D Conclusion

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

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

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

I Spin and emptiness

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

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

in each specific decision of the Court. What is meant by 'spin' is best understood by reading a concrete judgment where spin is evident, e. g. *Burchell, 1987* for 'coordinated' or *D'Hoop, 2002* for the 'fundamental status'. 'Spin' is certainly gradual. All three of the interpretive formulas examined sometimes spin decisions, while at other times they fail to do so. Unsurprisingly for case-lawyers, no clear observable overall pattern emerges of when they do and when they do not. It is all the more important to know the specific cases of spin by interpretive formulas, for it improves distinguishing.

'Spin' is more complex though. In the late 1980s, the phenomenon of 'empty spin' emerged with all three interpretive formulas. 'Empty spin' occurs when an interpretive formula is applied in a decision – e. g. that nationals of the member states are to enjoy the greatest possible freedom, that national social security systems are merely coordinated, or that the status of Union citizenship is fundamental. This raises certain expectations of the outcome of the decision. The expectations are then immediately frustrated, because the decision goes against the grain of the formula – the other way round so to speak. Again, 'empty spin' is best understood by reading decisions in which it occurred, such as *De Jong, 1986*, the first case where the 'greatest possible freedom' spun empty, *Pinna, 1986*, the first case of 'empty spin' concerning 'coordinated', or *Schempp, 2005*, the first 'fundamental status' case with an element of 'empty spin'. Clearly, cases of 'empty spin' are important, for they put into perspective the powers of interpretive formulas.

There is more to 'empty spin', though. It is also a sign of a broader evolution in the Court's drafting of decisions. Another such sign is the emergence of advance statements of case-law in the early 2000s, with the first case being *Kurz, 2002*. Advance statements of case-law occur with all three interpretive formulas. The Court puts the formula ahead of the actual reasoning on the merits of the case, normally together with other case-law, not unlike it does with statutory law which it often cites before addressing the merits of the case. Obviously, when an interpretive formula is part of an advance statement, spin is obfuscated, the power of the interpretive formula is diminished.

The emergence of 'empty spin' and advance statements of case-law can be seen in two perspectives. One portrays the Court in a favourable, the other in a less favourable light. The first sees the occurrence of advance statements of case-law as being partly due to the growing complexity and density of the case-law. Frequently, the case-law needs to be cited – the cases and the relevant rulings listed – before that case-law can be applied to the facts. Given the complexity of the case-law, a more integrated approach would risk rendering decisions incomprehensible. 'Empty spin' is seen in this perspective as a sign of transparency. A formula is not just cited when needed to steer a decision in a specific direction, but also when the Court decides against what the formula implies. The emergence of 'empty spin' and advance statements of case-law are thus part of an evolution towards more clarity and perhaps honesty in case-law. In the second perspective the feeling dominates that the advent of 'empty spin' and advance

statements of case-law signal a step towards formulaic, boilerplate text. Since, say, a decade, it seems that standardized pieces of text are fed into decisions whenever they fit – often just approximately. Pursuing other goals, this book obviously does not provide compelling proof of the verity of that second perspective. It can only be stated that the way the three interpretive formulas evolved in the last ten to twenty years reveals clear marks of boilerplate statements. Sometimes the use of standardized formulas seems unreflected in the light of the thrust and the outcome of the decision concerned. The feeling is hard to dispel that we have already moved quite deeply into legal automation.

II Breadth

In the free movement of persons and services the Court interprets certain notions broadly, while others restrictively. It also applies certain inherently expansive concepts. This is the story of the first interpretive formula which is narrated in this book. In truth we are looking at a set of interpretive formulas, encompassing in a first branch, *inter alia*, the early broad notion of 'worker', the later 'very broad' notion of establishment, and a broad notion of free movement in general; in a second branch narrow exceptions from rules; and in a third branch the apogee of broad interpretation, the 'greatest possible freedom'. These three branches can be clearly distinguished, but sometimes they 'touch' each other in a specific decision. Only the 'greatest possible freedom' has been confined to social security decisions, at least until very recently.

While the occurrences and the development of formulas of broad interpretation through the three branches and the impact they have can be read up in detail in the second part of this book – especially the crystal clear 'spin' and power of 'the greatest possible freedom' in a series of cases – a more general pattern of evolution in the case-law deserves mention. Early on, the Court of Justice posited a broad notion of 'worker' backed up soon by a restrictive reading of derogations from the free movement of workers. 'Worker' broadly understood subsequently evolved into a broad understanding of the free movement of workers more generally, an evolution that was largely complete by the time the Maastricht treaty came around. This might not be terribly surprising and may all be well known (though solid evidence for well-known facts is, of course, still scientifically valuable). Yet what is interesting is that this evolution was eventually mirrored for the freedom of services, once the services case-law took off. The evolution went from restrictive exceptions to the freedom of services over the broadly interpreted scope of the freedom to broadly construed provisions enshrining the free movement of services in general. In addition, a similar evolution can later be witnessed for Union citizenship. The Court began with some broad language both for workers and *citizens*, underpinned by a particularly restrictive interpretation of derogations from the freedom of *workers*, given *Union citizen-*