

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; *Simutenkova*, 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 parlance, ‘spin’ occurs when one reads a judgment, arrives at an interpretive formula which raises a certain expectation of