard the revenue of a national company was incompatible with the freedom of services (paras 9-11).

That the programmes concerned were principally directed at Belgian territory also failed to provide any justification, as trans-border service provision as such could not be prohibited, else the freedom of services would be abolished (para. 12). Belgium, moreover, did not dispute that the authorization requirement applied by the Flemish community as well as the definition it applied of 'own cultural productions' violated the freedom of services; nor did it dispute that to reserve the majority of the share capital in the Flemish broadcasting company to certain shareholders was contrary to the freedom of establishment (paras 14-5).

*Veronica*, 1993 then addressed a situation under the Netherlands' broadcasting system again. Veronica was a Dutch broadcasting association of viewers which was indirectly funded by viewer's fees and advertisement revenues, could produce programmes, and was allocated programme time, but was not allowed to make profit. Veronica helped found a company in Luxembourg which was to broadcast its programmes in particular towards the Netherlands, by providing *inter alia* advice and a bank guarantee. However, the Dutch authorities prohibited that specific activity of Veronica. The Court confirmed that the Dutch system, as a pluralistic, non-commercial system justified by the freedom of expression which was characterized by viewer's associations such as Veronica, was in accordance with the free movement of services and capital. The idea of prohibiting the support provided to the Luxembourg company was to avoid diverting funds to purely commercial ends (paras 9-11). Moreover, the freedom of services would be misused in order to evade professional rules applicable in the Netherlands by directing a service from Luxembourg towards the Netherlands (paras 12-3). *TV10*, 1994 further elaborated that aspect of prevention of abuse under the Dutch broadcasting system. The Dutch authorities had treated a broadcaster established in Luxembourg which aired principally towards the Netherlands as a domestic undertaking. The Court explained that the case-law established did not remove such services from the scope of the freedom of services. Rather, the Netherlands were entitled, in the circumstances of its broadcasting system designed to implement media pluralism and a certain cultural policy, to take measures to prevent that kind of evasion of Dutch rules (para. 15). To treat a broadcaster as domestic was such a measure (paras 21-6).

*Leclerc-Siplec*, 1995, apart from applying *Keck and Mithouard*, 1993 under the free movement of goods, then dealt with a French television ad ban for the distribution sector, which affected a company importing goods, under Directive 89/552 on television broadcasting services. The Court ruled that the Directive left the member states free to adopt stricter rules than those in the Directive. The ad ban thus did not go against the grain of the Directive (paras 37-47). The implementation of Directive 89/552 was also at issue in *Commission v. Belgium (TV broadcasting)*, 1996. The idea underlying the Directive was that the state in the territory of which broadcasts originated was to ensure that these broadcasts complied with that state's law and the Directive (see paras 34-9 and 86). In contrast, Belgium – more specifically, the language communities in Belgium – maintained certain requirements for 'incoming' broadcasts, such as requirements of

prior authorization. In essence, the Court ruled that the Directive covered broadcasts via cable (paras 19-25); that cable retransmission was concerned by the Belgian measures (paras 27-8); that a measure's compliance with the freedom of expression as laid down in the European Convention of Human Rights did not guarantee compliance with Community law (para. 45); that neither of the newly adopted provisions of the Maastricht Treaty concerning cultural policy and subsidiarity justified Belgium's measure (paras 46-53); that Belgium had failed to demonstrate the measure's necessity and proportionality in the light of cultural policy and copyright protections (paras 55, 57, 90, and 92); that the measures were too general to combat abuse of law in the sense of the case-law (para. 65); and that the member states had to have mutual trust with regard to the supervision of broadcasters (para. 88).

*RTI, 1996* equally concerned Directive 89/552. The Court decided that 'telepromotions', which were common practice in Italy, could, but need not necessarily benefit from the option provided by article 18(1) to increase total ad time (paras 34-6); and that nothing in the Directive required sponsors only to be named at the beginning or the end of a programme (paras 43-7). *De Agostini, 1997* again dealt with broadcasting of advertisements. Certain transmissions from the United Kingdom were prohibited in Sweden because the ads they contained violated certain Swedish rules as to content; in particular, they addressed minors. The Court decided that Directive 89/552 did not preclude the application of rules that protected consumers and ensured fairness by the host state (paras 32-5). Under the freedom of services, too, the restriction the Swedish rules established (paras 50-1) were amenable to justification by consumer protection, subject to the national court's assessment (para. 52). However, as the Directive contained a set of rules to ensure that the broadcasting state guaranteed the control of programmes with regard to protection of minors, the host state no longer could control content in this regard (paras 59-61). (The judgment also had a dimension of free movement of goods.) Finally, *ARD, 1999* also raised issues under Directive 89/552. Germany applied the net rather than the gross principle to television ads. The ad time allowed per movie was calculated on the basis of the net length of a movie, rather than the overall time required to screen a movie together with advertisements. The Court held that the Directive had to be read so as to embody the gross principle, because that reading chimed more with the freedom of services (paras 29-32). However, as the Directive did not prevent a member state from applying stricter standards to broadcasters under its jurisdiction, Germany could lawfully require application of the net principle (paras 37-42) and still be in compliance with the freedom of services, for the restriction posed by the net principle was justified by the need to protect consumers (paras 49-52).

#### *No connection to services, purely internal*

In *Grogan, 1991* students in Ireland distributed information material about possibilities to have a legal abortion in clinics in the United Kingdom. Those student



officers were not in any way affiliated with the British clinics. Irish law prohibited abortion and the distribution of materials about it. The Court decided, after having confirmed that the freedom of services applied to medical services in general and to legal abortions more specifically (paras 18-20), that the link between the persons handing out the information and the service provided by the British clinics was too tenuous for the prohibition to distribute information material on abortions to constitute a restriction of the freedom of services (para. 24). The distribution of information was a way to make use of the freedom of expression, but it was independent of the economic activity (para. 26). Hence, in those circumstances the freedom of services was not restricted by Ireland's prohibition. Consequently, the Court did not have jurisdiction to examine any violation of fundamental rights, either (para. 31). In *Hoefner and Elser*, 1991, a competition law case, the Court, also ruled that the free movement of services was not concerned. German consultancy companies provided advice with recruitment of German nationals for German companies. There was no link to any situation governed by Community law (paras 38-9). In *Boscher*, 1991 the Court decided that the free movement of services was not applicable when a trader occasionally sold goods belonging to him by public auction in another member state and challenged the rules governing that sale. The freedom of services only applied when no other market freedom was applicable. In that case the free movement of goods was indeed applicable (paras 8-9).

In *Gervais*, 1995 the Court characterized a situation as purely internal to France, because a French national had practised artificial insemination of animals without proper qualifications and in violation of the monopoly established in France. The free movement of services and establishment were not in any way concerned by the situation (paras 24-6). The Court merely reiterated *Mialocq*, 1983, viz. that a monopoly in services could indirectly affect the free movement of goods which would render article 37 Treaty applicable (paras 35-7).

The Court in *RI.SAN.*, 1999 declined to assess whether equal treatment and transparency obligations flowing from the freedom of movement were violated, for the situation concerned was purely internal to Italy. An Italian company which had previously provided waste disposal services to a municipality in Italy had objected to those services being entrusted offhandedly to a newly formed Italian company partly owned by that municipality (paras 21-3). In *Jägerskiöld*, 1999 the Court again refused to apply the freedom of services, because the dispute was confined in all aspects to a member state. Two Finnish nationals resident in Finland had been in dispute over fishing rights in Finland (paras 43-4). Yet the Court clarified that granting a right to catch fish meant to provide a service. That the right was transferable and certified in a document did not render the free movement of goods applicable (para. 36).

### Public works

In *Commission v. Italy (public works)*, 1992 the Court dealt with certain conditions which Italy required tenderers to meet to be awarded a contract, in the

light of the freedom of services and Directive 71/305 on public works contracts. More specifically, Italy insisted that tenderers entrusted a minimum amount of services to sub-contractors established in the region. Moreover, in an invitation to tender preference was to be given to groups that pursued their main activities in the region concerned. The Court found that approach to be discriminatory. It was true that Italian undertakings were also treated unfavourably. However, the decisive point was that it were essentially Italian undertakings that were favoured (paras 8-9 and 12). The idea to counter disadvantages experienced by local and regional undertakings because of the award of a single, large contract was unsuitable as a ground to justify that discrimination (paras 13-4). (Directive 71/305 was violated, too, by the preference to be given to local groups, para. 21.)

### *Various services*

In *Fedicine*, 1993 Spain linked the licence to dub movies from third countries into the Spanish national languages to the filming and distribution of Spanish movies. According to the Court, foreign film distributors, who provided services within the meaning of article 59 Treaty (paras 10-1), were thereby disadvantaged, because Spanish distributors and producers gained an advantage (paras 14-5). As the measure was not indiscriminately applicable, only express derogation grounds could be argued. None of them applied. Apart from that, cultural policy could not provide justification, as Spanish producers were favoured independently of the quality and content of films. Moreover, the measure pursued an economic aim in that it sought to safeguard revenues of national producers (paras 16-21). In *Hubbard*, 1993 the Court was faced with a German measure which required a British executor to lodge a deposit in proceedings in Germany in order to obtain possession of real property in Germany belonging to the testator's estate. (The relevant conventions either contained a reservation or were only applicable to those resident in the host state.) As the service was provided in a member state other than that where both service recipient and provider were established, the freedom of services applied (paras 11-3). The measure was discriminatory, as it applied only to nationals of other member states, and as such precluded (para. 14). That Germany's law on succession was involved was irrelevant, since procedural law had to comply with the freedom of services (para. 19). In *Wirth*, 1993 the Court confirmed *Humbel*, 1988 in that the freedom of services did not apply to public education. In particular, it was not applicable to courses at institutes of higher education which were in essence financed out of public funds. In contrast, it did apply to private for-profit institutions where students paid for training (paras 15-7). Furthermore, in the answer to the second question the Court confirmed *Lair*, 1988 in that maintenance grants were held to be outside the scope of the Treaty.

### *Games of chance*

*Schindler*, 1994 was the first case that concerned games of chance. Agents of a German public large-scale lottery had sent ads and application forms to persons in the United Kingdom where such lotteries were prohibited, in contrast to small-scale lottery-like activities. The agents were prosecuted in the United Kingdom. The Court first decided that the freedom of services applied rather than the free movement of goods, because the materials sent to the persons in the United Kingdom embodied a larger service, i. e. a service that combined the sale of a hope to win with the collection of the bets, the determination of the winner, and the payment of prizes for the price of a ticket. The service was not prohibited in all the member states. Even the United Kingdom allowed it, though on a smaller scale. Thus, the import of the tickets was not to be likened to an import of illegal products. The activity was moreover economic, despite the elements of chance and recreation and the use of the profits in the public interest (paras 22-35). According to the Court, the British prohibition was applicable without distinction as small-scale lottery-like activities were not comparable to large-scale lotteries. But it raised an obstacle to the provision of a service across the border which (the service) was lawfully provided within Germany (paras 43-4 and 47-52). As such it was amenable to justification by overriding considerations in the public interest. The need to protect the service recipient and to maintain order justified the restriction, given the general tendency of the member states to restrict lotteries and the need to prevent crime, fraud, and excessive spending. That the revenues were used for public interest purposes was not a ground of justification in itself, but fed into the protection of the recipient. Hence, the member states had a certain latitude which allowed them to prohibit large-scale lotteries (paras 57-63). *Commission v. Italy (lottery machinery)*, 1994 also concerned lotteries, but in a different perspective. Italy had required the undertaking that delivered the automated system used for running lotteries to be publicly owned for the main part. The Court countered that the official authority derogation in article 55 Treaty did not apply, for the responsibility to organize lotteries was not transferred. The computerization system merely registered, checked, and transmitted data; the draws were still made by a state committee; the public administration approved and paid the prizes; the concession merely defined the terms of operation; and players' payments did not constitute fiscal charge (paras 6-12). Thus, the freedom of services and establishment was violated. Besides, the Court thereby validated the president of the Court's interim measures in *Commission v. Italy (lottery machinery interim I)*, 1992, as confirmed in *Commission v. Italy (lottery machinery interim II)*, 1992. (Directive 77/62 on public supply contracts was also violated.)

*Läärä*, 1999 dealt with the monopoly to operate slot machines in Finland. A British company which lawfully operated slot machines in the United Kingdom had challenged the exclusive right of the public licence holder to run slot machines in Finland. That licence holder forwarded the proceeds to the Finnish

state. The Court transposed the *Schindler*, 1994-case-law to other forms of gambling such as slot machines. The repetitive nature of slot machines put into perspective the relatively modest stakes and prizes contrasting it with the cross-words at issue in *Familiapress*, 1997, a free movement of goods case (paras 15-8). In contrast to *Schindler*, 1994, a monopoly rather than a full prohibition was at issue (para. 21). The impediment to the freedom of services resulting from that monopoly, which was according to the Court a non-discriminatory restriction (paras 28-9), could be justified by the grounds admitted in *Schindler*, 1994. A member state had discretion on how to pursue those aims on its territory. A tax on gambling or the control of operators could prove less effective. The proceeds were paid over to the state. In addition, a monopoly had the advantage of keeping gambling within controllable channels (paras 27-42). In *Zenatti*, 1999 the Court extended the *Läärä*, 1999-ruling to bets on sporting events. An intermediary had channelled such bets from the United Kingdom where they were lawfully offered as a service to Italy where they were subject to authorization. Certain operators in Italy held the prerequisite Italian licence. The service intermediary in Italy who cooperated with the British provider, in contrast, was barred. The Court validated the Italian approach in keeping with *Läärä*, 1999, but emphasized that it was not sufficient that the proceeds gained contributed to the financing of social activities. Rather, a genuine concern to limit gambling opportunities was required (para. 36).

### *Maritime transport*

In *Corsica Ferries*, 1994, the Court applied Regulation 4055/86 on maritime transports in the light of the freedom of services. In the port of Genoa different tariffs for piloting were applied based on whether the ship piloted flew the flag of Italy or another member state. The Court decided that Regulation 4055/86 implemented the freedom of services in maritime transport and assessed the tariffs under non-discrimination. The freedom of services applied, because some of the ferries operated between Genoa and ports in other member states (paras 30-1). The tariffs affected the operators in their freedom of services when they received piloting services as well as when they provided transport services (para. 21). The undertakings operating ships flying the Italian flag were essentially Italian. That was why the tariffs were indirectly discriminatory (paras 32-4). Even if navigational safety, environmental protection or the national transport policy were capable of providing justification, those objectives did not necessitate the distinction in tariffs (para. 36). In conclusion, article 1(1) Regulation 4055/86 ruled out the distinction in tariffs. In *Peralta*, 1994 the Court also applied free movement of services case-law under Regulation 4055/86, though to little avail. The captain of a ship which flew the Italian flag and was held by an Italian owner, after having flushed containers at sea in breach of Italian law, was tried on less favourable terms than he would have been had he been a national of another member state. According to the Court, the case did not give rise to discrimination. The same technical legislation was applicable across the board when Italy

had jurisdiction. The fact that other member states applied less stringent rules, did not amount to discrimination. Moreover, any restrictive effect was simply due to a regular application of Italian legislation (paras 41-52). Besides, the free movement of workers did not apply in a purely internal situation when a member state treated one of its own nationals less favourably than nationals of other member states (paras 27-8). The freedom of establishment was, finally, not concerned when a member state imposed technical rules on undertakings subject to its jurisdiction. That situation was comparable to when national laws on labour, social security, or tax systems diverged (paras 30-5).

In *Commission v. France (maritime transport)*, 1994, the Court revisited charges on intra-Community passenger transports. Those charges were, ultimately, lower for domestic transports than for transports between France and other member states, but all operators were subject to the same charges. The Court, after having confirmed that the services case-law applied under Regulation 4055/86 else the freedom of services would become nugatory (paras 13 and 20), struck down the differential charge, for it made service provision across borders more difficult than within a member state and secured a special advantage for domestic transport (paras 17-8 and 21).

*Corsica Ferries France*, 1998 again dealt with services in the context of maritime transport, more specifically, with the mooring regime in certain Italian ports. In the light of the security aspects of mooring services certain mooring groups were given a *de facto* monopoly. It was mandatory to use their services and the prices of the services were fixed at a level beyond the usual for such services in order to take account of security-related aspects. Having not found any indirect discrimination of service receivers, the Court ruled that the mooring service provision constituted a service of general economic interest within the meaning of article 90(2). Given that, any potential restrictive effect of the mooring regime on the service provision was justified (paras 57-9 and paras 45-6). As far as maritime transport services, in contrast to mooring services, were affected, if at all, the potential restriction caused by the requirements to use the services of specific mooring groups and to pay the fixed price were justified by the need to safeguard public security (para. 60). (Any restrictive impact on the free movement of goods was, according to the Court, too uncertain and indirect to be of relevance; paras 30-1.)

### *Again various services*

The Court in 1994 ruled that Spain infringed the free movement of services by requiring non-resident nationals of other member states who were older than 21 years to pay entrance fees for museums, while admission was free for everybody else (*Commission v. Spain (museum admission)*, 1994). *Van Schaik*, 1994 dealt with the Netherlands' roadworthiness test for registered vehicles. Dutch law allowed only garages established in the Netherlands which had to fulfil certain requirements and were supervised by the Dutch authorities to offer that roadworthiness test. A side-effect of that approach was that Dutch vehicle owners usual-

ly, for the sake of convenience, had their cars maintained in garages in the Netherlands, too, although maintenance work in garages abroad was generally less expensive. The Court acknowledged the restrictive effect of the Dutch approach on the freedom of services, while the freedom of goods was only incidentally affected (para. 14), but found it justified by the need to maintain road safety. To allow foreign garages to offer the Dutch test would, moreover, come down to delegating state authority to foreign agents (paras 16-20). A test taken pursuant to the law of another member state for a vehicle registered in that state would, furthermore, have to be recognized in accordance with Directive 77/143 on roadworthiness tests (para. 22).

In *Alpine Investments*, 1995 the Netherlands' prohibition of cold calling for dealers in commodities futures was at issue. The Dutch authorities prohibited a Dutch trader from calling potential customers in the United Kingdom unless those customers had given their written consent to being contacted, while British law did not in general forbid it. The free movement of services was applicable, because the service recipient was resident in another member state. It was irrelevant that the service was merely offered or that it was offered via telephone (paras 18-21). The prohibition was restrictive in that the trader was, by the state where he was established, stripped of an effective method of marketing his services and of contacting clients. That British law allowed cold calling, in turn, was immaterial. The Court also refused to transpose the *Keck and Mithouard*, 1993-ruling. The Dutch prohibition was not analogous to certain selling arrangements. It impeded access to the market of customers in another member state (paras 27-38). The needs to protect consumers and the integrity of the Dutch capital market, however, were valid justifications. While the British customers were best protected by British, rather than Dutch regulation, it was the 'home' state, viz. the Netherlands in the case at issue, that was best positioned to regulate cold calling. Proportionality was ensured, because it was possible to obtain written consent, only a specific sector was concerned, and less intrusive measures did not exist (paras 42-54).

In *Svensson*, 1995, Mr Svensson, a resident of Luxembourg, was denied an interest rate subsidy available essentially to those who had dependent children and took out a loan to construct a house in Luxembourg. The reason was that he had taken out the loan with a credit institution in Belgium rather than Luxembourg. The Court found that the freedom of services and free movement of capital were applicable to a loan agreement with a bank in another member state. The measure was discriminatory, because it relied on the place where banks were established (para. 12). Hence, Luxembourg's social policy argument that the profit tax on financial establishments in Luxembourg funded its social policy went unheard for not coming within the scope of an express derogation ground. Moreover, the *Bachmann*, 1992-ground, i. e. the need to ensure the cohesion of the tax system, did not apply for lack of a direct link (paras 13-8). In conclusion, the measure was precluded.

In *Perfili*, 1996 a British insurance company was denied leave to intervene in proceedings in Italy concerning an Italian national who had taken out an insurance policy with the company. The reason essentially was that the company had granted legal authority to its representative under English law, which failed to live up to the requirements of Italian procedural law (see para. 6). The Italian procedural requirements, according to the Court, affected the ability of foreign service providers to defend their interests in Italy. However, the freedom of services and establishment was not concerned with disparities in treatment resulting from differences existing between the laws of the member states, if they applied based on objective criteria rather than nationality. Yet it was impossible for the Court by means of the information given to assess whether the national legislation which applied indiscriminately constituted an unjustifiable obstacle to the freedom of services (paras 16-8). Moreover, the Court did not have jurisdiction to apply fundamental rights outside the scope of Community law (para. 20).

In *Reisebüro Broede*, 1996 the Court sanctioned Germany's reservation for lawyers to recover debt in court. A company established in France had argued that that reservation violated the freedom of services and establishment. The Court conceded that the freedom was restricted. That restriction did not occur on a discriminatory basis, though (paras 26-7 and 30). Applying the *Gebhard*, 1995-test under the freedom of services (para. 28), the Court found the restriction justified by the need to protect service recipients. Germany was entitled to ensure that those who recovered debts in court on behalf of legal persons were properly qualified and that justice was correctly administrated (para. 31). Germany was allowed to assess what was necessary to protect service recipients (paras 36-42).

*Parodi*, 1997 focused on the requirement to have a banking licence in the host state at a time when only the first banking Directive 77/780 was applicable. France required banks established in other member states to have a banking licence and to be established in France. In the case at hand, a company established in France had taken out a mortgage loan with a bank in the Netherlands. Ruling that the freedom of services applied, because capital movements had been liberalized in that regard already (paras 8-16), the Court found the French requirement to restrict the freedom of services, because banks established abroad already had to hold a licence in the state where they were established (para. 19). However, at that point in time, banking authorizations had only been subject to mutual recognition to some extent in the Community. That was why consumer protection, which was particularly sensitive in banking, still justified the restriction, subject to the national court's assessment which needed to distinguish between savers and borrowers (paras 20-9). The prerequisite of being established in the host state was only justifiable if it was indispensable (para. 31).

### *Medical services*

*Kohll*, 1998 then essentially rendered the freedom of services applicable in situations that basically came within the scope of article 22 Regulation 1408/71, viz.



when medical treatment was sought in another member state and the 'home' state's social security system subjected reimbursement of the cost incurred to prior authorization. *Kohll, 1998* only concerned treatment *extra muros*, i. e. outside hospital. In Luxembourg Mr Kohll sought reimbursement of the cost incurred by reason of his daughter's medical treatment in Germany – treatment for which the authorization required by Luxembourg law had not previously been given. Yet Mr Kohll only requested reimbursement to the extent the Luxembourg social security system would have covered the cost had treatment been provided in Luxembourg. The Court first decided that the freedom of services applied in the domain of social security (paras 19-21). Article 22 Regulation 1408/71 only governed prior authorization in case of medical treatment in accordance with the law of the host state. In contrast, the freedom of services, as part of primary law from which secondary legislation could not derogate, could apply when reimbursement pursuant to 'home' state law, i. e. the law of the state to the social security system of which the person concerned was affiliated, was requested (paras 25-7). Medical services *extra muros* were covered by the freedom of services (para. 29). Luxembourg's prior authorization requirement, as a condition for the reimbursement of cost for medical treatment provided abroad, amounted to a restriction of the freedom of services (paras 34-5). While the need to maintain the financial balance of the social security system of a member state basically was a ground for justification, the ground was not plausible in the case at hand, because Mr Kohll had not requested more than what he would have received, had the treatment been provided in Luxembourg (paras 41-2). Public health considerations did not justify the restriction, either. The public health sector could not lawfully be excluded as a whole from the freedom of services. The Community rules on the mutual recognition of medical professional qualifications ensured the quality of the services. Moreover, the maintenance of a balanced medical and hospital service accessible to all did not require a prior authorization scheme (paras 46-52). As a result, Luxembourg could not lawfully subject the reimbursement of cost arising out of *extra muros* treatment provided abroad to authorization. Besides, the day *Kohll, 1998* was handed down the Court also ruled in *Decker, 1998*, on the same grounds as in *Kohll, 1998*, that the free movement of goods ruled out a scheme under which the cost of corrective eyeglasses were only reimbursed if the glasses had been purchased within the member state concerned or if the authorization to buy them abroad had been given beforehand.

### Taxation

*Safir, 1998* dealt with the Swedish approach to taxation of life assurances. Under Swedish law, capital life assurance policies were taxed in the hand of the insurer. The insured neither deducted the premiums paid from tax nor paid any tax on the proceeds. To level the playing field for domestic and foreign insurers, policies taken out with foreign insurers were taxed in the hand of the insured established in Sweden, i. e. the premiums paid were subject to tax. The insured was entitled

to prove to the Swedish authorities that a similar tax had already been levied on the assurance policy by another member state and thereby have the Swedish tax reduced in steps, viz. by 50 per cent, if the foreign tax amounted to at least a quarter of the Swedish tax normally due, or by 100 per cent if it amounted to at least half of the Swedish tax. The Court found the Swedish approach to have a dissuasive effect on the freedom of services for several reasons (para. 30). The insured had to register, declare the premiums, and apply for a reduction of Swedish tax (para. 26). It was more costly to surrender a foreign policy after a short period of time (para. 27). It was burdensome for the insured to prove the tax levied by another member state (para. 28). Sweden's diverging decisions as to the tax paid by foreign insurers established in one and the same country resulted in a state of uncertainty for the insured (para. 29). Finally, the reduction of the Swedish tax in steps had a threshold effect resulting in higher taxes (para. 31). That it was not possible to apply the Swedish standard tax regime or that a fiscal vacuum ensued if the foreign policies were not taxed in the hand of the insured did not justify the restriction. It would be possible to tax all life assurances equally by taxing the yield on life assurance capital across the board. The freedom of services would then be less restricted and the system more transparent (paras 32-4).

*Lease Plan, 1998* was a value added tax-case which also had a dimension of freedom of services. The Court decided that Belgium violated the freedom of services in that companies established abroad which regularly conducted business in Belgium, in contrast to companies established in Belgium, had to give notice to receive interest and, even if they did, received less interest on the amounts of tax they had advanced than companies established in Belgium (paras 32-3). According to the Court, the proper comparison for the purpose of assessing discrimination was between companies established in Belgium and those established abroad providing services on a regular basis in Belgium, rather than between the latter and those who did not at all, or only irregularly, pursue an economic activity in Belgium and sought reimbursement of the tax (paras 36-9).

*Eurowings, 1999* concerned the effects of Germany's tax regime in cases of cross-border leasing contracts. In essence, a lessee established in Germany and subject to German trade tax had to add back to the taxable total a certain amount, if the lessor was not subject to tax in Germany; had the lessor been subject to tax in Germany, add-backs did not apply in general for the lessee. The idea of that approach was to avoid taxing a taxable amount twice, i. e. once in the hands of each taxable person. As a result of the add-backs the tax burden of the lessee was increased. That was the case for the German company Eurowings when it rented a plane from an Irish company. Applying the freedom to receive services, the Court found a difference in treatment in that German companies such as Eurowings in the majority of cases had to pay higher taxes when they leased planes from companies established abroad than when they leased them from companies established in Germany (paras 35-40). The cohesion of the German tax regime within the meaning of *Bachmann, 1992*, did not justify that

difference in treatment for lack of a direct link (para. 42). Neither did the fact provide justification that the Irish company was generally subject to a lower tax burden. According to the Court, compensatory tax regimes jeopardized the foundations of the single market (paras 43-5).

A tax regime was also challenged in *Vestergaard*, 1999. Denmark applied a presumption that a stay abroad in a tourist resort, even if in the context of an educational course, had a touristic purpose. As a consequence, the corresponding expenditures were only tax deductible, if a taxable person rebutted the presumption by proving that a stay abroad had served for professional training. In the case at issue, Mr Vestergaard was established in Denmark and had followed a course in Crete offered by a Danish provider. The presumption of non-deductibility was applied. It would not have been applicable, had the course been given in a tourist resort in Denmark. The Court confirmed that the freedom of services applied when the service was provided in another member state than the state where both the provider and the receiver were established (paras 18-20). The Danish tax regime applied a distinction based on where the service was provided (paras 21-2). The restrictive effect of that distinction was not justified by the need to safeguard the cohesion of the Danish tax system, since a direct link between taxation and deductibility was missing. Neither did the effectiveness of fiscal supervision provide justification, given Directive 77/799 on mutual assistance (paras 23-8).

### *Public procurement*

In *Gemeente Arnhem*, 1998 the Court was faced with issues under Directive 92/50 on public services contracts which were raised when two municipalities in the Netherlands entrusted the collection of refuse to an entity they had founded and owned. The Court resorted to the freedom of services on two occasions in the detailed reasoning on the provisions of the Directive. On the one hand, after having decided that the fact that other private companies also offered waste disposal services did not have an impact on the qualification of the entity founded by the municipalities under Directive 92/50, the Court defined the objective of that Directive to be the elimination of barriers to the freedom to provide services and the protection of operators offering services to contracting authorities in other member states (para. 41). On the other hand, the Court ruled that the nature of the provisions setting up the entity in question were not relevant in determining whether it was a 'contracting authority' within the meaning of the Directive, because that term needed to be interpreted functionally in order to give the freedom of services full effect (para. 62).

*Mannesmann*, 1998 was a public works contract case in which, in general, the qualification of an Austrian entity that fulfilled certain public and commercial tasks, such as printing identification cards and newspapers, as a contracting authority under Directive 93/37 on public works contracts was at stake. In this context, the Court *inter alia* ruled that the transfer of a public works contract pursuant to article 1(a) from a contracting authority pursuant to article 1(b) to

an entity it controlled but which did not itself qualify as a contracting authority did not have an impact on the classification of the contract as a public works contract, else the aim of the Directive, which was to realize the free movement of services and establishment in public works contracts, would be frustrated (para. 43).

### *Further services cases*

In *Bickel*, 1998 a German tourist and an Austrian truck driver challenged the legislation in the German-speaking part of Italy which offered the option to have criminal proceedings conducted in German exclusively to Italian nationals who resided in that part of Italy and spoke German. The Court accepted the applicants' argument. The situation was within the scope of the Treaty, as they were potential service recipients and as union citizens had the right to move freely and reside in other member states. Hence, the principle of non-discrimination in article 6 Treaty had to be applied, even though the rules governing criminal proceedings were at issue (paras 15-7). German-speaking nationals of other member states were disadvantaged, while Italian residents of the region who spoke German were put in a favourable position by the rule (paras 23-6). The protection of a national minority, as such a legitimate ground, did not justify the residence and nationality requirements, as that aim would not have been undermined, if the rule had been extended to cover German-speakers from other member states. Moreover, additional costs would not arise in that case (paras 28-30).

In *Ambry*, 1998 the Court applied the freedom of services under Directive 90/314 on package travels and the banking Directives 89/646 and 92/49. French law required the guarantee, which travel agencies had to provide under Directive 90/314 to secure the risk of certain costs, *inter alia* for the repatriation of customers in case of insolvency of an agency, essentially to be issued by a financial institution established in France. In case of a guarantee from a bank established in another member state an additional agreement between that foreign bank and a French bank was required (para. 27). An interpretation in the light of the freedom of services revealed that the use of foreign banks by travel agents was discouraged due to the cost the additional agreement with a French bank generated (paras 28-30). The justification of that restriction failed, as Italian legal procedures were sufficiently expedient even if immediate funds were needed, e. g. in case of repatriation. Moreover, travel agents did not have the possibility to prove that the guarantee provided by a foreign bank was sufficient in terms of rapid availability of funds (paras 33-8).

In *Calfa*, 1999 the Court dealt with the lifelong expulsion of a tourist from Greece as a consequence of the possession of drugs. According to the Court, expulsion for life of a national of another member state for possession of drugs for the possessor's own use constituted an obstacle to the freedom of that national, as a tourist, to receive services in the host state, as it would have constituted an obstacle to the free movement of persons had the person concerned been (self-)employed (para. 18). Drawing on established case-law, notably *Bouchere*-

*au*, 1977, the Court went on to find that, while the use of drugs endangered public policy within the meaning of article 56 Treaty as interpreted in the light of Directive 64/221 on public policy, security or health measures (para. 22), an expulsion order was only justified if the conduct of the person concerned amounted to a sufficiently serious threat to society (para. 25). The Greek legislation at issue did not live up to that requirement, for under Greek law foreigners guilty of drug possession for their own use were to be expelled automatically, without due account being taken of their personal conduct (paras 27-8).

*Ciola*, 1999 concerned mooring places on Lake Constance. Austria had restricted the number of places capable of being rented out to persons residing abroad. Mr Ciola, an Austrian owner of mooring places, was prosecuted for disregarding an administrative decision ordering him not to lease out any further places to persons not resident in Austria. The Court reiterated that an Austrian service provider such as Mr Ciola could rely on the freedom of services against Austria, as long as the service recipient was resident abroad (paras 11-2). To require residence in Austria for a person to be eligible to receive a service amounted to indirect discrimination, since the majority of those residing abroad were nationals of other member states (paras 13-4). In the absence of an exception in the Act of Accession such discrimination was only amenable to justification by the regular express derogation grounds. None of those applied in this case. Economic grounds in particular, such as the pressure on prices for mooring places, were excluded (paras 15-9). (The rest of the judgment concerned the primacy of Community law over a measure taken to enforce an individual administrative decision adopted before accession.)

For the sake of completeness, a number of further cases related to services must be mentioned. In *Commission v. Denmark (Storebælt)*, 1993 Denmark had accepted that a Danish content clause requiring the use of Danish materials and services to the greatest possible extent in an invitation for tenders to build a bridge violated *inter alia* the freedom of services. In *Ballast Nedam*, 1994 the Court applied Directives 71/304 and 71/305 on public works contracts in the context of holdings and their subsidiaries. The *Opinion on GATS and TRIPS*, 1994 dealt with the power of the Community to conclude the Marrakesh agreements, one part of which was the General Agreement concerning Trade in Services (GATS). Finding overall that the Community shared the competence to conclude those agreements with the member states, the Court found specifically that cross-frontier supplies, the so-called mode 1 under the GATS, were covered by the common commercial policy of the Community, in contrast to the other modes of service provision under the GATS, i. e. consumption abroad, commercial presence, and the presence of natural persons (paras 41-7). Moreover, the free movement of services and establishment the nationals of the member states enjoyed within the internal market did not imply the power of the Community to enter into agreements with third countries to liberalize services and first establishment for third country nationals; neither was an exclusive power to be derived from certain acts addressing third country nationals or from the harmonization

of certain service sectors as it remained partial (paras 81, 86, and 95-7). In *Job Centre*, 1997 the Court exclusively applied competition law, which was violated by a refusal to grant permission to open a job recruitment agency in Italy on the ground that this activity was reserved to public agencies. Given that violation, the Court did not continue to assess the case under the freedom of services (para. 39). In *Romanelli*, 1999 the Court interpreted the term ‘other repayable funds’ in article 3 Directive 89/646 on banking. In *Commission v. Luxembourg*, 1999 the Court confirmed that Luxembourg had failed to transpose in time Directive 93/22 on investment services in the securities field.

## V The 2000s

The first decade of the millennium was by far the most fruitful of the history of the Court. The Court handed down about 500 judgments in the free movement of persons and services. The free movement of workers and citizens contributed more than 150 judgments. The coordination of social security remained rather stable with a little more than 80 judgments. The exponential growth of the case-law was most visible in the free movement of services and establishment which together accounted for some 240 judgments.

### 1 Workers and citizens

#### *Worker*

In the first decade of the millennium, the Court added little to the term ‘worker’. *Fahmi and Amado*, 2001 clarified that a migrant worker who had definitely ceased work and then returned to her home state could not lawfully rely on article 48 Treaty and article 7 Regulation 1612/68 to claim a benefit for her children in the state where she had worked (paras 41-51). In *Ninni-Orasche*, 2003 the Court mainly elaborated that objective criteria and the circumstances were decisive in determining whether a person was a ‘worker’ (para. 27). Thus, were irrelevant the conduct of the person before and after having begun to seek work (para. 28) or the short duration of the work in relation to the entire residence period (para. 30). The Court also generally disqualified the argument that a person had possibly obtained the position of a ‘worker’ abusively as a means to benefit from the advantages linked to that status (para. 31). In *Collins*, 2004 the Court ruled that a person was not to be regarded as a ‘worker’ by reason of him having last worked in a member state 17 years before (para. 28). The Court also reiterated the distinction between persons who had worked in a member state and then sought employment there, i. e. ‘workers’, and those who just came to a member state to search for employment, i. e. job seekers (paras 30-32).