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The Greatest Possible Freedom

Interpretive formulas and their spin in free movement case law

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Für Lotti und Kaspar

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A Introduction: The way to the greatest possible freedom

'The greatest possible freedom' is a formula which originated in the very first preliminary ruling of the Court of Justice of the European Union in social security, the judgment in *Hoekstra, 1964*. Ever since then, the Court has regularly relied on this formula, most recently in *Dumont, 2013*. The evolution and the power of formulas like 'the greatest possible freedom' are the topic of this book: Under which circumstances does the Court use them? When do they spin the Court's decisions?

Three types of formula are examined, namely formulas that embody either broad interpretation, like 'the greatest possible freedom', a coordinative interpretation, or a fundamental interpretation. Simply put, the book thus examines certain aspects of the Court's activism, structuralism, and fundamentalism. This is done in the second part entitled 'the evolution of interpretive formulas'.

The object of analysis is the internal market case-law of the Court on natural persons, i. e. on citizens, workers, establishment, services, diplomas, and social security. This body of case-law, roughly 1400 decisions, is presented in the first part named 'the case-law'. Practitioners will be pleased to find that the book is complete: It includes all the decisions the Court has ever handed down concerning natural persons as citizens, workers, established persons, diploma awarders/-ees, service providers/receivers, or persons involved with social security. It includes decisions based on primary as well as secondary law. To uncover this case-law each volume of the European Court Reports was perused manually, from cover to cover. The case-law is included up to 16 April 2013.

I Free movement of persons and services: 1400 decisions

This is a book about the rights of natural persons in the internal market. The book unearths all the decisions the Court of Justice of the European Union has ever handed down concerning free movement of persons and services. This means that the book includes the free movement of workers, the freedom of establishment, the coordination of social security, the recognition of diplomas, and the freedom of Union citizens; it also includes the free movement of services, i. e. the freedoms to provide as well as to receive services. The entire case-law as to *secondary* legislation which implements these freedoms and diplomas/social security is included, too. The book includes judgments and orders.

All in all, this body of case-law includes roughly 1400 decisions that the Court handed down over the course of almost 60 years. These decisions were found first by searching the official data base. Since the data base has no memory – search sessions rapidly expire, decisions cannot be flagged or annotated – it was necessary to peruse all the volumes of the European Court Reports manually. This took the author almost three years to complete. Because of the delay in

publishing the European Court Reports books, the last of them scrutinized was volume two of the year 2011. From then on, the online database had to suffice. Decisions therein were perused until 16 April 2013.

The borders of the case-law examined are fuzzy. The freedom of establishment overlaps with the free movement of capital; the way the freedom of establishment of legal persons is interpreted has effects on the freedom of natural persons to establish themselves; a ground justifying a restriction of the free movement of goods – a freedom that is not included in this study – is also relevant for restrictions of the free movement of persons and services. Hence, some hard decisions had to be taken on what is included in this book and what is excluded. They are as follows. The basic rule of thumb is that decisions concerning natural persons are included while those concerning legal persons are excluded. Judgments based on the secondary rules on taxation of intra-group dividends, for instance, are not included, although these rules implement the freedom of establishment; decisions interpreting the secondary rules governing public procurement are not included, either; decisions on the company law directives are not discussed in detail, but mentioned briefly. However, if the *primary* freedom of establishment is treated in any of these decisions, it is necessarily included, regardless of whether it concerns natural persons or companies. The reason for this inclusion is that the primary rules on the establishment of natural persons are too intricately entwined with those on companies to be separated. As a compromise, the decisions concerning the primary freedom of establishment of companies are dealt with less extensively in the first part of this book on 'the case-law'. The same approach is followed for the free movement of services and the secondary norms implementing it for legal persons. Only one line of authority of the primary freedom of establishment of companies is fully excluded, namely the golden share decisions that are handed down on the basis of the freedom of establishment. The free movement of capital is entirely excluded. Decisions concerning social policy, i. e. discrimination on the basis of sex, age, etc., are not included, either. Decisions of the Court of First Instance, now called the General Court, are left aside entirely. Decisions concerning agreements extending the rights of natural persons in the internal market to third states – i. e. decisions on the Agreement on the European Economic Area, the Europe Agreements, and the Agreements with Turkey, the Maghreb countries, Russia, and Switzerland – are included. Decisions concerning the Schengen or Dublin frameworks, in turn, are not included. The opinions of the Advocate Generals are generally excluded. So the occasional hint at an opinion in the first part on 'the case-law' is random.

For those who prefer the jargon of case-law what is included in this book can be described as follows. Are included all lines of authority that, respectively, began with *Ugliola, 1969*; *Costa v. ENEL, 1964* (re freedom of establishment, not primacy); *Hoekstra, 1964*; *Thieffry, 1977*; *Van Binsbergen, 1974* (or *Sacchi, 1974*); and with *Martínez Sala, 1998* (or *Skanavi, 1996*). The series beginning with *Coname, 2005* or arguably *Parking Brixen, 2005* is included, so is the strand initiated by *Commission v. France (tax credit), 1986*. The series that the

three judgments *Commission v. Portugal (golden share), 2002*; *Commission v. France (golden share), 2002*; and *Commission v. Belgium (golden share), 2002* began is excluded, as is the thread that began with *Bordessa, 1995*. The likes of *Defrenne II, 1976* and *Mangold, 2005* are not included, either. However, the series beginning, respectively, with *Demirel, 1987*; *Kziber, 1991*; *Krid, 1995*; *Kondova, 2001*; *Simutenkov, 2005*; and *Stamm, 2008* are all included.

II The structure of the book

The first part of the book, 'the case-law', is devoted to a thick description of the case-law within the framework noted above. Each chapter in this first part encompasses a decade of case-law. Each decade is further broken down into 'workers' – or 'workers and citizens' – 'establishment' including diplomas, 'social security', and 'services'. The description within each section sometimes follows a chronological sometimes a content-based order, depending on various factors. The few decisions of the early days are grouped according to substance. Their implications for other decisions are rather evident. Later on, as the case-law developed, decisions became typically more complex and addressed various points while having multiple cross-implications. So a chronological description is more suitable for this time period. Within social security, decisions are easily categorized according to topics – namely aggregation, family benefits, unemployment benefits, etc. – owing to the rather homogenous and self-referential nature of social security. Within the freedom of services judgments are generally more heterogeneous. Services cover a vast array of topics and have multiple links to establishment. Hence, a chronological order combined with categorization according to substance is applied for services. Overall, this structure should make it easy for practitioners to navigate the case-law and to tap into the context of decisions they previously identified as interesting. In general, the presentation in the part on 'the case-law' is as neutral as possible. Opinionated qualification, e. g. through the use of adjectives, is avoided as is analysis more generally.

The second part, 'the evolution of interpretive formulas', takes the body of case-law identified in the first part and traces how certain interpretive formulas evolve. Some interpretive formulas are thus mapped out through the entire case-law of persons and services, from the beginning to the present. It is examined where certain formulas originate, when they appear, and how they influence the Court's decisions. More succinctly, the questions are answered where the formulas are from, when they are used, and how powerful they are. The power of a formula is examined and qualitatively assessed in each decision where it occurs. 'Power' in this context is represented by the 'spin' a formula exerts within a decision. This 'spin' is gradual. In casual parliance, 'spin' occurs when one reads a judgment, arrives at an interpretive formula which raises a certain expectation of

the way the decision will go – and the decision then indeed goes this expected way and ends there.

Three sets of interpretive 'formulas' are examined. First, in the chapter entitled 'broad', formulas are examined that embody either broad or restrictive interpretation. Which formulas exist in the body of case-law examined that embody a broad or restrictive approach? In which circumstances are they typically used? How do they evolve? When are they decisive for the Court's decision, when do they provide impetus, exert 'spin'? These are the questions that are answered first for 'broad' interpretation. The chapter on 'broad' interpretive formulas is different from the other two chapters on interpretive formulas in that it may contain aspects that are relevant beyond the law of the Union and the Court of Justice. Broad or restrictive interpretation is common in other legal orders, too, like in international and domestic law. Yet, these broader implications and possible cross-connections are not addressed in this book, because it is about the case-law of the Court of Justice. In the next chapter the above questions are pondered for interpretive formulas in which the Court relied on the idea that parts of Union law merely coordinated national law, as an alternative to harmonizing it. This is the chapter entitled 'coordinated'. This interpretation is highly specific for the law of the Union and the case-law of the Court. Coordination of legal systems is – at least in this terminology and as far as can be judged – unique to the law of the Union. Within this law, social security is of primary importance. The final chapter labelled 'fundamental' ponders the above questions for formulas drawing on the idea that some notions are fundamental, while others are not. Like broad interpretation, interpretation relying on hierarchy, such as a notion being fundamental, is not unique to the law of the Union. Most legal orders, perhaps even all, at one point or another prioritize some notions over others. However, this chapter is uniquely tied to the law of the Union in that it primarily deals with Union citizenship and an intepretive formula used exclusively with regard to it ('the fundamental status').

III Why is the first part on 'the case-law' necessary? Why not cover more interpretive formulas?

Why not drop the voluminous first part on 'the case-law' and cover more interpretive formulas? And why are three interpretive formulas investigated and others left aside? Answers to these questions are not easy to give. They to some degree concern scientific honesty and, in addition, require a deep understanding of the case-law that is the subject of the first part of this book. Admittedly, the evolution of further interpretive formulas could be traced. For instance, the formula used to argue that social security rights based solely on national law must not be lost after the right of free movement has been exercised would have been an alternative; or the formula relying on the need for cohesion of the tax system.

However, several points are important in this regard. First, to live up to scientific rigour the first part on 'the case-law' is indispensable. The body to be investigated must first be established – the facts, the data must first be collected and described, so to speak – before it can be discussed. A crucial step would be missed, if discussion and interpretation were begun right away. Uncertainty about the framework and the limits of the interpretation would result, ultimately rendering the study useless. Second, it cannot be avoided to be selective when it comes to interpretive formulas. Dozens of interpretive formulas are used in the body of case-law under scrutiny, a body of case-law that is, moreover, exceptionally large. It would fill many more volumes, if all of those formulas were to be traced. Third, given the need to select, variety is important. Hence, interpretive formulas are chosen that shed light on as many different aspects of the case-law as possible. The broad as well as the restrictive formulas discussed first in the second part elucidate the Court's activism to some extent and are potentially important beyond the law of the Union; the formula of coordination, which comes next, illuminates a possibly unique structural element in the Court's case-law; and the fundamental formula(s) partly reveal(s) how the case-law relies on hierarchy, in particular with regard to an 'institution' that is central to the Union, i. e. Union citizenship. The examination of this set of formulas, hopefully, allows us to achieve at least a better understanding of the Court's case-law in persons and services and of the way it evolves. Fourth, quite plainly, those interpretive formulas are traced in the case-law which, after years of careful study of the case-law, turned out to be most interesting. A personal element is, obviously, involved in this choice. But it is an informed choice and one the reader hopefully finds plausible.

IV A text-based approach

For all three interpretive formulas the analysis is based on the text of the decisions of the Court. This has two consequences. First, it is possible that some decisions escape scrutiny which, generally speaking, turn out to have a broad, sweeping character or implicitly rely on a coordinative or fundamental approach without that this is reflected in the wording of the decisions. Second, this book is not capable of fully answering the question *why* a specific formula is used in a decision. Factors outside the text of a decision influence the answer to the question 'why'. These factors include the composition of the Court, the opinion of the Advocate General, or the person who writes the decision. Such factors are not taken into account in this book because of the text-based approach. The book rather explains the 'when', the 'how', and to a certain extent the 'wherefore' for the relevant formulas. Yet, although the 'why' is ignored, the contribution this book makes is significant. As indicated above, the analysis of 'broad' formulas clarifies an aspect of the Court's activism, at least implicitly; the en-

gagement with formulas of coordination sheds light on the structural nature of the Court's case-law; and the examination of 'fundamental' formulas helps us understand the hierarchy the Court injected into the law and its constitutional nature.

V Why is this book useful and novel?

The book for the first time gathers *all* the case-law of the Court on workers, citizens, establishment, services, diplomas, and social security. It does not just assemble the 'important' decisions, but *all of them*.[1] This completeness is useful for the practitioner who is relieved of the worry that a relevant judgment escapes attention. The usefulness is not limited to this practical aspect though. The Union's law of social security has so far been a technical domain that has been left to the specialists. Consequently, there are mainly handbooks that are confined to explaining the basics of the Union's law of social security.[2] Such handbooks sometimes also include international social security law; and they deal with the implications of international and Union law for a specific (member) state.[3] Other items address just one aspect of social security.[4] Shorter pieces regularly discuss the latest social security case-law of the Court.[5] More profound contributions remain the exception.[6] In scholarship the market freedoms of workers, service providers, and established persons exist entirely apart from social security.[7] In

1 The book avoids drawing a distinction from the outset between 'important' and 'unimportant' decisions. Such a distinction would typically be drawn on the basis of the number of judges assigned to a case, thus distinguishing between grand and small chamber cases. However, the size of the chamber is plain data which is accessible through the Court's decision database. Given that, it seems exaggerated to add a further layer of complication to an already quite complex analysis. Quite apart from that, though, a distinction between 'important' and 'unimportant' decisions would be at odds with the aim of this book, which is to trace fully the evolution of certain interpretive formulas in the whole case-law examined. This aim basically implies that all cases are treated on an equal footing from the outset. An interpretive formula can then play a key role in a decision that is 'unimportant' in the greater scheme of things (and was e. g. assigned to a small chamber). In other words, from the perspective of interpretive formulas such a decision is indeed truly 'important', although it was decided by a small chamber. In brief, whether a decision is important or not for the evolution of interpretive formulas is to be decided in the light of the role an interpretive formula plays in this decision; 'importance' is an output of the investigation this book undertakes, rather than an input to it.

2 Robin C. A. White, *EC Social Security Law* (Harlow: Longman, 1999); Frans Pennings, *European Social Security Law* (Antwerpen: Intersentia, 2010); Eberhard Eichenhofer, *Sozialrecht der Europäischen Union*, 5. ed. (Berlin: Schmidt, 2013).

3 Bettina Kahil-Wolff and Pierre-Yves Greber, *Sécurité sociale: aspects de droit national, international et européen* (Basel: Helbing, 2006).

4 Yves Jorens and Bernd Schulte (eds), *European Social Security Law and Third Country Nationals* (Bruxelles: La Charte, 1998).

5 Vicki Paskalia, 'Co-ordination of Social Security in the European Union: An Overview of Recent Case Law', 46 *Common Market Law Review* (4) (2009), pp. 1177-1218.

6 One early exception was R. Lecourt, *L'Europe des Juges* (Brussels: Bruylant, 1976); later on, Robin C. A. White, *Workers, Establishment, and Services in the European Union* (Oxford: Oxford University Press, 2004); and Robin C. A. White, 'Social Solidarity and Social Security', in Anthony Arnull, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States?* (Oxford: Hart, 2011), pp. 301-319, are to be noted.

7 Take the edited volume Henry G. Schermers, Cees Flinterman, Alfred E. Kellermann, Johan C. von Haersolte and Gert-Wim A. van de Meent (eds), *Free Movement of Persons in Europe* (Dordrecht: Ni-

contrast to social security, scholarship has very actively engaged with those freedoms and dealt extensively with them.[8] Union citizenship has drawn most of the attention in recent years.[9] There is thus a gap in scholarship between social security and the market freedoms. This book bridges this gap and for the first time

jhoff, 1993), as an example. Joseph Weiler's well-known article "Thou Shalt Not Oppress A Stranger (Ex. 23 : 9): On the Judicial Protection of the Human Rights of Non-EC Nationals" (pp. 248-271) is in it. It is often quoted. The volume does not contain a section on the coordination of social security, although the Court by the time the book was published had handed down more than 200 judgments on social security, while hardly half as many on the free movement of workers. A more recent example is Anne Pieter Van der Mei, *Free Movement of Persons Within the European Community – Cross-border Access to Public Benefits* (Oxford: Hart, 2003). Despite the impression created by the title, the book only briefly deals with social security. Anthony Arnull, *The European Union and its Court of Justice* (Oxford: OUP, 2006), strongly relies on free movement of workers, establishment, services, and citizens, but does not address social security. Further back, the 'Integration Through Law'-series contained a section about migrant workers, but the author of the section notes: 'In part my purpose is to avoid repeating a story that is now very familiar and, especially with regard to social security, [footnote omitted] full of technical details that would overwhelm a comparative discussion.' (Bryan G. Garth, 'Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State', in Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law: Europe and the American Federal Experience*, vol. 3 (Berlin: De Gruyter, 1985), pp. 85-163, p. 98.).

8 Nicola Rogers and Rick Scannell, *Free Movement of Persons in the Enlarged European Union* (London: Sweet & Maxwell, 2005); Andrea Biondi, 'Recurring Cycles in the Internal Market: Some Reflections on the Free Movement of Services', in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law* (Oxford: OUP, 2006), pp. 228-259; Friedl Weiss and Frank Wooldridge, *Free Movement of Persons within the European Community*, 2. ed. (Kluwer: Alphenn aan den Rijn, 2007); Eleanor Spaventa, *Free Movement of Persons in the European Union – Barriers to Movement in their Constitutional Context* (Kluwer: Alphenn aan den Rijn, 2007); Alina Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?', 46 *Common Market Law Review* (5) (2009), pp. 1591-1620; Siofra O'Leary, 'Free Movement of Persons and Services', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 2nd. ed. (Oxford: Oxford University Press, 2011), pp. 499-545. Much work has also been invested in non-discrimination: Astrid Epiney, *Umgekehrte Diskriminierungen* (Köln: Heymanns, 1995); Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerpen: Intersentia, 2005).

9 The earliest item on this topic (the market citizen) was Hans Peter Ipsen and Gert Nicolaysen, 'Haager Kongress für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts', 17 *Neue Juristische Wochenschrift* (8) (1964), pp. 339-344. Newer pieces include Michelle Everson, 'The Legacy of the Market Citizen', in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Oxford: Clarendon, 1995), pp. 73-90; Joseph Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), in particular pp. 324-357; Dominik Hanf, 'Le développement de la citoyenneté de l'Union européenne', in Dominik Hanf and Rodolphe Muñoz (eds), *La libre circulation des personnes – Etats des lieux et perspectives* (Brussels: Peter Lang, 2007), pp. 15-28; Ferdinand Wollenschläger, *Grundfreiheit ohne Markt* (Tübingen: Mohr Siebeck, 2007); Helmut Philipp Aust, 'Von Unionsbürgern und anderen Wählern – Der Europäische Gerichtshof und das Wahlrecht zum Europäischen Parlament', 11 *Zeitschrift für europarechtliche Studien* (2) (2008), pp. 221-242; Jo Shaw, 'A View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union', in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart, 2010), pp. 356-362; Ulrich Hufeld, 'Vom Wesen der Verfassung Europas – die Freiheit der Unionsbürger als europäisches Legitimationsfundament', *59 Jahrbuch des öffentlichen Rechts der Gegenwart* (2011), pp. 457-475; Jürgen Habermas, 'Bringing the Integration of Citizens into Line with the Integration of States', 18 *European Law Journal* (4) (2012), pp. 485-488; Christian Calliess, 'The Dynamics of European Citizenship: From Bourgeois to Citoyen', in ECJ (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (The Hague: Asser, 2013), pp. 425-441; Daniel Thym, 'Toward 'Real' Citizenship? The Judicial Construction of Union Citizenship and Its Limits', in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges* (Oxford: Hart, 2013), pp. 155-174.

builds an argument on the basis of the whole case-law concerning natural persons in the internal market.

The study also seeks to contribute to the understanding of the Court and its decisions. The Court's methods of interpretation have been studied and debated intensely.[10] Its activism and its political nature have stirred controversy at the latest since Rasmussen's *On Law and Policy*.[11] The way the Court's decisions and its approach to interpretation have changed from the beginning up to the present is well established.[12] The nature of the Court's decisions, including whether they create precedent,[13] and the nature of the Court itself are well understood by now.[14] This book adds to this scholarship. It is a deep study of in-

10 The early authorities in this regard are Roger-Michel Chevalier, 'Methods and Reasoning of the European Court in Its Interpretations of Community Law', 2 *Common Market Law Review* (1964), pp. 21-35; C. J. Mann, *The Function of Judicial Decision in European Economic Integration* (The Hague: Nijhoff, 1972); and Hans Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice', in European Court of Justice (ed.), *Judicial and Academic Conference* (Luxembourg, 1976), pp. I-1-51. Later came Anna Bredimas, *Methods of Interpretation and Community Law* (Amsterdam: North Holland, 1978); Richard Plender, 'The Interpretation of Community Acts by Reference to the Intentions of the Authors', 2 *Yearbook of European Law* (1982), pp. 57-105; J. Mertens de Wilmar, 'Reflexions sur les méthodes d'interprétation de la Cour de Justice des Communautés Européennes', 22 *Cahiers du Droit Européen* (1) (1986), pp. 5-20; Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Clarendon, 1993).

11 Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986); followed in particular by Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon, 1989). The discussion is not over: Lüder Gerken, Volker Rieble, Günter H. Roth, Torsten Stein and Rudolf Streinz, *"Mangold" als ausbrechender Rechtsakt* (München: Sellier, 2009); Andreas Grimmel, 'Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice', 18 *European Law Journal* (4) (2012), pp. 518-535; Ulrich Haltern and Andreas Bergmann (eds), *Der EuGH in der Kritik* (Tübingen: Mohr Siebeck, 2012); Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar, 2013). For a broader perspective: Antoine Vauchez, 'The transnational politics of judicialization. Van Gend en Loos and the making of EU polity', 16 *European Law Journal* (1) (2010), pp. 1-28.

12 The historical groundwork was done by Jack Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Press, 1968), though not specifically with regard to the Court; later on came Michel Waelbroeck, 'Le Rôle de la Cour de justice dans la mise en oeuvre du Traité CEE', 18 *Cahiers du Droit Européen* (4) (1982), pp. 347-380. With a broader approach: Joseph H. H. Weiler, 'The Transformation of Europe', 100 *The Yale Law Journal* (1990-1991) (1991), pp. 2403-2484; also more recently, Francis Snyder, *New Directions in European Community Law* (London: Weidenfeld, 1990); Neville March Hunnings, *The European Courts* (London: Cartermill, 1996); Miguel Poiares Maduro, *We, the Court* (Oxford: Hart, 1998); Gráinne de Búrca and Joseph Weiler (eds), *The European Court of Justice* (Oxford: Oxford University Press, 2001); Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2012); Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Groningen: Europa Law Publishing, 2013); or from a comparative perspective, Mitchel de S.-O.-L.'E. Lasser, *Judicial Deliberations – A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2009). For a history in broad strokes consider Waltraud Hakenberg, 'Der Europäische Gerichtshof – 59 Jahre Gestaltung von Europa durch Recht', in Werner Meng, Georg Ress and Torsten Stein (eds), *Europäische Integration und Globalisierung* (Baden-Baden: Nomos, 2011), pp. 233-247.

13 The authority in this regard is John J. Barceló, 'Precedent in European Community Law', in Neil Maccormick and Robert Summers (eds), *Interpreting Precedents – A Comparative Study* (Aldershot: Dartmouth, 1997), pp. 407-422. More recently: Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart, 2013).

14 Alec Stone Sweet, *Governing with Judges – Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); Alec Stone Sweet, 'The European Court of Justice', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 2nd ed. (Oxford: Oxford University Press, 2011), pp. 121-153; Ninon Colneric, 'Entwicklungslinien in der Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften zum Status von Ausländern', in Klaus Barwig, Stephan Beichel-Benedetti and

terpretation in a specific, though large, body of case-law. It thereby tries to make up for the deficiencies of previous methodological works, which were typically over-arching, focussing on what they identified as the 'most important' cases in the entire case-law. Those studies could therefore only reach very broad conclusions, such as that the Court relies on *effet utile*, uses the four or five traditional methods of interpretation, or applies other interpretive approaches such as *lex specialis* or *e contrario* arguments. In contrast, this book pinpoints certain interpretive formulas in the case-law, traces them through the entire story of the case-law under scrutiny, and assesses their power. These interpretive formulas have so far not received sufficient attention.

VI An illustration of how this book is different from other works

As an illustration of the usefulness and novelty of this book, let us consider four examples of scholarship discussing broad and restrictive interpretation, an interpretation that is, among other interpretations, dealt with in the part of this book on 'the evolution of interpretive formulas'. A classic passage in Hans Kutscher's influential contribution of 1976 notes: The 'Community Treaties, as the constitution of the Community, are to be interpreted broadly rather than restrictively, according to the methods of interpretation applicable to constitutional jurisdiction, and thus like national constitutional law'[15]. It continues: 'The exception which the Treaty makes to the basic rules of equality of treatment, freedom of movement and freedom to provide services have been consistently given a narrow interpretation by the Court' (p. I-37), citing as examples *Van Duyn*, *1974*, and *Rutili*, *1975*.[16] A passage from a book of 1978 by another prominent author, Anna Bredimas, reads: '[T]he Court has adopted the principle that exceptions to general Community rules and derogations to Treaty obligations must be restrictively interpreted. This is the case where a narrow construction has been applied in order to promote the purposes of the Treaty and reinforce Community efficacy. Its application is so consistent that the case law bristles with examples of it.'[17] This statement is supported with passages from seven judgments stemming from the whole spectrum of the Court's case-law. In 1993, a third leading author, Joxerramon Bengoetxea, in his book quotes the above passage

Gisbert Brinkmann (eds), *Perspektivwechsel im Ausländerrecht* (Baden-Baden: Nomos, 2007), pp. 49-60, in particular p. 60. On the way scholarship has changed: Anthony Arnull, 'The Americanization of EU Law Scholarship', in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law* (Oxford: OUP, 2006), pp. 415-431; and more broadly on judges: Daniel Thürer, 'Die Worte des Richters – Gedanken rund um die Verfassungsgerichtsbarkeit', in Stefan Hammer, Alexander Somek, Manfred Stelzer and Barbara Weichselbaum (eds), *Demokratie und sozialer Rechtsstaat in Europa – Festschrift für Theo Öhlinger* (Wien: WUV, 2004), pp. 272-297.

15 Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice', p. I-31.

16 That Kutscher does not cite any services cases to support this statement is not surprising given that the three cases with a services dimension which had been decided up to that point – *Sacchi*, *1974*; *Van Binsbergen*, *1974*; and *Coenen*, *1975* – did not contain any evident passage to that effect.

17 Anna Bredimas, *Methods of Interpretation and Community Law*, p. 109-110 (footnote omitted).

on the broad interpretation of the constitutional treaties by Kutscher and adds a 'corollary criterion, i. e. that exceptions to fundamental Community principles are to be narrowly interpreted (see, in general, jurisprudence on article 36)'[18]. Later in his book he identifies 'the directive that „exceptions to fundamental rules (principles) found in the Treaties are to be interpreted strictly"' (p. 246) as a conceptual argument, a systemic criterion. Finally, in a most recent book of 2012, Gunnar Beck examines 'topoi' of interpretation and states as to the restrictive interpretation mentioned in the above passages: 'The principle of the restrictive interpretation of derogations, exceptions, exemptions and exclusions has been well established since the 1970s.'[19] He cites *Commission v. France (maritime worker quota), 1974* as proof and goes on: '[…] [T]he distinction between a broad and a restrictive interpretation, the former designed to give maximum effect to general principles and fundamental rights and the latter ensuring that legitimate national policy prerogatives cannot be used to avoid treaty obligations, is somewhat artificial, not always easy to apply in practice, and in reality the judicial interpretation of a principle or right is determined by a congery of factors which include the area of law concerned as well 'extra-legal' motivational factors' (p. 204).

These are passages from four of the most authoritative works on the Court's methods of interpretation. The above statements are basically all these works say about the notion that some terms are subject to broad while others to restrictive interpretation (while they, of course, say much more than this book about other aspects of interpretation). These statements all suffer from three deficiencies which this book attempts to remedy. (i) They all rely on a selective, anecdoctal range of cases, namely one, two, seven or an undefined range of cases. In contrast, the evidence this book relies on is comprehensive. *All* occurrences of the idea, which is mentioned in the above statements, in the body of case-law identified in the first part are documented. The conclusions this book is able to draw are thus firm and reliable. The conclusions of this book rely on evidence, not eminence. (ii) The ambition of all of the above statements is strong. They all extrapolate and claim to apply to the entire case-law of the Court. In contrast, this book is more modest. It does not work with inference. Its conclusions only relate to a clearly identified body of case-law, the case-law on free movement of persons and services. (iii) The content of the above statements is weak. They only say that interpretation is consistently narrow, that a principle is consistently applied, that there is a directive to interpret exceptions strictly, or that this directive is somewhat artifical, not always easy to apply, and subject to influence by extra-legal factors (see the above statements). In contrast, this book attempts to come to firmer conclusions with regard to such 'directives'. Its thick description offers more context and allows the reader to identify the circumstances in which the 'directives' are deployed. This book is thus not satisfied with plain conclu-

18 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice*, p. 233.
19 Beck, *The Legal Reasoning of the Court of Justice of the EU*, p. 204 (italics removed).

sions such as that a specific interpretation is not easy to apply in practice and subject to extra-legal factors. Rather, it combines methods and substantive law to reach more solid conclusions.

What distinguishes this book most clearly from the above works, though, is an element that seems to be foreign to those works, partly because of the three points identified above, namely that the broad/restrictive interpretation they identify might constitute an interpretive *formula*, a formula that evolves over the years, one that exercises a certain function within decisions and exerts a certain power – ‚spin' – that is of interest. It is in these regards that this book breaks fresh academic ground. This, in turn, again generates practical value. The book enables practitioners representing natural persons in the internal market to predict more accurately whether certain notions in persons and services will be interpreted broadly or restrictively by the courts, to name just one formula examined in this book. Thus, ideally, the book, owing to its depth, should allow lawyers to strengthen their cases and bind the Court to its own logic. Underlying the approach of this book is obviously the belief that it matters what the Court writes in its decisions. The idea that the grounds of a judgment constitute merely *ex post* justification for majoritarianism or for other unmentioned 'exogenous' factors is too simple. Moreover, a Court that speaks to several hundreds of millions of people does not mention passages, formulas, and even single words by accident. Formulas do not just slip in. We have to take every word the Court writes seriously.

VII What this book is not

Why is there so little discussion of academic writings in this book, in particular in the part on 'the case-law'? Why are there not more footnotes quoting scholarship to underpin a statement made in the text? The terseness in terms of footnotes and quoting is owed to the rigorously scientific approach applied in this book.[20] The body investigated is not academia's publications, but a certain, clearly delineated body of case-law established by the Court of Justice – see the description above. This large body of case-law is the data the book uses and relies on. Consequently, this book can only make reliable statements with regard to this case-law, and not with regard to academic writings. A full investigation of academic writings – and in order to live up to scientific rigour it would necessarily have to be full – would be a different project, one that would for instance investigate the evolution of interpretive formulas or their reception in academic writing. Hence, this book uses academic writings for one purpose only, namely

20 Note also that in-text citations rather than footnotes are used for references to case-law.

to show that the study it undertakes has not been done before and to justify why it should be done. This is done above.[21]

21 When a legislative act is mentioned in this book the publication in the Official Journal is not cited. Citing the details of legislative acts would have overburdened the text. Some acts, like Regulation 1408/71, were changed repeatedly. Hence, the official publication would have to be cited over and over again, in particular when during one and the same year one version was applicable in one judgment, while another was applicable in another judgment. The version relevant in a specific judgment can easily be found out by looking up the case in the official database and verifying it in the text of the judgment. It is usually mentioned right at the beginning of the judgment.

B The case-law

This first part of the book is about the case-law only. It contains a thick, roughly chronological description of the case-law in free movement of persons and services. The second part on 'the evolution of interpretive formulas' then traces how certain interpretive formulas have developed in this body of case-law.

I The 1960s

The famous *Van Gend en Loos, 1963* and *Costa v. ENEL, 1964* overshadowed everything the Court delivered up to the 1970s. However, in the shadow of direct effect and primacy other less obvious developments took place. *Costa v. ENEL, 1964* did not just establish the primacy of Community law, but also instilled article 53 Treaty with direct effect, thus precluding a member state from adopting new measures hindering predominantly the establishment of nationals of other member states (p. 596). In 1969, the Court handed down the first judgment in free movement of workers, *Ugliola, 1969*. In that judgment the Court found that the time period completed in the military service of one member state had to be taken into account on an equal basis in another member state when seniority in an undertaking was determined (paras 6 and 7).

By the time the Court had handed down these two judgments, however, it had already decided more than twenty cases in social security. This social security case-law had begun with *Hoekstra, 1964* in which the Court gave the concept of a worker within the sense of both Regulation 3 concerning social security of migrant workers, i. e. a wage-earner or an assimilated worker, and articles 48 and 51 of the Treaty a Community meaning. It thus removed the term 'worker' from the grasp of the member states. The term 'worker' covered persons who were subject to social security under the various national systems. More specifically, a 'worker' was a person who had been employed and could be employed again and was subject to voluntary continued insurance for workers, regardless of any temporary residence abroad. In the second judgment in social security, *Nonnenmacher, 1964*, the ECJ ruled that the principle that the law of the state of employment was mandatorily applicable pursuant to article 12 Regulation no. 3 did not preclude the state of residence from applying its own law simultaneously, when it afforded additional protection to the migrant worker (para. 1b). The next case was *Kalsbeek, 1964*. In this case the Court first clarified that 'legislation' under Regulation 3 included present and future legislation; the Regulation was applicable regardless of whether a member state had notified the amendment of an act. The Court then dealt for the first time with the aggregation of insurance periods. It decided that the apportionment in article 28(1)(b) Regulation 3 need not have been applied if periods had not previously been aggregated pursuant to article 27 in order to acquire, retain or recover a right to benefits,