



EUROPEAN UNIVERSITY INSTITUTE
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**European Institutionalisation of Social Security Rights:
A Two-layered Process of Integration**

By

Dorte Sindbjerg Martinsen

Thesis submitted for assessment with
A view to obtaining the Degree of Doctor of the
European University Institute

Florence, February, 2004

B/C →



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Examining jury:

- Prof. Martin Rhodes (EUI) (supervisor)
- Prof. Gráinne de Búrca (EUI) (co-supervisor)
- Prof. Maurizio Ferrera (Università degli Studi di Milano)
- Prof. Jo Shaw (University of Manchester)

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Abstract

Within the study of European integration, the questions of the existence of 'social Europe' and the possible impact of European integration on national welfare policies continue to be most disputed. The present study aims to contribute to this scholarly discussion, questioning to what extent the European Union has institutionalised social security rights, how, and with what impact on national welfare policies. Whereas existing research either tends to investigate a process of European integration in its own right or focuses on the impact of European integration, this study employs a two-step research agenda. It attempts to bridge two layers of institutionalisation by, first, analysing the gradual development of Community Regulation 1408/71, which entitles the migrant worker/person to equal and exportable social security rights within the European Union, and, subsequently, by examining how that specific integration process has impacted on Danish and German social security policies and the organising principles behind them. In order to examine the two separate – and intertwined – layers of institutionalisation, a diachronic, process-tracing study is carried out on the basis of the argument that the effective reach, meaning and impact of Community law and policy unfolds gradually over time and through subtle steps at two levels of decision-making. The analysis brings into focus institutionalisation through the interaction of law and politics. The European Court of Justice has continuously interpreted the scope and content of the Regulation, and has appeared to act when politics has been absent. Judicial activism, furthering cross-border social security, has been seconded by the European Commission's persistent attempts to set the agenda. However, the research also finds that institutionalisation has not been progressively driven towards 'more Europe', but that politics at times responds, either through collective reactions or through the subsequent national implementation of supranational decision-making. The research findings, however, also suggest that such political response may not be the last word, since the Court, on request, may reinterpret matters.

On the basis of the analysis of institutionalisation between an extensive T_0 and T_2 , the study concludes that over time the European Union has established a social security dimension, which increasingly has impacted on and restructured the organising principles of national welfare policies, however, not in a systematic, immediate or converging way.

Keywords: European integration; Welfare Policies; Regulation 1408/71; Intra-European social security; Institutionalisation through the interaction of law and politics; Domestic impact.

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As if trying to add personal experience to the research puzzle of my thesis, researching and writing this thesis has implied several cross border movements within the European Union. I thus believe I have come to know many of the extra-legal barriers there are to intra-European mobility, how complex it is to move between different systems, social codes and languages, but also how much it may add when becoming an European migrant. During the course of my writing, I have had five European domiciles: Italy, Denmark, Germany, Spain and not least Menorca. For me, these places particularly represent the persons to whom I am most indebted.

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Per n'Otto i en Biel

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Chapter I: Introduction

To what extent has the European Union¹ institutionalised social security rights, how and with what impact on national welfare policies? This research question addressing *to what extent, how and with what impact* is the main focus and puzzle of this thesis. The study analyses the European integration² of welfare policies as a result of the free movement of workers and later persons. It thus aims to add to the scholarly discussion on the extent to which and how a 'social Europe' has been established, and what the consequences are for national institutions. Specifically, the study examines how intra-European social security rights have been established for the European migrant³ over time and how this has affected the national welfare institutions in place. Following a two-step research agenda, the study aims to go beyond existing research, which either tends to investigate the process of European integration in its own right, or focuses more or less exclusively on its impact. A two-step research strategy has been chosen on the basis of the argument that the effective reach, meaning and impact of Community law and policy can only be assessed when analysing how supranational decision-making is subsequently implemented into nationally enforceable rights or obligations. This thesis argues that in order to capture the dynamics and impact of a given integration process, we need to examine the process as two-layered and unfolding over time,

¹ The term 'European' refers to the geographical scope of the European Community and later the European Union. By the Maastricht Treaty of November 1993, the European Community (EC) became the European Union (EU). In general, I will refer to the EU in this thesis, except when giving historical references.

² As noted by Kelstrup, 'integration' is a static as well as a dynamic concept for the degree of coherence: "In general, *integration* is seen as denoting either the degree of coherence in a system or a process which increases the degree of coherence in a system" (Kelstrup 1998, p. 18).

³ The concept 'migrant' refers to both the 'immigrant' and the 'emigrant'. The concepts 'migrant' and 'migration' are used to describe intra-European circulation, rather than a defined movement 'to' or 'from' one specific country, as 'immigration' and 'emigration' do.

analysing the subtle steps of and feedbacks between supranational integration and national response in terms of subsequent implementation.

The focus throughout the thesis is on the concrete institution of *Community Regulation 1408/71*⁴, its creation, institutionalisation and impact. Institutionalisation⁵ is defined as the process by which rules (institutions)⁶ are created, applied and interpreted (Stone Sweet & Sandholtz 1998, p. 16). By studying institutionalisation as a two-layered process, the thesis analyses in detail the meeting between supranational obligations and national institutions in place in the case of social security. The study concludes that while the European Union has established a social security dimension over time, which has increasingly impacted on and restructured the organising principles of the member welfare state, it has not, however, done so in a systematic, immediate or converging way.

1.1: Transnational Social Security in the European Union

Since the foundation of the European Economic Community, the free movement of labour has been one of the Community's cornerstones (Cornelissen 1997, p. 29; Pennings 1998, p. 3). In order to realise the Community objective of free movement of workers as well as its subsequent extension to other persons, Regulation 1408/71 has for decades coordinated EU migrants' social security rights across member states' borders.⁷ The framework coordinating social security rights is based on the assumption that in order to stimulate intra-Community migration, it is necessary to abolish national barriers to movement. Such a barrier might be the loss or risk of losing social security entitlements.

⁴ Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; as amended by Regulation (EC) 118/97 of the Council of 2.12.1996 (OJ L 28 of 30.01.1997).

⁵ 'European integration' and 'European institutionalisation' essentially refer to the same process, except that the latter focus on the institutional process of change.

⁶ Institutions are in this thesis defined as 'formal rules'. Different theoretical definitions of institutions will be discussed in more detail in chapter II section 2.2. As an introductory note, it shall here be emphasised that the thesis employs a definition of institution different from how the concept of institution is normally used within the discipline of law. Whereas 'institutions' in political science may range from organisations, rules to norms, 'institutions' in law generally refer to 'organisations' or 'bodies', as for example the European Commission as an European institution. For theoretical purposes, this thesis defines Regulation 1408/71 as an 'institution', whereas European bodies such as the Commission and the European Court of Justice are defined as 'supranational organisations'.

⁷ Since the coming into effect of the Agreement on the European Economic Area (EEA) on the 1st of January 1994, Regulation 1408/71 also applies to the nationals from Norway, Iceland and Liechtenstein. This means that the rights and obligations entailed in the Regulation apply to 18 states. This thesis will, however, not distinguish between EU and EEA nationals, but simply refer to the rights of EU or European citizens.

which would make the Community worker reluctant or unwilling to take up work outside his own member state (Flynn 1997, p. 18). Against this background, the Regulation prescribes that migrant workers/persons in the Community have *equal* social security rights when settling in another member state, as the nationals of that state, and migrants have a right to *export* their social security entitlements when deciding to reside in another member state. The aim of the Regulation is to spur intra-European migration, which according to the Commission serves as a means to labour market flexibility, again assumed to create prosperity. The gradual development of intra-European social security rights has been explained as part of this larger chain of cause and effect, which makes up the ideational context of the Regulation.

Regulation 1408 prohibits national legislation that discriminates against citizens from other member states, as it partly prohibits territorial principles formulated in national social security legislation. The Community institution thus intervenes directly on two of the core principles and the historical reasoning of the welfare nation-state. From an organisational perspective, the decisions on access to and the territorial scope of welfare policies have traditionally been regarded as a national prerogative. Welfare policies have traditionally been organised through clear links between the state and the entitled persons, demarcating benefits to the national, the long-term resident or the insured person and confined within national borders. The organising principles of the policy domain have traditionally been *social citizenship* and *territoriality* (Marshall 1950; Altmaier 1995; Leibfried & Pierson 1995; Corneliissen 1997). The process of European integration has increasingly put these two main principles under adaptive pressure.

1.2: Research Puzzle

Studying European integration of welfare policies implies researching the puzzle arising from the contradictory meeting between mobility for the European migrant on the one hand and national welfare encapsulated within territorial borders on the other hand. That is, the meeting between the European *mobilisation* of production factors to create an internal market and the *immobility* that national welfare in its traditional construct represents. Historically, the construction of welfare has been closely linked to the formation and consolidation of the nation-state (Eichenhofer 1999; 2000; Ferrera 2003). The demarcation of the nation and the territorial borders of the state has traditionally defined social citizenship, i.e. who and where to be protected against social risks. In its gradual development, welfare came to constitute a decisive means of national integration, where material

rights and obligations linked the state and civil society together. European integration challenges the original national embeddedness of welfare.

The existence and reach of 'social Europe' has long been debated.⁸ Formally regarded, the organisation of welfare continues to be a national prerogative, and 'social Europe' has been laid down as "the road not taken" (Maydell 1999, p. 9; Scharpf 2002, p. 645).

"...the course of European integration from the 1950s onward has created a fundamental asymmetry between policies promoting market efficiencies and those promoting social protection and equality" (Scharpf 2002, p. 665).

From a formal point of view, member states possess social sovereignty. Despite a generally intensified process of European integration, social policies have appeared as a remaining stronghold of the sovereign nation-state against the influence of European law and policy – 'an island beyond its reach'⁹ (Eichenhofer 1999b, p. 102).

It has, however, also been pointed out that the market building process of the European Union entails social integration through the abolishment of national barriers to the internal market (Leibfried & Pierson 1995, p. 51). As part of a negative integration process, 'social integration' means constrained policy options for the national welfare state instead of a positive build-up of a European social polity (Leibfried & Pierson 1995, p. 65; Scharpf 2002, p. 666; Maduro 2000, p. 327).

This thesis examines an extract of 'social Europe', namely social integration of the traditional core of welfare: protection against social security risks. It does so by analysing the gradual development of Regulation 1408/71 and its implementation in Danish and German social security legislation. The research aims to assess 'to what extent' and 'how' an intra-European social security dimension has been built up as well as 'the impact' it has had on the national institutions in place.

⁸ See among others Abrahamson & Borchorst 1996; Amum 1999; Hantrais 1995; Goma 1996; Leibfried & Pierson 1992; 1996; Majone 1996; Montanari 1995; Nielsen & Szyssczak 1997; Rhodes 1995; 1997; Ross 1995; Scharpf 2002.

⁹ As formulated by Advocate General Tesauro in the cases C-120/95 *Decker* and C-158/96 *Kohll*, para 17. The case-law will be discussed in detail in chapter V and VII below.

The discipline of law has investigated the scope of European social security law in detail and described the legal dynamics which have extended rights across member state borders.¹⁰ Law studies have furthermore contributed with research on the effects of social security integration on organising principles or specific welfare policies.¹¹ Political science has supplemented these studies by more general conclusions on the consequences for the autonomy to define national welfare policies.¹²

The conglomerate of existing research tells us that Europe's social security dimension has mainly been the result of a Court driven process, which has had either considerable, some or hardly any impact on national welfare policies. Whereas existing work may depict the scope of intra-European social security protection, and thus provide descriptions of 'to what extent', we have no coherent study on the path dependent process, expanding supranational social security competencies. We still lack diachronic, process tracing studies able to link incidents over time and thus investigate 'to what extent' and 'how' in connection. If social integration has transformed welfare states from sovereign to semi-sovereign, as Leibfried and Pierson claim, how could such transformation take place despite the fact that welfare policies are national competencies (Leibfried & Pierson 1995)? We lack the analytical insight into how integration can expand and constrain national policy options, without any apparent political reaction. Why do member states allow a change of 'status' from sovereign to semi-sovereign entities? Such questions are left unanswered by existing research. In order to examine the puzzle of 'to what extent' and 'how' in relation, the present study will link decision-making, trace path dependency and analyse the dynamics of social security integration, by focusing on the acts and reactions of law and politics and by tracing the process as it has unfolded over time.

When turning specifically to 'with what impact', the puzzle is intensified by the fact that scholars disagree quite strongly on the effects of European coordination of social security rights. Leibfried, Pierson and Ferrera argue that social sovereignty has been compromised. Member states have lost the means of welfare policy control, including the ability to control who are to benefit from national

¹⁰ See among others Becker 1998; Bieback 1990; 1994; Christensen & Malmstedt 2000; Cornelissen 1997; Eichenhofer 1995; 2000; 2001; Haverkate & Huster 1999; Holloway 1981; Huster 1999; Igl 1998; Kötter 2000; Langer 1999; Malmstedt 2000; Maydell & Schulte 2001; Pennings 1998; Sakslin 2000; Sieveking 1997; 2000.

¹¹ See among others Altmaier 1995; Berg 1999; Cornelissen 1996; Ketscher 1998; 2002; Schulte 1998; Zuleeg 1998.

¹² See among others Abrahamson & Borchorst 2000; Conant 2001; 2001b; 2002; Ferrera 2003; Leibfried & Pierson 1995; 1996.

social security schemes and the spatial consumption thereof (Leibfried & Pierson 1995, p. 50; Ferrera 2003, p. 632). Furthermore, by constraining policy options, coordination may indirectly converge national policies:

“...coordination has become the catalyst for an incremental, right-based homogenisation of social policy” (Leibfried & Pierson 1995, p. 65).¹³

The work of Conant contrasts with these rather strong assessments of impact. Conant finds that at the same time as the European Court of Justice has attempted to blur national boundaries by constructing transnational social rights and obligations, member states have been successful in maintaining and reconstructing national borders through the means of law, politics and practices (Conant 2001b, p. 24). Whereas we may identify a cause, we will have to keep searching for its effects (Goetz 2001). Conant argues that member states are able to overturn or pre-empt the effects of unwelcome legal decisions (Conant 2001b; 2002). According to Conant, member states respond actively to social security integration and have various ways of minimising its general impact:

“The exclusion of many migrants from their legal entitlements to equal treatment reflects a significant discrepancy between what the ECJ justices and national officials consider to be appropriate practice. The ECJ created rights that national governments never intended to honor, and reactions of evasion, overrule and pre-emption prevail as a result” (Conant 2001b, p. 27).

Existing research thus offers conflicting interpretations on social security integration in the EU. The puzzle left to be resolved questions 1) to what extent and how transnational social security rights have been established within the European Union and 2) whether supranational institutionalisation has compromised welfare sovereignty, as argued by Leibfried, Pierson and Ferrera, or largely been impact neutral, as suggested by Conant.

The separate aspects of the research puzzle are, however, interlinked and related in cause and effect as well as by feedbacks. Examining ‘how’ requires an examination of ‘to what extent’. Questioning ‘with what impact’ necessarily requires a preceding analytical mapping of ‘to what extent’. Also here ‘how’ becomes the underlying puzzle. Only by studying both layers of the institutionalisation process, will its separate and interlinked dynamics stand out. By analytically laying down the scope

¹³ Leibfried and Pierson note that they deliberately do not speak about ‘supranationalisation’, nor ‘harmonisation’ but use the term ‘homogenisation’. According to them, effects such as supranationalisation or harmonisation would imply a stronger political centre than the current construct of the EU (Leibfried & Pierson 1995, p. 65).

of the cause, retaining it, and diachronically searching for its effect, impact may become identifiable. Only by tracing cause-effect relations over an extensive period of time will we be in an analytical position to decline or identify impact. By examining institutionalisation and its eventual effect as it evolves over decades, we should be able to assess both the hypothesis of semi-sovereign welfare states as well as the opposing one on impact neutral processes of European integration. In addition, by studying impact comparatively, variations in effects may be revealed although referring to the same cause. The following analysis will address the three questions contained in the research puzzle, by *first* discussing *theoretical approaches* on institutionalisation and impact, *then* analytically mapping the bits and pieces of *supranational institutionalisation* and *finally* investigating *impact* as it appears in relation to national institutions, as it differs between the Danish and German member states and as it manifests immediately or in the long run.

The following two sections will further detail research motivation and approach.

1.3: Research Motivation

The motivation for researching European institutionalisation of social security rights has in part been empirical and theoretical as well as disciplinary. The *empirical motivation* has been that the regulatory framework coordinating social security entitlements across member states' borders exemplifies an extraordinary piece of 'Europe' in the sense that it guarantees concrete rights to the migrant. Substantive rights which most likely would not have been established or extended without the regulatory framework of the European Union. At the same time, it interferes with the core functions of the nation-state and by challenging traditional organising principles ultimately questions social sovereignty. Its development has been highly sensitive politically, and from time to time the Regulation has been attributed a converging effect. The 'convergence hypothesis', however, remains an abstract proposition rooted in academic and political assumptions which has not been rigorously tested. From an empirical point of view, the field should be ripe for analysis. From a *theoretical* point of view, an analysis of Regulation 1408/71 allows us to apply, question and perhaps ultimately improve on some prevailing theoretical assumptions about institutional creation, institutionalisation and the domestic impact thereof. Finally, from a *disciplinary* point of view, research on the institution of 1408/71 has largely been left to the discipline of law despite the considerable impact on European and national politics that has been ascribed to the Regulation. A political science perspective on theories of integration combined with a detailed analysis of the

evolution of Community social security law and policy may highlight important aspects of institutionalisation between law and politics within the field of welfare.

Concerning the *empirical motivation*, the coordination system institutionalised by Regulation 1408 has been viewed as the most advanced social policy achievement of the EU, and as the most comprehensive system of access to cross-border health care in international social law (Eichenhofer 2001, p. 227; Palm et. al 2000, p. 28). Above all, the coordination system gives 'life' to Europe, by extending concrete rights beyond national borders, by solving very practical and material problems for the person crossing borders, and recently by adding flesh to the skeleton of European citizenship. For migrants exercising their right to cross-border movement, the Regulation is a concrete and substantive example of how the EU may add to their lives in practice. For the member states, the Regulation solves allocative questions concerning those who do not remain and those who enter established social communities. The Regulation weaves social responsibilities across borders, however, without imposing any redistributive instructions. In terms of substantive rights and in its practical effect, 1408 is an extraordinary regulatory instrument. Furthermore, its development concretely mirrors the move of the general integration process from economic community to European union. Researching its institutionalisation over time may therefore provide us with a particular depiction of a general development.

However, the success and practical effect of Regulation 1408 is likely to be acknowledged only by national administrations and by the relatively small number of EU workers and citizens who cross borders. As noted by Eichenhofer, despite its radical achievement, the social security dimension of the European Union has not received much recognition:

"[Regulation 1408] has been the most significant development so far in social policy at the European level. Its success has been remarkable, yet its implementation has been scarcely noticeable. For decades pensions have been exported, medical treatment has been available for tourists travelling between Member States, and pro-rata pensions have been payable to those who have spent their working lives in more than one Member State. Such benefits of EU social security co-ordination is today taken for granted" (Eichenhofer 2000b, p. 231).

While intra-European social security rights have been added with little attention being paid to them, the Regulation has been attributed with having had a significant impact on domestic welfare policies. For reasons which will be detailed in chapter VI and VII on domestic impact, the core rationales of the Regulation have thus been held to 'fit' the social insurance welfare model, and

equally 'misfit' the principles of the residence-based welfare model (Banke 1998, p. 30; Ketscher 1998, 2002; Abrahamson & Borchorst 2000).¹⁴ The assumptions hold that the Regulation does not impact uniformly, but foremost challenges universal, non-contributory social policy designs:

"Coordination requirements work best with individualized, earned social rights of the employed, and worst with collective provision of services to all citizens. Policymakers are thus encouraged to follow the program designs of Bismarck (benefits based on contribution) rather than Beveridge (universal, flat-rate benefits)." (Leibfried & Pierson 1995, p. 57).

Within Danish academia, it has been argued that free movement and Regulation 1408 favour an individualistic insurance principle to such an extent that it will gradually force the residence-based, non-contributory welfare state, i.e. the Danish welfare state, to converge with the dominating social insurance pattern of the EU member states (Ketscher 1998, p. 283; 2002, pp. 221-222; P1 Lige Lovligt, 26 November 2003).

The comparative research conducted in this thesis between Denmark and Germany originates in the motivation to examine whether empirical findings actually support the proposition that the coordination requirements foremost challenge the residence-based, non-contributory welfare state, and to examine whether an empirical analysis identifies an equally strong impact on the welfare institutions of Denmark.

The *theoretical motivation* for studying the European institutionalisation of social security rights has been to follow an institution through, thus analysing its rationale and its transformative capacity as established over time. The case of social security has deliberately been chosen as a research field, since it represents a case distinct from the core areas of economic integration. In part the choice of case has been strategically motivated from a theoretical perspective, since if integration and impact occur within the 'less likely' policy field of social security, it demonstrates that integration increasingly occurs and has effects and that control is increasingly escaping member states - also within policy fields at the margin of European integration.

¹⁴ The work of Risse, Cowles and Caporaso on "Europeanisation and Domestic Change", as well as the work of Börzel, suggest that the 'adaptational pressure' exerted by Europeanisation varies depending on the 'goodness of fit' between a specific European integration process and the national institutions in place (Risse, Cowles and Caporaso 2001; Börzel 1999; Börzel & Risse 2000). By identifying the degree of 'fit' or 'misfit' (compatibility/incompatibility), one identifies the degree of adaptational pressure on domestic institutions which may cause change.

Another part of the theoretical motivation has been to conduct an empirical analysis which confronts some frequently raised and essential theoretical questions in both institutional analysis and the study of European integration. The research question of this thesis can thus be 'translated' into a theoretical one, inquiring: *To what extent do institutions matter as inputs in the European integration process, how do they evolve and what impact do they have on established national institutions?* The case and the research question thus address three frequently asked theoretical questions within the study of institutions and European integration:

- How was the institution created?
- How has it subsequently been institutionalised?
- How have its creation and institutionalisation impacted on national institutions? I.e. how have supranational path dependencies impacted on national ones?

The theoretical chapter will address these questions in turn and so will the five analytical chapters, thus overall aiming to answer both the empirical and theoretical research motivation. Chapter II contains the theoretical discussion. Chapter III addresses the creation of the institution from an empirical point of view. Chapter IV and V examine the gradual supranational institutionalisation over time. Chapter VI and VII analyse the impact of institutionalisation on Danish and German welfare institutions.

Finally, the more *disciplinarily* oriented motivation increased gradually as insight was gained into the process of integration of social security. The insight early encouraged an inter-disciplinary study, which although initiated on the basis of political science, revealed impossible to conduct without the discipline of law. Despite the fact that the institutionalisation of intra-European social security has gradually removed the national barriers to welfare across borders and despite the fact that institutionalisation may challenge core organising principles of the welfare state, political science has largely left the study of the coordination system to law.¹⁵ Coordinating social security rights across the EU is indeed a very technical matter, where questions of accessing, accumulating and exporting rights across borders have been decided by national and European administrations as well as inside national and European courtrooms. By and large, integration has been legally driven to the fore. However, the motivation for studying a predominantly legal integration process from a

¹⁵ That of course does not account for such writers as Ferrera (2003), Leibfried & Pierson (1995; 1996) and Abrahamson & Borchorst (2000) among others.

political science perspective has been that the case powerfully demonstrates the relative autonomy of the European Court of Justice. Additionally, it demonstrates how political and judicial decision-making at times are interwoven so tightly that their separateness almost dissolves. Finally, the case exemplifies repeatedly how the spheres of law and politics reciprocally restrain one another and how implementation may – at least in the short term - constitute a second stronghold of national control. To answer “to what extent, how and with what impact” in fact requires the insights and tools of both disciplines.

1.4: Research Approach

The research question “*to what extent has the European Union institutionalised social security, how and with what impact on national welfare policies?*” requires a thorough analysis of Regulation 1408/71 and its development over time.

The question ‘*to what extent*’ addresses the development of the Regulation. The question implies a comparison over time. A process-tracing study will therefore be conducted, comparing the regulatory scope of 1408 at identifiable points of time. It will compare institutional innovation in T_0 with the regulatory framework before, the gradual development in T_1 mapping decisive incidents, and the output of recent negotiations on 1408 in T_2 will be compared with the established institutional path. The research strategy is diachronic, aiming to assess institutional dynamics as they unfold over time.

The question ‘*how*’ aims to investigate what has moved the institution of 1408 forward as well as what has restrained its integrative course at times. Investigating how the scope of the Regulation is laid down brings the supranational organisations of the *European Court of Justice* and the *Commission* into focus, as well as the *Council* representing the collective voice of the member states. Since unanimity has been maintained as the procedural rule for 1408/71, reforming the Regulation has at times been politically very difficult. At the same time that members of the Council have refuted or considered the Commission’s reform proposals, the European Court of Justice has taken a most active part in defining the scope and meaning of the Regulation as well as its Treaty base, thus defining Community competencies. Analysing the evolving scope of intra-European social security rights is inextricably bound with examining the actions and reactions of

Council, Commission and Court. From the fact that the political actors in long periods between T_0 and T_2 have been unable or unwilling to act, the European Court of Justice has at crucial moments played the lead, seconded by the Commission. In the following analysis, the capacity of the European Court of Justice and the Commission to extend the scope of a supranational institution and settle its effective meaning will be depicted. The reactions of the Council and individual member states will, however, demonstrate how supranational organisations do not unilaterally define the integrative steps. Politics may retort.

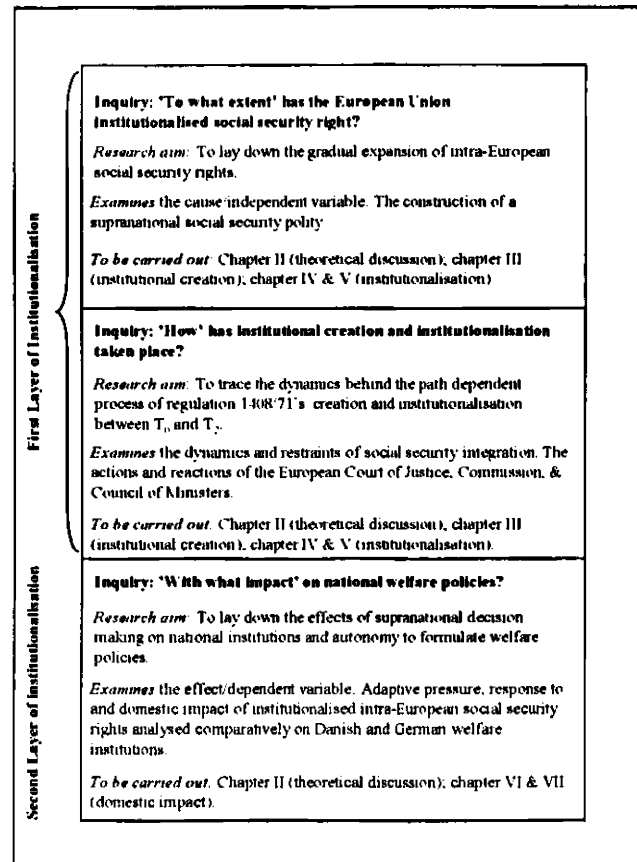
The question '*with what impact*' requires an examination of the effects that supranational decision-making has had on national institutions and on the national autonomy to formulate welfare policies. Although 'impact' may appear as a concrete concept, its operationalisation demonstrates that it contains many facets, and there is much disagreement as to whether impact takes place. First of all, the compatibility between national institutions and the obligations of European law and politics determines the degree of *adaptive pressure* that European integration exerts on national policies.¹⁶ If implementation of supranational decision-making occurs to the letter, adaptive pressure is equal to impact. However, adaptive response may not correspond to adaptive pressure. A national (re)interpretation of European obligations in relation to national institutions may reduce or increase actual impact. To the extent that this happens, the impact of the same decision-making is diversified across member states, not only due to varying adaptive pressure but also due to national responses. Furthermore, when discussing free movement of workers and later persons the notion of 'adaptive pressure' contains a de facto component. The factual adaptive pressure on national social security systems varies across member states depending on the extent of EU-related immigration into that country. Secondly, *perceptions of impact* may vary over time and be decisive for the member state's bargaining position in the Council. How the impact of the regulation is at first perceived may therefore hinder further integration, but perceptions may equally be dynamic thus allowing integrationist decision-making at a later stage. Perceptions of impact thus feed back into decision-making, which in the end determines the actual impact. Finally, the *actual impact* depends on the

¹⁶ The definition of 'adaptive pressure' contains both an institutional and a de facto component. From an institutional perspective, 'adaptive pressure' can be defined as being constituted by the degree of compatibility (the 'fit') between the principles and obligations of a given European integration process and those of national institutions (Risse, Cowles & Caporaso 2001, pp. 6-7). In the concrete case of the free movement of workers and, later, persons, 'adaptive pressure' likewise contains a de facto aspect. From a de facto perspective, 'adaptive pressure' arises from the actual EU-immigration into a member state and the extent to which such immigration challenges the organisation of national social security policies. 'Adaptive pressure' will be analysed in chapter VI and VII of this thesis. For more references at this stage, see footnote 14 above.

national response in terms of implementation. In the short/medium run, member states alone attend to implementation. In the longer run, their compliance with Community obligations is monitored by the Commission and the European Court of Justice. The actual impact of supranational political and judicial decision-making is studied through the process of national implementation. On the whole, researching the question 'with what impact' highlights the significance both of the time-variable and of variations across member states. In order to analyse the domestic impact, a diachronic and comparative analysis is carried out. Variations on the impact of Regulation 1408/71 over time are examined, and a comparative analysis of the effects of supranational decision-making between the member states of Denmark and Germany is carried out.

Figure 1 sums up the research question, puzzle and approach of the present study as detailed above.

Figure 1: Research Puzzle and Approach



1.5: Research Strategy

Analysing European institutionalisation of social security rights is done by means of a case study of Regulation 1408/71's creation, development and impact over time. The research strategy of the present study thus employs the case study method. Furthermore, the study of the question 'with what impact' uses the comparative method, examining the impact on the Danish and German welfare states respectively.

The general characteristic of a case study is that it deals with 'how' or 'why' questions (Yin 2003, pp. 6-7). Case studies are explanatory in character. By questioning 'how' or 'why', they reveal the links of an incident over time, its cause and effect or context, rather than consider frequencies or the incident in isolation. According to Yin, a case study is an empirical inquiry into a topic, which could be characterised as:

"The essence of a case-study, the central tendency among all types of case-study, is that it tries to illuminate a decision or set of decisions: why they were taken, how they were implemented, and with what result" (Schramm 1971, quoted in Yin 2003, p. 12).

Apart from their general characteristics, case studies are conducted for different purposes and thus make different contributions to theory. A case study can be conducted for purely atheoretical reasons and only serve a descriptive purpose. But case studies may also lead to theoretical refinement or even theory-building. To set out explicitly the theoretical purpose of the case study becomes an important part of the research strategy, since it details how the empirical work relates to theory.

I classify the present case study as 'disciplined-configurative' in character, but one adding a 'heuristic' research approach when analysing 'with what impact' (Verba 1967, pp. 114-115; Lijphart 1971; Eckstein 1975).¹⁷ In his landmark essay on the case study method and theory in political science, Ekstein described the disciplined-configurative case study as the study aiming to

¹⁷ The different case study categories are ideal types (Lijphart 1971, p. 691). Their application to empirical phenomena and existing theory reveals that the borders between them are blurred, for which reason a particular study may fit more than one category. The disciplined-configurative case study was originally recommended as a method by Verba (1967). Verba did not, however, limit the approach to the research on a single case, but found that it could also be employed in the comparative study (Verba 1967, p. 117).

explain on the basis of existing theories (Ekstein 1975, p. 99).¹⁸ In the disciplined-configurative case study type, the researcher recognises the availability and explanatory value of existing theories and thus structures her/his research strategy in accordance therewith. A case study of this type, however, need not be a passive application of existing theory, but may on the basis of its empirical findings bring into question some of those guiding theoretical propositions. Finding existing theory insufficient calls for alternative theoretical explanations. In this sense, applying existing theory to a concrete case is likely to have a feedback effect on such theorising, leading to its refinement. Therefore, a disciplined-configurative case-study may contribute to theorising.

The heuristic case study, on the other hand, inductively aims to find new variables or generate hypothesis in order to establish reasonable explanations on the basis of the empirical findings.¹⁹ Previous to the heuristic study, a disciplined-configurative case study may have taken place, concluding that existing theories cannot – fully or partly – be applied to the case at hand. A heuristic case study may then be carried out, deliberated from the binding element of a priori theoretical propositions.²⁰ Heuristic case studies “tie directly into theory building” and do so

“...less passively and fortuitously than does disciplined-configurative study, because the potentially generalizable relations do not just turn up but are deliberately sought out” (Ekstein 1975, p. 104).

In the present study, the disciplined-configurative case study has been combined with the heuristic one to frame and explain different stages of European institutionalisation of social security rights. The empirical research has been structured with the clear objective of addressing and perhaps providing new findings to three reposed theoretical questions within the institutional study and that on European integration: How was the institution created? How did it subsequently institutionalise? How has its creation and institutionalisation impacted on national institutions? Before the empirical

¹⁸ In his landmark essay, Ekstein operated with five types of case studies: 1) the configurative-idiographic study, 2) the disciplined-configurative study, 3) the heuristic case study, 4) plausibility probes, and 5) the crucial case study (Ekstein 1975, pp. 96-123). Lijphart termed the disciplined-configurative study as ‘interpretive’, but the category essentially accounts for the same (Lijphart 1971, p. 692). Lijphart classified six types of case studies: 1) the atheoretical case study, 2) the interpretive case study, 3) the hypothesis-generating case study, 4) the theory-confirming case study, 5) the theory-infirming case study, and 6) the deviant case study (Lijphart 1971, pp. 691-693).

¹⁹ Ekstein termed this case study type as ‘heuristic’, whereas Lijphart termed it as the ‘hypothesis-generating’ case study (Ekstein 1975, pp. 104-108; Lijphart 1971, p. 692). The two labels, however, account for the same relation between research strategy and theory-building.

²⁰ In the process of theory-building, the findings of one case-study may be tested in a subsequent one, thus applying a “building-block technique” (Ekstein 1975, p. 104). The findings of a disciplined-configurative case-study may through this technique be supplemented by a heuristic study.

research is conducted, chapter II of this thesis discusses how existing theories explain the facets of institutionalisation as contained in the questions. These theoretical propositions are finally tested against the findings of the case study. The theoretical aim is to question their explanatory value against the researched case and eventually contribute with analytical insights to refine theoretical arguments. In this aspect, the case study method chosen is disciplined-configurative.

However, when moving beyond established theoretical reasoning, analysing adaptive pressure, national response and impact, the research strategy falls between the disciplined-configurative and heuristic case study type. The research on 'with what impact' cannot be structured on the basis of existing theories by the fact that there is no single coherent theoretical school or competing schools on the impact of supranational decision-making on national institutions. Studies on the effects of European integration still move largely within a theoretical vacuum. Although recent research indeed makes valid theoretical suggestions which may gradually lead to theory building, they still do not provide a coherent theoretical framework on the basis of which a research strategy can be formulated (Börzel 1999; Börzel & Risse 2000; Conant 2002; Risse, Cowles & Caporaso 2001). Whereas the objective of the research on 'with what impact' is not in itself to develop a theoretical generalisation, the aim on a more modest scale is to provide detailed empirical insight in a under-researched as well as under-theorised dimension of European integration, and by this insight eventually contribute to theory-building as it evolves.

In general, the generalising, and thus theorising, ability of case studies has been questioned. It has been questioned how the findings of a case-study can be generalised beyond the immediate study, since the study *singling* out a case evidently does not operate with a large n-sample. Yet, the fact that the results of a case study cannot be generalised to a sample or immediately generate theory, is not the same as arguing that the method cannot serve a theoretical purpose, as here pointed out by Lijphart:

"The scientific status of the case study method is somewhat ambiguous, however, because science is a generalising activity. A single case can constitute neither the basis for a valid generalization nor the ground for disproving an established generalization. Indirectly, however, case studies can make an important contribution to the establishment of general propositions and thus to theory-building in political science" (Lijphart 1971, p. 691).

The drawback of the case study being the lack of frequencies, its advantage clearly is that focusing on a single case allows its details to be examined intensively. A case study conducted in depth

obviously provides more detailed and contextualised information, which is relevant to the theory being evaluated or generated. The many observations gathered on the basis of a single case should compensate for the $n=1$ sample. Thereby, the case study is a method making information accessible, which, for example, the statistical method cannot provide.

Furthermore, the case can be selected for strategic-theoretical purposes. Such a case aims to test a theory or theoretical proposition. If the case beforehand seems unlikely to support theory, it constitutes the 'least likely' case, or in the contrary case a 'most likely' case. The 'least likely' case may confirm the theory against odds. The propositions of the theory thus appear stronger and more likely to hold in other cases as well. It has gained explanatory value. The opposite account is true for the 'most likely' case. If contrary to expectations it invalidates the theory, that theory has been fundamentally weakened. The 'least likely' case is thus foremost tailored to confirmation, and the 'most likely' case to invalidation of a theory (Ekstein 1975, p. 119). By choosing one's case strategically along the continuum of 'least likely' and 'most likely', the case study becomes a most suitable method for testing and improving theories:

"A single crucial case may certainly score a clean knockout over a theory" (Ekstein 1975, p. 127).

Placed on a continuum between 'least likely' and 'most likely' cases, the case study on European institutionalisation of social security rights represents the 'less likely' case of integration. Not 'least likely', because the free movement of workers constitutes a key principle in the construction of the internal market and therefore makes up a key factor within the process of economic integration. However, still 'less likely', because member states maintain the prerogative to organise their social security policies, and have repeatedly refuted harmonisation moves from the European Union. The autonomy to decide on welfare policies has been jealously guarded by the member states. Integration, compromising national welfare competencies, is thus 'less likely' to happen.

As a final point to be mentioned with regard to this thesis' research strategy, the comparative method has been employed in order to relate findings on the study of impact. The comparative method allows an inquiry into the effective reach, meaning and impact of European law and policy when supranational decision-making is transposed into nationally enforceable rights. By employing the comparative method, it becomes possible to assess whether the European coordination system foremost challenges the residence-based, non-contributory welfare state and eventually causes

convergence. In chapter VI, competing hypotheses on impact are drawn up, including a specific one on convergence of national institutions. Of the 15 member states, Denmark and Germany have been chosen for comparison, as representing the residence-based and insurance-based welfare states respectively. Other member states would likewise have been interesting comparative cases, but in historical terms Denmark and Germany are strong examples of two member states which chose different paths of the social security model, and by and large confirmed these through a century-long process of general change. Due to the significant difference of these national institutions, the examination of their individual adaptation to the European *acquis communautaire* is assumed to uncover comparative differences. The convergence hypothesis makes us expect that European institutionalisation of social security rights foremost impacts on the residence-based welfare state, i.e. the Danish member state. This is, however, up for empirical contestation.

Comparatively, Denmark constitutes the primary case and Germany the contrasting one. Given the two-step research agenda of the present study demanding a detailed and time-consuming collection and analysis of materials at two levels of decision-making as well as over time, it has not been possible to undertake research strictly equally on the two cases. In practical terms, this means that more interviews and more primary sources have been examined in the Danish case. These empirical findings have then been compared with the German case on the basis of extensive, but fewer, interviews and the use of secondary sources. For this reason, chapter VII on domestic impacts analyses 'perceptions of impact' only for the Danish case, whereas impact in institutional terms is analysed in individual sections for both Denmark and Germany.

1.6: Research Material

To study 'to what extent, how and with what impact' the EU has institutionalized social security rights necessitates several selective choices. This necessity arises from the two-step research agenda, aiming to examine supranational institutionalisation as it evolves over time and its impact on national welfare. The specific institution of Regulation 1408/71 is complex, dense and not least dynamic and so are national institutions of social security. The study has therefore required a specific delimitation, based on rigorous methodological choices on what to research, using which material and sources, and within which period of time.

In essence, the meeting between the EU Regulation and national institutions in place means that the supranational institution obliges the member states to grant *equal treatment* to the *personal scope* of 1408 and partially to make acquired social security rights *exportable*. This is an obligation which exerts adaptive pressure on the nationally institutionalized welfare principles of *social citizenship* and *territoriality*. This confrontation of organizing principles explains the research choices made.

Against this background, the analysis of the process of supranational institutionalisation contains an investigation of five interrelated aspects: 1) how the Regulation's *principle of equal treatment* has been enforced over time; 2) to whom intra-European social security rights have been granted over time, i.e. *the personal scope* of Regulation 1408/71; 3) how *the material scope* of 1408 has been defined and extended over time; 4) how the Regulation's *principle of exportability* has been enforced over time; and, finally, 5) the institutionalisation of the concrete social security field of *health care* is examined in order to demonstrate how the meeting between supranational obligations and national institutions may unfold within a specific welfare policy field. In the analysis of all the five aspects, the time variable is significant. The research is chronologically structured in order to uncover eventual institutional dynamics.

In terms of materials, the selection has been made on the basis of specific articles in the Regulation. *Article 2* treats the personal scope of Regulation 1408/71, *Article 3* its principle of equal treatment, *Article 4* the material scope, *Article 10* the principle of exportability and *Article 22* treats the right to health care in another member state. The development of the five individual articles has been analysed in detail using three sources: 1) the case law by the European Court of Justice in which at least one of the five articles has been cited as instrument; 2) the Commission's amendment proposals and recommendations; and 3) amendments adopted by the Council. The three sources thus equally allow an examination of the role of the two supranational organizations as well as of the Council as collective voice for the member states. The case law of the Court and the amendments adopted by the Council are listed in appendix 1 and 4 respectively. Appendix 1 is detailed below. Appendix 4 lists the Regulation number, the date of adoption, and the articles amended. Between 1971 and 2002, Regulation 1408/71 has been amended 28 times. This introductory finding alone indicates the dynamism of the institutionalisation process.

Again in order to delimit the very large amount of material and the very dynamic process, the three sources of material address institutional changes happening from 1971, when 1408 was adopted, until the end of 2002. However, the historical examination of 1408's regulatory background in chapter IV includes an analysis of case-law preceding 1971 and in addition examines 1408's predecessor Regulation 3/58. The case-law preceding 1971 has, however, not been selected systematically according to the five articles. Furthermore, recent negotiations on the reform of the Regulation as well as its domestic impact analysed in the subsequent chapters includes incidents occurring in 2003 to the extent that they were emphasized in the qualitative interviews carried out.

In order to access the case law of the European Court of Justice interpreting the regulatory scope of 1408, a CELEX analysis has been carried out. Between 1971 and the end of 2002, the Court ruled on Regulation 1408/71 in 338 cases. The 338 cases are listed in appendix 1. The case law has been coded according to: date of the judgment, name of litigant, member state under examination, case-law number, European Court Report details and the Article of 1408/71 cited in the case law. The cases in which at least one of articles 2, 3, 4, 10 or 22 have been cited have been chosen for examination. These cases, which number 138, are emphasized in appendix 1. Initially, all 138 cases have been examined. They have, however, not all had the same impact in settling the supranational regulatory scope or on national institutions for which reason not all of them have been analysed in detail. Nevertheless, the majority of the cases are discussed in the analytical chapters, some in the text itself, others as substantiating case-notes listed as endnotes in the individual chapters. The rest simply constitute the background material of this thesis. The early research strategy was to systematically examine all case law related to one of the five articles. As research progressed, the qualitative interviews and secondary sources enabled me to focus among the case law. Although indeed time consuming, the early approach was necessary in the sense that it helped me to understand the material as a whole. From a methodological point of view, I furthermore find that the early research strategy was important to avoid the peril of "selective citation of illustrative cases" (Garrett, Keleman & Schultz 1998, p. 151; Burley & Mattli 1993, pp. 50-51).

Additional sources of information to study the supranational institutionalisation process have been documents from the Council, press releases from the Commission and the European Court of Justice as well as documents and reports from the European Parliament.

Researching 'with what impact' has required delimitation of the national social security institutions on which to examine impact. In practical terms, it has not been possible to analyse the impact of the whole material scope of 1408, covering social security legislation on: illness and maternity; invalidity benefits; old-age pensions; survivors' benefits; occupation-related accidents and disease; death grants; unemployment benefits; and family benefits. Domestic impact will be analysed for the national policies of *statutory pension*, *long-term care*, *family benefits* and *health care*. Thereby the analysis addresses the two classic social security schemes of statutory pension and health care, as well as the younger ones of long-term care and family benefits, representing more recently institutionalised social responsibilities of the welfare states.

For the primary case, i.e. Denmark, a very valuable source of information has been governmental notes to the Danish Parliament's European Affairs Committee. These have been collected through documental search in both the Library of the Danish Parliament and in the Parliament's EU Information Centre (Folketingets EU-Oplysning). Also Danish parliamentary debates and questions to individual ministers on the free movement of workers and the consequences of European integration on national welfare have been examined. Furthermore, decisions from the Danish Social Appeal Authority (Den Sociale Ankestyrelse) treating Regulation 1408/71 have been analysed. In addition, newspaper articles treating the topic have been sought out. Also, secondary material in the form of academic writing has been used for both the Danish and the German case. It is, however, notable that whereas Germany has a whole school of prominent scholars dealing with international social security this is far from the case in Denmark, where the issue has been treated widely by the press but relatively little by academia.

Regarding the contrasting case, i.e. Germany, the case law on German legislation and administrative practice have constituted decisive material for analysing the impact of the Community Regulation on the insurance-based welfare state. The case law concerning Germany is listed in appendix 2, according to the same coding as appendix 1, but adds which national court referred the case. Furthermore, for the cases citing at least one of articles 2, 3, 4, 10 or 22, I have analysed and coded whether the European Court of Justice ruled in favour of the migrant or found the German act in accordance with European obligations. The rulings citing one of the five articles are **emphasised** in appendix 2.

Finally, a very important source of information for this study has been qualitative interviews. Between April 2001 and February 2004, 21 interviews were conducted with representatives from the Commission as well as from the Danish and German civil service. The large majority of the interviews were held in person, recorded and subsequently coded. Two interviewees insisted on not being recorded in order to speak more freely, and five interviews were conducted over the phone. The length of the interviews were between 45 minutes and 3½ hours, most being about 1½ hours. Interviews were conducted with representatives from the Commission's DG on Employment and Social Affairs – the Unit of Free Movement of Workers and Co-ordination of Social Security Schemes; from the Danish Ministry of Social Affairs; the Danish Ministry of Interior and Health; the Danish Social Security Board; the Danish Foreign Ministry; the Danish Permanent Representation; the German Federal Ministry of Labour and Social Affairs; the German Verbindungsstelle; and the German Bundesanstalt für Arbeit und Sozialordnung.

I promised that none of my sources would be identified or quoted in the written text. Therefore, when referred to in the following, the date of the interview appears as well as the organisational affiliation of the interviewee, but name and rank do not.

1.7: Thesis Structure

This thesis is divided into eight chapters. The present chapter I introduces and chapter II contains the theoretical discussion. The five subsequent chapters conduct the empirical analysis of Regulation 1408/71's creation, institutionalisation and impact over time. Chapter VIII finally concludes on the empirical and theoretical findings.

Chapter II discusses theoretical accounts of institutions, institutionalisation, and institutionalisation through the interaction of law and politics together with the domestic impact of such institutionalisation. This is intended to enable us to understand how European integration of social security rights has taken place over time and what the impact thereof on national institutions has been. The chapter introduces an analytical model with which to analyse European institutionalisation of social security rights as a two-layered process of integration.

Chapter III initiates the empirical analysis by introducing the Regulation, its meaning, scope and its main principles. The chapter then analyses the context and history of the Regulation. This is done by examining the process by which the objective of Regulation 1408 – i.e. the free movement of workers and subsequently of persons more broadly – was institutionalised. Secondly, it is done by examining de facto intra-European migration on the basis of statistical observations and, lastly, by analyzing the inherited institutional context on the basis of which Regulation 1408/71 was created.

Chapter IV initiates the analysis of the Regulation's process of supranational institutionalisation. The chapter traces the process of how the principle of equal treatment and the personal scope of the Regulation has been settled and extended over time. Individual sections focus on the actions and reactions of the European Commission, the European Court of Justice and the Council of Ministers, separately and intertwined as they are.

Chapter V continues the analysis on supranational institutionalisation. The chapter analyses how the Regulation's principle of exportability has been institutionalised over time in relation to the material scope of the legislation, in relation to 'special non-contributory' benefits and finally in relation to the specific policy field of health care. This chapter also focuses on the action and integrationist ability of the Commission and Court of Justice, and on the existence of political support for or restraint of supranational activism.

Chapter VI initiates the analysis of the 'second layer' of institutionalisation whereby it is national implementation which determines the effective meaning and impact of supranational institutionalisation. The chapter identifies the adaptive pressure on the Danish and German welfare models which is caused by an ultimate incompatibility between European and national institutions. It does so by examining the historical reasoning, the organizing principles and the boundaries of welfare within each of the two member states. This examination is concretized by focusing on the four contemporary social security institutions of statutory pension, public health care, long-term care and family benefits. Finally, the chapter examines the de facto pressure exerted by EU immigration into the two member states respectively.

Chapter VII continues the analysis of the second layer of institutionalisation. The chapter conducts a comparative analysis of the national response to and the domestic impact of intra-European social

security rights in Denmark and Germany. This is done, first, by researching how Denmark has changed its perceptions of the impact of this legislation over time; secondly, by analyzing how this particular instance of supranational institutionalisation has impacted on the Danish social institutions of statutory pension, family benefits, long-term care and health care; and, thirdly, by examining the response of Germany and the impact on its four social security schemes.

Chapter VIII concludes by presenting my analytical findings which are summed up and related back to the earlier theoretical propositions concerning institutions, institutionalisation and their domestic impact.

Chapter II: Theoretical Explanations on European Institutionalisation of Social Security Rights

In a general discussion on European integration, 'social security' represents a 'less likely case' of integration. For national and historical reasons, member states have safeguarded their welfare competencies and have not left much for the Community to do.

"The Europeanisation is capable of effective action only in areas which the major interests affected are either convergent or complementary. Such areas do exist but social policies and welfare state are not among them (Scharpf 1997, p. 25).

However, it is debatable whether social policies continue to be the exclusive competence of the member state, since the policy 'island beyond reach' may be indirectly – but increasingly – affected by the market making processes of European integration:

"Irrespective of the results of "high politics" struggles over social charters and Treaty revisions, the movement towards market integration carries with it a gradual erosion of national welfare autonomy and sovereignty, increasingly situating national regimes in a complex multi-tiered web of social policy" (Leibfried and Pierson 1996, pp. 186-187).

On a theoretical account, how and why European integration has taken place continues to be a theme of great controversy. When applying European integration theories to the policy-field of social security, such controversy becomes even more pronounced. On the one hand, a liberal intergovernmentalist interpretation would argue that social integration is 'the road not taken' due to the absence of converging national interests.²¹ On the other hand, neo-functionalist interpretations would identify integration and among other factors explain these findings by spill-overs from one policy-field to the other and by the self-sustaining dynamics of the Community.²²

²¹ See among others Garrett 1992; Moravcsik 1991; 1993.

²² See among others Haas 1958; Lindberg & Scheingold 1970; Tranholm Mikkelsen 1991; Burley & Mattli 1993; Stone Sweet & Sandholtz 1997, 1998; Pollack 1998.

In order to inquire *to what extent, how and with what impact the European Union has institutionalised social security rights*, the dichotomised dispute between liberal intergovernmentalism and neo-functionalism becomes inadequate. Even a quick glance at the case makes it clear that we need theoretical explanations which go beyond intergovernmental negotiations and decisions of high politics. Instead, we need theoretical approaches able to explain a process constituted of very subtle and detailed steps of integration, in which politics and identifiable interests seem absent for long periods, but where integration may, however, proceed discreetly. A process where contradictory dynamics at times further integration, but at others roll back previous steps taken. Empirical findings of the latter exclude any straightforward application of neo-functionalism.

Furthermore, the research question of the present study necessitates a theoretical frame able to bridge the study of supranational integration on the one hand with its domestic impact on the other. The recurring debate between neo-functionalism and intergovernmentalism has generally been concerned with explaining the integration dynamics of the emerging European polity alone, and has largely ignored research on the domestic impact of that same dynamic. The same goes for proposed alternative theoretical interpretations such as multi-level governance and 'the path to European integration' as presented by historical institutionalism (Marks, Hooghe & Blank 1996; Pierson 1998). In these studies, it is the European polity itself which becomes the main dependent variable (Börzel & Risse 2000, p. 1).

In order to analyse 'to what extent, how and with what impact' the EU has institutionalised a social security dimension, this thesis will juxtapose theoretical propositions highlighting and explaining different aspects of two intertwined processes of change. In theoretical terms, the focus throughout the study is institutional, since it analyses Community Regulation 1408/71 in detail and context. The institution will be analysed as a historical phenomenon, i.e. as it evolves and impacts over time. This study's theoretical point of departure is therefore that of historical institutionalism and applies its key propositions on how to research 'the path to European integration', as described by Paul Pierson:

"This scholarship is *historical* because it recognizes that political development must be understood as a process that unfolds over time. It is *institutionalist* because it stresses that many of the contemporary implications of these temporal processes are embedded in institutions - whether these be formal rules, policy structures or norms"

(Pierson 1998, p. 29).

However, as pointed out above, the path to European social security integration cannot be captured by historical institutional explanations alone. First of all, a historical institutional theoretical view needs to be supplemented by more detailed theoretical accounts of the dynamics, actors or organisations furthering integration and those restraining it. The European Court of Justice plays a key role in defining and interpreting the regulatory scope of 1408 as well as its purpose, thus in part deciding the subtle moves of social security integration. Therefore, the explanation of the case requires a theoretical frame which treats judicial decision-making as a decisive part of policy-making, but which also highlights how politics responds towards such judicial activism. Secondly, we need to add theoretical interpretations where the national institution becomes the dependent variable; that is, propositions which enable the two layers of institutionalisation to be combined and suggest whether we should expect supranational integration to have domestic impact - or not.

Empirically and theoretically this thesis aims to follow Regulation 1408/71 from institutional creation onwards, and thus research its rationale and transforming capacity as it is established over time. The theoretical purpose of the research question is to examine *to what extent do institutions matter as inputs in the European integration process, how do they evolve and what impact do they have on established national institutions?*

To meet this purpose, the present chapter will investigate certain theoretical approaches which make propositions on the central research questions of 1) institutional creation, 2) institutionalisation, 3) institutionalisation through the interaction of law and politics, and 4) the domestic impact thereof. The individual sections of this chapter as well as the subsequent empirical analysis in the following chapters correspond to these questions.

I *initiate* this chapter by presenting a model created to analyse 'institutionalisation as a two-layered process of integration'. The model is composed of different theoretical propositions on European institutionalisation and its impact, and divided into two figures. The next four sections discuss the theoretical propositions behind the model, and argue why they should be joined in order to explain the path to social security institutionalisation. In the *second* section, I examine historical institutionalism as the theoretical point of departure for the subsequent research and discuss the definition of 'institutions', their function and impact as well as the core concept of 'path dependency'. I *then* address the approach 'institutionalisation of Europe', which explains the virtuous cycle of European integration, where self-sustaining institutionalisation dynamics drive the process forward. In order to explain institutionalisation, the mediating and transforming role of the

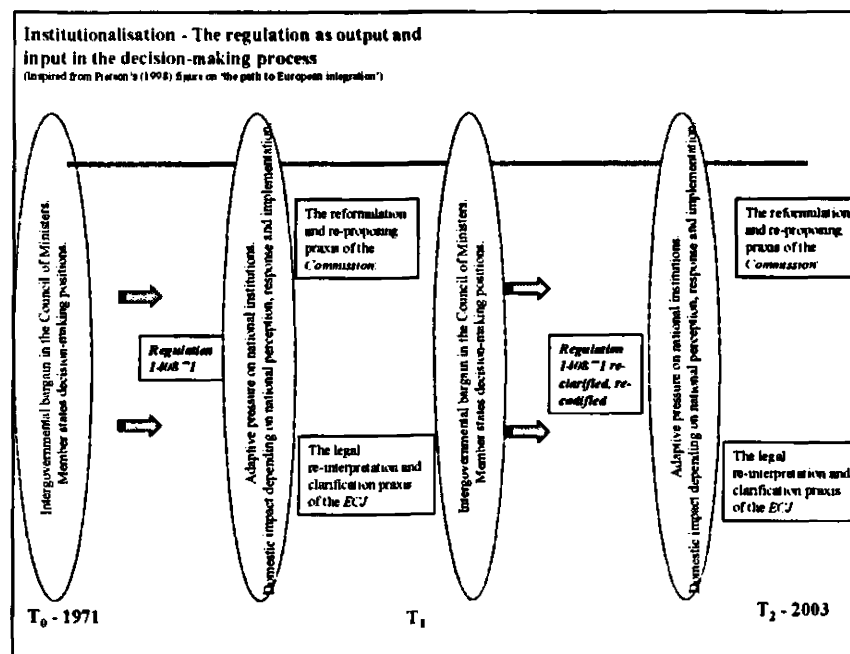
Commission and European Court of Justice are brought into focus. The *next* section narrows the discussion on institutionalisation down to what occurs through the interaction of law and politics. The position of the European Court of Justice is discussed in greater detail, as well as its historical ability to 'transform Europe'. The section contrasts theories of legal autonomy with those of political power, in individual subsections questioning whether judicial activism sets aside politics, or politics manage to overturn law. The *final* section deals with the question of domestic impact. It brings in theoretical approaches, discussing how rights and obligations generated through supranational decision-making are implemented nationally. In general, the section discusses the effective impact of supranational institutionalisation and the Community's ability to monitor the reach and correct implementation of the *acquis communautaire*. The section emphasises the importance of the time-variable when we assess the effectiveness and impact of EU law and politics.

1.0: A Model to Analyse Institutionalisation as a Two-layered Process

In order to conduct the analysis on European institutionalisation of social security rights as a two-layered process of integration, a model has been built on the basis of certain existing theories. The model is presented in figures 2 and 3 below. Figure 2 details the applied historical institutional approach and is inspired by Paul Pierson's 'path to European integration' (Pierson 1998, p. 49). The figure, however, extends the historical institutional outlook by including national implementation as the second layer of institutionalisation. Figure 3 presents the part of the model focusing on institutionalisation through the interaction of law and politics. This second part of the model concerns how the effective impact of institutionalisation establishes as a process determined by the interplay of law and politics, where activism is followed by reactions, and precise cause - effect relations blur through feedback. The figure is inspired by Garrett, Kelemen & Schultz's 'the legal politics game', but extends their stage game by propositions about what happens when a litigant government accepts a decision (stage 2) and by detailing how other EU governments apart from the litigant react to judicial decision-making (stage 3). The figure furthermore holds that a 'law - politics' game does not end in stage 3, but continues beyond it. A main proposition in the model as a whole is that the meaning, effectiveness and impact of European law and politics is only identifiable over time. In both figures the time-variable is therefore in focus, either presented as a T_x or a stage X .

Figure 2 formulates the more general framework to analyse how Regulation 1408/71 has been institutionalised over time, constituting both output and input in the process of integration. Institutionalisation is pictured as two-layered where the institution is first created as an outcome of intergovernmental negotiations in T_0 and subsequently implemented at the national level. The supranational institution may exert adaptive pressure on national institutions in place, but the actual impact of social security integration essentially depends on how national actors or organisations respond to and implement European decision-making. In T_1 the effective institutional meaning is reformulated and re-proposed by the Commission as well as being re-interpreted and clarified by the ECJ. Against this background, the Regulation is re-negotiated and re-codified by the Council of Ministers. The re-clarified and re-codified institution is subsequently implemented nationally. The institutionalisation process repeats between T_0 , T_1 and T_2 , where the feedback effects of intergovernmental bargains, supranational mediation and rulings, and national implementation mutually formulate and reformulate the effective meaning of Regulation 1408.

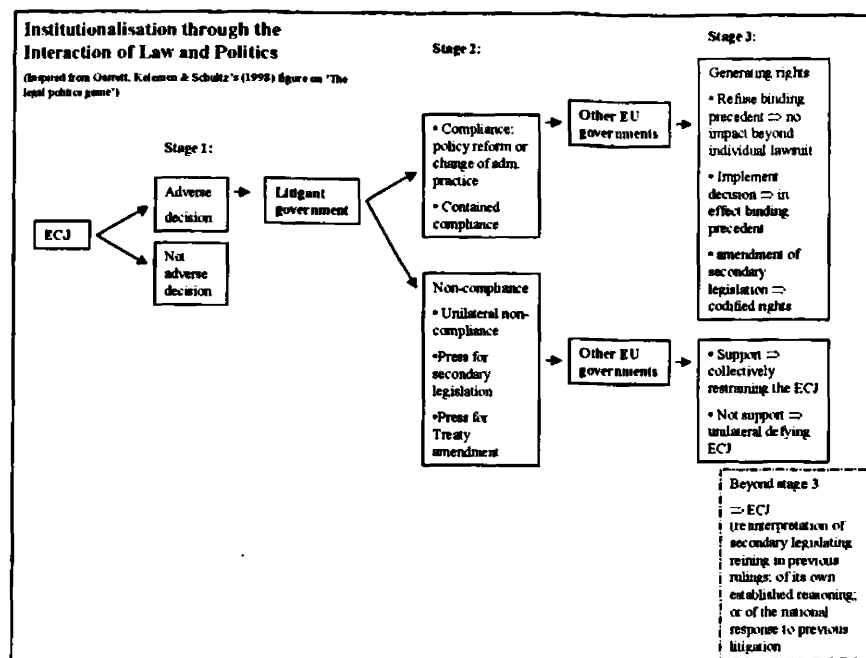
Figure 2: Institutionalisation as a Two-layered Process



The dynamic perspective of rulemaking is likewise expressed in the model's second figure. Figure 3 concentrates on the interaction between the ECJ and the member states. This part of the model thus specifies how institutionalisation occurs as a result of the interaction between law and politics, and makes up the background against which to analyse how politics respond to judicial decisions

and vice versa. This part of the analytical framework aims to identify the reach and impact of Community law as manifesting over time.

Figure 3: Institutionalisation through the Interaction of Law and Politics



Together the two figures depict the steps to be analysed to meet the research objective on 'to what extent, how and with what impact' the European Union has institutionalised a social security dimension. The model treats institutional creation, institutionalisation where the Regulation becomes output and input in the decision-making process, institutionalisation as determined by the interplay of law and politics, and, not least, domestic impact. Theoretically derived, the model constitutes the analytical framework for the subsequent empirical study. The remaining part of this chapter will discuss those theoretical approaches on whose arguments the model is essentially based, that is that of *historical institutionalism* and '*institutionalisation of Europe*', certain contrasting viewpoints concerning *institutionalisation through the interaction of law and politics*, and, finally, different interpretations on the *domestic impact* thereof.

2.0: An Institutional Study of European Integration

This thesis' theoretical point of departure for understanding European integration as well as its national impact is a historical institutional one. Whereas historical institutionalism may still call for

theoretical reinforcement, it provides very specific and operationable methodological suggestions proposing to carry out process-tracing studies to uncover a given path to European integration.

In essence, historical institutionalism brings into focus the *time-variable* for any conducted research. Change sediments gradually and can therefore only be captured by a diachronic analysis. Furthermore, this approach prescribes the detailed study of *institutions*, their innovation and change. That is, the approach takes the transformative impact of gradualism seriously, assuming that by bits and pieces it comes to constitute the greater regulatory whole. Process-tracing studies on institutionalisation should therefore be carried out, where different points of time T_0 , T_1 and T_2 each entail an individual integrative output, which at the same time represent input in the future process. By linking output and input over time, rather complex chains of cause and effect appear.

This section begins by outlining the historical institutionalist perspective on European integration, which proposes to study institutions in their own right and as historical phenomena. The intricacies of institutions and their resounding impact require a more detailed examination of the analytical objects, which will be carried out subsequently. How are institutions defined? What are their function and impact? And what are their premises for change?

2.1: European Integration Viewed from a Historical Institutional Perspective

Historical institutionalism from comparative politics has been applied to the study of European integration most successfully by Paul Pierson. According to Pierson, European integration gradually establishes gaps in member states' control and these gaps thus explain why supranational competencies expand.²³ If a gap of control emerges and is identified, it is difficult for member states to regain control and at the same time gaps "create room for actors other than member states to influence the process of European integration while constraining the room of manoeuvre for all political actors" (Pierson 1996, p. 126). Historical institutionalism points to four factors responsible for establishing gaps of control:

- The *relative autonomy of supranational organisations*. Through delegation of authority, member states and supranational organisations enter into a relationship of principals and agents. The prime function of the agent towards the principal is to establish transparency and credibility in the decision-making process. However, at the same time the agent will restrict the principal

²³ Gaps are defined as "significant divergences between the institutional and policy preferences of member-state governments and the actual functioning of institutions and policies" (Pierson 1998, p. 34).

by formulating and enforcing Community legislation and by institutionalising the intergovernmental relationship. Redesigning policies or even organisations is complicated by institutional barriers to reform, such as decision-making rules.

- *The restricted time horizon of political actors.* Contemporary political outcomes have long-term consequences, but member governments act in a restricted time horizon and are interested in the more immediate result of politics and law.
- *Unintended consequences and issue-density.* Political actors cannot grasp the total complexity of the political process, because of its long-term consequences and high level of issue-density. In this context of complexity, the political action is likely to be short-sighted and applied alone to the case at hand. However, even what seems to be an isolated political or legal result may affect other policy domains in the longer run. Issue-density increases the likelihood of 'spill-over' between policy fields. As complexity and interrelatedness between issues are dense in the European Union, an individual outcome may have manifold impact.
- Whereas intergovernmentalism tends to view *national preferences* as largely fixed, these *are dynamic*. National preferences may change as governments change, external change occurs or ideological change takes place.

Historical institutionalism prescribes a path-dependent analysis, applying an institutional focus which unfolds between T_0 and T_2 , detailing what happens in T_1 . The institutional outcome in T_0 , a regulation, a directive or a Treaty revision, is to be analysed as an input in the future process. The gaps in member states' control and the transformative impact of institutions can only be identified if we conduct a diachronic analysis, assuming that rule-making has its own dynamic. Member states are not irrational, but they act in an institutional context which transforms their position and institutional outlook.

2.2: Defining Institutions

When turning to the roots of historical institutionalism in comparative politics, some of the theoretical arguments sketched out above get more flesh on the bone. This section and the next two will discuss the definition of institutions, their functions and impact, as well as the notion of path dependency. The discussion will take place on a general historical institutional theoretical basis, and not be specifically related to the study of European integration.

Historical institutionalism is less a coherent school of thought than a label for scholars who apply a historical focus to institutional development, and do so by arguing against both rational choice institutionalism and sociological institutionalism.²⁴ Thus the definition of 'institution' varies considerably, some being more abstract than others. Pierson adopts the definition of Douglas North, where institutions are "the rules of the game in a society or, more formally, are humanly devised constraints that shape human interaction" (North 1990, p. 3; Pierson 1998, p. 29, note 2). Immergut pictures institutions as almost every mechanism that filters or structures political interaction: "the formal rules of political arenas, channels of communications, language codes, or the logics of strategic situations" (Immergut 1998, p. 20). Bulmer also supports the broad definition, making institutions both formal and informal policy-instruments and procedures, as well as embedded symbols and norms (Bulmer 1994, p. 355; Bulmer 1997, p. 7).

Thelen and Steinmo conclude with different definitions and write:

"In general, historical institutionalism work with a definition of institutions that include both formal organizations and informal rules and procedures that structure conduct" (Thelen & Steinmo 1992, p. 2).

Their definition refers to that of Hall, as formulated in 1986. According to Hall, institutions are:

"...the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy" (Hall 1986, p. 19).

This thesis applies a rather narrow definition of institution, based on the definition given by Hall but narrowed down to the *formal rule*. This does not deny that a broader definition may yield meaningful insights, but is done to operationalise 'institution' in a very concrete sense, namely to the formal rule of Regulation 1408/71. By a very restricted definition, applicability increases and the institutional scope and effect becomes identifiable at all specific points of time. The aim behind this specific notion of 'institution' is to reduce the theoretical and analytical abstractness of a concept. Some of the definitions given above appear to be so all encompassing that it is difficult to identify what institutions are not. Regulation 1408/71 is an institution which prescribes administrative practices and routines as well as containing principles and rationales. For analytical purposes these are, however, not defined as institutions in the present study.

²⁴ The discussion on the differences and similarities between the three variants of new institutionalism is beyond the scope of this thesis. For such a discussion see, among others, Campbell 1994; Hall & Taylor 1996; Arum 1999; Torfing 2001.

However, in order to avoid interdisciplinary conceptual confusion, it should be emphasised that this thesis' institutional definition goes beyond what is normally regarded as an institution by the discipline of law. Law would hardly define formal rules as 'institutions'. Contrary to the broad conceptual use of political science, 'institutions' in law generally refer to 'organisations' or 'bodies', for example, the European Commission is seen as an European institution. However, for theoretical purposes this thesis' institutional concept originates in theoretical discussion conducted primarily within the disciplines of political science and sociology. Against this background, Regulation 1408/71 is defined as an 'institution', while the Commission and the European Court of Justice are defined as 'supranational organisations'.

2.3: Institutions, their Function and Impact

Institutions are instruments to achieve defined objectives. Furthermore, they regulate actors' interaction and structure their political choices. In this function, institutions constitute mediators for the political process (Thelen & Steinmo 1992, p. 2). At the same time, institutions act as constraints on any immediate pursuit of economic and political aims. They bind or obligate actors. As they manifest, they become increasingly difficult to ignore. The functional characteristics of institutions are such that they constitute both enablements and constraints.

When institutions regulate, certain sets of political options which are likely to correspond to previous choices are favoured. Every political system will over time have constructed its own set of institutions, interlinked and explained by reference to one another and within the historical context. The institutional outlook of an actor is a determining factor for perceptions, preferences and strategies:

"...different institutional structures set the rules of the political or policy game in different ways. Institutional rules provide different incentives to political actors, yielding different power resources and interests. Different institutions shape the context in which individuals and groups define their interests; thus institutions shape the strategic choices of policy actors" (Steinmo & Tolbert 1998, p. 168).

Actors are not unaware of their institutional context and may act strategically on that basis. However, a key argument of historical institutionalism is that, once established, institutions tend to take on a life of their own (Puchala 1999, p. 318). However, utilitarian calculations may now and then be part of the political process. Historical institutionalism does not subscribe to the 'logic of

appropriateness' as an almost general imperative for action.²⁵ At the same time, there are clear limits to rational institutional design, where outcome X exists because it serves function Y (Pierson 2000a).²⁶ Strategies and solutions may be adopted because they seem to be the most efficient for the task at hand, but an adopted institution may actually reveal itself to be dysfunctional in the long run. Dysfunction or unintended consequences are reinforced by the short-sightedness of political actors. Generally, political actors are incapable – perhaps sometimes unwilling – of regarding the long-term consequences of an institutional creation. Often the larger institutional and political context is not considered, in which very long and complex causal chains connect political actions to political outcome (Pierson 2000a, p. 482). And then, even if institutional designers act instrumentally and actually focus on long-term effects, unanticipated consequences may disturb the outcome. Unanticipated consequences arise since decision-making is increasingly complex and tightly coupled. The likelihood of unanticipated consequences is fortified by time constraints, information scarcity and by the functional need to delegate decisions (Pierson 2000a).

The institutional environment affects or may even transform the actor's reading of his/her own preferences. Preferences are politically and socially constructed, hence endogenised.

"The preferences and capabilities of political actors cannot be treated as exogenous variables; they can only be understood within the context of a given set of institutional arrangements" (Krasner 1984, p. 238).

Institutions are ambiguous when it comes to their consequences for the political process, since they sometimes constitute independent contributors and at other times are dependent variables, formed due to the functional needs of actors. As channels of information, institutions reduce the insecurity of the intentional action of other actors, mediate the relation between actors and make the political process more transparent. Institutions may thus be what enables the actor to decipher the political context (Norgaard 1996, p. 33).

²⁵ In this aspect, historical institutionalism opposes the arguments of sociological institutionalism, as presented by writers such as Scott (1987, 1994 & 1995) and March and Olsen (1984 & 1989). Sociological institutionalism explains the 'logic of appropriateness' as when actors act mainly in accordance with the norms of a given institution, and thus leaves individual utilitarian calculations aside in order to comply with what is considered 'appropriate' by the institution.

²⁶ By these arguments, historical institutionalism distances itself from the rational choice institutionalism, represented, among others, by North (1990).

2.4: Path Dependency and Institutional Premises for Change

Historical institutionalism has been criticised for focusing on continuity and being unable to explain change. The critic says that the approach generally places institutions as mechanisms restraining the free action of individuals, and therefore mechanisms blocking innovation (Campbell 1994, p. 11; Arnum 1999, p. 58). However, this criticism disregards the fact that historical institutionalism analyses the mediating function of institutions, i.e. when institutions become driving forces.

The structuring function of institutions connect the political process. Institutions should therefore be analysed as a historical phenomenon. The historical focus is conceptualised by 'path dependency'; the contemporary institutional construct is a result of previous choices which adds up to become path dependent developments. The actor acts in, and is influenced by, an inherited institutional context. Therefore, most political choices have a direct reference to the past and link up with historical experience.

"The natural path for institutions is to act in the present as they have acted in the past" (Krasner 1984, p. 235).

Path-dependency therefore contains both self-reinforcing and reactive sequences (Mahoney 2000).²⁷ Pierson defines path dependency as "a social process grounded in a dynamic of 'increasing returns'" (Pierson 2000b, p. 251). This again relates to a broader definition where path dependency is a concept referring to "the causal relevance of preceding stages in a temporal sequence" (Pierson *ibid*, p. 252). As a metaphor, 'path dependency' has been described as a tree where branches of continuity are punctuated by a 'critical juncture'. 'Critical junctures' are moments when substantial change takes place, thereby creating a 'branching point' from which historical developments move onto a new, but not unrelated, path (Krasner 1984; Hall & Taylor 1996, p. 942).

Returning to the Pierson description of the dynamics of 'increasing returns', the definition works mathematically rather than metaphorically. He illustrates 'increasing returns' by Arthur's 'Polya Urn Process'. The 'Polya Urn Process' is a cycle of self-reinforcing activity. There are two balls of different colour in an urn. One picks up a ball, puts it back at the same time as adding a ball of the same colour as the one removed until the urn is filled up. The possibility of grabbing a ball of the same colour as the one grabbed the first time will increase as the process unfolds. By repeating the action, an equilibrium will be found:

²⁷ Whereas 'self-reinforcing sequences' refer to a process of increasing returns where the initial choice is decisive, but not deterministic, for the final outcome, 'reactive sequences' are "chains of temporally ordered and causally connected events (Mahoney 2000, p. 526). In his distinction between the two types of sequences, Mahoney relates 'self-reinforcing sequences' to economic historians and 'reactive sequences' to historical sociologists.

"Early draws in each trial, which have a considerable random effect, have a powerful effect on which of the possible equilibrium will actually emerge" (Pierson 2000b, p. 253).

The dynamics of increasing returns means that the initial choice frames future political means and objectives. Through self-reinforcing mechanisms, the rationale of institutional genesis accumulates its advantage over time (Mahoney 2000). Actors as well as organisations are in their actions re-creators of tradition, which in advance make radical change less likely:

"Historical developments are path dependent: once certain choices are made, they constrain future possibilities. The range of options available to policymakers at any given point in time is a function of institutional capabilities that were put in place at some earlier period, possibly in response to very different environmental pressures" (Krasner 1988, p. 67).

The premise for change is a question of the intensity and character of the internal or external pressure on the established institutional order. Theoretically, premises for change depend on the 'critical juncture' or 'branching point'. As far as possible, actors and organisations respond in incremental, reinforcing ways to new challenges, but sometimes the pressure for change will be so severe that the established institutional structure must be reformed. Radical or optimal change seldom happens in a highly institutionalised environment. Change is more likely to take place as a long-winded, rather sub-optimal process of adjustment.

2.5: The Missing Link; What Develops the Institution?

In the institutional study of European integration, historical institutionalism offers theoretical explanations on how institutions emerge, how they change as a repetition of previous choices and which consequences they hold for actors' preferences and the political process.

Notwithstanding the fact that an institution may have a life of its own, we still lack explanations as to what contributes to the life, objectives and development of the institution. Intergovernmentalism would suggest that the member states are crucial actors, but we have just learned that they may be neither far-sighted, nor even very instrumental. Who, apart from some intentional actors, assures that institutions have at least some anticipated effects, in order not to lose their *raison d'être*? What mediates a process of institutionalisation and helps us explain how an institution moves from being a dependent variable in T_0 , to become an independent variable in T_1 , and go back to being a dependent variable in T_2 ? Although institutions may constitute independent variables for the

political process and actors' preferences, institutions themselves are unlikely to develop independently or acontextually.

Furthermore, the application of historical institutionalism to the study of European integration details only how a given supranational path dependency restricts the long-term decision-making scope of member governments, but does not explicitly consider what happens when such a supranational path meets and challenges national path dependencies. If supranational institutions are capable of establishing gaps in member states' control, are they equally capable of withering away national path dependencies? How does a supranational institutionalised path sediment into a national one? As with other theories on European integration, historical institutionalism does not reach beyond the isolated scope of the European polity and does not extend its argumentation to the impact of supranational institutions on national institutions. It identifies different causes of European integration, but it does not capture its effect on national policy making.

Before returning to the question of the impact of such supranational path dependencies, I will now bring in certain theoretical explanations focused on the dynamics of institutionalisation. These interpretations furthermore attribute a significant role to the supranational organisations of the Community, seeing them as adding 'life' to the institution, and sometimes as being capable of developing it contrary to the preferences of its creators, the member governments. The next two main sections are devoted to explanations of institutional dynamics and restraints.

3.0: The Dynamics of Institutionalisation

When studying institutions, their functions and impact, a recurring question is why are institutions created in the first place? In a European integration context, theoretical explanations on institutional innovation are various. Institutional creation may be a reflection of national interests, or explained as a collective choice dealing with a collective problem, or as adopted to realise a Community objective. When discussing the co-ordination of European social security rights, all suggestions explain parts of the institutional emergence of Regulation 1408, as will be empirically substantiated in chapter III.

These explanations of institutional creation have a certain functionalist orientation. Institution X is adopted because it has been agreed to, interpreted, or actually does serve function Y. The functionalist assumption is maintained because of the more immediate relation between institution

X and function Y. Whereas actual, agreed or interpreted functionalism may be a general rationale for institutional innovation, it does not necessarily explain the continued existence of an institution, nor how the institutional domain may be expanded or intensified over time. Subsequent institutional development may not straightforwardly refer to the initial motives for adoption. Hence a theoretical approach which can explain institutional evolution, here phrased as 'institutionalisation', is called for.

3.1: Understanding Institutional Evolution

The theoretical approach to the 'Institutionalisation of Europe' as presented by Stone Sweet and others focuses on the dynamics of institutional evolution.²⁸ Over time, the answer to the question of 'who governs' has changed and the dynamic cannot solely be attributed to the deliberate actions of member states. As a starting-point, this approach dissociates itself from the key-arguments of intergovernmentalism. Essentially, intergovernmentalists "have gotten it wrong" (Stone Sweet & Brunell 1998, p. 63). Although there are strong intergovernmental components in the integration process, governments do not fully control the content, scope or direction thereof, since they do not fully control the process of legal integration, all aspects of rulemaking, or the political autonomy of the supranational organisations (Stone Sweet & Brunell 1998, p. 73; Caporaso & Stone Sweet 2001, p. 224).

When considering the institutional features of the Community, it remains a puzzle why supranational governance has expanded at all. First, the Rome Treaty did not specify how the aim of market integration was to be achieved. Second, the decision-making rules of unanimity and qualified majority voting should mean institutional inertia instead of change. However, deadlocks have been overcome, and Community competences have expanded (Stone Sweet, Fligstein & Sandholtz 2001, p. 16). Somehow, the Community has moved from a relatively 'primitive site of collective governance' to a 'densely institutionalised system of interrelationships' (Caporaso & Stone Sweet 2001, p. 221). 'Institutions' and 'institutionalisation' have independently influenced

²⁸ As presented in the 1998 volume edited by Sandholtz and Stone Sweet on "European Integration and Supranational Governance", in the 2001 volume edited by Stone Sweet, Sandholtz and Fligstein on "The Institutionalisation of Europe", in the work of Sandholtz and Stone Sweet (1997) and in that of Stone Sweet and Brunell (1998).

this process of change. Whereas 'institutions' are defined as systems of rules, 'institutionalisation'²⁹ is the dynamic process by which these are created, adopted and interpreted.³⁰

"Actors behave in self-interested ways, but both the interests and the behaviours take form in a social setting defined by rules [...]. *Institutions are systems of rules and institutionalisation is the process by which rules are created, applied, and interpreted by those who live under them*" (Stone Sweet & Sandholtz 1998, p. 16, emphasis added).

Individual as well as interlinked institutionalisation dynamics have been powerful mechanisms behind this general change of the European Community. Institutional innovation is the premise for further institutionalisation. Generally, the Treaty of Rome is considered the integrative starting point in institutional terms, but is in itself a minimalist and vague document which does not specify how to get there:

"the Rome Treaty is a vague document, like many constitutions, in that it declares the high aspirations of the Member States, and fixes mundane organisational procedures, but barely touches on the precise modalities of achieving market integration" (Stone Sweet, Fligstein & Sandholtz 2001, p. 16).

In the absence of any initial institutionalist guidance, the supranational mode of governance that we witness today has to a certain extent been creatively constructed. Life and shape have been given to the Treaty text along the way, in a manner which was not predictable for those who originally formulated and adopted the text.

According to the arguments of Stone Sweet and others, a given institutionalisation process begins outside the rule context by increased transaction between actors. Transnational activity is the basic justification for institutional innovation and the catalyst of European integration. Intensified cross-border action will produce a social demand for transnational regulation, since actors are gradually confronted with the limits of existing rules in the face of new interactive problems. However, transaction does not in itself determine the details or timing of supranational rule-making, although it does activate the Community's decision-making bodies. The member states, acting in the European Council or the Council of Ministers, may facilitate or hinder rulemaking. However, obstructing supranational rulemaking implies greater costs as transnational exchange increases

²⁹ European integration and institutionalisation refers to the same process (Fligstein & Stone Sweet 2001, p. 29, footnote 1).

³⁰ The theoretical approach on 'Institutionalisation of Europe' conceptualises institutions with reference to North's definition of institutions as "humanly devised constraints that shape human interaction", including 'rules of the game', 'customs and traditions', 'conventions, codes of conduct, norms of behaviour, [and] ...law' (North 1990, chapter 1; Caporaso & Stone Sweet 2001, p. 227).

(Stone Sweet & Sandholtz 1998, p. 4). Transnational exchange may in itself give member states a greater incentive to adjust their policy position in favour of integration. Furthermore, supranational organisations, such as the Commission and the European Court of Justice, will respond to the demand expressed by extending the regulatory framework in place or propose to create new ones. A process of rule innovation or extension has begun:

“Once fixed in a given domain, European rules – such as the relevant Treaty provisions, secondary legislation, and the European Court of Justice’s (ECJ) case-law generate a self-sustaining dynamic that leads to a gradual deepening of integration in that sector and, not uncommonly, to spill-overs into other sectors” (Stone Sweet & Sandholtz 1998, pp. 4-5).

3.2: The Role of Supranational Organisations

Supranational organisations initiate and transmit the rules that guide cross-border action. In these functions, they are policy innovators/entrepreneurs behind the regulatory construction or evolution, with “meaningful, autonomous capacity to pursue integrative agendas” (Stone Sweet & Sandholtz 1998, p. 6).

The view of supranational organisations as ‘engines of integration’ goes back to the early neo-functional literature. As ‘engines of integration’, supranational organisations are assumed to be in a position of autonomy to pursue their interests and independently influence the policy outcome (Pollack 1998, p. 219). In a principal-agent explanatory framework, this means that the agent enjoys considerable discretion from the control of the principal. The framework says that a group of collective principals have chosen to delegate authority to an agent in order to minimise transaction costs and maximise the gains from interaction. So far the principal has acted deliberately. However, in fulfilling its functions the agent may generate its own preferences and act contrary to the aims of the principal (Pollack 1997, p. 111).³¹

The member states have entrusted the *Commission*³² with the right of initiative for the Community. It thus enjoys the formal agenda-setting power. In addition, it may informally set the agenda, being

³¹ The last assumption would not be part of a liberal intergovernmentalist principal-agent argumentation. According to this argumentation, the principal maintains control over the agent. The principal and agent engage in a contractual commitment, where the principal chooses to delegate certain, specified functions. The organisation, the agent, does not act beyond its mandate and remains the passive instrument to facilitate intergovernmental bargain and ensure credible commitment under uncertain conditions (Moravcsik 1995, p. 620, Talberg 2002, p. 33). Supranational organisations are therefore in no position to exert independent causal influence on the policy process, but act rather obediently according to the preferences of the member states or, at least, the most powerful among them.

³² For a brief description of the Commission’s functions, see Pollack 2003, pp. 84-88.

the persistent policy entrepreneur, who acts when a 'policy window' allows it (Pollack 2003, p. 51). Furthermore, its function is to execute EU policy in specified domains, and ensure that member states comply with EU rules. The Commission is the guardian of the treaties, and is to initiate infringement procedures against non-complying states. At the same time, the delegated function to the European Court of Justice is to interpret the treaties and make sure that EC law is correctly applied in the member states. When the Commission has initiated an infringement procedure against one of the member states, it is the ECJ that ultimately decides whether the state complies or not (Talberg 2002).

The supranational autonomy of the Commission is constituted and compromised by several factors (Pollack 1998):

- The free action of the supranational organisation is basically constrained by the preferences of the member states. By skilful action, the organisation may exploit conflicting preferences between the member states. Thereby the Commission may manage to get a legislative proposal through, and the ECJ may avoid subsequent sanctions after a controversial case.
- Just as the Community's decision-making rules make it difficult to get proposals through, rules make up thresholds for sanctioning the agent.
- Asymmetrical information about a policy-field is likely to favour the agent, which is closer to the heart and interests of transnational actions.
- Autonomy is likely to increase when the agent is supported by sub-national organisations, interest groups or individuals. Such 'transnational constituencies' make it possible to build up links bypassing the state, which intensify the pressure the agent can exert against the principal. Over time, the Commission has built strong links with interest organisations, multinational firms and European citizens. The same goes for the ECJ, relying on the support of national courts, national lawyers and European citizens acting as litigants.

The autonomy of both the Commission and the European Court of Justice and their ability to institutionalise 'more Europe' vary across issue-areas and over time, and will in the end always be determined by member states' preferences. The Commission will not be able to get its 'ideal proposal' adopted without considering the preferences of the member governments, but it may act creatively within such constraints (Pollack 1997, p. 120). This is where the Commission proves its ability as 'policy entrepreneur', managing persistence and expertise (Pollack 2003, pp. 50-51). However, the possibility of entrepreneurship is clearly limited in situations where the member states have defined and coherent preferences contrasting with those of the Commission.

The autonomy of the *European Court of Justice* differs as it is confronted with different constraints. The fact that the treaties are framework treaties and that it is the ECJ's task to interpret them, gives the supranational organisation wide discretion to lay down the letter of the text and specify its objectives (Talberg 2002, p. 27). The same goes for parts of the secondary legislation which are incomplete, to the extent that their actual meaning and scope is disputable. What constrains the ECJ is the possibility that the member states may sanction a legal interpretation that they disagree with, by re-legislating or, ultimately, by redefining the mandate of the ECJ. The possibility of sanction invites the ECJ to exert self-restraint. The Court may rationally anticipate the principal's reaction and adjust its behaviour to avoid sanction (Pollack 1997, p. 116). Concretely, this would mean that the Court would try to avoid jurisprudence which significantly goes against the preferences of the member states – or the most powerful among them (Garrett 1992; Garrett, Kelemen & Schultz 1998). The position of the Court, as well as institutionalisation through the interaction of law and politics and its limits will be discussed in greater detail in the following main section.

The Commission and the ECJ are normally assumed to act in some kind of partnership, preferring 'more Europe', and sharing a teleological reading of the treaties. But, from time to time, the Court rules against the Commission. Compared with the ECJ, the Commission is more constrained as it operates in an environment where the most immediate sanction is to have a proposal rejected. The Commission thus needs continually to mobilise support for its proposals (Talberg 2002, p. 30). When its policy-agenda is supported by existing EC rules, Court decisions and transnational interests, its authority is clearly enhanced.

In the process of institutionalisation, supranational organisations apply, interpret and clarify rules, so that the context for subsequent action is changed (Stone Sweet, Fligstein & Sandholtz 2001, pp. 13-14). How these organisations interpret the ruling word gives life to the institution, since it establishes its effective meaning. Supranational organisations thus have a key impact on the content and scope of institutionalisation.

3.3: On Institutionalisation

The 'institutionalisation of Europe' approach theorises integration as a dynamic chain of cause and effect. Institutionalisation is initiated by transnational exchange. Transnational exchange creates situations with a need for dispute resolution. The legal system considers the dispute and lowers the

costs of future transactions by providing certainty. Legislation elaborates legal rules, which facilitates and structures exchange.

The three factors: transnational exchange, judicial activity and rule production are viewed in a dynamic relation, where they evolve interdependently and 'in doing so constitute and reconstitute a polity' (Stone Sweet & Brunell 1998, p. 64). The legal system is a core component in this dynamic relation since, as cross-border activity increases, judicial activity will increasingly be needed. The dynamic of rules and rule-making constitute the core of the institutionalisation logic (Stone Sweet & Sandholtz 1998, p. 16).

The work of Stone Sweet and Brunell introduces co-integration analysis to the study of European integration. On the basis of testing four propositions, they find that their theoretical assumptions are sustained. The four testable propositions are (Stone & Brunell 1998, pp. 66-67):

1. Transnational exchange generates social demand for judicial activity,
2. Higher levels of transnational activity will push for supranational judicial or legislative rules,
3. The consolidation and expansion of European rule-making will cause more transnational activity and more judicial references in an increasing number of domains,
4. The future course of development will be such that the three factors: transnational activity, judicial activity and the production of European legislation, will evolve interdependently. This will drive European integration in a predictable direction, i.e. towards more integration. The causal link between the three factors will produce a self-sustaining dynamic.

On the first proposition, they argue that their data analysis supports the view that transnational exchange has been a crucial driving factor behind the construction of the EC legal system (Stone Sweet & Brunell 1998, p. 69). They find a very high correlation between intra-EC trade and Article 177 references. However, from this high correlation, it cannot simply be inferred that there is a long-run relation between these variables, because both time series have a nonstationary stochastic trending behaviour. For this reason, Stone Sweet & Brunell apply the Johansen cointegration test to check if this high correlation is due to a real long-run relation, i.e. a cointegration relation (Engle & Granger 1987), or to a spurious relation (Granger & Newbold, 1976). They find cointegration with a positive sign of the coefficient which demonstrates that, in the long-run, member states with more intra-EC trade also have a higher number of judicial references (Stone Sweet & Brunell *ibid.* pp. 67-68).

They add an additional variable to the cointegration analysis, rule production, to test the other three propositions. They find cointegration again between the three variables (Stone Sweet & Brunell *ibid.*, pp. 70-71). From these econometric findings, Stone Sweet and Brunell go further with their conclusions. From their cointegration analysis, it seems that there is the possibility of two cointegrated relations between the variables. One between intra-EC trade and judicial activity and a second one among all variables, an issue that could shed more light on the dynamics of the three variables. However, as emphasised in the econometric literature, the cointegration test is very sensitive to some aspects of the statistical model building that are not specified in the paper of Stone Sweet and Brunell, and could change their results completely. Thus, it would be interesting to check if cointegration is found using a different specification of the statistical model. This criticism means that the conclusions based on the propositions should not be accepted without reservations.

According to Stone Sweet and Brunell, their data analysis support the argument that the three variables make up a virtuous circle, expanding European integration:

"The theory, after all, posits an expansive logic to integration processes. According to this logic, the growing interdependence of transnational exchange, judicial activity, and Euro-rules drives the progressive construction of the supranational polity. By that we mean the process by which governmental competencies, in an increasing number of domains, are transferred from the national to the supranational level [...]. These national rules and practices will be targeted by litigants, and pressure will be exerted on EC legislative institutions to widen the jurisdiction of EC governance into new domains. We think of this dynamic as a kind of legal "spill-over" (Stone Sweet & Brunell 1998, p. 72, emphasis added).

It may be argued that the first proposition formulated by Stone Sweet and Brunell addresses institutional creation, whereas the others concern institutional evolution, i.e. institutionalisation. The first proposition thus looks at the functional demand for institutions. Studying subsequent institutionalisation is, on the other hand, to assume that institutions have a supply-side as well, and exert independent effect. When an institution is first in place, it may still transform functionally as a response to an exogenous change. However, the more frequent form of institutional change is likely to be caused by an endogenous process. The transaction-based analysis suggests that transnational exchange, judicial activity and the production of rules develop along mutually reinforcing paths. Feedback effects are powerful parts of institutionalisation. Applied complexes of supranational rules fertilise further rule creation, since established rules will point to unregulated aspects of a specific policy domain. When applied, adopted rules may need clarification or extension to new situations. Rules are seldom definitive, and need constant rewriting. The dynamics of institutionalisation are a result of this constant revelation of the insufficiency of existing rules.

Institutions are continuously asked for, interpreted, clarified and rewritten by actors and organisations, and the context for subsequent social demands and institutional solutions are altered along the developmental path.

As a rule-pattern gradually materialises itself, it expresses tracks of causality;

“When an institutional or organisational solution to a particular problem emerges and stabilises into accepted rules and procedures, it will shape subsequent expectations, interaction, and institutional innovation. Once such developments come to follow a specific track, shifting to another track will be increasingly difficult [...]” (Stone Sweet, Fligstein & Sandholtz 2001, p. 18).

Institutionalisation is thus described as a path dependent process, where feed back mechanisms or increasing returns reinforce the direction once chosen (Caporaso & Stone Sweet 2001, p. 230). Change is patterned along the way by the institutions in place. Therefore, studying institutionalisation requires a historical form of process-tracing, since this seems to be the only obvious way of tracking down chains of cause and effect.

3.4: The Possibility of De-institutionalisation?

Stone Sweet et al's theoretical presentation of how 'Europe' became institutionalised echoes key propositions from neo-functionalism. Like early neo-functionalism, the argument is that there is a logic of institutionalisation (Stone Sweet & Sandholtz 1998, p. 16). Like neo-functionalism, they find that 'spill-over' is a driving mechanism of the integration process. A kind of 'legal spill-over' is phrased as a powerful dynamic (Stone Sweet & Brunell 1998, p. 72). Finally, like neo-functionalism, the approach suggests that institutionalisation or integration has its own self-sustaining dynamic (Stone Sweet & Sandholtz 1998, p. 5). The authors note that some of them are quite comfortable under the label 'modified neo-functionalists' (Caporaso & Stone Sweet 2001, p. 224).

The immediate critique of the theory seems to be rather like the one formulated against early neo-functionalism. Is the approach equally capable of theorising the limits of institutionalisation? The dominant viewpoint seems to be that institutionalisation drives progressively towards 'more Europe':

“Although we do not rule out the possibility that 'de-institutionalisation' can occur or that institutionalisation in Europe can accommodate a great deal of deregulation and decentralized administration, we are sceptical of roll-back [...]. Because modes of supranational governance tend to be heavily rule-oriented, legalistic, and demanding

of coordination among relatively autonomous governmental entities, they are also expansionary and potentially subversive of national practices" (Stone Sweet, Fligstein & Sandholtz 2001, p. 21).

The description of path dependency through a virtuous cycle of self-sustaining dynamics ignores the possibility of negative feed-back or 'decreasing returns', and for these reasons the approach is inappropriate when trying to explain outcomes other than those sustaining or expanding institutionalisation. The approach is likely to overestimate jurisprudence as the source of deepened integration and, on that account, not pay sufficient attention to the role of politics.

By theorising a supranational institutionalisation logic which is almost automatically expansive, the arguments are up for both theoretical and empirical contestation. Hence, institutionalisation through the interaction of law and politics, including its limits, will be discussed below in further detail.

4.0: Institutionalisation through the Interaction of Law and Politics

By making judicial activism a core component in the virtuous circle driving European integration forward, it could be argued that the 'Institutionalisation of Europe' theoretical approach describes a process which downplays the importance of politics, and thus the member states. Nevertheless, the approach does analyse the relation between law and politics, since the institutionalisation process described above has important political consequences, involving moving competencies from the national to the supranational level. It is, furthermore, an approach that is highly relevant for political science, since it highlights litigation as a central part of supranational decision-making that at times overlaps with, at times overtakes, the role of politics. It thus emphasises judicial activism as indeed politicising, (co)deciding the scope, content and direction of European integration. Studying legal integration inherently implies a study of politics:

"The legal process, and the process of expanding the reach and scope of European law in the national realm, is inherently political" (Alter 2001, p. 44).

That said, the institutionalisation approach may have a fundamental flaw, since it does not account for the possibility of negative feedbacks or 'decreasing returns', when European jurisprudence and rulemaking are not ever-expanding. Crucial questions remain open. To what extent does the European Court of Justice enjoy political autonomy? What characterises institutionalisation through the interaction of law and politics? What are the limits to the institutionalisation which is furthered by the Court? Different interpretations by political science and law-in-context approaches on these questions will be addressed in what follows, which discusses the position of the Court of Justice, its

ability to 'transform' Europe, and whether judicial activism goes beyond politics or whether politics is capable of overturning law. On the whole, this section discusses how the instrument of law mediates supranational institutionalisation and the limits set on it by politics.

4.1: The Position of the European Court of Justice

The European Court of Justice is generally regarded as having an unusually influential position, compared with other international courts. No matter whether scholars ascribe to the Court a high degree of autonomy, or view it as a restrained supranational organisation with a conditioned scope of manoeuvre, it is widely agreed that the ECJ has managed to further integration (Garrett, Kelemen & Schultz 1998, p. 149; Moravcsik 1993, p. 513; Alter 1998, p. 121; Burley & Mattli 1993). Its unusual position lies in the fact that it can declare both EU law and national law that violate the *acquis communautaire* illegal, even within areas that have traditionally been regarded as the pure prerogative of the member state. As will be demonstrated in the following empirical analysis, social and health policies are powerful examples of the Court's ability to extend EU law and principles to other policy domains.

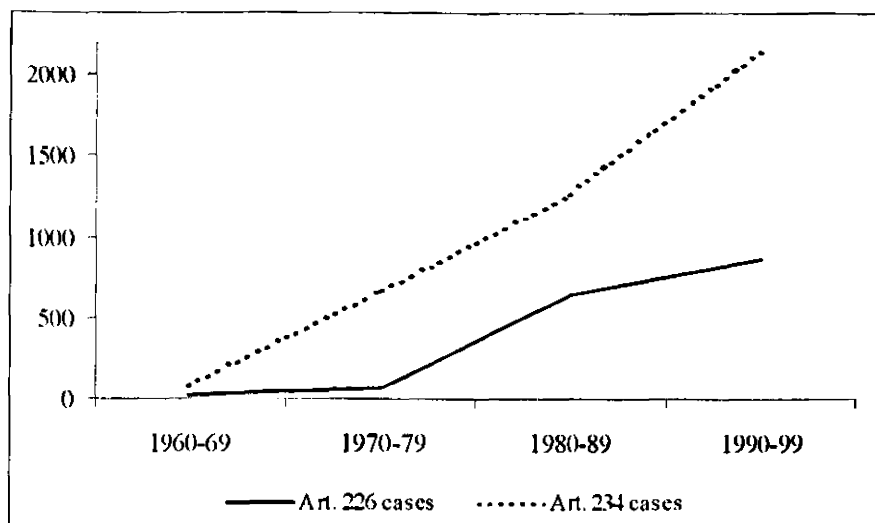
Article 234 of the Treaty (ex. art. 177) has proven to be among the most important provisions to have shaped Community law and enhanced its effectiveness. Article 234 authorizes the Court to give preliminary rulings on the interpretation of the Treaty, secondary legislation and on the relation between Community law and national law (Craig & de Búrca 1998, pp. 406-407). Through Article 234, the relationship between the Community and national legal systems has been defined. The Article on preliminary ruling has enabled private individuals to challenge the compatibility of national law with Community law. Whereas lower national courts can refer a question on the interpretation of Community law to the ECJ, national courts of last resort are in certain contexts obliged to do so. By engaging national courts and private individuals in the extension of Community law, Article 234 has served as a powerful means of promoting the uniformity of Community law (Rasmussen 1998, p. 478).

Furthermore, the ECJ can be requested by the Commission to judge whether a member state fulfils its Treaty obligations. Article 226 (ex. art. 169) authorizes the Commission to initiate infringement proceedings against any of the member states, and ultimately gives the Court the final word in determining whether the member state complies or not (Talberg 2002, p. 26). Finally, according to

Article 227 (ex. art. 170) a member state can bring an infringement procedure against another member state to the Court. However, that procedure has very seldom been used.³³

Over the years, the judicial activity of the Court has increased dramatically, especially since the 1980s. Between 1960 and 1999, the Commission has brought 1604 infringement cases to the Court, and, during the same period, 4157 preliminary rulings have been brought from national courts to the ECJ. Graph 1 below illustrates that the Court's caseload has dramatically increased since 1980.

Graph 1: Article 226 & 234 cases between 1960 – 1999³⁴



The authoritative rulings of the Court have continually increased, as more and more cases have been referred to it. The legal push for integration is not only a matter of quantitative terms, but also a matter of the method through which the ECJ has given substance to the words of the Treaty. The Court's reasoning and methodology has generally been described as teleological or purposive, where law is interpreted in the service of an objective. That is, the goal is the motor of law (Alter 2001, p. 20; Craig & de Búrca 1998, p. 89). It has been described as the application of a systematic method of 'gap-filling', where the line of a legal principle is gradually being drawn and extended to

³³ In fact, between 1960 and 1999 there has only been 4 infringement cases brought to the Court by a member state (Alter 2001, p. 15).

³⁴ Article 226 cases brought to the Court between 1960-1999 were in the individual periods: 1960-69: 27 cases; 1970-79: 70 cases; 1980-89: 646 cases; 1990-99: 861 cases. During the same periods, Article 234 cases brought to the Court were: 1960-69: 75 cases; 1970-79: 666 cases; 1980-89: 1255 cases; 1990-99: 2161 cases. The figures rely on the work of Alter (2001), p. 15. The calculations of Alter are based on infringement statistics from the Commission and preliminary ruling statistics provided in the European Court of Justice's 1999 annual report.

new situations. The gradual establishment of a legal principle means establishing precedent, where the content or conclusive parts of a former case are applied to a subsequent one. The full scope and consequence of the legal principle is thus revealed from case to case:

"A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle, but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed" (Hartley 1998, p. 79).

Teleological interpretation of Community law and a creative case-by-case establishment of precedent suggest a proactive position by the Court of Justice and that it has a great deal of manoeuvrable scope. However, we are reminded to be cautious about generalizing conclusions on judicial activism:

"The Court has at times been reactive, at times proactive, and at times a mixture of both. In other words, the Court has not pursued a project of integration growing more or less 'activist' all the time. At times it appears cautious in one area of law and ambitious in another, responding perhaps to external events and to the position of the member states or other institutions" (Craig & de Burca 1998, pp. 78-79).

The quote above pictures judicial activism as rather complex. It rejects the idea of the Court as being generally proactive, and furthering integration. Moreover, it also does not support the proposition that the Court has generally exerted a greater degree of self-restraint after the reintroduction of qualified majority voting with the Single European Act, as has been hypothesised (Weiler 1993, p. 430; Dehousse 2000, p. 27). The quote suggests a Court which acts contextually, capable of both politicising and showing political cautiousness.

This ambiguous style of action serves as a starting point for entering into the theoretical disagreement that exists on the question of the political autonomy of the European Court of Justice. On the one hand, a group of scholars argue that the Court, historically and at present, is a decision maker, which over time has extended its own scope of manoeuvre alongside that of 'Europe'. On the other hand, a different group of scholars argue that the Court does not act with more autonomy than that which the member states permit.

4.2: Transforming Europe

The autonomy ascribed by scholars to the Court of Justice is, in part, historically deduced. When the member states signed the Treaty of Rome and thereby adopted Article 177 on preliminary

ruling, it was neither the intention to give individuals the opportunity to sue their own governments, nor to declare the supremacy of Community law. The case law of the Court itself established the doctrines of direct effect and supremacy, and thereby, in the words of Weiler, initiated the transformation of Europe and with it the relationship between the Community and its member states (Weiler 1991).

The Court's ruling in the *van Gend* case of 1963 gave Community law direct effect.³⁵ The doctrine of direct effect meant that certain provisions conferred direct rights on individuals and equally imposed obligations on national authorities, without these necessarily having been implemented in national law.³⁶ With the principle of direct effect, individuals became subjects of Community law. The establishment of direct effect thus made Community law different from traditional international law, as the latter only has states as the subjects of law. By conferring direct rights on individuals, the Court built an important alliance with 'the man in the street', and laws adopted in Brussels became directly enforceable as if they had been adopted by national parliaments (Wind 2001, p. 138; Weiler 1994, p. 513).

The legal doctrine of direct effect gave the private litigant a supranational possibility to challenge national policies. The later doctrine of supremacy established by the *Costa* case in 1964 reinforced that possibility.³⁷ Whereas federal constitutions normally specify that in the case of conflict, federal law is supreme to the law of lower states, the Treaty does not define the relation between Community law and national law (Rasmussen 1998, p. 263). In the *Costa* case, the Court laid down that if national law conflicted with Community law, the latter was supreme.³⁸ The doctrine made

³⁵ Case 26/62, *van Gend & Loos vs. Netherlands Inland Revenue Administration*, 5. February 1963, ECR 1963, p. 1.

³⁶ In the conclusions of the *van Gend* case, the Court stated: "The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals. Independently of the legislation of the member states, community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reasons of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community" (emphasis added).

³⁷ Case 6/64, *Costa vs. ENEL*, 15. July 1964, ECR 1964, p. 564.

³⁸ In the conclusions of the *Costa* case, the Court stated: "The integration into the laws of each member state of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over the legal system accepted by them on the basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. *The transfer by the*

European law supreme to subsequent changes of national law, meaning that member states cannot adopt policies that contradict their Community obligations (Alter 2001, p. 17). In the *Costa* case, the Court concluded that by being part of the Community legal system, the member states had permanently limited their sovereign rights. By establishing a new legal hierarchy, the Court stressed that Community law was more than the simple sum of national legal orders (Wind 2001, p. 145).

Whereas the Treaty nowhere states the principles of direct effect and supremacy, the legal reasoning of the Court brought about this conclusion. The Court of Justice thereby revolutionised the preliminary ruling system and the Community legal order, from a system where individuals could question Community law to a system allowing them to question national law, even in national courts (Alter 1998, p. 126; Alter 2000, p. 491). The Court's legal actions integrated the national and supranational legal systems, and engaged national judges in upholding the supremacy of European law (Stone Sweet & Brunell 1998, pp. 65-66). By allying itself with the citizens of the member states, granting them direct rights beyond their own state, the Court made sure that individuals would take a private interest in monitoring state compliance with supranational law. By allying itself with national courts, the Court ensured a decentralised enforcement mechanism of Community law. The transformation of the Community's legal system thus increased the effectiveness of European law.

The two doctrines have considerable political implications. The doctrines compromise the sovereign position of national parliaments by giving direct effect to supranational law and make Community law supreme over what has been or will be legislated nationally. By establishing the doctrines, the direct and effective impact of Community law had exceeded the original intentions of the Treaty drafters. The question as to why politicians did not step in when legal interpretations 'transformed Europe' remains a fundamental puzzle to both the theoretical and empirical study of European integration. The relation between law and politics will be discussed in the following sections.

4.3: Judicial Activism Beyond Politics?

Legal, neo-functional scholars, as well as scholars of comparative politics, have claimed that the European Court of Justice should be accredited its own part in European integration dynamism, and

states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights" (emphasis added).

that it does act as a policy maker in its own right (Weiler 1991, 1993, 1994; Shapiro 1999; Burley & Mattli 1993; Mattli & Slaughter 1995; Pierson 1996; Alter 1998, 2000, 2001).

However, a point to which discussion continually returns is why member governments should have ever allowed a supranational organisation, serving as an agent, to expand its autonomy, to define competencies and to limit the role of politics.

One explanation is that law masks politics (Burley & Mattli 1993, p. 44; Beach 2001, pp. 46-47). Due to the dominant belief in the separation of law and politics, the Court has had considerable manoeuvrability to be political exactly because its actions are generally believed to be apolitical.

In this line, Alter has argued that the political implications of a legal ruling are unlikely to be revealed in the first place (Alter 1998; 2001). When establishing the doctrines of direct effect and supremacy, the Court's conclusions were revolutionary from a legal perspective. But from a political perspective, the cases did not seem to have a significant political or financial impact. The financial implications in the *van Gend* case against the Netherlands were small. In the *Costa* case, the Italian government actually won the case, at the same time as the Court in a obiter dictum formulated the supremacy of Community law, which had no relevance for the case at hand. The Court simply added that had there been a conflict of law, Community law would have prevailed. Thus, what, it has been argued, has constitutionalised the Community legal order, were, when taken, rather marginal legal decisions from a political point of view (Alter 1998, p. 131-133).

This argument explains political non-action. It pictures law and politics as two distinct spheres, which do not follow to the same logic, and instead respond to very different logics. According to this argument, lawyers and judges evidently take a long term interest in the evolution of law, whereas politicians have short term interests, and react to judicial activism for its immediate impact and not for its potential one. To lawyers and judges, case-law is interesting for its establishment of precedent. For politicians, the rather short term material impact of a case is what makes it important – or not. Applying Pierson's argument on the restricted time horizon of political actors, Alter explains that whereas political non-action towards the judicial activism establishing direct effect and supremacy today seems short-sighted, the doctrines, at that time, appeared at most only as potential problems (Alter 1998, pp. 130-132; Alter 2001, p. 189).

Finally, should member governments wish to act and restrain the legal praxis of the Court, they are confronted with varying, but considerable, institutional barriers. 1) To limit the mandate of the Court of Justice would require a Treaty amendment, and thus unanimity as well as ratification by national parliaments. 2) Should member states wish to correct one of the Court's interpretations of the Treaty, this would equally require a Treaty amendment – and unanimity. To rule in the Court through the means of a Treaty amendment is severely constrained by the fact that, besides unanimity, it would require national processes of ratification, meaning referendums for several member states, or approval by national parliaments. 3) If politicians wish to overrule a legal interpretation of secondary legislation, it can be done by the Council's amendment of the legislation, which clarifies the points of dispute. Such a political correction would require unanimity or qualified majority voting, depending on the decision making procedure. These different decision-making rules thus constitute the thresholds to sanction a legal course of integration. Although the institutional barriers to amend secondary legislation are considerably lower than those involved in restricting the Court's authority by a Treaty amendment, Alter notes that the Court's decisions have surprisingly seldom been rewritten by the change of a simple statute (Alter 1998, p. 138). One explanation is that a legal decision seldom affects member states equally, and only seldom all or the qualified majority of the member states disagree with the legal interpretation. Under the unanimity rule, which applies to Regulation 1408/71, only *one* member state needs to support the jurisprudence, and it will be impossible to mobilise the necessary political support for re-legislation. Such institutional barriers to change express what Scharpf has termed, the 'joint decision trap' (Scharpf 1988).

These difficulties for the member states to sanction the Court, when it goes too far beyond political intentions, pictures a European Court of Justice which enjoys a relative high degree of interpretive autonomy and authority. However, not all scholars agree on the extent of legal autonomy it has in its interpretation. The political power approach, outlined below, understands the Court's position as much more interdependent and restrained and, at the end of the day, subordinated to the political will of the more powerful member states.

4.4: Politics Overturning Law?

The basic argument of the political power approach is that, ultimately, member states control the Court and thus the process of legal integration. The Court does not have the autonomy to rule

against the more powerful states, but must generally bend to their interests (Garrett 1992, p. 537; p. 552). The basic assumptions of the approach thus agree with those of intergovernmentalism.

In a set of articles written in the 1990s, Geoffrey Garrett and co-writers pose the argument that control of the course of integration has not escaped national governments due to legal integration. On the contrary, legal integration has largely taken place when it has been politically supported. The political power approach pictures the Court of Justice as a strategic actor, sensitive to political constraints and preferences (Garrett 1992, 1995; Garrett & Weingast 1993; Garrett, Kelemen & Schultz 1998).

In contrast to neo-functionalism, the approach introduces a focus on politics in the process of legal integration - or disintegration. By bringing in political power as a (co)determinant for Court decisions, assumptions on self-sustaining dynamics are criticised. Far from being self-sustained, dynamics are politically sustained, and law is not shielded from political pressures. Politics is seen as ever present and if judicial activism oversteps what member governments can accept, politicians will attempt to overturn or evade the legal decision. Politics respond actively to law.

The relationship between politics and law is illustrated in 'the legal politics game' by Garrett, Kelemen & Schultz (1998, pp. 152-154). As emphasised in section 1 of this chapter, their description of 'the legal politics game' has inspired the model drawn up to analyse institutionalisation of social security rights as a two-layered process of integration, depicted in figure 3. The argument for making 'the game' an essential part of the model which is built up for the subsequent analysis, is that it forces us to include a focus on the limits of legal integration, which is essentially left out in a neo-functional depiction of legal path dependencies.

The first part of the game, as described by Garrett, Kelemen and Schultz, is when the Court rules on a national law or practice and decides whether or not it complies with European law. There are two possible outcomes. In the first, the ECJ finds the national act in compliance with Community law, and that is the end of the stage game. In the second, the Court rules against the national law or administrative practice. The second part of the stage game pictures the political reaction to the adverse decision. The member government must choose whether or not to conform with the decision. If it chooses to abide, it must change the national law or practice. But if it chooses to challenge the ruling, it has three ways to react. i) It may overtly or covertly evade the decision. ii) It may work for a collective overturning of the decision, i.e. re-legislation. iii) It may propose a

revision of the Treaty. The third part of the stage game concerns how the other member states will react in that situation. They may either support the overruling of the judicial activism of the Court, through re-legislation or ultimately through a Treaty amendment. Or, they may not support the proposal to correct or constrain the Court, in which case the litigant member state will either continue its defiance alone, or finally choose to accept the decision.

According to the political power approach, this is the temporary end of the legal politics game, but the game continues with new rulings of the Court and political reaction. The infinite repetition of the game directs the evolution of legal integration. In this sense, the process of legal integration is shaped dynamically, but not apolitically.

4.5: Institutionalisation and its Limits

Within both political science and law-in-context legal approaches, a significant disagreement exists as to what extent the European Court of Justice may integrate contrary to political preferences. Returning to the discussion on the position of the Court, such disagreement may mirror the fact that the Court behaves in contradictory ways: at times furthering integration and, at other times, behaving cautiously. Explanations based on legal autonomy may account for those cases where judicial activism has furthered integration, whereas the political power approach highlights the motives for the Court to be cautious. Different theoretical deductions on the position of the Court and its scope of manoeuvre is likely to mirror the empirical material selected and studied.

The political power focus of Garrett and co-authors is supported by cases, which are not adverse, where the litigant government chooses not to accept an adverse decision, or where the other member governments support the litigant state in restraining the Court. It is notable that the approach criticises legal autonomy studies for supporting their conclusions "with selective citation of illustrative cases", but hardly avoids basing its own conclusions on some kind of case selectivity (Burley & Mattli 1993, pp. 50-51; Garrett, Kelemen & Schultz 1998, p. 151).

The model built up for the purpose of the present study, focusing on institutionalisation through the interaction of law and politics (figure 3, section 1), aims both to account for institutional stagnation or de-institutionalisation, as well as to bring into focus the parts of social security integration which are not captured by the 'legal politics game' as formulated by Garrett, Kelemen and Schultz. Their study of the 'legal politics game' must be based on case selections, since it does not theorise the

various ways a litigant government may accept a decision (stage 2, figure 3). Furthermore, it only considers the reactions of other member governments in the case where the litigant government defies the ECJ ruling. However, to trace the reaction of other member governments to adverse cases which were accepted by the litigant government may be just as important (stage 3, figure 3). These cases vary greatly and may show the reach and effectiveness of Community law as well as the establishment of a binding precedent. When a litigant government accepts an adverse decision, it is by no means the end of the legal politics game, as suggested by Garrett, Kelemen and Schultz, but rather the beginning of the second layer of institutionalisation. Other member states may refuse the multilateral effect of an individual ruling and continue to deny any general applicability, until the day the ECJ rules otherwise. But other member states may also accept a ruling as having general impact and implement the rights and principles themselves. Furthermore, all member governments may gradually agree together on a legal principle, and amend European law so that it reflects the legal principle established (stage 3, figure 3). Such a political response to innovative legal interpretation would suggest a great degree of political acceptance of judicial authority, even when the Court rules against defined national preferences. Finally, it may be that politics manage to overturn law, and it may be that the Court subsequently accepts such a political restraint, but if analysing the acts and reactions of law and politics between an extensive $T_0 - T_2$, law may answer back (beyond stage 3, figure 3). Since institutionalisation is a repetitive process, it is very likely that in a given 'beyond stage 3', the Court will re-interpret national application or non-implementation and reassert its previous conclusions.

Despite significant disagreement between legal autonomy and political power approaches, they resemble one another on one key point. Institutionalisation is theorised as a process shaped alone at the supranational level of decision-making. The scope, effectiveness and effects of Community law all considered without taking the subsequent phase of national implementation into account.

By researching national implementation and impact, considerable variations in the cross-case, cross-time and cross-country reach of Community law are likely to be revealed. How supranationally generated rights are subsequently institutionalised into national policies and administrative practices gives us different insights into the effectiveness and limits of Community law, and may add to our understanding of why politicians do not respond immediately or consistently to new legal conclusions and doctrines. In the following section, the national impact of supranational institutionalisation will be discussed.

5.0: What Is the National Impact of Supranational Institutionalisation?

Integration theories generally seem to expect that when institutionalisation takes place, it implies a corresponding policy change at the national level. In addition, it seems to be generally expected that when the scope of integration increases, it will produce a greater uniformity in national policies (Dimitrova & Steuenberg 2000, p. 202). Neo-functionalism, intergovernmentalism, as well as most of their modified variants, focus on how and why member states engage in European decision-making, but do not discuss what impact a decision-making result may have on national policies (Börzel & Risse 2000, p. 1). Moreover, the theoretical dispute about the member states' possibility to control the scope and direction of European integration does not consider the member states' ability to control how EU policies are implemented into national legislation. When it comes to the political impact of jurisprudence, most work has focused on the influence of ECJ decisions on EU policies, but has left out the question of how litigation influences national policies (Alter 2000, pp. 507-508). Generally, integration theories have in common the fact that they focus on supranational decision-making in itself, but leave out how such output is subsequently transposed into national policies or administrative routines. Such a focus may determine a great deal of the conclusions these approaches reach.

This section argues that the effective meaning of an institution is established through both supranational political and judicial decision-making, as well as through national implementation. It is argued that both layers of institutionalisation are decisive for the domestic impact of European integration. National implementation of EU law and policies constitute the reactive institutionalisation process, which, at least in the medium run, is controlled by national politicians and administrations. Implementation as a reactive part of policymaking makes up the second stronghold of national control, where actors are capable of filtering and sometimes modifying the actual impact of EU decision-making. It is argued that it is important to view implementation as an act of 'governance', rather than a neutral 'management' of political decisions, and to consider analytically the discretion member states possess when implementing (Dimitrova & Steuenberg 2000, p. 215; Scott 2000, p. 259). Institutionalisation will be examined as a two-layered process.

5.1: Implementation Formally Regarded

Implementation may be defined as the way decisions are put into effect (From & Stava 1993, p. 59). Implementation is therefore the process which establishes concrete rights and obligations for those subject to law.

From a formal point of view, member states are legally bound to uphold the *acquis communautaire*, in other words treaties, secondary legislation and ECJ jurisprudence. However, to a great extent member states themselves decide how to comply with their Community obligations. The European Union has its own division of labour. Whereas the decision making level is European, member states attend to implementation, which, in practical terms, is often carried out at the sub-national level. The structures of Community implementation appear fairly independent, formally regulated through Article 10 (ex. art. 5) of the Treaty:

"Member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from actions taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty"

The degree of discretion that member states enjoy when implementing depends on the institution in question. Regulations are directly applicable, whereas directives have to be adopted in national legislation (Hartley 1998, pp. 196-206). Directives thus leave more room to slip in national preferences when enacted in national legislation, whereas regulations to a greater degree, ensure the uniformity of Community law. However, regulations may also from time to time, require implementation. That will be needed when the terms of the regulation are formulated vaguely, and individual provisions need to be applied in detail. At the same time, the case-law of the Court has laid down that directives may also be directly effective.³⁹ In this way, the distinction between regulations and directives has become somewhat blurred.

The ways of integration also differ in their domestic impact and implementation requirements (Knill & Lehmkuhl 1999). Positive integration prescribes the direct institutional requirement for domestic adjustment, and leaves limited discretion for the member state in deciding which concrete arrangement to apply. Negative integration, on the other hand, focuses on 'market making' and prohibits national barriers to the internal market (Scharpf 1996).⁴⁰ When confronted with negative integration, member states do not have to implement a prescribed institutional model, but instead abolish those parts of domestic policies which conflict with internal market principles. In this sense,

³⁹ See for example Case 41/74, *Ivonne van Duyn v Home Office*, 4. December 1974, 1 CR 1974, p. 1337.

⁴⁰ Positive integration is intergovernmentally enacted in the sense that it depends upon agreements in the Council of Ministers. The basic rules of negative integration are already laid down by the primary law of the Community, and the scope of negative integration may be expanded supranationally without involving the Council of Ministers (Scharpf 1996, p. 18).

negative integration leaves more decision-making scope for member states to decide how to comply with the law and policies of the Community.

Regulation 1408/71 is an illustrative example of the fact that sharp distinctions between different types of institutions, and ways of integration, may not mirror the degree of discretion member states enjoy when implementing. As a regulation, 1408 should be directly applicable. However, putting the provisions of 1408 into effect has indeed required implementation and, in some cases changes in national law. The social security rights that the Regulation covers are prescribed, not only by the Treaty and the text of 1408, but also by the extensive case-law of the Court, which lays down the meaning of broad and sometimes rather abstract provisions. Transposing the *acquis communautaire* into enforceable rights in accordance with national legislation implies a national administrative assessment. Although a regulation, 1408 requires implementation in a more or less detailed fashion. Furthermore, the principles of Regulation 1408 prescribe negative integration, aiming to abolish national barriers to free movement. The Regulation does not 'harmonise', but 'coordinates' national social security policies.⁴¹ In contrast to positive integration, 'coordination', as a form of negative integration, leaves considerable scope for national actors to interpret whether national acts are in compliance with Community obligations. For these reasons, it is essential to study implementation when assessing the domestic impact of European coordination of social security rights.

5.2: Institutionalisation Equal to Change? Implementing EU Policies

Thus when considering impact, it is important whether a specific institution allows for flexible or uniform implementation. Institutions allowing more flexible implementation are likely to produce a greater degree of differentiation between member states when decisions are put into effect. Such differentiation must be expected in the case of 1408, due to the regulation's special characteristics, as described above. But differentiated implementation does not only depend on the characteristics of the European institution, but must likewise take those of national institutions into account.

Although in general rather under-researched and vaguely theorised, there has been recent literature on 'Europeanisation' which analyses the national impact of European integration and the process through which national policies may change due to integration (Börzel & Risse 2000, p. 3).

⁴¹ The difference between the concepts of 'harmonisation' and 'coordination' will be discussed in more detail when introducing the Regulation in chapter III below.

Theoretical assessments of the domestic impact of integration may be divided into three main groups (Jacobsen, Lægreid & Pedersen 2001).⁴²

The *first* group is the neo-functionalist oriented research, which regards EU policies as the independent variable, determining change. Member states translate supranational rules loyally and unambiguously into national legislation and administrative practices. Therefore the scope of supranational decision-making is equal to the extent of national change. A *second* group consists of more intergovernmentalist oriented scholars and arrives at the opposite interpretation of implementation, namely that it is a process that national actors manage to control through strategic action. Supranational decision-making is thus transposed in accordance with national interests.

The *third* group, however, focuses on the stability and historical heritage of national institutions and administrations. The robustness of national rules and practices will influence any final effective outcome. The dynamics and details of Europeanisation cannot be captured by the simple logics of independent and dependent variables (Olsen 1996, p. 271). European integration matters, and may thus constitute an independent variable for change, but national institutions, with all their legitimacy and historical heritage, were in place long before. Cause - effect relations therefore become blurred, and the importance of explanatory factors, such as national institutions and their compatibility with Community obligations, are highlighted.

According to the third approach, change will always be historically embedded, and depend on national traditions, established administrative practices and the willingness to transpose. Such studies of Europeanisation apply a historical institutional perspective, but, in contrast with Pierson's interpretation, the starting point is national. The expectation is that European institutionalisation only conditions change in a slow and incremental way. Institutionalisation may reflect a supranational path dependent process, but it is confronted with the resistance to change of all the separate national path dependent institutions:

"Starting from such a historical, institutional perspective we must expect that norms, traditions, routines and established practice, which have evolved through a long historical process, in the short term change very little"
(Jacobsen, Lægreid & Pedersen 2001, p. 19, own translation)

⁴² The following division on impact-studies into three main groups rely mainly on the work of Jacobsen, Lægreid & Pedersen (2001), which researched the Europeanisation of the Nordic central-administrations. Jacobsen, Lægreid & Pedersen, however, work with a division into four groups. Both the third and fourth group find that national institutions constitute important explanatory variables for variations in impact. Since the analytical perspectives of these two groups do not differ considerably, they have, for simplification reasons, been integrated in the following description.

In the long run, European institutionalisation may cause change, while leaving room for national interpretations. Rules are not translated to the letter, but as far as possible, according to national traditions – and perhaps preferences. Established national practices are decisive for the effective meaning of an institution.

The third approach views integration as neither equal to convergence, nor to status quo. It is emphasised that implementation is not an automatic process, but is indeed coloured by national institutions, norms and practices. One key point that is emphasised in the work of Risse, Cowles and Caporaso is that, although European integration matters, it does not lead either to convergence or to continued divergence, but rather to “domestic adaptation with national colours” (Risse, Cowles & Caporaso 2001, p. 1). Since national institutions vary, so does the extent of adaptive pressure caused by any European institutionalisation process. The extent of the adaptative pressure that European integration exerts depends on the degree of ‘fit’/compatibility or ‘misfit’/incompatibility between European law and national policies (Börzel 1999; Börzel & Risse 2000; Risse, Cowles & Caporaso 2001).⁴³ Some national institutions may be much more EU-compatible than others. However, even when a degree of adaptive pressure exists, it may not lead to change, since member states could simply choose not to respond to ‘Europeanisation’. There may be “no straightforward connection between adaptive pressures and adaptive reaction” (Goetz 2001, pp. 214-215). It is therefore a research task to account for both the variations in European impact, as well as to explain the differing responses and robustness of national institutions against European pressures for change (Olsen 2002, p. 12). ‘Europeanisation’ is not dictated by a specific form of institutional adaptation, but considerable discretion is left to the domestic actor and organisation. Impact is not “perfect, universal or constant” (Olsen 2002, p. 15). Such analytical observations should make us expect that comparative research on the impact of European institutionalisation will reveal both cross-country, cross-case and temporal variations.

“...we have to pay attention to how institutional spheres are affected differently and how they attend to, interpret and respond to European developments differently and in a non-synchronized ways” (Olsen 2002, p. 13).

5.3: Case-law Enacted as Policies? Implementing Case-law

EU-policies are implemented at the national level, and member states thus may have a second stronghold of national control. Implementation has been regarded as the national “come-back”,

⁴³ Adaptive pressure and response, as phrased by Risse, Cowles and Caporaso (2001) among others, will be discussed in more detail in chapter VI, as it will be operationalised into practical research in chapter VI and VII.

where member states can recodify EU decisions more in accordance with national traditions, thus clawing back what they may have lost through intergovernmental decision-making (Goetz 2001, p. 217; Meny et al. 1996, p. 7).

Many of the observations above on the implementation of EU-policies also contain insights into the more concrete implementation of the Court's case-law. Here member states may equally exert discretion. The quite recent work of Lisa Conant accepts the arguments of retained political power (Conant 2002). Conant criticises conclusions on judicial empowerment at the expense of politics for not following legal interpretations out of the courtroom, and for simply assuming that member states enact case-law as policies (Conant 2002, p. 44). Among others, her critique addresses the approach on the 'institutionalisation of Europe' as formulated by Stone Sweet et al. Her argument is that it may well be that legal innovation takes place and that the ECJ generates new rights, but ECJ rulings may not be automatic catalysts for policy change, and innovative legal interpretation may not result in wide-ranging domestic reforms. The reach of European law outside the courtroom largely depends on how member states accommodate the rights and obligations that have been created. Conant emphasises that it is the member states, rather than the ECJ, which control the specific content of policy change. Like the political power approach, Conant (re)focuses on the role of politics, but she does so by concentrating on how politics subsequently meets settled law. Individual case-law is characterised by ambiguity and by being incremental or by having been generated piecemeal. This leaves considerable reactive and interpretive scope for the member states as it may insulate, to a certain extent, the policy process from judicial interference. Studies focusing on the radical aspects of judicial activism forget that innovative legal interpretation does not necessarily translate into a corresponding policy response.

Furthermore, Conant argues that Article 234's system of judicial review only compels member states to comply with individually addressed rulings, since the system of preliminary ruling has no doctrine of 'stare decisis', establishing binding precedent (Conant 2002, pp. 63-73). Lacking the institution of precedent, preliminary rulings have no 'erga omnes' (generally binding) or 'ultra partes' (beyond the parties) effects (Conant 2002, p. 63). The scope of a judgement is formally limited to the individual lawsuit. That, means, first of all that the referring court only has to apply the judgement to the facts of the specific case. Secondly, it means that the judgement has no direct effect for similar facts in other member states. Without binding precedent, national courts and administrations are not obliged to base legal or administrative decisions on prior judicial rulings. Conant argues that since an ECJ judgement is not generally binding, the national administration

may refuse to evoke the rights until it gets its own lawsuit, obliging it to do so. The effect of an ECJ generated principle thus depends on the member states' decision whether and how to apply it, but generally preliminary rulings are not treated by national administrations as binding policy prescriptions. Instead Conant argues that her empirical findings substantiate that "contained compliance constitutes standard administrative practice", thus restricting the policy impact of ECJ decisions (Conant 2002, p. 69). According to Conant, the lack of binding precedent constitutes a crucial limit to law in Europe.

"The European system of judicial review operating through Article 234 (177 EEC) references only compels compliance with individual judgements because ECJ preliminary rulings do not constitute *binding* "precedents".

The absence of generally binding legal obligations enables national officials to disregard principles that are articulated in ECJ case law. National administrations capitalize on this restriction to contain justice" (Conant 2002, p. 63).

The Conant argument is, however, disputable. Craig and de Búrca find that, in effect, the ECJ has established a system of precedent, inviting national courts to regard previous rulings as generally binding. Contrary to Conant, they find that a previous ruling has a "multilateral and not merely a bilateral effect" (Craig & de Búrca 1998, p. 418). They thus conclude that the points of law generated in a judgement have a general effect and reach beyond the individual lawsuit (Craig & de Búrca 1998; de Búrca 1998, pp. 229-230). This dispute may reflect that the reach of Community law varies across time. There may be a considerable gap between when a general premise is established by an ECJ decision and when its binding precedent is accepted by political and administrative response, as well as by national courts.

Conant lists three forms of dominant policy response to innovative ECJ interpretations, and three rarer forms of policy response (Conant 2002, pp. 32-33). The dominant forms of response are far from any idea of complete application of the Court's interpretation, and include, a) contained compliance, b) restrictive application as policy, and c) pre-emption. Contained compliance happens when member states apply an innovative ruling to the individual case, but refuse to treat the ruling as a broader established principle, i.e. refuse its status as a binding precedent. Restrictive application as policy is when member states subsequently place limits and exceptions on the judicial principle in secondary and primary law. Restrictive application thus modifies the principle generated. Pre-emption takes place when member states construct European or domestic law so as to avoid ECJ interference in that policy area. Pre-emption thus addresses how past judicial activism may influence future policies. Rarer forms of response include d) non-compliance with individual cases, e) complete application as policy, f) legislative overruling. Non-compliance is not the norm.

Neither is complete application, where member states apply the generated principle without posing any conditional limits on its application. The interpretation of a principle is likely to diverge to some extent. Finally, member states may decide on a collective legislative overruling of the Court's interpretation, which, however, is a rare outcome due to the institutional constraints on mobilising support. Overruling does, however, take place, and is the most direct way politically to correct an innovative legal interpretation. This final reaction corresponds to Garrett et al's collective overturning of a legal ruling in the 'legal politics game', which was sketched in section 4.4

The work of Conant argues against the assumptions of legal autonomy, by focusing on the restricted domestic impact of legal innovation. A legal principle, which may seem radical when first stated in the courtroom, goes through a second process of institutionalisation where it is interpreted according to national institutions, administrative practice and, not least, political, administrative and judicial willingness to transpose and comply. The domestic impact of legal integration may thus reveal itself to be less significant, when supranationally generated rights and principles are translated nationally.

5.4: Monitoring Implementation

After all, political or administrative attempts to ignore or refuse Community obligations cannot be solutions in the long run. Although implementation is the concern of the member states, the Community possesses instruments to ensure that the *acquis communautaire* is rightfully put into effect. Subjects of Community law such as individuals and enterprises may complain to the Commission or the ECJ over non-compliance with Community law.

The Commission's infringement procedures (the Treaty's art. 226) and the preliminary rulings of the Court (the Treaty's art. 234) are thus important means of monitoring implementation. The actions of the Commission and the Court have, over time, enhanced the effectiveness of EU law and its domestic impact. However, it is clear that the reach of the instruments varies from member state to member state.

The Commission is assigned the task of monitoring the implementation of EU law. To fulfil this task, it will collect information about implementation (Bursens 2002, p. 176). It will be notified by the member states about how they have carried out their Community obligations. Furthermore, the Commission can investigate implementation on its own initiative. In addition, complaints may be

made to the Commission that rights have been violated. Against such backgrounds, the Commission may initiate an infringement procedure to monitor implementation. It first gives the member state the opportunity to submit observations on the matter, then submits a 'reasoned opinion' on the basis of those observations and, finally, if non-compliance continues, bring an infringement procedure before the ECJ. The Treaty did not initially entail any sanctions for non-compliance with legal decisions. The Commission's enforcement powers have, however, been increased gradually through Treaty amendments. The Maastricht Treaty amended art. 228 (ex. art. 171) and gave the Commission the possibility of infringement procedures against member states which had not complied with an ECJ ruling, and moreover the power to fine member states for their non-compliance (Pollack 2003, p. 86).

The quantitative demonstration of how many infringement procedures the Commission has initiated in recent years against individual member states, and how many of these have led to actual Court referrals, indicate the different compliance records of the member states, as well as the different ways of response when the Commission questions implementation.

Table 1: Infringement Procedures Initiated and Referred 1998-2000⁴⁴

	Infringement Started			Reasoned Opinion			Court Referrals		
	1998	1999	2000	1998	1999	2000	1998	1999	2000
<i>Denmark</i>	51	51	61	50	50	61	1	1	0
<i>Finland</i>	69	51	81	68	49	77	1	0	4
<i>Sweden</i>	70	72	88	69	71	85	1	1	3
<i>Netherlands</i>	54	85	92	51	84	80	3	1	12
<i>UK</i>	102	102	104	101	94	100	1	8	4
<i>Austria</i>	118	131	126	114	122	122	4	9	8
<i>Belgium</i>	186	125	131	166	110	126	20	15	5
<i>Spain</i>	120	100	133	114	93	125	6	7	8
<i>Luxemburg</i>	112	121	134	101	103	118	11	18	16
<i>Ireland</i>	129	114	135	109	99	118	10	15	17
<i>Germany</i>	139	123	143	154	114	132	5	9	11
<i>Greece</i>	162	150	173	146	136	150	16	14	23
<i>Portugal</i>	142	150	176	137	137	166	5	13	10
<i>France</i>	238	182	180	225	147	153	23	35	27
<i>Italy</i>	217	158	192	201	126	168	16	32	24
Total	1899	1713	1953	1776	1535	1781	123	178	172

⁴⁴ The figures are in absolute numbers. Table 1's data rely on the work of Bursen (Bursen 2002, p. 178) on infringement established. Bursen's work is based on various issues of the Commission's "Report on Monitoring the Application of EU Law". The Commission will initiate a given infringement procedure by informing the member state by a letter of formal notice, then followed by the administrative procedure in which the Commission gives a reasoned opinion. If the member state does not comply with the opinion, the Commission may refer the matter to the Court.

Table 1 breaks down the data from graph 1 in section 4.1, which pictured the development in infringement procedures referred to the Court between 1960-99. Whereas the data on the development between 1960-99 indicate a dramatic increase in the number of Commission-referred cases, table 1 above specifies that, generally, member states decide to comply before the Commission refers the infringement. Article 226 proceedings happen only "when all other means have failed" (Börzel 2001, p. 11). Between the initiated infringement procedure and the actual Court referral, the Commission and the member state engage in bilateral negotiations, which means that the conflict is most often solved before it comes to a legal clarification. However, the compliance behaviour of the member states varies. Focusing on Denmark and Germany, it can be seen that Denmark has, between 1998-2000, faced fewer infringement procedures and has, to a greater extent, complied with the opinion of the Commission, thus avoiding a Court referral. That suggests that Denmark reacts less confrontationally when accused of non-compliance than, for example, Germany. Such findings are supported by the reputation Denmark enjoys as a member state which generally seeks to fulfil its Community obligations (Börzel 2001, p. 12). As noted by Hjalte Rasmussen, Denmark deliberately endeavours to avoid infringing the *acquis communautaire* (Rasmussen 1988, p. 97). Danish political and administrative tradition seems to have led to a "conscientious non-infringements policy", where in the situation that litigation seems unavoidable, the government will carefully weigh the pros and cons of its chances of winning a case:

"As a matter of policy, if a threatening in-court battle is unlikely to be won, the government seems to prefer to settle it by an out-of-court compromise. This will often be followed by pertinent new legislation being issued or other sorts of legal enactments which brings Denmark impeccably in line with its obligations" (Rasmussen 1988, p. 97).

As emphasised by Börzel, infringement procedures do not mirror the actual level of non-compliance in the EU. They merely cover a fraction of member states' violation of their Community obligations. As graph 1 in section 4.1 above demonstrates, the preliminary ruling procedure of Article 234 reflects that non-compliance occurs extensively without attracting the attention of the Commission through the art. 226 procedure (Börzel 2001). In addition, many other incidents of non-compliance are likely to occur without it ever coming to a lawsuit. At best, cases of non-compliance as expressed through art. 226 and 234 procedures mirror a random sample of actual non-compliance.

The Treaty's art. 234 system of preliminary rulings is the other important instrument with which to monitor compliance. We have learned that, with the support of EU citizens and national courts, the preliminary rulings of the Court have enhanced the effectiveness and uniformity of Community law

(Alter 2000; Wind 2001; Rasmussen 1998). When litigants initiate a judicial procedure, arguing that their rights according to Community law have been violated, national implementation is questioned and an implementation deficit may be improved. However, an examination of the variations in the reference patterns of the member states suggests that Community law does not have an equal reach in all member states, and may have different effects. Incorrect or insufficient implementation may be the object of legal inquiry to a greater extent in some member states than in others.

Table 2 pictures the reference patterns of 12 member states as illustrated by Alter (2000, p. 499). The use of preliminary references varies significantly between the member states. The cross-country comparison shows that, in all periods, the national courts in Germany have most frequently made use of the system of preliminary references.

Table 2: Reference Patterns in 12 Member States 1961-97⁴⁵

	1961-69	1970-79	1980-89	1990-98	Total
<i>Germany</i>	30 (40%)	284 (42%)	346 (28%)	463 (26%)	1123 (30%)
<i>France</i>	7 (9%)	85 (13%)	285 (23%)	216 (12%)	593 (16%)
<i>Netherlands</i>	22 (29%)	108 (16%)	189 (15%)	174 (10%)	493 (13%)
<i>Italy</i>	3 (4%)	84 (12%)	125 (10%)	370 (21%)	582 (15%)
<i>Belgium</i>	10 (13%)	77 (11%)	142 (11%)	124 (7%)	353 (9%)
<i>Luxemburg</i>	3 (4%)	4 (1%)	17 (1%)	18 (1%)	42 (1%)
<i>UK</i>		20 (3%)	85 (7%)	163 (9%)	268 (7%)
<i>Ireland</i>		6 (1%)	15 (1%)	16 (1%)	37 (1%)
<i>Denmark</i>		6 (1%)	25 (2%)	47 (3%)	78 (2%)
<i>Greece</i>			21 (2%)	32 (2%)	53 (1%)
<i>Spain</i>			5	116 (7%)	121 (3%)
<i>Portugal</i>			1	30 (2%)	31 (1%)
Total	75 (100%)	674 (100%)	1256 (100%)	1769 (101%)	3774 (99 %)

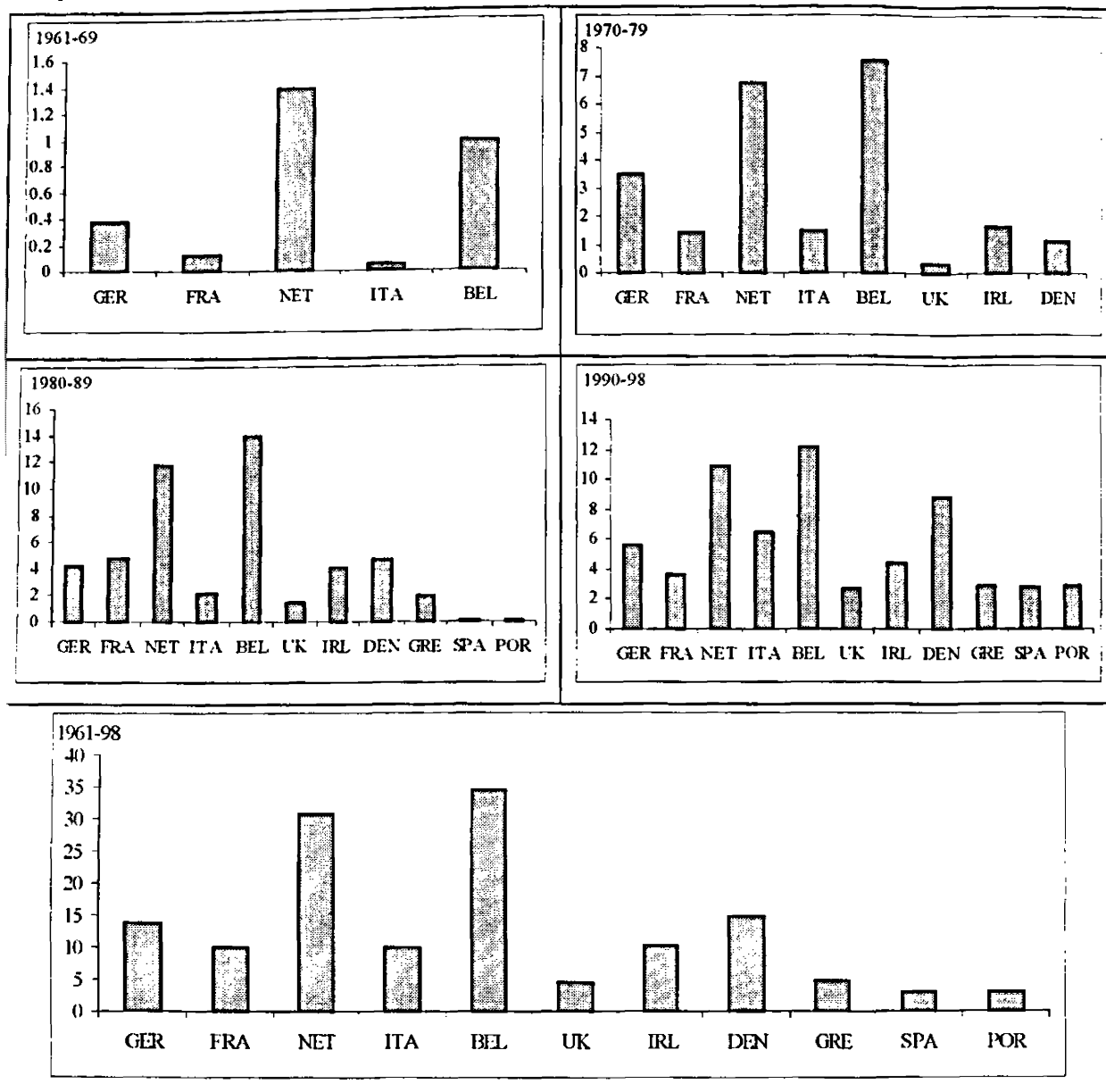
Such variation may lead to a variable impact of Community law on national policies. There is a clear difference in how much the national courts are willing to make references and subsequently to enforce Community law. Citizens and national courts have not responded equally positively to the invitation to participate in the European legal system (Conant 2001, p. 101). Cross country and

⁴⁵ The figures rely on Alter's data on reference patterns in EU member states 1961-97 (Alter 2000, p. 499). The data are based on the statistics of ECJ's 1997 annual report.

cross case differences in reference patterns have been explained by various factors, such as the litigiousness of a society and transnational activity (Alter 2000; Conant 2001; Stone Sweet & Brunell 1998). Concerning the litigiousness of a society, the work of Alter points out that German citizens raise more legal questions concerning domestic law than, for example, French and British citizens (Alter 2000, p. 497). That point of view is supported by the work of Conant, who argues that, since Germany faces a more active use of the national legal system, it is likely also to face the greatest bottom up societal pressure to participate in the legal system of the Community (Conant 2001, p. 105). Both Alter and Conant emphasise that the national legal tradition influences the reference pattern.

Their conclusions are based on a comparison between the three biggest member states, Germany, France and the United Kingdom, which finds that German national courts have enforced EU law more than the other two. When, however, we consider citizens as the basic unit enforcing EU law, it becomes relevant to compare references based on the individual member states' population size. That is done in graph 2 below, whose details can be found in the attached appendix 3's table 1. The graph pictures the number of references that 11 member states made 1961-1997 *pr. 1 million people*. The graph is divided over four different periods of time and, finally, one in total. In such a comparison, Germany no longer stands out. It remains a member state with a high number of references, but the reference rates of Belgium and the Netherlands become so much more remarkable, with a total number of references *pr. 1 million people* almost 3 times higher than Germany. Even Denmark has made a higher number of total references *pr. 1 million people* than Germany, even though Denmark could not make references before its membership in 1973.

Graph 2: References pr. 1. million people in 11 member states (Luxemburg excluded)⁴⁶



Graph 2 and the attached table 1 (appendix 3) furthermore show that, in the beginning of their membership, member states make fewer references. That suggests that citizens and national courts need a learning period, in which they acknowledge EU law as a means of questioning national law,

⁴⁶ The data on the total number of references are the same as used in table 2 above (Alter 2000, p. 499). The data are then divided by the population size of the 11 individual member states. The individual population sizes have been informed by the Danish Foreign Ministry and are the population sizes as of January 2003. That means that changes in population sizes between 1961-97 are not taken into account.

and a source of additional rights. This is another finding which substantiates the argument that enhancing the effectiveness of EU law and its domestic impact seems to be time dependent.

5.5: Monitoring Implementation of Regulation 1408

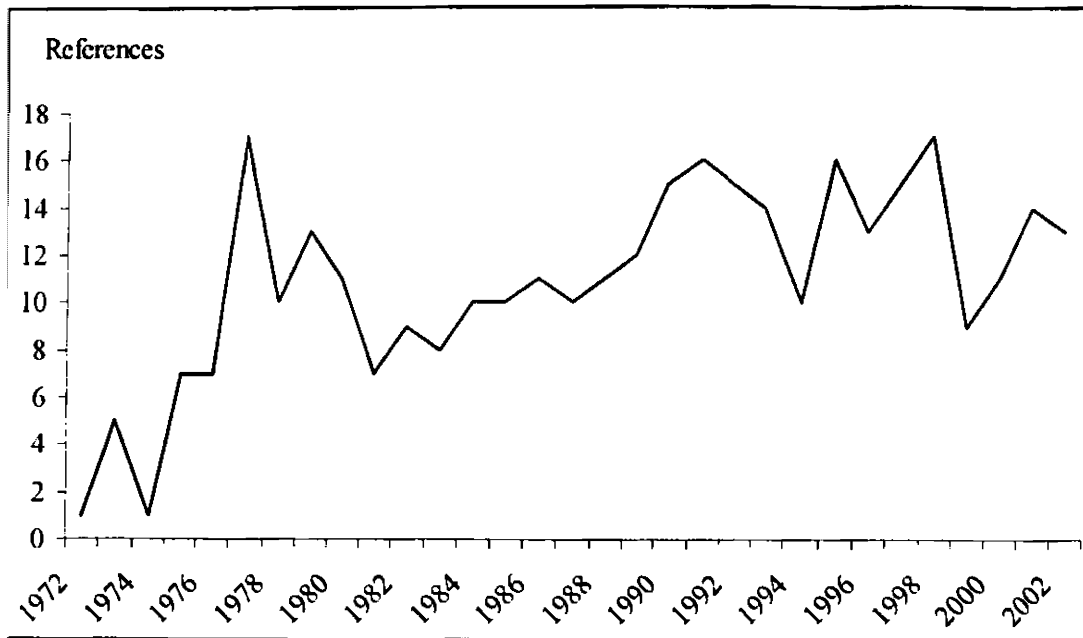
In order to analyse the case-law development and its content regarding Regulation 1408/71, a CELEX study has been carried out as part of this thesis' empirical work. For each year between 1971-2002, the number of preliminary references and infringement procedures that the Court has ruled on the basis of 1408/71 has been examined.⁴⁷ The results are listed in appendix 1 on "Preliminary References and Infringement Procedures on the Basis of Regulation 1408/71 between 1971-2002", which was detailed in section 1.6 on 'Research Material' in chapter I of this thesis.

In total, the European Court of Justice has concluded 338 cases related to 1408 between 1971-2002. The extensive case-load tells us that judicial clarifications have been a most important source of the regulation's institutionalisation. However, it is important to note that judicial clarification has not necessarily furthered integration, but has at times restrained that process, as will be further demonstrated in the analysis of the following chapters. The high number of cases should therefore not be taken as provisionally supporting Stone Sweet et al.'s propositions on progressive institutionalisation, as formulated in section 3.3 above.

Appendix 1 lists the case-load for each year, which is depicted aggregated in graph 3 below:

⁴⁷ These are judgements by the European Court of Justice, where one of the provisions cited relates to Regulation 1408/71.

Graph 3: Preliminary References and Infringements Procedures between 1971-2002 regarding Regulation 1408/71



he aggregated data appear in more detail in table 3 from which it is possible to assess the case-load referred or infringed against by the individual member states. For simplification reasons, table 3 does not detail the case-load of each year, but periods of years:

Table 3: Preliminary References and Infringement Procedures on the basis of Regulation 1408/71 regarding Individual Member States:

	1972-76	1977-81	1982-86	1987-91	1992-96	1997-2002	Total
<i>Germany</i>	9 (42,86%)	16 (27,59%)	5 (10,42%)	18 (28,13%)	17 (25%)	21 (26,58%)	86 (25,44%)
<i>Netherlands</i>	3 (14,29%)	11 (18,97%)	15 (31,25%)	7 (10,94%)	12 (17,65%)	10 (12,66%)	58 (17,16%)
<i>Belgium</i>	6 (28,57%)	22 (37,93%)	18 (37,5%)	23 (35,94%)	23 (33,82%)	18 (22,78%)	110 (32,54%)
<i>United Kingdom</i>	1 (4,76%)	6 (10,34%)	2 (4,17%)	5 (7,81%)	6 (8,82%)	4 (5,06%)	24 (7,1%)
<i>France</i>	1 (4,76%)	3 (5,17%)	7 (14,58%)	9 (14,06%)	4 (5,88%)	2 (2,53%)	26 (7,69%)
<i>Italy</i>	1 (4,76%)		1 (2,08%)	2 (3,13%)	1 (1,47%)	4 (5,06%)	9 (2,66%)
<i>Luxembourg</i>					1 (1,47%)	4 (5,06%)	5 (1,48%)
<i>Denmark</i>					1 (1,47%)		1 (0,3%)
<i>Spain</i>					2 (2,94%)	5 (6,33%)	7 (2,07%)
<i>Greece</i>					1 (1,47%)	1 (1,27%)	2 (0,59%)
<i>Sweden</i>						2 (2,53%)	2 (0,59%)
<i>Finland</i>						2 (2,53%)	2 (0,59%)
<i>Austria</i>						6 (7,59%)	6 (1,78%)
Total	21 (100%)	58 (100%)	48 (100%)	64 (100,01%)	68 (99,99%)	79 (99,98%)	338 (99,99%)

The information contained in table 3 is not divided between preliminary references, on the one hand, and infringement procedures on the other. As appears from appendix 1, only 15 infringement procedures have been referred by the Commission to the Court on behalf of 1408, within the analysed period. 6 procedures were against France, 5 against Belgium, 1 against the Netherlands, 1 against Luxembourg, 1 against Greece and 1 against Germany. Monitoring implementation and compliance as regards to Regulation 1408 has primarily taken place through preliminary references, with migrants as litigants and national courts as questioning national policies or practices against Community law.

The results listed in table 3 indeed points to the fact that preliminary references as an instrument with which to question Community, as well as national law, vary between member states. To the extent that judicial clarifications have enhanced the effectiveness and uniformity of intra-European social security rights, such enhancement is only general if national courts and administrations subsequently accept the multilateral effect of a judgement. It is evident in the case of social security that, if the conclusions of a judgement do not impact beyond the individual lawsuit, as argued by Conant, the transforming effect of preliminary references does not reach equally across Europe. Preliminary references have primarily been raised by the national courts of Belgium, Germany and

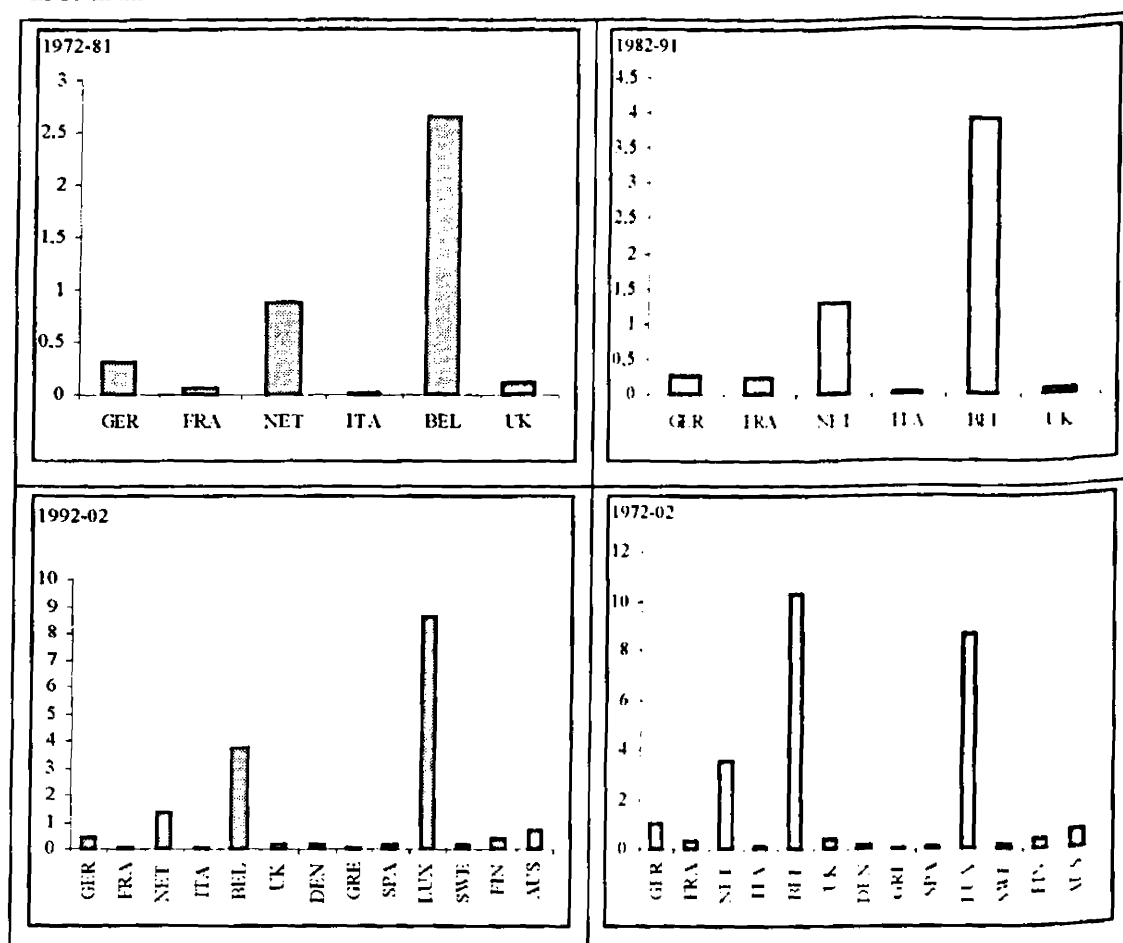
the Netherlands, whereas countries such as Denmark, Greece, Finland, Sweden, Ireland and Portugal have only raised a very few – or no – references. Again focusing on Germany and Denmark, Germany scores second highest by number of references and infringement procedures with 86, whereas Denmark has only had one case referred. Whether this means that Community law, as clarified by judicial decision-making, impacts less on Danish welfare policies will be questioned and analysed in chapter VI and VII.

Such cross country differences in the reference patterns regarding coordination of social security confirms Karen Alter's findings of the relatively high degree of litigiousness of German society. However, it should be added that societal litigiousness needs mediating institutional structures. One key difference between Denmark and Germany, when it comes to social security reference patterns, is that, whereas Germany has national social courts at local, land and federal level, Denmark has not. Denmark instead has an administrative social appeal authority. Appendix 2 concerns the cases referred by German national courts. The appendix lists the same information as appendix 1, but adds the national court which has referred the case, as well as listing the output of individual cases.⁴⁸ It is evident that German social courts at all levels - as well as across time - have taken an interest in questioning Community and national law, thus, at times, enhancing intra-European social security rights. The existence and accessibility of social courts is likely to influence social litigiousness in society and thus, in part, to explain the variance in reference patterns.

German national courts have been essential for the enforcement of Community social security law. However, when comparing references on the background of the individual member states population sizes, Germany no longer stands out. Graph 4 below confirms the general pattern depicted in graph 2 above. The details of graph 4 are found in appendix 3, table 2:

⁴⁸ Chapter VII will elaborate further on the information contained in appendix 2.

Graph 4: Preliminary References made 1972-2002 concerning Regulation 1408/71 pr. 1. million people in 13 member states



Belgium, the Netherlands and recently Luxembourg have had most references pr. inhabitant. Compared on the basis of population size, the German number of references no longer stands out as for example Belgium, the Netherlands and Luxembourg. Whether that mirrors highly litigiousness societies in the three latter countries, their institutional structure, or relatively higher non-compliance with Community obligations is for another comparative research project to detect. The essence here is that, estimated on the basis of population size, Germany faces no significantly greater bottom up pressure to participate in the Community's legal system, as argued by Alter and Conant (Alter 2000, p. 497; Conant 2001, p. 105). As a matter of fact, the greatest bottom up pressures are faced by the Benelux countries. That, however, may impact generally if a binding precedent has, in effect, been established. The process-tracing study of the two-layers of institutionalisation to be carried out in the subsequent chapters will in part address this question.

5.6: National Implementation – the Second Layer of Institutionalisation

Studies on domestic impact suggest implementation to be the national possibility of 'come-back', despite the fact that further integration may appear to have compromised national competencies. Implementation is an act of 'governance' through which the effective meaning of an institution is established. As the reactive part of decision-making, it may limit the actual impact of institutionalisation or defer it. These impact studies point to the importance of national path dependencies, politicians and administrators, which do not automatically yield to European principles and obligations. National institutions and actors instead filter impact, and translate the need to adapt in accordance with national rules and practices.

That national implementation is crucial for the way European decisions are put into effect, suggests that institutionalisation is a two-layered process, which unfolds supranationally when rights are continuously generated and clarified, and nationally when these are put into effect, either to the letter, restrictively, or simply ignored. There is, however, more to the argument than, for example, has been suggested by Conant. Returning to the model built up for the analytical purpose of this thesis, Conant's argument on the limits of European law is mainly substantiated by national reactions of contained compliance. The argument is, however, not supported by incidents where member states, other than the litigant, implement the principles of a decision and accept its binding precedent or where member states collectively codify the ruling of the Court by amending secondary legislation (stage 3, figure 3). The tracing of such political responses indeed demonstrates the effectiveness and reach of Community law. Such empirical findings would substantiate the argument that member governments gradually accept preliminary rulings as having *erga omnes* (generally binding) and *ultra partes* (beyond the parties) effect. That would seriously question the limits to European law, as pointed out by Conant (Conant 2002, pp. 63-65). Furthermore, the Conant argument is not supported by empirical findings which demonstrate that, over time, at a given point beyond stage 3, law may (re)interpret political constraints or its own established legal reasoning (beyond stage 3, figure 3). Examining the different ways that member states may comply or non-comply with ECJ rulings, most certainly requires both a short/medium term examination as well as a long-term one. In the long run, contained compliance or non-compliance should be addressed by the European legal system, thus clarifying anew the relation between national and European institutions.

Disagreement is characteristic for empirical and theoretical research on the impact of European institutionalisation. Such disagreement appears to be determined by cross-country, cross-case and temporal variations. The effect and reach of European law and policies continue to be disputed. This thesis proposes to understand institutionalisation as a two-layered process of integration. That is, however, not to view the supranational layer as enhancing EU law and policies, at the same time as the national layer hinders its true effect. It is instead to understand institutionalisation as a repetitive process, where the national level accommodates rights and obligations generated supranationally as far as possible in accordance with national rules and practices, but, at the same time, is also receptive to European integration and, for this reason, such rules and practices may become more EU-compatible over time. Institutionalisation, implementation and monitoring implementation make up reciprocal interpretation, redefining competencies, rights and obligations, which is likely to enhance gradually the effectiveness and domestic impact of European integration. As an outcome of this reciprocal interpretation, national policies may not converge, but change in various ways as a response to the same cause, i.e. European institutionalisation.

6.0: Concluding Remarks

By juxtaposing and discussing different theoretical interpretations, this chapter has aimed to substantiate why institutionalisation should be analysed as a two-layered process, through which a given institution emerges, evolves and establishes its effective meaning.

At the supranational level, institutionalisation occurs due to the relative autonomy of supranational organisations, the restricted time horizon of politicians as well as dynamic national preferences. Institutionalisation is furthermore intensified by the unintended consequences of collective decision-making and issue-density, facilitating spill-over between policy fields. At the same time as institutionalisation is conditioned and developed by actors and organisations, part of its evolution seems almost self-sustaining. These self-sustaining dynamics are furthered by the fact that institutions are seldom definitive, but need constant rewriting as their context is changed or interpreted as having changed, and as they are applied to new situations or policy-domains. The dynamics of institutionalisation is a result of a constant revelation or interpretation of the insufficiency of existing rules. Supranational institutionalisation compromises member governments' ability to control outcomes in the long run, and its progressive construction may transfer competencies from the national to the supranational level of decision-making.

However, institutionalisation is not shaped through intergovernmental and supranational decision-making alone. National implementation is the second layer of institutionalisation, establishing the effective meaning and impact of the institution. Studies of 'Europeanisation' place implementation as the second stronghold of national control. Implementation filters the institutional impact, for which reason supranational institutionalisation may not be equal to a corresponding administrative or policy change. At least in the medium run, it is a member state's decision how to comply with Community obligations and decide whether a case has bilateral or multilateral effect. Accepting that supranational institutionalisation develops path dependently and thus, in a self-reinforcing way, is not the same as assuming that it will obliterate national path dependencies. The latter are likely to continue to express their own legitimacy, robustness and resistance to change. However, either gradually, or more immediately, they may react to the adaptational pressure, and thus evolve along a new, more EU-compatible, branch. But since the integrative starting-point varies according to national institutions in place, cross-country outcomes along the path are likely to vary equally. Different starting-points produce different outcomes. Change may take place as parallel, but not converging, processes.

The scheme below summaries the key arguments that provide the theoretical background for the subsequent analysis on institutionalisation of intra-European social security rights:

Table 4: A Two-layered Process of Integration:

<p>Institutional definition: Formal rules, compliance procedures & standard operating practices</p> <p>Operationalised as the formal rule of Regulation 1408/71</p> <p>Institutions as both instruments and barriers, mediating as well as constraining the political and judicial integration process</p> <p>Institutions affect and may transform the actor's reading of their own preferences. They create transparency, connect and shape change, through path dependent processes of increasing returns</p> <p>Must be analysed as historical phenomena unfolding over time</p>
<p>• Characteristics of institutions</p> <p>Due to national interests</p> <p>Due to a collective choice</p> <p>To realise a Community objective</p> <p>Social/functional demand due to increased transnational exchange</p>
<p><u>Institutional point of departure</u></p> <p>The puzzle: that institutionalisation happens despite vague prescriptions and at times contrary to political preferences</p> <p><i>How:</i></p> <ul style="list-style-type: none"> • Institutionalisation furthered by restricted time-horizons and dynamic preferences of national actors, unintended consequences of collective decision-making and issue density • Supranational organisations as mediators. Interpret and detail incomplete contracts.

	<p>exert skilful actions and persistency. Protected from sanctions by thresholds and transnational constituencies.</p> <ul style="list-style-type: none"> • Transnational exchange, juridical activity and rule-production constitute and reconstitute the polity, create legal 'spill-over' and further integration. In between supranational organisations apply, interpret and clarify rules thus changing the context for subsequent actions. • Dynamics of institutionalisation: a constant revelation of the insufficiency of existing rules. Constantly asked for, interpreted, clarified and rewritten. A path dependent process of increasing returns. <p>→ First layer establishing the effective meaning of the institution</p>
Institutionalisation through the Interaction of Law and Politics	<p><i>Legal autonomy emphasis:</i></p> <ul style="list-style-type: none"> • Litigation as a key component for integration; teleological interpretation & binding precedent enhance the scope and content of Community law • Politicians react reluctantly due to the mask of law; the opaque political and financial impact of legal decisions; the short time horizon of politicians; thresholds to sanction; only rarely the majority of member governments disagree with the legal interpretation; different impact and perceptions of impact of the legal decision → law and politics accord to different logics <p><i>Political power emphasis:</i></p> <ul style="list-style-type: none"> • Political power and preferences (co)determine legal decisions; the ECJ not an autonomous organisation but a responsive one → integrative dynamics are politically sustained • Various possible reactions to adverse legal decisions: i) accept, ii) evade, iii) apply restrictively, iv) propose legislative overrule or Treaty revision <p>→ Limits to Institutionalisation</p> <p>→ First layer establishing the effective meaning of the institution</p>
Adaptive Pressures and Impact on National Institutions	<ul style="list-style-type: none"> • Adaptive pressures vary according to national institutions in place. According to the degree of 'compatibility' between European and national institutions • Member states largely control implementation • Implementation as the reactive part of policy-making, transposing at times rather abstract rights into concrete enforceable ones • Impact varies across time, according to national institutions, implementing traditions and procedures • Impact does not necessarily mean greater uniformity, nor convergence of national policies, but 'adaptation with national colours' • National traditions, preferences and institutions as well as contained or non-compliance with judicial decision-making constitute limits to institutionalisation <p>→ Second layer establishing the effective meaning of the institution</p>

In the following chapters, the model to analyse institutionalisation as a two-layered process of integration and the theoretical propositions upon which it is derived, will be operationalised into practical research.

As in figure 2 above, the analysis initiates by investigating T_0 – the point of institutional creation. The main analytical purpose of *chapter III* is to seek the historical and ideational context behind the adoption of Regulation 1408/71 in 1971, in order to explain institutional innovation.

Chapter IV and V then examine the supranational institutionalisation dynamics from T_0 , over T_1 , up to the analytical T_2 . Figure 2 and 3 depict their part of these institutionalisation dynamics. As in figure 2, the regulation's path dependent process from output to input will be traced. It will be analysed 'to what extent' cross-border social security has been institutionalised, and 'how' the effective institutional meaning is gradually established through intergovernmental negotiations, through the Commission's reformulating and re-proposing praxis and through the ECJ's legal (re)interpretation and (re)clarification. As in figure 3, the analysis will detail the many stages that make up institutionalisation as determined by the interplay of law and politics. Where there is an important adverse legal decision, I will examine how the litigant government responded (stage 2) and subsequently how the other EU governments reacted towards the adverse decision (stage 3). The analysis will take certain decisions up to the point 'beyond stage 3' to examine how path dependencies have unfolded over an extensive $T_0 - T_2$. The analysis of institutional evolution, focusing on the dynamics of incremental change, is expected to demonstrate the importance of the time-variable when investigating how politics and law respond to one another, and how supranational objectives, means and competencies may gradually be defined and redefined.

Chapter VI and VII analyse the second layer of institutionalisation – the implementation of supranational decision-making at the national level. As depicted in figure 2, I will analyse whether supranational institutionalisation exerts adaptive pressure on national institutions and how national actors and organisations perceive and respond to European decision-making. This analysis aims to lay down 'with what impact' intra-European social security has been established. As in figure 3, the analysis will identify how national politics and administration react to an adverse decision by the ECJ. Empirically, the question whether the litigant government responds to the adverse ruling by compliance, i.e. by policy reform or change of administrative practice, by contained compliance, or by non-compliance (stage 2) will be traced. Furthermore, the question of how other governments, apart from the litigant respond to and eventually implement the principles generated in the adverse decision, by either refusing its status as a binding precedent or by implementing the relevant parts of the decision, thus proving the multilateral effect of judicial decision-making (stage 3), will be analysed. Response and domestic impact will be traced over time, in order to investigate whether the analytical results concerning compliance and impact depend on the period of time investigated.

The following chapter initiates the analysis of the path to social security integration by tracing its historical and ideational *raison d'être*.

Chapter III: On Institutional Creation

This chapter initiates the analysis of European social security integration by investigating the ideational and historical premises for the institutional creation of Regulation 1408/71 in T₀. In a theoretical perspective, the present chapter considers the context and origins of the path dependent process that institutionalised social security rights, and argues that an assessment of the scope and dynamics of the contemporary institution requires a reference to the past.

The purpose of the chapter is, first of all, to offer a brief introduction to Regulation 1408/71 and, next, to explore its *raison d'être*, by laying down its purpose and historical origins. To explain why the Regulation was created in the first place, as well as to account for its subsequent institutionalisation can only be done through an examination of its purpose: the free movement of workers and later persons. This chapter, along with the following ones, highlight the strong issue-linkage between purpose and means, which, in part, explain both institutional innovation, as well as the dynamics of institutionalisation.

By exploring the origins of aim and means, the empirical analysis addresses theoretical propositions on institutional emergence. How and why were the institutions of free movement of workers and transnational social security adopted in the first place? Where they adopted as an outcome of converging national interests, thus supporting intergovernmentalist explanations? Or to realise a Community objective, thus moving beyond a strictly intergovernmentalist account? Or alternatively, out of a functional demand which mirrored increased movements between member states, as suggested by Stone Sweet's transnational exchange interpretation? To address the latter, the analysis will include statistical information of *de facto* movements between member states. The purpose of these statistical observations is to examine whether *de facto* movements explain

institutional creation as well as subsequent institutionalisation, or the aim and means emerge and develop in a rather detached manner.

In order to examine the institutional point of departure, this chapter is divided into five sections. *Section 1* introduces the Regulation; its instrumental justification, its meaning, scope and main principles. *Section 2* studies the path to free movement of workers and later persons, the purpose of European social security co-ordination. The section will explore the national interests behind the establishing of supranational rights, and how the institution of free movement has subsequently been furthered. *Section 3* examines, on the basis of statistical information, how actual European migration has developed, while the liberalisation of free movement and cross border social security have been institutionalised, and investigates whether institutional emergence and institutionalisation happened as a function of actual migration. *Section 4* analyses how Regulation 1408 emerged out of a historical context, from which it inherited principles and content, but left regulatory gaps open and thus raised questions which required future clarifications. Finally, *section 5* concludes on the unique system of free movement and social security co-ordination, proposed, negotiated and approved over the past decades in the Community.

1.0: Introduction to European Social Security Coordination

European social security coordination, as materialised in Regulation 1408/71, is a Community instrument in an extended chain of aims and means. One of the main purposes for establishing the common market, in which persons, goods, services and capital can circulate freely, is to allocate resources more efficiently (O'Leary 1999, p. 389). A reallocation of resources is assumed to improve the economy of the common market. Among those resources to be more efficiently allocated are workers, who rank as a production factor just like each of the other fundamental freedoms.

From the foundation of the European Economic Community in 1957, the free movement of workers has been one of its cornerstones (Cornelissen 1997, p. 29; Pennings 1998, p. 3). The legal basis for the Community pillar on free movement of workers is the Treaty's Article 39 (ex Article 48).⁴⁹

⁴⁹ Article 39 of the Treaty of the European Union reads as follows:

- “1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

Co-ordination of the migrant worker's social security rights constitutes one of the main Community means of realising the basic freedom of workers and later persons (Pieters 1997, p. 177). The general purpose of Regulation 1408 is to stimulate intra-European migration by ensuring that movements across member state borders will not cause the loss of or put into jeopardy social security entitlements.

The Community regulatory framework, which was put in place to guarantee that migrant workers will not suffer negative effects in their social security rights by working abroad, is in secondary legislation constituted by Regulation 1408/71 and the implementing Regulation 574/72⁵⁰. Furthermore, Regulation 1612/68⁵¹ entails a provision on the "social advantages" that the Community migrant worker is entitled to when working in another member state. Regulation 1408/71 is the focus here, but brief reference will be made to the two other Regulations when it is considered to be analytically important.

1.1: Why is Co-ordination of Social Security Necessary?

Community coordination of social security rights has been regarded as necessary, because welfare generally is a restricted phenomenon, where the member states have traditionally limited their responsibility to their own citizens and/or own territory. National social security provisions thus entail territorial principles and discriminating rules, since social security policies generally were set up to deal with facts happening within national borders, or to grant rights to life-time members of the national community (Pennings 1998, p. 5). These historically embedded boundaries of welfare will be discussed in more detail in chapter VI. Such limitations in the set of national rules hinder cross border mobility of workers.

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- (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, Regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing Regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service".

⁵⁰ Regulation (EEC) No 574/72 of the Council of 21 March 1972, laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; as amended by Regulation (EC) 118/97 of the Council of 2.12.1996 (OJ L 28 of 30.01.1997).

⁵¹ Council Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement of workers within the Community (OJ L 257, 19.10.1968, p. 2). Article 7 (2) of Regulation 1612 is the provision on "social advantages".

The necessity for the Community to co-ordinate social security rights among its member states was recognised by the authors of the Treaty of Rome and, in part, already by the Treaty of Paris. The free movement of workers was enshrined in Article 48 (now Article 39) and Article 51 (now Article 42), which required the Council to take the necessary measures regarding social security. Article 42 emphasises the close link between free movement of workers and coordination of social security rights (Eichenhofer 2001, p. 60). Article 42 of the Treaty of the European Union reads as follows;

“The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

- a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- b) payment of benefits to persons resident in the territories of Member States.

The Council shall act unanimously throughout the procedure referred to in Article 251”.

1.2: Treaty Basis and Geographical Scope of 1408

The preambles of the various amendments of Regulation 1408/71 always refers to Article 42 of the Treaty. In addition, the explanatory memorandums often make reference to the Treaty’s Article 2⁵², stating the wide spectrum of the Community’s social, economic and cultural tasks, and to Article 12 (ex Article 6) on the prohibition of discrimination on grounds of nationality. Furthermore, amendments of the Regulation have, since 1981, been adopted through the use of the Treaty’s Article 308⁵³ (ex Article 235), thus constituting the Regulation’s legal basis in conjunction with Article 42 (Pieters 1997, pp. 182-183). Article 308 allows the Council to adopt measures beyond those where the Treaty has provided the necessary powers. The continuous use, since 1981, of the rather controversial provision 308 has been fundamental to the development of Regulation 1408. On the one hand, it has provided the Regulation with a certain flexibility, making it extendable to new situations, but has, on the other hand, raised questions on the scope and limits of Community competencies. This controversy will be demonstrated in the analysis of the subsequent chapters.

⁵² As in accordance with the case-law, Article 2 of the Treaty has no direct effect.

⁵³ The Treaty’s Article 308 reads as follows: “If action by the Community shall prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”.

Article 42 lays down two important procedural features for changing the coordination rules: 1) that it can only be done by unanimity in the Council and, 2) that it is done with the co-decision of the Parliament as referred to in Article 251 (ex Article 189b) of the Treaty. The Treaty of Amsterdam has in 1997 extended the role of the Parliament from co-operation to co-decision. These decision-making rules make up the thresholds to amend the Regulation.

Since the entry into force of the Agreement on the European Economic Area (EEA) on the 1st of January 1994, Regulation 1408/71 also applies to the nationals of Norway, Iceland and Liechtenstein (Schulte 2000, p. 144). This means that the rights entailed in the Regulation applies to 18 states.⁵⁴

Furthermore, the Regulation reaches beyond the territorial borders of those 18 states. Rights acquired, for example, in an ex-colony of a member state are co-ordinated by the Regulation, if a member state's legislation grants those rights. This means that it is the link between the person and the social security scheme which defines the territorial scope of the Regulation, and not the concrete borders of the 18 EEA states. It is not where the occupational activity is carried out which makes the Regulation applicable, but under which social security scheme rights are acquired (Pennings 1998, pp. 33-37). The question of the Regulation's geographical scope has been settled by the case-law of the European Court of Justice.ⁱ

1.3: What Does Co-ordination Mean?

Neither the Treaty's Article 42, nor Regulation 1408, entail a stated definition of 'co-ordination'. In addition, the case-law of the Court has not given a precise definition of the main concept, but has related the concept to the fact that the Regulation leaves it up to the member state to determine the type and content of a benefit (Pennings 1998, p. 8). In the case 1/78 *Kenny*, the Court did, however, touch upon a definition, which to date remains the interpretative line (Nielsen et. al 1997, p. 127, note 248).ⁱⁱ The judgment came close to a definition of co-ordination, by positively outlining the national legislator's competencies:

".... it is for the national legislation to lay down the conditions for the acquisition, retention, loss or suspension of the right to social security benefits so long as those conditions apply without discrimination to the nationals of the member states concerned and to those of other member states" (para. 16 of the judgement)

⁵⁴ Since this study analyses the institutionalisation over time of Regulation 1408, and thus begins a long time before its extension to the EEA, it will not distinguish between EU and EEA, but simply refer the geographical scope as to the EC or EU and to nationals from the European Community or Union.

The above quotation suggests that the rules of the national schemes are left intact by 'co-ordination'. The distinct features of the various national social security schemes remain, and 'co-ordination', as the more neutral or negative form of integration, does not interfere in the competence of the national legislator to decide who is to be insured; which benefits are to be granted; under what conditions; how many contributions should be paid; how benefits should be calculated; and for how long they should be granted (Schulte 2000, p. 148; Cornelissen 1997, p. 31; Eichenhofer 1996, p. 4). At the other pole of the continuum of integrative methods stands 'harmonisation', which would require positive integration, and thus involve direct change in national legislation to abolish differences.

However, the exact border between the concepts of 'coordination' and 'harmonisation' is far from being a given, but leaves a large interpretive scope for the Community organisations to fill out. Regulation 1408 does not aim to 'harmonise' national social security schemes, but those same schemes must not hinder the overall objective of the free movement of workers. In practice, it remains clear that the concepts of 'co-ordination' and 'harmonisation' are more closely connected than it appears at first sight (Pieters 1997, p. 187). It remains clear that 'coordination' is not a pure technicality, but rather an intervening policy tool (Christensen & Malmstedt 2000, p. 14). It could be argued that the prohibition of discrimination on grounds of nationality challenges or even hinders the national legislator's autonomous competence to decide on the personal scope of a given social security scheme. Furthermore, the Community provision on the exportability of benefits challenges the national autonomous competence to decide the spatial reach of social security benefits. The analysis in chapter IV and V below will illustrate that concepts and competencies are fluid ones, which is mirrored in the changing scope of Regulation 1408.

1.4: The Co-ordinated Personal and Material Scope

The personal scope of Regulation 1408 has also undergone a gradual, but continual development. From entitling only the worker 'stricto sensu', i.e., the market citizens⁵⁵, to cross-border welfare, the personal scope has been incrementally expanded to the point where the Regulation this year

⁵⁵ The concept of 'market citizen', as it is used here, refers to one who exercises economic activity (Shaw 1997b). Among others, a market citizen is the worker 'stricto sensu', i.e., one with a contract of employment. The European market citizen is one production factor among three others: goods, services and capital, whose free movement is one of the constituting pillars of the internal market. Thus the notion of 'market citizen' may be used as a contrast to 'European citizen'. The former refers to a status where market participation releases provisions or legal rights. As a contrast, the latter has entitlements without necessarily being an active market participant (Everson 1995, p. 84).

will extend to all European citizens and indeed, where legally residing third country nationals have recently been included in its personal scope. The development is thus a specific reflection of the general development from economic community to political union. The current personal scope of the Regulation has been settled through a detailed legal-political dialogue, consisting of piecemeal judicial interpretations, Commission proposals and the Council's codification thereof.

January 2004 marks the forthcoming and perhaps most remarkable extension of Regulation 1408/71's personal scope, and thus temporarily closes the long-running history of defining those with a right to cross border social security. On 26 January 2004, the Council unanimously adopted a common position on the amendment proposal COM (98) 779, and hereby agreed that *all nationals* of member states covered by the social security legislation of a member state shall be part of Regulation 1408's personal scope.⁵⁶ This means that not only employed workers, self-employed workers, civil servants, students and pensioners but also *non-active persons* are to be protected from the coordination rules. Furthermore, as of 1 June 2003, *nationals from third countries* as well as their family members and survivors, provided that they are legal residents in the territory of a Member State and that they have moved between member states, are covered by the Regulation.⁵⁷ Although, on the face of it the inclusion of third country nationals marks another, remarkable, step towards a generalised personal scope irrespective of nationality, the practicable rights of third country nationals are much more restricted, since they lack the underlying right of free movement.

1408/71 covers a very extensive range of material benefits, originally applying to all national social security legislation on (a) illness and maternity; (b) invalidity benefits; (c) old-age pensions; (d) survivors' benefits; (e) occupation-related accidents and disease; (f) death grants; (g) unemployment benefits; (h) family benefits. That is, the original material scope of the Regulation entailed the 8 traditional social security forms, as defined by the ILO in its convention 102. Since it was originally laid down, the substantive scope has been extended on the basis of developments in national social security legislation, Regulation 1408's own premises and its Treaty base. Furthermore, by the

⁵⁶ COM (2004) 44 final, by 27 January 2004. Communication from the Commission to the European Parliament concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council, on the coordination of social security systems.

⁵⁷ As laid down by Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

Council's recently adopted common position, the material scope will be extended to cover also statutory pre-retirement schemes.⁵⁸

Held outside the material scope of the Regulation are 1) social and medical assistance and 2) benefits granted to victims of war and their consequences.

The gradual development and clarification of 1408's personal and material scope will be analysed in detail in chapter IV and V below.

1.5: The Main Principles of Regulation 1408

Regulation 1408/71 is organised around a set of main principles, the added aim of which is to promote free movement. Four main principles seek to transcend the Treaty objective into secondary legislation, which again are to be implemented in national policies and practices.

- *The principle of non-discrimination* on grounds of nationality, which is concretely expressed in Article 3 of the Regulation and Article 12 of the Treaty. The principle applies without exception.
- *The principle of exportability*. Acquired rights are exportable within the geographical scope of the Regulation. The principle is expressed by Article 42 of the Treaty and mirrored in Article 10 of the Regulation.
- *The principle of aggregation*. Social security rights earned in one state is added to rights earned by working next in another state. The principle is formulated in the Treaty's Article 42.
- *The principle of pro-rata-risation*. The Regulation grants right to a pro-rata share if the beneficiary has not worked long enough, lived long enough or been insured long enough in one member state to receive the full social security benefit.

By institutionalising the principle of non-discrimination and exportability, the Community co-ordination of social security effects the core of traditional national welfare organisation. By an ever generous interpretation of the *principle of non-discrimination*, the Court has expanded the concept of who has the right to enjoy equal treatment along with a member state's own nationals. Simultaneously, the same generous interpretation means that the individual member state's welfare system is restricted from favouring their own citizens when granting social security benefits. The

⁵⁸ COM (2004) 44 final. See endnote 56 above.

evolution of the Community principle of equal treatment, as mirrored in Article 3 of Regulation 1408, will be analysed in chapter IV below.

The *principle of exportability* challenges the traditional territorial boundedness of social security. At the national level, the principle of territoriality has been an organising principle in social security law and policy, allowing the member states to use a territorial element in defining the scope of a social security scheme, and in setting the qualifying conditions (Cornelissen 1996, p. 441; Huster 1999, p. 10). Unlike the principle of non-discrimination, exportability is not an absolute principle. Benefits-in-kind can still be territorially demarcated without contradicting Community law (Haverkate & Huster 1999, p. 123). The case-law of the Court, clarifying the scope of the principle of exportability, has however been criticised for eroding the principle of territoriality on a general basis (Altmaier 1995, p. 71). The Court's interpretations of the principle of exportability show that there is no clear distinction between benefits-in-cash and in-kind. In its jurisprudence, the Court has continually held that the true nature of a benefit is defined by its content and function, and not by its classification in national legislation. Chapter V will analyse to what extent social security benefits have been de-territorialised as a consequence of Community law.

Another ruling principle of 1408/71 is that of '*lex loci laboris*' or 'the place of work principle'. In order to avoid a conflict of law⁵⁹ in the situation where a person works in one member state, but resides in another, the legislation that applies, in general, is that of the work state. The work state designates one's rights, irrespective of the place of residence. The principle of '*lex loci laboris*' is expressed in the Articles 13-17 of the Regulation. To choose the legislation of the work state as the applicable one, was a rather natural choice when negotiating both Regulation 1408 and its predecessor, Regulation no. 3. When both Regulations were adopted, most of the social security legislation of the 6 signatory member states was clearly Bismarckian oriented (Pieters 1997, p. 190; Cornelissen 1997, p. 35). To choose '*lex loci laboris*' as the general rule was a way of solving the question of allocative responsibility, since social security costs in this way are borne by the state where one works, and thus contributes to the economy. The Community co-ordination system has remained faithful to the "Bismarckian notion of social security", although the Union now consists of activity *and* residence based social security systems (van Rapenbusch 1996, p. 81).

⁵⁹ A negative conflict of law characterises a situation where no law is applicable. A positive conflict of law, a situation where more than one legislation is applicable (Pennings 1998, p. 82).

As a last principle to be mentioned here, is the *Petroni*⁶⁰ principle or the principle of favourability.ⁱⁱⁱ Expressed in a simplified form, the principle dictates that co-ordinating member states legislations must not result in a worse situation for the migrant, than if only national legislation applied (Pieters 1997b, p. 185). In the *Petroni* case, the Court concluded:

“The aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed them in any event by the laws of a single Member State” (para. 13 of the judgement).

1.6: Institutional Characteristics

The institutional characteristics, as summed up above, make up the contemporary scope and limits of Regulation 1408. The institutional identity of Regulation 1408 originates as an instrument with which to realise the free movement for workers. Its function is not to harmonise the social security policies of the member states, nor to interfere directly in the national competence to design its own welfare policies, but to co-ordinate those policies in a more neutral way. As supranational principles gain precision through integrative dynamics, the regulatory scope of 1408 has been extended and co-ordination appears as being far more than a neutral method of coordination, but in fact as an intervening policy tool. After all, the hierarchy between Community objectives and national policies is clear; the former are supreme. The aim to be achieved, the free movement of workers and later persons, undergoes its own separate institutionalisation process, to which the evolving character of Regulation 1408 is closely linked. Due to the causal link between aim and means, the emergence, evolution, and institutional status quo of the objective will now be discussed.

2.0: Free Movement of Workers/Persons

The formal liberalisation of free movement of persons in Europe has a long historical background. It was initiated as a rather unilateral Italian effort to open up foreign labour markets for its own unemployed; and proceeded as a complex of bilateral agreements which favoured the need of the host state; it became multilateral as it allowed for a restricted circulation of workers of proven qualification; later it became a supranational guaranteed right to free movement for workers; and finally transcended incrementally into free movement for the self-providing European citizen.

⁶⁰ Case 24/75, 21. October 1975. *Teresa et Silvana Petroni v Office national des pensions pour travailleurs salariés (ONPTS)*, Bruxelles. ECR 1975, p. 1149.

This section traces how the institution of free movement was put in place, the interests behind it, the context from which it emerged and how it has subsequently evolved. That is, this section aims to identify the ideational context of Regulation 1408/71, by depicting, in brief, the institutionalisation process that the free movement of workers/persons has undergone. Although, Regulation 1408 clearly gains a life of its own as institutionalisation proceeds, many of its progressive steps furthering cross border welfare are justified by its objective: to ensure or promote the free movement of workers/persons. Historically, and in the present, we are dealing with two interlinked processes of change.

2.1: The Era of "Bilaterally Organised Interdependence"

European labour migration is far from being a new phenomenon. International migration in the 19th century not only consisted of European workers heading for opportunities in the United States, but migration within Europe also took place at the same. Out of the 15 million Italians who migrated between 1876 and 1920, 6.8 million went to another European country. This early European migration then decreased between 1914 and 1945, due to the two world wars and their economic consequences (Holloway 1981, pp. 227-229).

Nor is European legislation on free movement for workers a process exclusively linked to the European Community. Bilateral agreements between individual countries became the early regulatory modus. From the beginning of large scale migration till the 1960s, Italy was the main labour exporting country in Europe, and the Italian governments were strong advocates for the liberalisation of workers' movement in Europe. According to the work of Romero, the position of the Italian governments was based on national interests, attempting to give its unemployed access to the European labour market, thereby easing domestic social tension and, at the same time, getting hold of foreign currency (Romero 1993). This Italian advocacy reflected a convergence in domestic political, social and economic interests.

In 1946, Italy signed bilateral agreements with France, Belgium, Switzerland, the UK and Luxembourg (Romero 1993, p. 39). The bilateral agreements were, however, formulated very much in favour of the labour importing countries. The agreements only welcomed a certain type of workers, and granted them only a temporal stay. The foreign workers were not supposed to settle in the inviting country, but rather to fill in cyclical gaps (Romero 1993, p. 50). Given the rather unpredictable content of the bilateral agreements, Italy was much in favour of a multilateral

Regulation of free movement (Holloway 1981, p. 254). Post-war Europe, however, lacked both the willingness and, perhaps even more importantly an effective organizational structure to regulate multilaterally the access to national labour markets.⁶¹

With the negotiations of the Treaty of Paris, Italy got a potential frame for the multilateral Regulation of free movement. Italy argued that an integrated market should entail a complete liberalisation of the coal and steel labour markets of the six member states. The Italian viewpoints were, however, not supported. The Benelux countries were not interested in increased mobility, and France and Germany would only accept mobility for a few and highly qualified workers. Art. 69 of the Paris Treaty came to reflect the restrictive French – German position, committing the member states to lift employment restriction based on nationality for workers with “proven qualification” (Romero 1993, pp. 42-43). Apart from Italy, the governments were not willing to give up national immigration control. In the mid-1950s, the socio-economic context seemed to favour the Italian preferences. Unemployment had generally decreased and, in 1955, Italy signed a migration agreement with the Federal Republic of Germany. The era of what Romero has termed “bilaterally organised interdependence” had thus culminated with the agreement between the main labour exporting and the main labour importing country (Romero 1993, p. 49). Italy could focus its multilateral ambitions on the negotiations of the Common market, which began in 1955.

2.2: The Initial Supranational Steps

Article 69 of the Paris Treaty was the first, somewhat timid, step taken at Community level to allow for worker mobility. The background to it was an actual migration between the six member states of about half a million workers⁶², and the Italian government's attempts to make the new multilateral organisation commit itself to the free movement of its workers. The right of mobility qua Article 69 was, however, a much restricted one, only given to workers of proven qualification, thus from early on reflecting the economic purpose of free movement. As noted by O’Keeffe, the right of the free mover was, from its earliest provisions, a deconstructed one, only conferred on someone engaged in the economic process (O’Keeffe 2000, p. 20).

⁶¹ From the foundation of the OEEC in 1948, Italy tried to include liberalisation of migration on the agenda. France and the United Kingdom, however, opposed granting the young international organisation such important competence (Romero 1993, p. 42).

⁶² Straubhaar (1988), which will be discussed in more detail in section 3 below.

The Italian – German bilateral agreement on cross-border movement of 1955 shows that Article 69 was far from sufficient in a context where economic growth and decreasing unemployment favoured a greater degree of worker mobility. The negotiations on the Treaty of Rome became the next multilateral platform upon which Italy could push for its ambitions on European mobility. When the objectives of the common market were initially discussed at the Messina conference in May 1955, the resolution adopted obliged the committee to work for a “gradual establishment of the free circulation of manpower”. In the subcommittee on social issues, Italy argued for a quick and complete free movement, where the unemployed would also be entitled to look for work in other member states. The other member states, however, held that circulation of labour should be decided by demand, and free movement should only be a long-term goal, the individual stages of which needed to be carefully negotiated. The restrictive viewpoints on demand-decided migration were later challenged in the Spaak report of May 1956. The Spaak report seemed to support the Italian position, viewing unemployment as a potential resource for European economic growth, and that therefore national labour markets should be opened up and integrated.

The Federal Republic of Germany was behind the final compromise. Germany increasingly needed foreign labour, and thus favoured more flexible conditions for migration. At the same time, it did not wish to give up extensive national control, and so circulation was still to be demand-induced. Against this background, the six member states agreed to reduce their barriers on entry and residence for Community workers over a 12-year transition period (Romero 1993, pp. 52-54). Article 48 in the Rome Treaty became the provision in primary legislation, which granted free movement for workers and obligated the member states to remove the parts of national legislation which discriminated on the basis of nationality.

Actual free movement for workers was institutionalised by the adoption, in 1968, of Regulation 1612/68 and the directive 68/360⁶³, on the abolition of restrictions on workers’ movement (Carlier & Verwilghen 2000, p. 7). Free movement, as adopted in 1968, had been gradually approached towards by the admittance of three successive regulations in 1961, 1964 and 1968, where 1612/68 was the culmination of a rather long process which gradually reduced national restrictions on labour entry and settlement (Holloway 1981, p. 264).⁶⁴ That it took 11 years to put the rights

⁶³ Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ L 257, 19.10.1968, p. 13).

⁶⁴ The two predecessors of Regulation 1612/68 were Regulation 15/61 of 16th August 1961 and Regulation 387/64, which entered into force May 1964.

granted by the Rome Treaty into secondary legislation, illustrates that the conversion from Treaty objective to secondary legislation was a complex matter, calling on a difficult compromise of national prerogatives.⁶⁵ Dahlberg has described this troublesome negotiation process, which was difficult for the Commission to steer. He argues that the Commission's final achievement, among other factors, was supported by the fact that Italy politically backed almost all the Commission's proposals on the matter, and that the economic conditions of that time favoured labour circulation. The Commission proved capable of using these favourable conditions skilfully in order to realise its policy objective (Dahlberg 1968, p. 331).

In 1970, the next institutional step concerning free movement and residence came about. With directive 1251/70⁶⁶, workers and their family members were granted the right to remain in the host state after having worked there.⁶⁷ In 1974, the self-employed and their family members got the same right, with directive 75/34⁶⁸ (Greve 2000, p. 192).

2.3: ... And the Subsequent Ones

A general right of residence for all member state citizens was from early on on the Community agenda. At the Paris Summit of the heads of government in 1974, an intra-Community right of residence, independent from the exercise of economic activity, was discussed. Five years later, the Commission adopted its directive proposal on a general right of residence to be admitted on the basis of Article 235 of the Treaty. The Council of Ministers did, however, not agree on the proposal, which remained pendent in its general formulation for a decade. To get the Council to approve, the Commission apparently changed strategy in 1989, and separated the general proposal on free movement into three individual proposals with the respective categories of students, retired persons and economically inactive persons. The separation into individual groups made adoption

⁶⁵ However, free movement came in place before the agreed deadline of 12 years. Article 48 of the Treaty of Rome laid down that free movement should be secured by the end of a transitional period, at the latest running until January 1970 (Carlier 2000, p. 44).

⁶⁶ Regulation (EEC) 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ L 142 of 30.06.1970, p. 24).

⁶⁷ The directive did, however, not grant the right to remain in a member state unconditionally. The person wishing to remain should have stayed at least three years in the member state, have the age for receiving an old age pension, and have worked at least 12 months in that state (Greve 2000, p. 192).

⁶⁸ Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ L 14 of 20.01.1975, p. 10).

possible and, on the basis of Article 235 of the Treaty, the directives were approved by the Council on June 1990 (O'Leary 1999b, p. 381).⁶⁹ Although it had proved troublesome for the Commission to get the Council to approve the general right of residence, the approval merely codified a development which had already been laid down by the Court. In successive case-law, the Court had extended the right to free movement far beyond the worker 'stricto sensu', as will be demonstrated in chapter IV section 2.2, and thus prepared the terrain for political codification. It can thus be argued that the residence directives was foremost a symbolic, political confirmation of the previous, legally established precedent.

Intergovernmental negotiations did, however, not make the right to reside in other member states unconditional. Today, the conditions entailed in the three residence directives are still intact. Member states are allowed to deny a residence permit if a person does not have sufficient means to provide for her/himself, or does not have health insurance for the entire family. The aim is to avoid the situation whereby a citizen of another member state becomes a burden to the social security systems of the host state, to which system he may never have contributed. The directives leave it up to the member states to define the level of "sufficient means", but suggest that if the migrant has means higher than that which gives right to social assistance, then these should be considered "sufficient" (Greve 2000, p. 193).

1990 thus marks the year in which the right to settle down in a preferred member state was generalised by political agreement after decades of negotiations and legal clarification. However, the conditions of the residence directives divide European citizens into two categories of persons. Workers, self-employed and those providing services hold rights directly under the Treaty and can move freely. The residence rights of students, pensioners and the non-active depend on their ability to provide financially for themselves (O'Keeffe 2000, p. 24).

In 1993, the Maastricht Treaty introduced the notion of European citizenship, and Article 18 (ex Article 8a) now grants every citizens of the Union the right to move and reside freely within the member states. Nevertheless, that right is still "subject to the limitations and conditions" laid down

⁶⁹ The three residence directives are Council Directive 90/364/EEC of 28 June on the right of residence (OJ L 180, 13.7.1990, p. 26); Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180, 13.7.1990, p. 28) and 90/366/EEC of 28 June 1990 on the right of residence for students. The Court did, however, not accept Article 235 as Treaty basis for students and annulled the directive in 1992. The directive was amended to 93/96/EEC of 29 October 1993 (OJ L 317, of 18.12.1993, p. 59), without that its content was changed apart from some more technical aspects (U-Karlov 1996, p. 272, note 12).

in the Treaty and in secondary legislation, i.e. in the residence directives (Langer 2000, p. 38). In practical terms, the new notion has not broken the link between economic means and mobility and has been argued to add nothing new, because it relies on a formalistic definition (Shaw 1997b).⁷⁰

Whereas Union citizens can be divided in two categories with different sets of rights, third country nationals, legally residing in a member state, stand as the excluded category upon which no Community rights to free movement are conferred, unless they come from a family of a Community worker. Whereas legally residing third country nationals have recently been granted the right to coordinated social security, they lack the underlying right of free movement (Peers 2002; Martinsen 2003). Regulation no. 859/2003, which extends 1408 to non-Community nationals, even highlights that it does not cover the situation "which is confined in all respects within a single Member State". At the same time as actions have been taken to reduce the barriers to free movement based on nationality within the Community, nationality as an assess point from which to be granted rights is as important as ever. The special – or deprived – status of third country nationals will be discussed further in chapter IV.

2.4: From Restricted Labour Circulation to the Free Movement of Persons

The entry and residence rights of the free mover no longer precariously depend on the temporary labour demand in the host state and the negotiating skills of the state of origin, but have been improved into a right of free movement for all European citizens, who by work, means or family status can maintain themselves.

Italian persistence managed to bring the issue of worker circulation to the negotiation table: first bilaterally, then supranationally. Formulated in the Rome Treaty as a main Community aim, the Commission took over the issue in an entrepreneurial fashion (Dahlberg 1968). Having completed the process that allowed for the free movement for workers in 1968, the Commission proposed a general right of entry and residence as early as 1974. The proposal, however, had to wait for 16 years before unanimity was reached by the Council, granting the conditional right of free movement to the European citizen. In the meantime, the Court contributed with proactive interpretations.

⁷⁰ Shaw points to the uncertain boundaries of European citizenship, which either relies on the formalistic definition in Article 8 of the Treaty (now Art. 17) or as defined by the contours of rights attached to European citizenship. Shaw emphasises that EU citizenship remains a figure developed in a transnational market context, and therefore in essence still refers to the concept of 'market citizenship' (Shaw 1997b).

From bilaterally organised interdependence, to supranationally guaranteed free movement for workers and later persons, institutionalisation of free movement has emerged and evolved by small institutional steps. The process stands out as a slowly and carefully negotiated one, where only the persistency of the national actor, subsequently followed up by Commission insistency and legal clarification, brought a proposal from early agenda-setting to late approval. Whereas intergovernmentalist interpretations of converging national interests may explain institutional emergence, subsequent institutionalisation was, from early on, furthered by supranational organisations.

In both de facto and de jure terms, significant barriers to intra-European mobility still exist. Although legal liberalisation has extended rights far beyond its original limits, decisive economic conditions must still be fulfilled. As a matter of fact, the analysis below demonstrates that the Community's institutionalisation of free movement – and coordination of social security rights - has not significantly spurred actual intra-European mobility. Extra-legal barriers remain decisive.

3.0: De Facto Intra-European Migration

It could be hypothesised that the institutionalisation of free movement has happened as a function of, or as a response to, growth in European cross-border movement. Such a hypothesis corresponds to Stone Sweet et al.'s theoretical assumption that transnational exchange creates a functional demand for dispute resolution and rule production, thus furthering institutionalisation. However, the examination of European migration in absolute and relative figures, carried out below, points out that the most significant growth in intra EC mobility happened between the six original member states when the issue of the liberalisation of labour movement was still on the negotiation table.

This section discusses, in statistical terms, actual intra-European migration for almost four decades. In order to illustrate the migratory background upon which the Community institutions of free labour movement, as well as Regulation 1408, were first put in place and the early context for further institutionalisation, Straubhaar's data on intra EC-6 migration for the years 1960, 1968, 1974, and 1984 are considered. Eurostat's annual series on intra EU-15 migration for the period 1985-98 is then described in order to get the more recent statistical information on intra-European migration. Both sources of information mirror the de facto context upon which institutional creation and further institutionalisation of free movement and co-ordination of social security rights have taken place.

3.1: Migratory Pattern in Post War Europe

In his study on the economics of international labour migration, Straubhaar analyses migration flows between 1960 and 1984 from Southern to Northern Europe. On the basis of statistical material, he divides the migratory pattern into post-war Europe in four phases. The first phase took place right after the war, where refugees migrated from Eastern Europe to Germany and the Benelux countries. In the same period, France and the Netherlands received immigrants from their former colonies. The second phase, between 1955 and the early 1960s, was characterised by migration within the European Economic Community and within the Nordic countries. Italy was the main provider of immigrant workers moving north (Straubhaar 1988, p. 53).⁷¹ The third phase ran until the first oil price shock of 1973. The northern directed movement of workers from Southern Europe continued, but Italians were increasingly joined by Portuguese, Greek and Spanish workers. However, the period was also characterised by increased immigration, especially from Turkey and Yugoslavia. The fourth phase, from 1973 to 1984, fundamentally changed the post war tendency of gradual liberalisation of labour market access. As a reaction to the oil price shock and rising unemployment, the receiving countries stopped recruitment policies and, instead, installed other measures to restrict further the inflow of foreign labour (Straubhaar 1988, pp. 53-58). Due to the free movement principle which had been implemented in the European Community in the meantime, such restricting measures were, however, solely directed towards third countries.

3.2: The Figures of EC-6 Migration 1960-1984

In another study⁷², Straubhaar focuses specifically on the case of the European Community, questioning whether migration between the original six member states increased as a result of the legal liberalisation of the free movement of workers. He compares the number of Community migrant workers living in the EC of six member states before the Regulation on free movement, with the number of Community migrant worker afterwards. The key years which he compares are 1960, 1968, 1974, and 1984. In order to decide whether the legal liberalisation stimulated intra-Community migration, Straubhaar compares the variation in immigration from another member state with the variation in immigration from outside the Community, arguing that:

⁷¹ Besides the movement of Italians to northern Europe, intra-European movement was characterised by movements between neighbouring countries: from the Netherlands to the Ruhr-district in Germany, from Southeast France to Southwest Germany, from Belgium to the Netherlands and France, and from Finland to Sweden (Straubhaar 1988, p. 53; 1988b, pp. 50-51).

⁷² The study is based on Eurostat data and data from national statistical offices.

"If the number of migrants of Community countries working in other member countries has increased faster than the number of migrants coming from non-EC countries, this would suggest that the formation of the EC has stimulated the intra EC-migration flows" (Straubhaar 1988b, p. 49).

Based on that assumption, Straubhaar concluded that the legal liberalisation of free movement had not stimulated Community migration between 1960 and 1984 (Straubhaar 1988b, p. 54). This Straubhaar conclusion is restated in the later work of O'Leary (O'Leary 1999, p. 388). The comparative premises can, however, be criticised, since the question is whether the two migratory groups are not too distinct to draw a comparative conclusion on their basis. It can be argued that the push and pull factors behind migration for the two groups are very different indeed. The largest non-EC emigrating group is from the third world, where the motivation to emigrate to the community must be assumed to be based on political and social factors, as much as on economic ones. It must, furthermore, be assumed that the economic motivation to emigrate is much stronger from the third world, with the income gap as a major pull factor. These differences makes it more likely that immigration from non-EC countries will grow stronger over the years, than EC-migration. In the light of the considerable differences between the two migrating groups, we argue that it is more accurate to analyse the two groups separately, than to use a relative comparison, in order to conclude whether legal liberalisation has stimulated EC movements or not.

Despite this criticism of its conclusions, the Straubhaar study provides relevant information on migration in absolute figures between the original six member states.⁷³ In 1960, 576,700 migrants resided in one of the six original member state other than their state of origin.⁷⁴ Between 1960 and 1968, the EC-6 migration increased, on average, 4.7% every year, so that, in 1968, when the Community institutionalised the free movement of workers, 830,000 citizens were living in a member state other than their home state. After institutionalisation in 1968, the increase of the migration stock was less important with an average annual growth rate of 1.5% until 1974 where

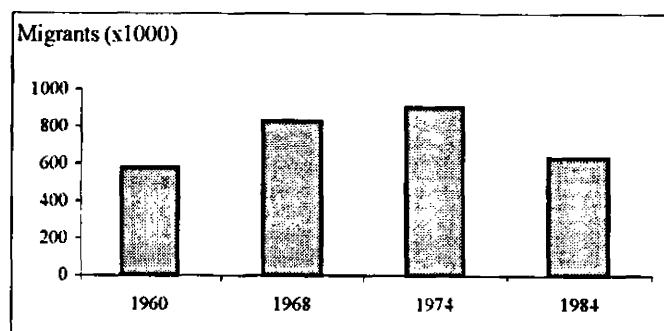
⁷³ It is important to note that more historical time series on mobility hardly fulfils general data demands on consistency and comparability. In 1988, Straubhaar stressed that a general problem of statistical data on migration was that most countries used to organise their migration statistics without much consideration of their comparability. However, he found that the work by OECD in the SOPEMI reports from 1973 had partly compensated for the lack of comparable data on the national level (Straubhaar 1988, pp. 60-63). On a later date, the Eurostat migration observations from 1985 makes comparison possible for the latest years, as printed in "European Social Statistics: Migration". Still, it must be emphasised that studies on population movements continue to be a complex area, where data problems relate to their availability, comparability and lack of data source harmonisation (Eurostat: "The social situation in the European Union" (2002), p. 24). Furthermore, all figures used here represent *stocks* and, for this reason are likely to underestimate real migration *flows* (Molle & van Mourik 1988, p. 323).

⁷⁴ The absolute figures for the years 1960, 1974 and 1984 are listed by Straubhaar in table A1, A2 & A3, pp. 59-61. The growth rates are calculated on this background.

the absolute figure was 905,300 migrants residing in another member state. From 1974 to 1979, the stock of migrants remained approximately constant, and from 1979 to 1984, the intra-EC 6 migration suffered a strong fall with a yearly decrease of 6.8%. In 1984, only 636,000 migrants stayed in another member state.⁷⁵

Therefore, the period 1960-1984 can be separated into two very different sub-periods. From 1960 to 1974, there is a continuous increase, much stronger during the 60s than in the first half of the 70s, of the intra-EC-6 migration, while from the mid 70s, the stock of EC-6 migration stops increasing and suffers a strong fall after the institutionalisation of free movement. The Community adoption of free movement in 1968 was thus not able to counterbalance the remaining barriers for cross-border mobility between the original six member states.

Graph 5: Intra EC-6 Migration 1960-1984 in Absolute Figures



Graph 5 suggests that the adoption of free movement might have stimulated free movement for an initial period but, considering the average annual growth rates of the different periods, the main stimulating factor seems to have been the demand for foreign labour in the host state. The demand for foreign labour must again be assumed to depend on the general economic situation of that period. The growth rates thus suggest viewing the functional relationships the other way around. Migration may not be a function of previous institutionalisation, but institutional emergence may be a function of previous migration. Such a finding supports Stone Sweet et al.'s explanation of

⁷⁵ It is important to note that the Straubhaar figures on EC-migration may underestimate the actual migration which took place between 1960-84. The difference between his figures and the ones provided by Eurostat on EU15 migration 1985-98 figures, is indeed considerable. It does not solely reflect the fact that Straubhaar considers migration in the original 6 member states and Eurostat migration between the contemporary 15 member states, but also that the Straubhaar figures are for the stock of migrant workers living in another member states. His figures rely on the working permission certificates issued by the immigration countries (Straubhaar 1988, p. 50).

institutional creation as a result of a functional demand, but does not confirm the virtuous circle, in which increased transnational exchange is only one component, which should further institutionalisation.

3.3: The Statistics of EU-15 Migration 1985-1998

Since 1985, Eurostat has provided us with data on migration between the 15 member states for each year.⁷⁶ This makes it possible to consider later intra-European migration in a more precise way. Table 5 and graph 6 below demonstrate that in absolute figures, migration has increased over the years. In 1985, 5.2 million citizens were living in a member state other than their home state, whereas, in 1998, 6 million EU-citizens resided in another member state. EC15 migration between 1985 and 1998 grew, on average, at 1.12% every year. However, if we do not consider the anomalous periods 1988-1990 and 1992-1994, the average growth rate is about 1.8%. Therefore, it is more precise to characterize the period 1985-1998 as having an approximate annual increase of migrants about 1.8%.

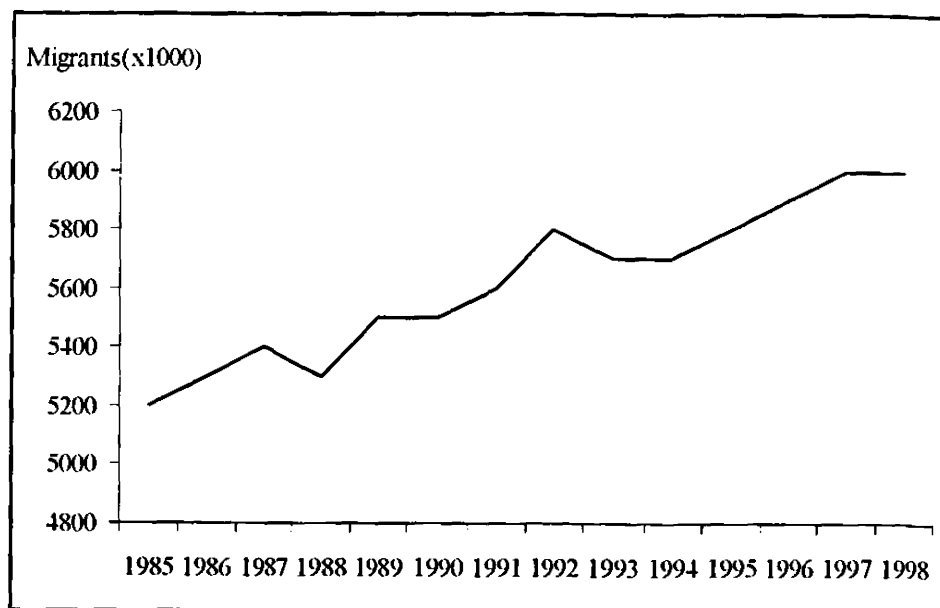
Table 5: Intra EU-15 Migration 1985-1998⁷⁷

	Migrants (x1000)	Growth Rate		Migrants (x1000)	Growth Rate
1985	5200		1992	5800	3,57%
1986	5300	1,92%	1993	5700	-1,72%
1987	5400	1,89%	1994	5700	0,00%
1988	5300	-1,85%	1995	5800	1,75%
1989	5500	3,77%	1996	5900	1,72%
1990	5500	0,00%	1997	6000	1,69%
1991	5600	1,82%	1998	6000	0,00%

⁷⁶ The Eurostat data include European migration to and from Spain and Portugal before the states became members in 1986. Again it is important to emphasise that the figures represent migration *stocks* and do not mirror actual migration *flows*, which is likely to be higher (see Molle & van Mourik 1988, p. 323).

⁷⁷ The figures on yearly stock of immigrants 1985-1998 are from Eurostat (2002) "European Social Statistics - Migration". In the Eurostat 2002 edition on migration, the time series run 1985-2000 for immigration to individual member states, whereas the time series on the EU as a whole only runs 1985-1998.

Graph 6: Intra EU-15 Migration 1985-1998 in Absolute Figures



However, when considering EU-15 migration as a percentage of the population, the relative growth of migration is less significant. Migration between the 15 member states, as a percentage of the total population, has increased from 1,5% in 1985 to 1,6% in 1998.

Separating the temporal observation 1985-1998 into two periods, 1985-1991 and 1992-1998, makes it possible to consider whether migration increased significantly, 1) after the Council adoption in 1990 of the residence directives, granting the conditional right of free movement for persons, and 2) when the southern member states of Spain and Portugal acquired the full right to mobility in 1993. The periodical growth rates demonstrate that this has not been the case. Intra 15 migration grew 7,69% in the period 1985-1991, whereas the growth rate in 1992-1998 diminished to 3,45%.

Thus, when comparing the historical observation 1960-1984 with the more recent time-series 1985-1998, we see interesting portraits of the migratory background upon which institutional creation and institutionalisation have taken place. *Institutional creation* happened after a period of intense increase in intra EC-6 migration, mirroring a high demand for foreign labour in the higher income member states. The demand continued until the first oil price shock in 1973, and migration remained at a relatively high level until the second economic crisis at the end of the 1970s. The

period 1985-1998 shows a general growth tendency in intra EU movements but, despite the progress in removing formal barriers to mobility, growth rates have remained low compared with the 1960s. According to these later data, subsequent migration has not increased significantly as a function of legal liberalisation. This finding suggests that further *institutionalisation* happened rather independently of the functional demand as expressed by de facto migration. It furthermore suggests that institutionalisation has proceeded even though previous institutional steps have not yet proven capable of fulfilling its objective; promoting intra-European mobility. The dynamics which spur institutionalisation must thus be sought for in other factors than the de facto context of migration.

3.4: The Characteristics of Free Movement Institutionalisation

The historical development of free movement in Europe shows that co-operation due to cross-border movement of labour has changed fundamentally over the decades. From being unregulated movement at the beginning of the century, it turned into "bilaterally organised interdependence". From being demand-decided bilateral agreements in the first post war decade, it became supranational regulated free movement for workers. From being a right that was exclusive to labour, granted at the supranational level, it was extended to a conditional right of free movement for EU citizens.

A characteristic of European migration is that, in scope, it has remained rather static. When considering migration between the six original member states, it is remarkable that, despite legal liberalisation which was initiated in 1951, mobility has not notably increased. The fears of the immigrating countries, that liberalisation would urge Southern Europe to go North, has not taken place (O'Leary 1999b, p. 388).

Observations over time on European migration seems to support the 'convergence hypothesis'. The convergence hypothesis assumes that generally a person will move to improve his/her economic situation, and therefore the prospect of economic gains, by moving from one place of settlement to another has to at least compensate for the socio-economic costs of that movement. The more equal economies become, the less the incentive to move will be. The assumption can be applied to the Community, as O'Leary puts it:

"One of the fundamental purposes for establishing a common market is to allocate resources more efficiently. However, the more similar national economies are, the less incentive there is for a reallocation of production factors and the less reallocation will take place" (O'Leary 1999b, p. 389).

As in the general debate on European integration, disagreements remain on whether supranational institutionalisation of free movement is a unique system offering a new set of rights to the free mover, or simply a system codifying what has already been put in place by bilateral agreements.

According to Romero, Community free movement as institutionalised between 1957 and 1968 came into place because of favourable economic conditions and a temporal convergence of national interests. The work of Romero thus sustains the theoretical proposition of liberal intergovernmentalism (Moravcsik 1991, 1993, 1995). Romero finds that the final compromise on mobility is too ambiguous to support the theoretical assumptions of neo-functionalism and automatic integration dynamics, contrary to political preferences;

"In the field of migration, the actual history of the Community-building process did not at all proceed along the allegedly ineluctable route of a functionalist expansion of the supranational dimension, nor did it witness any significant spillover from technical solutions into larger political powers for the Community" (Romero 1993, p. 55).

Another interpretation is found by Quintin, who terms the establishment of labour mobility in Europe as a "revolution" for Community workers. His argument is that it is crucial to compare the actual situation with the one before 1968, where work and residence permits were granted to European workers – as to other foreign workers – according to national legislation. Before 1968, the European worker had to apply for authorisation to work and live abroad before going to another member states (Quintin 2000, p. 9).

Different interpretations on whether Community institutionalisation on free movement *is* or *is not* considerable, and whether it has happened as an output of national interests *or* as a result of rather detached dynamics, are likely to be based on the analytical context, as well as the time-span compared. Romero may be right in arguing that the Council's adoption, in 1968, of free movement for workers was not a functional output of other supranational dynamics, but an outcome of a specific favourable economic situation, where the interests of the labour exporting and receiving states converged. But that still makes the result – delegation to the supranational level of national immigration control – outstanding. Among other aspects, it is outstanding because it is plausible to suggest that European workers might not have maintained their right to free movement if the legislative competence had not been delegated to Community level, if one considers the restrictive immigration policies that most member states applied after 1973 (Holloway 1981, note 69, p. 278).

Furthermore, what emerged as a carefully negotiated compromise, stood as the regulative input for new negotiations, making further integration possible. In this respect, the institution which was put in place became an asset for the future process.

4.0: The Historical Institutionalisation of European Social Security Rights

The co-ordination of social security rights, as one of the Community's main means for the realisation of intra-European migration, has been historically codified as happening in parallel with the free movement for workers and persons. The early institutionalisation of intra-European social security rights clearly cannot be explored in isolation from the history of its objective.

Having now examined how the objective, which the co-ordination of social security was established to achieve, emerged and has evolved as a separate institutionalisation process, and having examined the historical and recent development of de facto European migration, this part now turns to the institution of coordinated social security itself.

Conceived of bilaterally, social security across borders became the social attachment to the restricted liberalisation of labour movement between the ECSC states, before it developed as a stated priority in the Treaty of Rome. Thus obliged by the Treaty, the Council agreed on social security co-ordination as one of its first and major pieces of secondary legislation: the voluminous Regulation no. 3. Regulation 1408 was produced as a lengthy revision of its predecessor, Regulation no. 3. However, during the last three decades, 1408 has developed far beyond its institutional inheritance, a development which will be brought into focus in the next two chapters. What follows here is a short description of the historical context from which Regulation 1408 emerged.

4.1: Bilateral Predecessors

The regulative endeavour to co-ordinate social security across borders is almost as old as the institutionalisation of social security itself. When social insurance was established for workers in the beginning of the 20th century, it became clear that national legislation was insufficient in cross-border situations (Pennings 1998, p. 3). In 1904, the first bilateral social security agreement was signed between France and Italy which covered the areas of industrial accidents, old age and

unemployment insurance (Eichenhofer 2001, p. 25; Holloway 1981, p. 124). The French-Italian agreement became an institutional example for a large number of bilateral treaties concerning the conditions of the migrant worker. Italy, as the main labour exporting country, was a forerunner in bilaterally negotiating the social security conditions for its nationals working abroad. With the agreement from 1904 as model, Italy had similar social security provisions inserted in its commercial treaties with Switzerland, Germany and Austro-Hungary within the following year (Holloway 1981, p. 251). From these early treaties on, the contracting states adopted the principle of equal treatment of their nationals.

By 1920, 31 agreements on social security had been concluded. By 1945, 133 bilateral agreements had been signed, and between 1946 and 1966 another 401 agreements together with several multilateral conventions were concluded. In 94% of the 401 post-war agreements, both of the signatory states were European. The continual rise in the number of bilateral treaties was since its foundation in 1919, particularly stimulated by the work of the International Labour Office. The ILO recommended in its conventions that social security matters adopted the principle of equal treatment (Holloway 1981, p. 125 & p. 251).

4.2: The Social Security Co-ordination of the ECSC

At the same time as European states were increasingly concluding bilateral agreements, the future members of the European Coal and Steel Community agreed that the limited circulation of workers of "proven qualifications" had to be assisted by Community provisions on their social security situation (Haverkate & Huster 1999, p. 88). Therefore Article 69 (4) of the Paris Treaty laid down that:

"They [the member states] shall prohibit any discrimination in remuneration and working conditions between nationals and immigrant workers, without prejudice to special measures concerning frontier workers: in particular they shall endeavour to settle among themselves any matters remaining to be dealt with in order to ensure that social security arrangements do not inhibit labour mobility".

With the Treaty granting the qualified migrating coal and steel worker a right to equal treatment, the High Authority, national representatives, with technical assistance from the ILO, began the preparative work on a European convention on social security in 1953. In May 1954, an intergovernmental conference was held to discuss the principles and content of the convention. The negotiations made clear that it would be far from easy to co-ordinate six different schemes, agree on how to finance the co-ordination system, and arrange the cost-division between the states. Because

of the complicated negotiations, the convention was not signed before the 9th December 1957. It was, however, never ratified (Holloway 1981, p. 135).

4.3: Early Co-ordination in the European Community

The European convention on social security was never ratified, because of the intervening Treaty of Rome, establishing the EEC. Article 51 was adopted in the Treaty of Rome as the primary legislative formulation of how to achieve the objective of free movement for workers, as laid down in the Treaty's Article 48. On the basis of Article 51, it was decided that the easiest way to adopt the European convention was as a Regulation of the new Community, thus avoiding the problems of ratification. The text of Regulation no. 3, adopted by the Council on the 25th September 1958, was more or less identical with that of the European convention. The arrangements around administrative implementation were adopted in Regulation 4 on December 1958. Regulation no. 3 became the first major piece of legislation in the European Community (Holloway 1981, p. 260).

Regulation 3 stood out from other initial Community legislation because of its scope. It consisted of 56 Articles and 7 annexes. Compared with the existing bilateral treaties, the starting point of the Regulation may not have been revolutionary, but rather it codified principles which were already laid down bilaterally (Mabett & Boldersen 2000, p. 4). The Regulation applied the principle of equal treatment in its Article 8, thereby mirroring the Rome Treaty's general principle of equal treatment, as formulated in Article 7. The prohibition of discrimination based on nationality was, however, already a present principle in the bilateral agreements and international recommendations. Furthermore, a basic principle of the Regulation was aggregation of acquired rights, which was already an institutionalised praxis in the agreements between individual states. In addition, it adopted the rule, normal in international treaties of that time, that the applicable law to the migrant's situation was that of the place of his/her work.

However, Regulation no. 3 should still be considered as an unique piece of legislation, adding much to the rights of the migrant worker (Holloway 1981, pp. 138-142). *First* of all, it had a much broader scope of application than any existing agreement, including all the branches of social security as listed in the ILO convention no. 102: sickness, maternity, disability, old age, survivors, industrial injuries and diseases, death, unemployment and family benefits. *Secondly*, a novelty of the Regulation was that it partly prohibited residence clauses in national legislation, thus making it possible to maintain acquired rights when not remaining in the state in which one worked. For the

first time, it became the rule rather than the exception that benefits could be provided outside the work state. *Thirdly*, the Community Regulation replaced the existing bilateral treatments and, in this way, simplified the extensive and complex, but still incomplete, systems of individual agreements.⁷⁸

4.4: Criticism, Negotiations and the Adoption of Regulation 1408/71

Regulation 3 had not been long in place, before criticisms were raised. The institution was found to be incomplete, and too complex to achieve its aim. The Regulation did not cover frontier workers, seasonal labour nor seamen, who were respectively covered by Regulation 33/63, 75/63 and 47/67. In addition, the litigation of the European Court of Justice, national courts and administrative practices had pointed to regulatory gaps and unclear definitions in the co-ordination of social security.

Having just established a co-ordinating practice, the Commission began work on a new Regulation as early as 1964. The Commission submitted its first proposal for the new Regulation in the beginning of 1966 (OJ no. 194, 28. October 1966, p. 3333). After having considered the opinions of the Community Parliament and the Economic and Social Committee, the Commission modified its proposal and, in 1968, the Council received the revised one (OJ no. C95, 21. September 1968, p. 18).⁷⁹ Three years of negotiations took place before Regulation 1408/71 was finally adopted by 14th June 1971.

The early Community Regulation no. 3 was the predecessor of Regulation 1408/71, and served as its source of inspiration and model. Although bilateral agreements had established a practice for dealing with social security issues in cross-border situations, Regulation no. 3 marked an important improvement in the equal treatment of migrant workers. The Regulation was nevertheless soon ripe for improvement. As will be emphasised in more detail in the following chapters, the European Court of Justice played a decisive role in the revision of the Regulation, leading to the adoption of

⁷⁸ According to the study of Holloway, the bilateral and international agreements left a number of problems unsolved, whereby many regulatory lacunae remained. The most significant problems left were: that not all nationality restrictions had been removed; that residence restrictions still dominated; that aggregation and the pro-rata principle was a complex matter when the social security scheme of one of the signing parties was non-contributory; that the agreements left controversial matters untouched, such as unemployment benefits, voluntary and complementary insurance schemes; that the system was far from complete since several states still had signed no agreement, such as Germany and Luxembourg, and Germany and Belgium (Holloway 1981, p. 134).

⁷⁹ The first ESC opinion was printed in OJ no. 64, 5th April 1967, p. 1009 and the first Parliament opinion in OJ 14th February 1968. The opinion by the ESC regarding the modified proposal was printed in OJ no. C21, 20 February 1969, p. 18 and the opinion by the Parliament by OJ no. c135, 14. December 1968, p. 4.

1408/71; 1) the early litigation of the Court had constantly revealed problems in the regulatory systems; 2) the clarifications and interpretations of the Court became part of the new Regulation, whereby the Court's interpretative line was finally codified; 3) the Court's interpretation of Article 51 came to constitute "the basis, the framework and the limits" for the new Regulation (Holloway 1981, p. 146).

4.5: The Institutional Origins of Regulation 1408

On its adoption, Regulation 1408/71 built on a tradition of 12 years of co-ordination with Regulation no. 3, which again incorporated codified principles developed through early bilateral practices of cross-border social security. 1408/71 thus has an institutional history which goes back far beyond 1971. In a Community context, the objectives with social security co-ordination had been continuously developed by the Court since 1957 (Cornelissen 1997, p. 28). 1408 came to contain the same structure and principles as its predecessor and as adopted in 1971, it was closely modelled after Regulation no. 3. The main improvement brought about by 1408 was to complete an insufficient institutional situation, and, indeed, many of its provisions were initially responses to the problems that Regulation no. 3's implementation had brought about. The historical understanding of 1408 is thus tightly coupled to the previous institutional context.

5.0: Concluding Remarks - Two Unique Community Systems

It is often argued that neither the free movement for persons nor the European co-ordination of social security rights add significantly to the rights of the European citizen. That, after all, the right of the free mover is conditional and the co-ordination system is simply multilateral co-operation, without the delegation of national competences.

From a historical, comparative point of view such assumptions are not supported. Since 1968, the Community does not simply encourage worker mobility, but it removes from the member state the prerogative of controlling immigration from another member state. With the residence directives granting free movement of persons, the right is no longer one exclusive to workers, but extended to anyone who can provide for her/himself at a minimum level.

When it comes to social security, the co-ordination system has relativised the link between the state of origin and the citizen. In the early post-war years, the migrant was only to remain in the receiving state as long as he/she was productive. The costs of unproductive periods such as childhood,

maternity, unemployment, invalidity and old age were to be paid for by the state of origin (Holloway 1981, pp. 235-236). With the co-ordination system, the link to the state of origin, as the site issuing social security, is replaced by a link to the state of work.

Compared with bilateral and international treaties on social security, Community co-ordination of social security rights has, from the beginning, been an institutional novelty and, as further institutionalisation takes place, the system becomes increasingly wider and more complete. It may re-codify some of the principles developed by bilateral or international predecessors, but its depth and scope go much beyond that. *First* of all, the co-ordination system stands out for its intensity. It covers a much broader area than any previous agreement (Holloway 1981, p. 144). *Secondly*, whereas it borrows the principle of equality, it adds the principle of exportability. For the first time, social security benefits are de-territorialised as a rule, which previously had only been the exception. *Thirdly*, compared with bi-lateral social security agreements, the provisions on Community co-ordination have direct effect and thus immediately grant rights upon the citizen. The free mover does, at least in principle, not have to wait until the rights have been implemented in national law (Bieback 1994, p. 27). *Furthermore*, the Community rules enjoy supremacy over national law. *Fourthly*, European co-ordination is comparatively unique because the European Court of Justice continuously interprets the Regulation, the national administration thereof, and the consistency between the principles and criteria of the Regulation and those of national legislation (Cornelissen 1997, p. 28). In addition, the 'Administrative Commission on Social Security for Migrant Workers'⁸⁰ will clarify the more technical aspects of the Regulation and how to convert it into national administrative practice. *Finally*, the Commission can take the individual member state to Court when national law and its administration contradict the Community provision, and the Commission will propose to amend the Regulation when it is incapable of achieving its aim. The free mover's right to intra-European social security is thus guarded by permanent supranational organisations, granting institutionalised rights their own lasting credibility.

⁸⁰ The 'Administrative Commission on Social Security for Migrant Workers' is attached to the Commission. The 'Administrative Commission' consists of a government representative from each member state and a representative from the Commission. The Commission provides secretarial service for the Administrative Commission. The tasks of the Administrative Commission are among others to deal with administrative and interpretive questions regarding the Regulation, to develop the cooperation between the member states in social security matters and to submit suggestions for amendments to the Commission on the basis of the more practical insight of its members. The Administrative Commission is one important forum of contact between the member governments and the Commission. Provision 80 & 81 of Regulation 1408/71 describe the composition and tasks of the Administrative Commission.

The Council's gradual acceptance, between 1957 and 1971, of European free movement for workers and the original provisions on social security co-ordination may reflect the specific socio-economic situation of that time of high growth, low unemployment in high income member states and a need for foreign labour. It may have resulted from a regulative need to clarify the social security situation of intra-6 migration which increased by 44% between 1960 and 1968. However, an intergovernmentalist argument that the convergence of national interests explains the willingness to co-operate, becomes insufficient when the social, economic and political context of the 1970s up to the mid-1980s is considered. Rights remained and were even expanded, despite decreased migration, despite economic crisis and despite restrictive immigration policy towards third country nationals. The historical analysis suggests that whereas the institutions of free movement for workers and cross-border social security may have been conceived historically as a response to national interests and in a propitious socio-economic context, subsequent institutionalisation seems rather detached from the broader context, and, to a certain extent, developed according to its own internal logic.

In theoretical terms, Regulation 1408/71 was created in T_0 , i.e. 1971, but was at that time already an output of a long socio-economic and institutional history. Its predecessor had been put in place, pushed by national interests and institutionalised as a collective choice to solve cross-border problems. Furthermore, Regulation no. 3 came about in order to realise a Community objective as laid down in the Treaty's text. Finally, it can be theorised as being a result of the functional demand due to increased transnational exchange, i.e. migration. The institutional adoption of 1408's predecessor became an output of converging political interests, the establishment of an multilateral organisational framework, and a favourable socio-economic context.

As an institutional output in T_0 , 1408 occurred as a historical phenomenon. The range of optimal solutions and alternatives that politicians assessed in T_0 were already embedded in – and restricted by – the inherited institutional context. Furthermore, the need to reform the existing piece of legislation, Regulation no. 3, was successfully argued by the Commission, which thereby mediated the institutional course through skilful action. In addition, earlier interpretations by the Court had already given substance and direction to the developmental path of the Regulation. The output in T_0 was thus not only a result of intergovernmental negotiations, but had in part been transmitted by the supranational organisations. The institution in T_0 thus already evolved out of an established path of increasing returns. Further supranational institutionalisation on that path will be analysed in the two following chapters.

Case-notes

¹ In several cases the Court has dealt with the question of the ex-colonies and thus with the territorial scope of Regulation 1408/71.

- In case 87/76 *Bozzone* [31 March 1977. *Walter Bozzone v Office de Sécurité Sociale d'Outre-Mer*. ECR 1977, p. 687] the Court stated that the definition of employed person is encapsulated in one who was affiliated in one of the social security schemes listed in art. 1 (j). Mr. *Bozzone* was entitled to Belgian invalidity benefit, being Italian and residing there, but having worked in Belgian Congo and, at that time, affiliated with the Belgian social security system.
- Case 10/78 *Belbouab* [12 October 1978. *Tayeb Belbouab v Bundesknappschaft*. ECR 1978, p. 1915] considered both the change of nationality and work held in an ex-colony. *Belbouab* was born in Algeria, given French nationality by birth and preserved this until Algeria became independent in 1962. In the period in which he held French nationality, he worked as a miner in Germany. When he later applied for the German mineworker pension, the application was rejected, since he no longer possessed French nationality. The Court emphasised that the two criteria for belonging to the personal scope were: *to be or have been* subject to a member state legislation for employed or self-employed persons *and* to have nationality of one of the member states. *Belbouab* fulfilled the first criteria having been subject of the relevant German social security schemes, while working there. Furthermore, the Court concluded that because he held French nationality when the work was carried out, he was part of the personal scope. The Court thereby emphasised that the nationality required is that when the work is carried out and not at the time of application.
- The joined cases 82 and 103/86 *Laberero and Sabato* [Joined cases 82 & 103/86, 9 July 1987. *Giancarlo Laborero and Francesca Sabato v Office de Sécurité sociale d'outre-mer (OSSOM)*. ECR 1987, p. 3401] concerned Belgian index-linking, which adapted social security benefits to the cost of living. The cases concerned the ex-colony of Belgium, which became independent in 1960 and was thereafter named Zaire. Mr. *Laberero* was Italian, resided in Belgium, but worked in Belgian Congo from 1953 to 1968. Mrs. *Sabato* was Italian and resided in Belgium as well. She is the widow of an Italian national, who worked in the republic of Zaire from 1968 to 1970. Both claimed that their pensions should be index-linked, according to the periods in which the work was held in Belgian Congo/Zaire, but insured under Belgian law. In its written observation the Belgian government argued that the territorial scope of the Regulation could not be wider than that of the EEC Treaty. However, the Court's conclusion made it clear that it was not the geographical scope of the Treaty which demarcated rights. The decisive criteria was the link between the worker and the social security scheme, regardless of the place of activity. It referred to case 300/84 *van Roosmalen*, which will be discussed in chapter IV's part on the personal scope, and stressed that the essential criterion was not where the occupation was held, but the existing link between the worker and completed periods of insurance within a social security scheme of a member state (para 24. of the judgement). Referring to *Bozzone*, the Court emphasised that the definition of legislation in Article 1 (j) was very broad (para. 23 of the judgement). Both *Laberero* and the husband of *Sabato* had been affiliated with a relevant legislative scheme, and could thus be defined as "employed" persons. They were therefore entitled to the Belgian index-linking for the period where they worked in the former Belgian colony.
- The outcome was the contrary in case C-105/89 *Buhari Haji* [Case C-105/89, 14 November 1990. *Ibrahim Buhari Haji v Institut national d'assurances sociales pour travailleurs indépendants*. ECR 1990, p. I-4211]. *Haji* was born in Nigeria and thus from birth possessed British nationality until Nigeria gained independence in 1960. From 1937 to 1986, he worked in Belgian Congo and until the country became independent, he paid compulsory pension contributions to the Belgian scheme. With this background he applied for a pension. His application was refused in 1987 by the competent Belgian institution due to his Nigerian nationality, and the fact that he resided in Zaire. The Court concluded that the Belgian refusal was not against EC law, since the term "national of one of the member states" in Article 2 (1) must be considered in the period in which the worker held his occupation (para. 18 of the judgement). Despite the fact that *Haji* had paid contributions, he did not come within the personal scope of the Regulation, since he was working in Belgian Congo and held British nationality, when Britain was not yet a member state.

ⁱⁱ Case 1/78, 28. June 1978. *Patrick Christopher Kenny v Insurance Officer*. ECR 1978, p. 1489. *Kenny* was an Irish national residing in Britain. He received cash benefits, since he was incapable of working. In the summer 1973, he went to Ireland and was imprisoned there because of a previous conviction. During the time in prison, he became ill and was sent to an Irish hospital. When he returned to United Kingdom, he claimed cash sickness benefit for the time in hospital. His claim was, however, refused with reference to the British national insurance act, saying that a person was

not granted the benefit during imprisonment. The Court ruled that the national competent institution had a right to withdraw benefit in the concrete case, since had Kenny been a British national, or spend his time in a British prison, he would suffer the loss of benefit as well. There was no discrimination against Kenny, for reasons of his nationality.

ⁱⁱⁱ *Petroni* was an Italian national who worked both in Belgium and in Italy and, on retirement, was entitled to a Belgian old age pension on the basis of Belgian legislation alone, and to an Italian pension calculated on the basis of aggregation. However, as an effect of Article 46 (3) of the Regulation, his Belgian pension would be reduced if aggregated with the Italian pension. The preliminary question therefore addressed if such an effect would be compatible with Article 51 of the Treaty. The Court concluded that aggregation shall not be carried out if it diminish the benefits that the worker would be entitled to by applying the laws of a single member state.

Chapter IV: Extendable Rights - From Market Citizens to European Citizens and Beyond

This chapter, and the next one, explore the supranational institutionalisation process, assumed to have transformed Regulation 1408 from output in T_0 to dynamic input over T_1 up to the analytical T_2 . The present chapter traces out the process of how the *principle of equal treatment* and the *personal scope* of Regulation 1408/71 have been settled and extended over time. By doing so, the chapter analytically questions 'to what extent' the European Union has built up a social security dimension. It furthermore addresses the research question of 'how', exploring in detail how the institutional reach gradually establishes and expands through the European Court of Justice's (re)interpretation and (re)clarification, through the Commission's praxis of (re)formulation and (re)proposing, and through intergovernmental negotiation and codification. In other words, the individual and interlinked actions and reactions between Court, Commission and member states are examined in order to trace the dynamics furthering the institutionalisation of social security.

The empirical analysis of the present chapter relates to the theoretical propositions on institutionalisation discussed in chapter II. Questioning whether a logic of institutionalisation can be identified, the diachronic analysis explores the subtle steps of law and politics on the path to European social security integration and thus traces the premises for institutional change. Questioning the role of supranational organisations, the analysis investigates how case-law and the legal reasoning of the Court, as well as the Commission's persistency and agenda-setting capacity may have furthered integration. Questioning the role of politics, the analysis examines national positions and the political capacity to control over time the direction of the integrative path. Questioning institutionalisation through the interaction of law and politics, the chapter researches how member states have responded to legal activism and eventually have set its limits.

The chapter is divided into four analytical sections, where section one concerns the *principle of equal treatment* and the subsequent three sections analyse the evolution of the Regulation's *personal scope*. The *first* section examines how equal treatment was conferred on Community workers and how the reach of the principle has been extended by the teleological interpretations of the *Court*. The *second* section equally focuses on the role of the *Court*, analysing its interpretations on the personal scope. The section examines the Court's historical definitions of 'employed person', as well as the purpose of the Regulation's predecessor and its Treaty base. The *third* section analyses the agenda set by the *Commission*, which, by continuously linking intra-European social security to the free movement of persons and Union citizenship, alongside its stated political commitment to treat non-Community nationals equally, has argued that the Regulation should be extended to all persons, irrespective of economic activity and nationality. The *fourth* section turns to the reactions of the *Council* and the individual member states and analyses how the negotiations on a generalised personal scope evolve up to the point where 1408/71's personal scope extends to cover non-active Community nationals, as well as legally residing third country nationals. The *fifth* section concludes the analytical findings and relates them theoretically.

1.0: The Principle of Equal Treatment

One of the founding pillars and general principles of the European Community is the prohibition of discrimination on the grounds of nationality (Cornelissen 1996, p. 440; Pennings 1998, p. 91; Pieters 1997, p. 197; Quintin 1997, p. 233). This means that, within the scope of the Treaty citizens from another member states are to be treated equally with a host state's own citizens. The principle of equal treatment is expressed in Article 12 of the Treaty.⁸¹

Studies on the general evolution, in EC-law, of the prohibition of discrimination have pointed out that, over time, the principle has changed nature. The right to be treated equally arose as a privilege conferred on one exercising a market activity, but has through generous interpretations by the Court been extended to the European citizen (More 1999; Stoor 2000; Flynn 2000). Thanks to the Court's

⁸¹Article 6 of the TEU, Article 7 of the Rome Treaty. The principle reads as follows: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

ongoing interpretations, the non-market actor has been granted equal rights, however conditionally. Furthermore, it is argued that the principle changes its character or function, depending on the context it operates in. It may serve as an instrument with which to achieve a specific Community aim, play a mediating role for other Community goals, or be an independent objective in its own right (de Búrca 1997; Stoor 2000).

The system co-ordinating social security rights ascribes the same high importance to the principle of equal treatment as Community law generally does. The prohibition against the discrimination of the migrant in social security terms is detrimental to free movement. The general principle of equal treatment is mirrored in Article 3 of Regulation 1408/71:

“...persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State”.

The absolute status of the principle of non-discrimination is, however, conditioned by the fact that it is limited by the Treaty's applicable scope. It can therefore only operate beyond market goals to the extent that the Treaty does so, just as it can only regulate the situation defined as Community competence (More 1999, p. 537). The scope of the non-discriminating principle regarding social security rights is thus set on the basis of the personal and material scope of Regulation 1408. However, to whom and to what the Regulation applies has been under continuous interpretation, for which reason the scope of the principle of equal treatment becomes dynamic as well, as will be demonstrated below and in the following chapter.

This section examines the evolution of the principle of equal treatment, from a principle prohibiting direct discrimination against the migrant worker, to a principle regulating indirect discrimination as well, thus far beyond a workers-only privilege.

1.1: The Broad Spectrum of Equal Treatment

The judgements of the Court have clarified and re-settled the limits and the scope of the rights to equal treatment in social security matters.

The Court laid down a negative definition, settling down the circumstances under which the principle did not apply. The migrant worker was *not* entitled to equal treatment when the social benefit in question fell outside the material scope of Regulation 1408.⁸² Neither did the principle apply, when the facts of a case had happened within a single member state, i.e. without any cross-border movement having taken place.⁸³ Nor did the principle rule, if a case involved only one member state and the second party was a third country.⁸⁴ Furthermore, discrimination did *not* take place simply because different rights were conferred on different occupational categories, and the migrant therefore was treated different than a national, but on objective grounds.⁸⁵

On the other hand, the positive clarification by the Court extended the principle of equal treatment beyond direct discrimination, and prohibited all forms of indirect discrimination as well. The Court laid down that indirect discrimination took place when criteria which seemed to be based on non-nationality or appeared as neutral ones, had in fact a discriminatory result (Pieters 1997, p. 197)

That was the case against Ms. *Toia* of Italian nationality, residing in France, when she was denied the French allowance for women with children.⁸² The Court decided that the French social security code indirectly discriminated against migrant workers and their dependents, since one of the qualifying criteria for the allowance was that at least five of the children had French nationality.⁸³ In the case of *Toia*, the Court stated its wide interpretation of the principle of non-discrimination

"The rule on equality of treatment, laid down by Article 3 (1) of Regulation No 1408/71 prohibits not only patent discrimination, based on the nationality of the beneficiaries of social security schemes, but also all disguised forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result" (Summary of case 237/78, *Toia*).

The broad interpretation of discrimination, embracing overt as well as covert forms, was later restated, as laid down in *Toia*.^{viii}

In the *Pinna I*⁸⁴ case, French family benefits were readdressed.⁸⁵ The case clarified that the prohibition of indirect discrimination applied to the Regulation itself as well as to national

⁸² Case 237/78, 12 July 1979, *Caisse Regionale d'assurance Maladie (CRAM), Lille v Diamante Palermo, nee Toia* ECR 1979, page 2645.

⁸³ On the contrary to the requirement, five of her seven children had Italian nationality from birth.

⁸⁴ Case 41/84, 15 January 1986, *Pietro Pinna v Caisse d'allocations familiales de la Savoie*, ECR 1986, p. 1.

legislation (White 1999, p. 13). The *Pinna* case confirmed the broad interpretation of the principle of equal treatment, even when a praxis leading to actual discrimination of the migrant worker might be justified by Regulation 1408 itself. When 1408/71 was adopted, the Council did not reach unanimity on which state was to grant family benefits when the family of a migrant worker did not stay in the state of work. The general rule applied by Article 73 (1) was that of 'lex loci laboris', stating that it is the state of work which pays family benefits, regardless of where the family lived. However, a dual system was established for the sake of France, where Article 73 (2) permitted a French exception. Article 73 (2) allowed that, if the family of a migrant working in France stayed abroad, they were to receive benefits according to the law of the state in which they resided. In the case of *Pinna*, the Court, however, found that the French exception operated to make a distinction between French nationals subject to French legislation and Community nationals subject to the same legislation. The Court made clear that the principle of equal treatment prohibits "all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result" (Summary of case 41/84, *Pinna*). Even though French legislation did not discriminate directly between the migrant worker and French citizens on grounds of nationality, the non-exportability of French family benefit was more likely to affect the migrant worker and his family than a family of French citizens, presumably staying in France:

"Even though the legislation of a Member State employs the same criterion to determine the entitlement to family benefits of a national of that State employed in its territory, that criterion is by no means equally important for that category of worker, since the problem of members of the family residing outside the Member State of employment arises essentially for migrant workers" (Summary of case 41/84, *Pinna*).

On this basis, the Court concluded that not only did French legislation and praxis in fact discriminate against the migrant worker, but that the indirect discrimination was justified by the Community institution. Article 73 (2) of Regulation 1408 was therefore condemned as being invalid. The Council codified the rulings of the Court 3 years later by amending Article 73 of the Regulation, so that family benefits were now generally paid according to the legislation of the member state of work, also when the family stayed abroad (Cornelissen 1997, p. 37).⁸⁵ Reacting in accordance with the authoritative ruling of the Court, the Council's codification closed the regulatory gap, which previously had permitted the French exception. Both the Court and the Council thereby took a decisive integrative step, laying down that discrimination as a result of

⁸⁵ Regulation 1408/71 was amended by Regulation 3427/89 of 30 October 1989.

mobility was contrary to the aims of the Community even though no overt discrimination happened on grounds of *nationality*.

In the later *Masgio*⁸⁶ case, the Court continued along the established line of reasoning, finding German practice indirectly discriminatory, occurring on the ground of mobility.⁸ The Court emphasised that equal treatment in social security terms was a precondition for the actual possibility of free movement within the Community. Its teleological conclusion stated that Article 3 (1) must be interpreted in the light of its objective, which was to contribute to the greatest possible freedom of movement for migrant workers, and thus to achieve one of the founding aims of the Community (para. 16 of the judgement). In the case, the Court underlined the link between the right to free movement, the maintenance of social security advantages and the realisation of free movement.

“... the aim of Articles 48 to 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, migrant workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State (...) Such a consequence could deter Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom” (para. 18 of the judgement).

The Commission furthermore brought infringement procedures before the Court regarding the principle of equal treatment, thereby monitoring member states' compliance with the Community obligation to treat nationals from other member states equally.^{xi} The Commission found that Greece had not fulfilled its obligations, concerning family benefits. The cases of *Toia*, *Pinna* and the one *against Greece*⁸⁷, marked family policies as a rather controversial social security area, where more discrete discriminating criteria characterise member states' legislative means of pursuing demographic goals. The case *against Greece* considered the Greek conditions for its large family benefit which was based on the number of children and, additionally on Greek nationality or origin. In putting forward its case, the Greek government explained that benefits paid to large families had a historical and sociological basis, and the protection thereof had constitutional rank. The benefits were demographically aimed, since the percentage of old people in the Greek population increased. These policy objectives were, however, set aside by the Court, which found Greek law and practice

⁸⁶ Case C-10/90, 7 March 1991. *Maria Masgio v Bundesknappschaft*. ECR 1991, page I-1119.

⁸⁷ Case C-185/96, 29 October 1998. *Commission of the European Communities v Hellenic Republic*. ECR 1998, page I-6601.

discriminatory. The national policy aims were thereby superseded by Community obligation and the objective to promote free movement.

Over time, the case-law of the Court has furthered the principle of equal treatment. Historically considered, it could be argued that the principle was simply inherited from previous bilateral agreements on social security. However, the activism of the European Court of Justice, seconded by the Commission, brought equal treatment far beyond its overt meaning, to cover indirect forms of discrimination as well. Furthermore, the jurisprudence of the Court not only sought to bring national legislation into line with the principle, but it also interpreted to what extent the supranational institution itself was in accordance with one of its main principles. The Court thus overruled previous political decisions, and the Council subsequently accepted the legal reprimand and amended the Regulation. Finally, litigation expanded the character of the principle from being concerned with non-discrimination on the grounds of nationality, to non-discrimination on the grounds of mobility. According to the teleological interpretation of the Court, more discrete criteria in national legislation, such as a residence clause or a method of calculation, might – even if they were applied equally – tend to disfavour the free mover, thus hindering the overriding aim of free movement.

1.2: Beyond a Workers–Only Privilege

The early case-law of the Court established a restrictive view on the rights of the family member. In case 40/76 *Kermaschek*⁸⁸, the Court drew a sharp distinction between, on the one hand, the rights of the worker and, on the other hand, the rights of their families. The family member had only “derived rights”, meaning those acquired by national law through his/her status as a family member. The family member could therefore not rely personally on the principle of equal treatment. The Court maintained the distinction for more than 20 years, confirming it in a line of judgements known as the *Kermaschek* case-law.^{xii}

⁸⁸ Case 40/76, 23 November 1976. *Kermaschek v Bundesanstalt für Arbeit*. ECR 1976, p. 1669.

In 1996, the Court came out with a very important judgement, which came to influence much more than the individual law-suit, as will be demonstrated in chapter V and VII. In the *Cabanis-Issarte*⁸⁹ judgement, the Court reconsidered the scope of the equal treatment provision and its application to the family member, and revised the interpretive path of established case-law, which had been confirmed through more than 20 years of legal interpretation.^{xiii}

In the case of *Cabanis-Issarte*, the preliminary questions addressed whether it was justifiable to treat family members as a separate category, to whom the principle of equal treatment did not apply directly.^{xiv} Analysing the wording of Article 3 (1) of 1408/71, the Court found that the provision itself did not distinguish between workers, family members or surviving spouses (para. 26 of the judgement). In addition, it was unquestionable that the family member was part of the Regulation's personal scope (para. 27 of the judgement). Reconsidering its own logic, as established by the *Kermaschek* case-law, the Court departed here from it, and thus took a decisive step, extending equal rights and furthering integration. The Court held that a distinction which is maintained between rights in person and derived rights:

"may undermine the fundamental Community law requirement that its rules should be applied *uniformly*, by making their applicability to individuals depend on whether the national law relating to the benefits in question treats the rights concerned as rights in person or as derived rights, in the light of specific features of the domestic social security scheme" (para. 31 of the judgement, emphasis added).

As argued by the Commission, the Court agreed that it might be increasingly difficult to apply Community law uniformly, because national social security systems tended to blur distinctions as social security schemes had come to offer more universal cover. On basis of this new logic, the Court concluded that the distinction between personal and derived rights had to be partially abandoned.⁹⁰ The consequence was that family members and survivors can invoke the principle of equal treatment. The radicalism of the departure from the established interpretation is illustrated by the fact that the Court limited the material impact of the *Cabanis-Issarte* judgement, emphasising that its conclusions did not apply before the date of the judgement, i.e. 30 April 1996.

⁸⁹ Case C-308/93, 30 April 1996. *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte*. ECR 1996, page I-2097.

⁹⁰ The distinction shall only be upheld for unemployment benefits, which in general are conferred personally.

“Both the SVB and the governments of the Member States⁹¹ which have submitted written observations to the Court submit that, in the event of a departure from the Kermaschek line of authority, the temporal effects of the judgement should be limited. In this regard, reference has been made to the serious consequences which the judgement would entail for the funding of social security schemes and the radical change involved in such a departure from precedent” (para. 46 of the judgement).

By limiting the financial impact of its conclusions, the Court seemed to meet the national governments halfway. In this way, a subsequent political correction of the Court’s interpretation became less likely. In the absence of a political response, the Court managed to stretch out the right to equal treatment. By connecting the objective of a uniform legal order in the Community with the general development of the social security schemes at the national level, the principle of equal treatment was extended beyond a ‘workers-only’ privilege.

Also, the often discussed case of *Martinez Sala*⁹², considered the personal scope of the equal treatment provision.⁹³ The case is perhaps more famous for its clarification potential on European citizenship and the opinion of the Advocate General, than for what the Court ended up saying about the actual content of the European citizen’s residence right.^{xv} However, the Court’s conclusions were radical in laying down who has a right to equal treatment in social security matters. The Court examined whether the non-active Spanish citizen *Sala* could benefit from the non-discrimination provision of the Treaty and therefore be entitled to the German child raising allowance, due to her lawful residence in Germany.^{xvi} The right to reside was conferred on *Sala* by the 1953 European Convention on Social and Medical Assistance, and thus not by Community law itself.

Referring to the 1996 cases of *Hoever and Zachow*, which will be discussed in chapter V below, the Court reaffirmed that the German child raising allowance was a social security benefit within the material scope of 1408/71 (paras. 24 & 28 of the Judgement). Having thus clarified on the material scope and having left the question of the status as employed person for the national Court to decide,

⁹¹ The SVB was the competent Dutch institution. The member states which submitted observations were the Netherlands, Germany, Austria and the UK.

⁹² Case C-85/96, 12 May 1998. *Maria Martinez Sala v Freistaat Bayern*. ECR 1998, page I-2691.

⁹³ For an in depth discussion of the *Sala* case, see, among others, More (1999), O’Leary (1999), Langer (1999c), Tomuschat (2000).

the Court laid down that an EU citizen, lawfully residing in another member state, could rely on the Treaty's equal treatment provision, in all situations covered by the material scope of Community law (O'Leary 1999, p. 74, Langer 2000, p. 46):

"As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship. Article 8 (2) of the Treaty attaches to the status of the citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty" (paras. 61 & 62 of the judgement).

The *Sala* case clearly expanded the personal scope of the principle of equal treatment, extending it much beyond the entitlement of workers and self-employed (More 1999, p. 540). The principle was distanced from its market restrictions. The application of the non-discrimination provision no longer depended on the performance of an economic activity, but lawful residence was declared a sufficient prerequisite (O'Leary 1999, pp. 77-78, More 1999, p. 540). Future case-law will have to clarify whether the principles of the *Sala* case have established binding precedent.^{xvii}

1.3: From Inherited Provision to Objective in its Own Right

The principle of equal treatment in Regulation 1408/71 reflects partly the general principle on non-discrimination in Community law, partly a practice already established by bilateral agreements, and later codified in the early Community social security Regulation no. 3. Considering its origins, it may be argued that the principle is an inherited one.

However, subsequent Community case-law developed the principle on its own premises, so that its present content is only a mild reflection of its past bilateral predecessors. Through the activism of the Court, the right to be treated equally in social security matters developed its own Community character. The case-law analysis carried out above demonstrates that the principle both functions as a means towards the free movement of workers, as it performs as an independent goal in its own right, promoting migrants' position as if this were a separate Community aim. Through the clarification and generous interpretations by the Court, the scope of the principle has been widened, applying it to the case of indirect discrimination, the family member and the non-active Community citizen.

From a theoretical perspective, an analysis of the principle of equal treatment sustains legal autonomy assumptions. It has been law alone which has decided the scope and meaning of equal treatment and thus the premises for change. What to politicians may have appeared as clarifications of legal details have in fact detached the right to equal treatment from the exercise of economic activity, and thus greatly compromised the member states' ability to decide who should be treated equally with their own nationals. This enforcement of the principle took place as judicial decision-making alone and politics did not subsequently respond. Such empirical findings support the theoretical argument that politics and law follow different logics (Alter 1998, pp. 130-132; 2001, p. 189). It is a characteristic of all the case-law analysed in the present chapter that legal interpretations had no general or immediate political, or financial implications, and therefore made political response unnecessary, even irrelevant. The eventual unintended consequences of the Court's expansive deductions and political non-action will be analysed in the subsequent chapters.

The evolution, over time, of migrants' right to equal treatment in the area of social security reflects the general development of the EU from an economic area to a more "genuine community" (Stoor 2000, p. 125). The specific development of the principle of non-discrimination in the field of social security suggests a principle, which moved beyond its strictly instrumental role and reappeared as having gained some autonomous value (de Búrca 1997). As held by the ex-commissioner of Social Policy, Pádraig Flynn, equal treatment in social security matters can be interpreted as a practical recognition of European citizenship:

"One of the most important protections offered by Regulation 1408/71 is the guarantee that people within its scope will receive equal treatment in whichever Member State they are insured. It means in fact, that they should be treated by this Member State as if they were one of its own citizens. The principle of equal treatment is an important factor in the concept of citizenship of the Union. *In this sense, the Regulation has, in very practical terms, long recognised the concept of citizenship*" (Flynn 1997, p. 19, emphasis added).

Having quoted this, it is still important to emphasise the limits of the provision. The principle only applies within the scope of the *acquis communautaire*. For the concrete case of social security, this means that the principle of equal treatment does not reach beyond the material scope of Regulation 1408 and Regulation 1612/68. Furthermore, whereas the right to invoke the principle no longer depends on economic activity, it still depends on lawful residence. In the present institutional context, lawful residence in the Community is decided by the conditions of the residence directives.^{xviii} As long as the material scope of the social security Regulation mainly covers benefits

granted on the basis of work, and as long as lawful residence depends on the ability to provide for oneself, the principle of equal treatment has not definitively broken its link with economic activity or status. Thus, if the equal treatment provision in the Regulation is the practical expression of European citizenship, it has not fully recognised the traditional notion of citizenship, since some people certainly remain more equal than others.

2.0: The Historical Setting of a Personal Scope

The personal scope of Regulation 1408 has been extended incrementally through judicial interpretations by the Court, Commission proposals and the Council's codification thereof. The current personal scope has been under a process of definition since the adoption of 1408/71's predecessor, Regulation no. 3 in 1958. During more than four decades the personal scope of Regulation 1408 has been clarified. The last five years have been marked by very intense negotiations in the Council on extending the personal scope to non-active Community nationals as well as third country nationals. Only very recently have these negotiations been concluded by apparently extending the personal scope to all migrants in the EU covered by the social security legislation of a member state.

Behind the personal scope, as it stands today, is both the Court's early and gradually evolving interpretations of 'employed person', as well as its interpretations of the scope and limits of the Treaty's Article 42 (ex. Art. 51). An ongoing interpretation of the spirit of the Regulation's Treaty base, initiated years before the free movement of workers was implemented by secondary legislation in 1968, is behind the ever broader understanding of the personal scope, and the gradual construction of its own meaning.

In this first section on the personal scope, we examine how an independent social security conceptualisation of 'employed person' developed from the judicial activism of the Court, and how Regulation 1408 inherited the personal scope from its predecessor Regulation no. 3, but subsequently extended it far beyond that. *First* we sketch the current personal scope of 1408/71 and compare its unique definition of 'employed person' with Regulation 1612/68's definition of 'worker'. *Second*, we analyse the historical definition of 'employed person' based on Regulation no. 3. In the *third* part, we illustrate how 1408/71 subsequently inherited its notion of 'worker'. The

fourth part presents a discussion of the inclusion of self-employed persons in early case-law, while *part five* analyses the later Council codification thereof.

2.1: Who Has a Right to Cross-Border Welfare?

The personal scope of 1408, as it stands today, has departed fundamentally from that which once allowed access to welfare across European borders to a few workers of 'proven qualification'. Not only has Regulation 1408 recently been extended to legally residing third country nationals by Regulation 859/2003, but on 26 January 2004, the Council has furthermore finally adopted a common position on extending the Regulation to non-active persons (COM (2004) 44). These last categories of persons who are now included thus provide a provisional conclusion of a 'long-running saga' (Peers 2002, p. 1395).

Traditionally, Article 2, defining the Regulation's personal scope, entailed two criteria for a person to invoke the right to co-ordinated social security. First of all, apart from refugees, stateless persons, and family members, one must be a *national* of a member state. Secondly, one must *qualify* within one of the included personal categories.

The first criterion meant that a third country national would not enjoy any rights according to Regulation 1408, unless he or she was a family member of a Community national, in which case nationality became irrelevant, or else, if he or she was a refugee or a stateless person. The Regulation thus clearly discriminated against third country workers, despite their possibly considerable contributions to a member state's economy. Apparently, the recently adopted amendment puts an end to an intense debate between the Commission, Council, Parliament and Court on the status of third country nationals, and finally gives equal rights to a previously deprived group. However radical such an extension may seem, it should be noted that, in practice, it is not of much use. Third country nationals legally residing in member states have no right to free movement, but they can *only* invoke the rights according to Regulation 1408 if they *do move* between member states. The negotiations on the position of third country nationals will be discussed in detail in sections three and four below.

The second criterion means that in order to be included in the personal scope, one has to fulfil the criteria as listed in Article 1 of the Regulation. Article 1 lays down that one qualifies as an

employed or self-employed person, if one is insured by a social security scheme for employed or self-employed persons on a compulsory or voluntary basis. The relevant schemes are listed by each individual member state in annex 1 of the Regulation. Thus, the inclusiveness of national law becomes decisive. According to 1408, when national law allows a person without an employment contract to participate in a social security scheme for employed persons, that person holds worker status. The concept of 'worker' in the Treaty's Article 42 and Regulation 1408 relies on a particular social security law definition, and the meaning of this definition is established with reference to national legislation (Langer 2000, p. 56; Haverkate & Huster 1999, p. 89 & p. 96; van Raepenbusch 1997, pp. 74-75).

The special social security meaning of 'employed person' in 1408/71 implies that the concept differs from the meaning of 'worker' according to the Treaty's Article 39 (ex Art. 48) and Regulation 1612/68, where 'worker' is defined by labour law. The personal scope of Regulation 1612/68 is a narrower one, addressing the worker 'stricto sensu', i.e., those with a contract of employment.⁹⁴ Regulation 1612/68 does not cover the unemployed seeking work, nor the self-employed (Pennings 1998, p. 103; Haverkate & Huster 1999, p. 90).⁹⁵ Furthermore, a 'social advantage', earned according to 1612/68, cannot in principle be exported (Huster 1999, p. 15). However, the equal treatment provision of Regulation 1612, as stated in Article 7 (2)⁹⁶, entitles the migrant worker to a broad scope of 'social advantages' which, through the Court's interpretation, includes benefits outside of a contract of employment (Jacobs 2000, p. 36). Case-law has widened

⁹⁴ The narrower personal scope of Regulation 1612/68 would mean, if interpreted literally, that family members of the worker would not be entitled to the 'social advantages' of the host state. The Court has, however, interpreted Article 7 (2) in a much broader way, arguing that if family members were not granted social rights that would hinder free movement and thus contradict the objective and spirit of the free movement provision (Pennings 1998, p. 104). The broad interpretation was, among other cases, exemplified in case 157/84, 6 June 1985. *Maria Frascogna v Caisse des depots et consignations*. ECR 1985, page 1739; in case 94/84, 20 June 1985. *Office national de l'emploi v Jozsef Deak*. ECR 1985, page 1873; in case C-310/91, 27 May 1993. *Hugo Schmid v Belgian State, represented by the Minister van Sociale Voorz.* ECR 1993, page I-3011.

⁹⁵ The exclusion of the unemployed was however questioned by the *Antonissen* judgement where the Court ruled that the Treaty's Article 48 (now Art. 39) also protects the one in search of work [Case C-292/89, 16 February 1991. *The Queen v. Immigration Appeal Tribunal, ex parte Antonissen*. ECR 1991, p. I-745].

⁹⁶ Article 7 of Regulation 1612/68 reads:

"1) A worker who is a national of a member state may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regard remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;
2) He shall enjoy the same social and tax advantages as national workers".

the scope of 'social advantages' to include childbirth loans⁹⁷, invalidity benefits⁹⁸, minimum means of subsistence⁹⁹, financial support for studies¹⁰⁰, maternity benefits¹⁰¹ and benefits for large families¹⁰² (Stoor 2000, pp. 116-117). In addition to this, the Court has interpreted the personal scope of 1612 generously, pushing the limits of an 'effective and genuine' activity to exclude nothing but activities "on such a small scale as to be regarded as purely marginal and ancillary" (O'Leary 1999, p. 392)^{six}. Although case-law may have pushed Regulations 1408 and 1612 in the same direction, extending their scope of application, the equal treatment provisions of the two Regulations still refer to distinctive functions and rationales. Article 7 of Regulation 1612, and its clarification in case-law, aim to promote the full integration of the migrant worker into the host state. Regulation 1408, in full text and provision, aims to promote cross-border mobility by ensuring that rights can be acquired under another member state's legislation, and that acquired rights are maintained and aggregated when moving between states (Stoor 2000, pp. 120-121).

2.2: The Historical Definition of 'Employed Person'

The distinctiveness of the concept of worker in Regulation 1408 was established through clusters of case-law, and subsequently codified by the Council. The activism of the Court has indeed amplified the social security meaning of who is to be defined as an 'employed person'. The historical process establishing the Community's social security meaning of worker, started from the same place as the

⁹⁷ Case 65/81, 14 January 1982. *Francesco Reina and Letizia Reina v. landeskreditbank Baden Württemberg*. ECR, 1982, p. 33.

⁹⁸ Case 63/76, 16 December 1976. *Inzirillo v. Caisse d'allocations familiales de l'arrondissement de Lyon*. ECR 1976, p. 2057; Case C-310/91, 27 May 1993. *Schmid v. Belgian State*. ECR 1993, p. 3011.

⁹⁹ Case 261/83, 12 July 1984. *Carmela Castelli v Office National des Pensions pour Travailleurs Salariés (ONPTS)*. ECR 1984, p. 3199; Case 249/83, 27 March 1985. *Iera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmarhout*. ECR 1985, p. 973; Case 122/84, 27 March 1985. *Kenneth Scrivner and Carol Cole v Centre public d'aide sociale de Chastre*. ECR 1985, p. 1027; Case 139/85, 3 June 1986. *R. H. Kempf v Staatssecretaris van Justitie*. ECR 1986, p. 1741.

¹⁰⁰ Case 235/87, 27 September 1988. *Amunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*. ECR 1988, p. 5589; Case C-308/89, 13 November 1990. *Carmina di Leo v Land Berlin*. ECR 1990, p. I-4185; Case C-3/90, 26 February 1992. *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen*. ECR 1992, p. I-1071.

¹⁰¹ Case C-111/91, 10 March 1993. *Commission of the European Communities v Grand Duchy of Luxembourg*. ECR 1993, p. I-817.

¹⁰² Case C-185/96, 29 October 1998. *Commission of the European Communities v Hellenic Republic*. ECR 1998, p. I-6601.

definition of 'worker' in Regulation 1612 and in the Treaty's Article 39, with a more traditional understanding of the 'wage-earner'. The concept, however, gradually developed its own meaning and scope through case-law and the Council's codification of it.

Soon after Regulation no. 3 came into force, the disagreements among member states on the extent of the personal scope became clear. France and Luxembourg held the opinion that the Regulation only applied to workers 'stricto sensu', i.e. workers with an employment contract. The other member states found no such limitations in the Regulation. The discussion continued in the 'Administrative Commission on Social Security for Migrant Workers'¹⁰³, where the member states in 1962, managed to agree on the broader interpretation of the concept (Holloway 1981, p. 166). However, the setting out of the conceptual meaning continued in the form of legal dialogues between the national Courts and the European Court of Justice.

In one of the first social security cases, 75/63 *Hoekstra*¹⁰⁴, the Court interpreted the personal scope in Regulation no. 3 quite broadly, presumably applying it far beyond what the authors of the Regulation could have imagined (van Raepenbusch 1997, p. 74).^{xx} In the *Hoekstra* case, the Court emphasised that since Regulation no. 3 was adopted on the basis of Article 51 of the Treaty, the meaning of 'wage-earner' depended on the scope of this Treaty provision. The Court interpreted that since Article 51 was placed in the Treaty's Title III on free movement of persons, services, and capital, its aim was:

"The establishment of as complete a freedom of movement of workers as possible, which thus forms part of the "foundations" of the community, therefore constitutes the principal objective of Article 51 and thereby conditions the interpretation of the Regulations adopted in implementation of that Article" (Summary of the Judgement, 75/63 *Hoekstra*, emphasis added).

The objective of establishing "as complete a freedom of movement of workers as possible" meant that the term 'wage-earner' could not be defined by national legislation alone. The objectives of the Treaty would not be achieved if the concept was "unilaterally fixed and modified by national law" (Summary of the Judgement, 75/63 *Hoekstra*). The preliminary questions of the case furthermore addressed the question whether the term 'wage-earner' covered a person such as Mrs *Hoekstra*, who

¹⁰³ See footnote 80 above.

¹⁰⁴ Case 75/63, 19 March 1964. *Mrs Hoekstra (née Unger) v Bestuur der Cont. Bedrijfsvereniging voor Detailhandel en Ambachten*. ECR 1964, p. 177.

was no longer in active employment, but still covered by the social security scheme for employed persons, and whose movement was motivated by leisure. The Court answered that the concept 'wage-earner or assimilated workers' referred to "all those who, as such and under whatever description, are covered by the different national systems of social security" (ibid). The Court thus clarified that it was the attachment to a social security scheme for wage-earners that linked a person to the Community Regulation. This conception even covered those who no longer held active employment, but continued to be voluntarily insured in a social security scheme for wage-earners (Holloway 1981, p. 168). Thus, the concept did not restrict protection to those in active employment. Also, the motives of the movement were treated as irrelevant, since Regulation no. 3 not only covered movements for work reasons, but also for leisure, such as in the case of Mrs *Hoekstra*'s desire to stay with her parents in Germany (Langer 2000, p. 57).

Since one of its first social security cases, the Court has stretched the personal scope through a teleological interpretation, where the aim and spirit of the Treaty have been decisive for the conceptual borders of 'wage-earner'. The earlier cluster of cases, which interpreted Regulation no. 3, confirmed that 'worker' was not defined by national law, but rather according to Community law, and that a broad interpretation in light of the Treaty's Article 51 was called for. Subsequent case-law repeated that the reasons motivating movements were irrelevant as long as the person moving was covered by a social security scheme for wage-earners. In the 44/65 *Singer*¹⁰⁵ case concerning a German mineworker who was killed in a car accident during his holiday in France, one of the involved parties argued that it would be against the aim of Article 51 to apply the Regulation to the leisure situation as well. However, the Court confirmed its *Hoekstra* interpretation, referring once again to the spirit of Article 51:

"It would not be in conformity with that spirit [of the Treaty] to limit the concept of "worker" solely to migrant worker *stricto sensu* or solely to workers required to move for the purpose of their employment. Nothing in Article 51 imposes such distinctions, which would in any case tend to make the application of the rules in question impracticable. On the other hand, the system adopted by Regulation no. 3, which consists in abolishing as far as possible the territorial limitations on the application of the different social security schemes, certainly corresponds to the objectives of Article 51 of the Treaty" (Summary of the Judgement, 44/65 *Singer*).

¹⁰⁵ Case 44/65, 9. December 1965. *Hessische Knappschaft v Maison Singer et Fils*. ECR 1965, p. 1191.

2.3: Inherited Definition and Beyond

The case-law on the scope of Regulation no. 3 developed a broad definition of worker, clarifying that the actual nature of the work was irrelevant (Cornelissen 1997, p. 42). The definition went far beyond the written text of the Regulation, and extended the personal scope to practically everyone insured under a social security scheme for wage-earners (van Rapenbusch 1996, p. 75). When adopting Regulation 1408, the same extended scope was codified in Article 1 (a), which defined a worker merely by her/his attachment to a relevant social security scheme.

Although 1408/71, when adopted, contained the institutional experience of its predecessor and inherited its notion of 'worker', the personal scope of co-ordinated social security rights was far from settled, and it continued to be disputed for the next three decades. Legal dialogues between citizens, national courts and the Court of Justice have questioned and clarified the rights of family members^{xxi}, the concept of employed and self-employed persons, and whether employment status depends on the hours spent on the work-activity^{xxii}. Through its successive case-law, the Court declared that the meanings of employed and self-employed are extensive, and that the amount of hours spent working does not influence one's status as worker whatsoever. The individual development of Regulation 1408's personal scope emphasised that the Regulation applied to persons who were not migrant workers within the meaning of the Treaty's Article 39, nor within the meaning of Regulation 1612. As time went by, the applicable scope of the Regulation became wider as its notion of worker became more precise.

2.4: Anticipated Extension to the Self-Employed

Two years after Regulation 1408 was approved, the UK, Ireland, and Denmark joined the Community, and with this first enlargement the *acquis communautaire* was to be applied to the residence-based social security models of the new members. The application was by no means straightforward, one reason being that the residence-based model did not have distinct schemes for workers on the one hand, and other categories of persons on the other. The problem with applying institutionalised rules to different social security traditions became evident in case 17/76 *Brack*¹⁰⁶, on which both the United Kingdom and Denmark submitted observations.

¹⁰⁶ Case 17/76, 29 September 1976. *M. L. E. Brack, widow of R. J. Brack v Insurance Officer*. ECR 1976, p. 1429. The Submitted Danish observation will be discussed in chapter VII as part of the analysis on perceptions of impact.

In the *Brack* case, the Court was asked whether a British national who had been an employed person 17 years earlier, but was self-employed at the time of the actual incident, had a right to claim for sickness cash benefits for a period of illness in France.^{xxiii} Mr *Brack* had been insured under the British national insurance scheme both as an employed and as a self-employed person. The observation submitted by the UK government provided a description of the development of its social security legislation, initially covering only narrowly defined classes of workers, but gradually extended to other classes. The general scheme did not draw a distinction between those regarded as wage-earning workers and those belonging to other categories. According to the United Kingdom, it would be beyond the scope of the Regulation if an actually self-employed would be covered due to the fact that he was insured by a national social security scheme which did not distinguish between categories of employment.

In this specific case, the Court overruled the institutional objections put forward in the submitted observations, and referred instead to the historical logic of 1408/71. Just as Regulation no. 3 was, 1408/71 must also be interpreted in light of the spirit and the objectives of the Treaty. With reference to the historical case-law on Regulation no. 3, the Court stressed that the evolution of the Community rules on social security reflected the developments in the social law of the member states, where more personal categories have been covered by social security schemes:

“...it must be borne in mind that, as the Court has previously held, the Community rules on social security “follow a general tendency of the social law of Member States to extend the benefits of social security in favour of new categories of persons by reasons of identical risks”” (para. 20 of the judgement).¹⁰⁷

Since *Brack* was still insured under the social security scheme for employed persons, the Court found that he enjoyed the rights to sickness cash benefits, despite falling ill outside of the UK's territory. Though *Brack* had been self-employed for most of his working life, and was so when he fell ill in France, he retained the full rights provided for in Regulation 1408/71. The Court found the Regulation applicable to:

“persons who, although they have lost the status as employed persons, remain compulsorily insured under the same scheme which covered them previously when they had that status” (para. 24 of the judgement).

¹⁰⁷ The Court referred to Case 19/68, 19 December 1968. *Giovanni de Cicco v Landesversicherungsanstalt Schwaben*. ECR 1968, page 473 and to Case 23/71, 27 October 1971. *Michel Janssen v Landsbond der christelijke mutualiteiten*. ECR 1971, page 864.

In the *Brack* case, the European Court of Justice granted intra-European social security rights to the self-employed, 5 years before the Council adopted the amendment Regulation 1390/81, which definitively included the category.

2.5: Council Codification and Further Interpretation

A key feature throughout the historical development of co-ordinated social security has been the continual work to amend the Regulation. As depicted in Appendix 4, Regulation 1408 has been changed 27 times between 1971 and 2002. Behind this high number lies an even higher one of proposed amendments, which suggests that from the Commission's point of view, co-ordinated social security is never really sufficient or up-to-date.

When the Commission began its revision of Regulation no. 3 in 1964, it was initially envisaged that the self-employed should be included in the personal scope (van Raepenbusch 1997, p. 71). However, the proposal was later withdrawn with the argument that including the self-employed would add too much technical complexity to the Regulation (Holloway 1981, p. 296).

In light of the case-law interpretations of the personal scope, the Commission proposed in December 1977 that the self-employed should be included.¹⁰⁸ The proposal was subsequently amended and re-proposed to the Council in October 1978.¹⁰⁹ At the same time, the 'Administrative Commission' suggested extending the applicable scope to include all persons covered by a social security scheme of a member state, regardless of their employment status (Pieters 1997, p. 205). However, the latter idea had to wait until the beginning of the 1990s, when it was re-vitalised in the light of the three residence directives¹¹⁰ (van Raepenbusch 1997, p. 80).

¹⁰⁸ OJ C 14/9 of 18 January 1978, proposed to the Council 31 December 1977.

¹⁰⁹ OJ C 246/2 of 17 October 1987, proposed to the Council 28 September 1978.

¹¹⁰ See footnote 69 above.

Envisaged as early as 1964, the self-employed and their family members were finally included in the personal scope by the Regulation amendment 1390/81, adopted in May 1981.¹¹¹ In the explanatory memorandum, the extension of the scope of application was reasoned by the fact that the free movement of persons was not confined to employed persons and, in the framework of the freedom of establishment and the freedom to supply services, Regulation 1408 should include the self-employed as well. The explanatory memorandum further reasoned that since 1408/71 already covered certain categories of self-employed persons, it should, for the sake of equity, be extended to all self-employed.

Whereas the inclusion of the self-employed in the co-ordinating framework was deemed necessary for attaining one of the Community objectives, the Treaty did not provide a specific legal basis for this purpose. Since the Treaty's Article 51 could not be used as a legal basis for any extension of social security rules beyond workers, the self-employed were brought within the regulatory scope on the legal basis of Article 235 (now art. 308). The Council hereby agreed that the Community objectives went beyond the strict meaning of Article 51. The total Treaty basis for the inclusion of self-employed thus consisted of Articles 2, 7, 51 and 235.

Despite its inclusion, the meaning of "self-employed" was not immediately elaborated, and had to be clarified through another legal dispute. In case 300/84 *van Roosmalen*¹¹², the Court was asked whether a Roman Catholic priest fell within the definition of self-employed.^{xxiv} In its judgement, the Court emphasised that Regulation 1390 was adopted to achieve the same objectives as 1408, and therefore self-employed were entitled to the same level of protection as employed persons. The term "self-employed" had a wide meaning as well (Cornelissen 1996, p. 421; Pennings 1998, p. 43). Despite a somewhat non-standard type of self-employment, a person engaged in work such as *van Roosmalen*'s, fell within the personal scope of the Regulation, because like 'employed person' 'self-employed' was to be interpreted according to the objective of the Treaty's Article 51.

"With regard to the interpretation of the expression "self-employed person", it must first be pointed out that initially the provisions of Regulation no 1408/71, adopted for the implementation of Article 51 of the Treaty, applied only to those who were covered by the term "employed person". According to the established case-law of

¹¹¹ Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

¹¹² Case 300/84, 23 October 1986. *A.J.M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen*. ECR 1986, page 3097.

the court, "employed person" is a term of Community law rather than national law and must be interpreted broadly, having regard to the objective of Article 51, which is to contribute towards the establishment of the greatest possible freedom of movement for migrant workers, an objective which is one of the foundations of the Community" (para. 18 of the judgment).

The Court thus reasoned its interpretation, referring to its previous case-law, and the logic of the argument closely resembled that used in the early judgements on Regulation no. 3. The teleological interpretation of the Court defined the concept of self-employed broadly.

2.6: In the Light of the Treaty Spirit - Dynamic Aims and Means

The personal scope of both Regulation 3, and its descendant Regulation 1408, extended incrementally due to a teleological interpretation by the Court and the Council's acceptance and codification of it. The Court cultivated a distinct social security notion of 'worker', which, from its earliest interpretations, covered more than just those in active employment, such as individuals moving for leisure reasons. The first cases justified the wide interpretation on the basis of Article 51 of the Treaty itself. The principal objective of Article 51 was not simply to guarantee migrant workers social security, but also to promote the greatest possible freedom of movement for workers. Interpretations followed the guiding light of the Treaty spirit. After the adoption of Regulation 1408, the Court anticipated the imminent inclusion of the self-employed, once again justified as being in keeping with the spirit of the Treaty. Five years later, the Council adopted the Regulation amendment which finally covered the self-employed. However, no matter how broadly the aims of the Treaty's Article 51 were constructed, it could not be used as the legal basis of any extension beyond workers. Adopting Regulation 1390/81 required Article 235 (now art. 308) as the other Treaty base. In this way, the member states formally accepted that the purpose of 1408/71 went beyond promoting the free movement of *workers*. The adoption illustrates that the Community objectives with Regulation 1408, as well as the competencies of the Community, were by no means given, but open to further interpretation. With the self-employed persons included under the umbrella, the Court continued its broad definition of the personal scope, whereby the line of reasoning in previous case-law served as grounds for new conclusions. Since 'employed persons' was understood broadly, 'self-employed' had to be as well.

As was the case in the previous section on the principle of equal treatment, this section's analytical findings equally support theoretical interpretations on legal autonomy. The process tracing study on the historical definition of 1408/71 personal scope has pointed the Court out as a supranational organisation enjoying a relative high degree of interpretive autonomy and authority. Furthermore, the examination of the institution as a historical phenomenon has made it clear that member states have disagreed among themselves, and with the Court, on the aim and content of the Regulation. The Court has, however, overruled member state opinions, and institutionalisation has proceeded despite the absence of converging national interests. The research findings have demonstrated the gradual emergence of a legal path dependency as a process decided by continuous, but very gradual, (re)interpretations and (re)clarifications of who has the right to intra European social security rights. In this incremental extension of rights, the Court has certainly been the proactive part and the Council has merely codified judicial activism, and accepted a dynamic legal interpretation of aims and means.

The development of the personal scope from Regulation no. 3 to the first two decades of 1408/71's institutional existence, left students, civil servants, non-active persons, and third country nationals without access to cross-border social security. These excluded groups have subsequently been incorporated in new proposals, which were formulated by the Commission and considered by the Council, as will now be demonstrated.

3.0: Proposing a Generalised Personal Scope

Up until the 1990s, the personal scope of 1408 was extended mainly through the jurisprudence of the Court and the Council's 1981 adoption of the extension to the self-employed. The 1990s was the decade in which the Commission re-challenged the status quo of the Regulation, and initiated a dialogue with the member states on the future personal scope of the Regulation through proposals and recommendations. According to the Commission, a personal scope restricted to the market citizen would be inadequate. Instead, it should include all European citizens as well as legally residing third country nationals. By putting the latter on the agenda, the Commission went beyond a communitarian conception of social protection.

This section focuses on the *Commission's* position as initiator and policy entrepreneur. The section analyses the way in which the Commission managed, through proposals and recommendations, to set an agenda that proved the insufficiency of Regulation 1408's personal scope. As later negotiations demonstrate, the Commission pursued its agenda by coupling key issues. European citizenship and the free movement of persons were invoked as strong arguments for extending the co-ordination of social security rights to all Community nationals. The moral obligation and the political commitment to improve the legal status of third country nationals became arguments for including persons who were not member state nationals. Below, the analysis first illustrates how a "People's Europe" developed into a citizenship argument, and how Commission recommendations were used as a means to substantiate the need to extend Regulation 1408. Second, it explains how the Commission initiated its dialogue with the member states concerning the extension of the regulatory scope beyond European citizens, and also how the Commission initially interpreted the scope and limits of the Treaty base, so as to justify an extension to third country nationals.

3.1: Proposing New Value to European Citizenship

The adoption of the three residence directives in 1990 revived the idea, which dated back to the late seventies, that 1408/71 should be extended to all member states' citizens. In December 1991, the Commission presented a proposal to extend the Regulation to all Community citizens insured in a member state.¹¹³ The proposal referred to the new general right of residence, and was found to be "indispensable in the context of the social dimension of the internal market and a People's Europe" (COM (91) 528, p. 3).

However, it soon became clear that, in the beginning of the 1990s, the member states were far from prepared to grant any such radical extension of the personal scope. The Commission therefore had a long way to go to gain support for its proposal. The soft-law tool of recommendations was used to emphasize how 'the peoples of Europe' merited equal rights. European citizenship was brought in as a new dimension of European integration (Cornelissen 1997, p. 30). In its communication, "Modernising and Improving Social Protection in the European Union"¹¹⁴, the Commission argued:

¹¹³ COM (91) 528 final. Presented by the Commission 13 December 1991.

¹¹⁴ Communication from the Commission. COM (97) 102 final. 12 March 1997.

"The original dimension of European integration, i.e. a common market allowing and fostering free movement of workers, has been enriched by a new concept, namely that of *European citizenship*. The personal scope of Regulation 1408/71 should be adapted accordingly" (COM(97) 102, p. 16, emphasis added).

There were other soft-law communications on the free movement of persons in 1997, which also dealt with the instrument of Regulation 1408. On a Commission mandate, a high level panel on the free movement of persons was set up to identify the "obstacles which confront European citizens seeking to exercise their rights to move freely and to work within the Union" ("Report of the High Level Panel", p. 91).¹¹⁵ The report was motivated by the Commission's recognition that, of the four fundamental freedoms of the single market, the least progress had been made on the free movement of persons. The Commission argued that even though free movement was an institutionalised right, it was not yet a practicable fact for European people. The report confirmed the Commission's line of reasoning according to which the exercise of free movement was argued to constitute an essential means towards other Union objectives;

"The effectiveness of the right to move freely would contribute not only to attaining the objectives of the single market but also bringing the Community closer to the goal of an "*ever closer union among the peoples of Europe*" envisaged in the original treaties, which gave form to the Communities and, subsequently, to the European Union" ("Report of the High Level Panel", p. 94, emphasis added).

The high level panel pointed out the incompleteness of Regulation 1408 as one of the obstacles to free movement. Its personal scope was held to be inadequate, given the many changes that had occurred since its adoption, particularly the adoption of the three residence directives. The panel found it both logical and essential to extend the scope to cover all persons entitled to move freely within the Union.

The panel's recommendations were later followed up in "An Action Plan on the Free Movement of Workers". In this document, the Commission stressed that free movement had to be seen in a new perspective. The Commission expected that, due to demographic changes and the changed nature of working life, free movement would become much more important over the next 10-20 years than it had been for the last 30 years (COM (97) 586, p. 8). Although the '*acquis communautaire*' was pointed out as the starting point for reinforcing free movement, it contained "serious flaws and

¹¹⁵ "Report of the High Level Panel on the free movement of persons chaired by Mrs Simone Veil". Presented to the Commission on 18 March 1997.

lacunae" (COM (97) 586, p. 5). Once again, the Commission identified the right of free movement as a substantial part of European citizenship:

"Moreover, following the report of the High Level Panel, which also concerns free movement of persons who are not exercising an economic activity, the Commission has already announced its intention to present in 1998 proposals to simplify and enhance the existing secondary legislation with a view to drawing all consequences in order to give full value to the citizenship of the Union" (COM (97) 586, p. 9, emphasis added).

The communication emphasised co-ordination of social security rights as a prerequisite for free movement, but said that the Community system was in need of reform and simplification. The Commission obliged itself to press for the adoption of pending proposals, among others the proposal on the personal scope from 1991. Furthermore, it intended to present a simplification proposal before the end of 1998 (COM (97) 586, pp. 11-12).

3.2: Proposals, Recommendations and a Partial Adoption

The proposals and recommendations set forth by the Commission in the 1990s, introduced and reinforced new perspectives on the co-ordination of social security rights. Whereas the institutional aim in the 1970s and 1980s had been to allocate production factors more efficiently, by the 1990s, the goal of cultural integration among the 'peoples of Europe' had been added to the economic objectives of the single market. According to this line of reasoning, 1408 should be up-dated to reflect the state of overall Union development, and brought in line with the general right of free movement. The Commission formulated its point of view clearly: cross-border social security rights should be attached to European citizenship rights.

However, the proposal for a generalised personal scope made no headway until the late 1990s. During the Austrian presidency in the autumn of 1998, a compromise was formulated that proposed a separate extension of the personal scope to students. The strategy of the Commission and the Austrian presidency was to isolate the more controversial part of COM (91) 528 on the extension to non-active persons and special schemes for civil servants, and thereby accelerate the Council's approval of the inclusion of students.¹¹⁶ Furthermore, the compromise was made

¹¹⁶ Informative note from the Danish Ministry of Labour to the European Committee of the Danish Parliament, 19 October 1998, supplement 47, p. 15.

possible by proposing a separate material scope for students. The proposal put students outside of the Regulation's part on social pension, and the material impact of the extended personal scope was thus reduced (Interview, DG Employment and Social Affairs, 12 September 2001). Since students had already been granted the right to medical treatment outside of their home country¹¹⁷, the inclusion only meant access to cross-border family benefits. The Council adopted the proposal including students in December 1998, and codified the inclusion in Regulation 307/99 of 8 February 1999.¹¹⁸ As had been the case with self-employed, students were included on the grounds of both Articles 51 and 235 of the Treaty.

3.3: Beyond European Citizenship

At the same time as 'European citizenship' was being introduced as the new justification for an extension of Regulation 1408's personal scope, the Commission also suggested that the Regulation be extended to *legally residing third country nationals*. It thus presented a notion of European citizenship which was independent of the exclusion of a third part as the "inevitable flipside" of the concept of membership, and thereby challenged a traditional communitarian perception of co-ordinated social security rights (Shaw 1997, p. 3). By placing the rights of third country nationals on the agenda, the Commission introduced an amplified comprehension of the Regulation's purpose, arguing that, although non-Community nationals do not enjoy any rights of free movement under Community law, they should still enjoy the social protection of 1408. The questions of whether and how to ensure the co-ordination of social security rights for third country nationals launched a protracted legal and political dispute, in which legal questions became political and vice versa. Indeed, this dispute exemplifies the degree to which law and politics may become intertwined.

The background to the Commission's initiative was the fact that even though third country nationals are not entitled to free movement under Community law, they may, due to international law or

¹¹⁷ By Council Regulation (EC) No 3095/95 of 22 December 1995, the right to cross-border medical treatment had been granted to all insured member state citizens, thus including students. This extension will be discussed further as part of the analysis in chapter V below.

¹¹⁸ Council Regulation (EC) No 307/1999 of 8 February 1999 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover students.

bilateral agreements, enjoy the right to move between member states (Interview, DG Employment and Social Affairs, 13 September 2001). Due to their exclusion from 1408/71, they risked losing any social security entitlements they had accrued via regular contributions to a member state's social security scheme, if they left that member state for another (Roberts 2000, p. 190).

On these grounds, the Commission opened the discussion in 1993, questioning whether it was still justifiable to exclude third country nationals from the protection offered by 1408 (COM (93) 551). The question was posed by the Belgian chair to member state representatives, at an informal Council in Charleroi in November 1993. However, the meeting did not mobilise sufficient support for a general extension of Regulation 1408 beyond Community citizens. The meeting nevertheless suggested that a limited extension, granting third country nationals a right to intra European health care, as regulated under Article 22 of 1408/71, might be supported (Roberts 2000, p. 192). On this basis, the Commission announced its intention to extend Article 22 to third country nationals as a first step (COM (94) 333). Furthermore, at the Portuguese colloquium in November 1994, the Commission presented its long-term intentions to extend the whole scope of 1408 to non-Community nationals legally residing in the Union. The member states' delegates attending were told that such an extension would not only satisfy a moral obligation, but that it would also result in a legal and administrative simplification (Roberts *ibid*). Even though granting third country nationals a right to health care benefits would only be an initial and very limited extension of 1408, the proposal was vetoed by the UK, when it was finally presented to the Council in November 1995. As part of the same negotiations, the Council adopted Regulation 3095/95, which extended 1408/71's Article 22 to all member states' nationals insured in a social security scheme.

This initial Council refusal did not, however, discourage the Commission from proceeding with its long-term intention. In the recommendation that suggested that free movement and Regulation 1408 be brought in line with European citizenship, the Commission also insisted that 1408, on the whole, should be extended to third country nationals (COM (97) 102, p. 17). The Commission obliged itself to present a separate proposal in 1997 concerning 1408's extension to non-Community nationals with legal residence in the Union (COM (97) 586, p. 12).

3.4: The First Separate Proposal on Third Country Nationals

Within the normative framework of the European Year Against Racism in 1997, the Commission came up with its announced separate proposal on an extension of 1408/71 to third country nationals, legally residing and insured in one of the member states.¹¹⁹ The rather extensive explanatory memorandum of COM (97) 561, amounting to no less than 8 pages, indicates that the proposal was controversial on several points.

The proposal was motivated by the general desire to improve the legal status of third country nationals residing in the Community. The Commission emphasised that this objective was generally accepted and had been formulated in its own recommendations: in resolutions from the European Parliament; and in opinions from the Economic and Social Committee (COM (97) 561, p. 2). Moreover, the Commission reminded the Council that it had recognised:

“the great importance of implementing, in the field of social policy, policies based on the principle of non-discrimination and equal opportunity at Community and Member State level, within the framework of their respective powers, as a contribution to the common fight against racism and xenophobia” (COM (97) 561, p. 3, quoted from Council resolution¹²⁰ of 5 October 1995).

The Commission pointed out that third country nationals suffered from a “muddled legal situation”, where rights were by no means uniform and each individual case could be considered through a “multiplicity of protection levels” (COM (97) 561, p. 5). Some might be covered by 1408 as refugees or stateless persons, some as family members, others through an agreement between the Community and a specific third country, and yet others by individual bilateral or multilateral agreements. A remaining group of third country nationals might not benefit from any social security protection at all, should they move within the Community. This complexity was identified as harmful to individuals, and a source of administrative difficulties when deciding specific rights. The Commission noted that third country nationals contribute to the social security systems of member states, just as Community nationals do.

¹¹⁹ COM (97) 561 final. Presented by the Commission 12 November 1997.

¹²⁰ Point 3 of the Resolution of the Council and the representatives of the Governments of the Member States of 5 October 1995 on the fight against racism and xenophobia in the fields of employment and Social Policy (OJ C 296, 10.11.1995).

The Commission did not find that 1408's requirement to be "nationals of one of the Member States" precluded an extension of the Regulation to third country nationals. It emphasised that the nationality requirement was not an absolute, and indeed was set aside in the cases of family members and survivors, refugees and stateless persons, and persons from the EEA member countries (COM (97) 561, p. 4).

3.5: The Reach of Community Competence?

The issue of nationality underlies the long argumentation in proposal COM (97) 561 on its Treaty basis. Traditionally, 1408 had been formulated as an instrument to promote the free movement of workers and, according to Article 48 (now art. 39) of the Treaty, only Community workers enjoy the right to free movement. A key point in the long-running dispute on the potential inclusion of non-communitarian nationals in Regulation 1408 was the question of whether Article 51 (now art. 42) of the Treaty was inextricably bound to Article 48, and thus dependant on the nationality requirement of the latter. According to the Commission this was not the case. Article 51 and Regulation 1408 had gained instrumental value, not solely as means of promoting free movement, but also as instruments of social protection:

"Regulation (EEC) No 1408/71 is not just geared to the free movement of workers but also constitutes an instrument of social protection. For the purpose of applying the Regulation, the crucial element is not exercise of the right to freedom of movement but the fact that the person concerned is insured under a social security scheme. The purpose is to maintain social protection for persons moving within the Community for whatever reason. In line with the task devolving on the Community under Article 2 of the EC Treaty, the aim is to provide a high level of social protection" (COM (97) 561, p. 8, emphasis added).

To support its interpretation, the Commission pointed out that 1408/71 also regulated the cases where the person concerned might not have exercised her/his right to free movement for workers, but where a problem of social security arose due to a cross-border situation.¹²¹ Furthermore, it substantiated its viewpoint with the historical fact that Regulation no. 3 was adopted on the basis of Article 51 ten years before the right to free movement for workers actually came into force in 1968 with Regulation 1612/68 and directive 68/360. Finally, the Commission reminded the Council and

¹²¹ The Commission emphasised that Article 10 of the Regulation makes it possible for a person to export benefits to a member state in which he may never have worked, that Article 22 enables persons temporarily staying in another member state to receive health care, and that Article 73 ensures family benefits to family members who reside in another member state.

the Court that they had already applied the Regulation to persons who were not migrant workers according to the meaning of Article 48 of the Treaty, and thus,

“appear to recognize that Article 51 of the EC Treaty allows the Community to co-ordinate national social security schemes for all workers insured under one of those schemes, even if they are not migrant workers within the meaning of Article 48 of the EC Treaty” (COM (97) 561, p. 9).

Referring to the extension of the Regulation to the self-employed, the Commission suggested that, in so far as Article 51 was not a sufficient legal basis on which to include third country nationals, Article 235 could be added with the objective of attaining ‘a high level of social protection’ which is stated as a Community task in the Treaty’s Article 2.

Despite the various arguments listed by the Commission, member states remained dead-locked on the issue, and it was left unresolved for years. One political concern put forward by the UK was that, although the proposal emphasised that third country nationals were not granted any right of free movement under Community law¹²², it still remained unclear if non-community nationals would be entitled to the social protection of the Regulation without having moved between member states. 1408’s Article 3, stating equal treatment, in conjunction with Article 2 of COM (97) 561 could be understood as if the Regulation covered non-Community nationals moving from a third country directly into a member state, and who had only been subject to the legislation of one member state (Roberts 2000, p. 194; Langer 2000, p. 42). The UK thus feared that Community law could oblige member states to treat third country nationals equally to their own nationals on the basis of 1408/71, without their having moved across Community borders.

Directly or indirectly, the major disagreement hampering negotiations in the Council was the question of the appropriate Treaty basis and, thus, the scope and limits of Community competences. On the one hand, the Commission held that 1408/71 had become an instrument of social policy, even when free movement had not been exercised. It did not find that the use of Articles 42 and 308 as a Treaty base, required the personal category addressed to enjoy also the right to free movement. On the other hand, a minority of member governments, i.e. the United Kingdom, Denmark and Ireland, maintained that Articles 42 and 308 did not together constitute an appropriate Treaty base

¹²² COM (97) 561, p. 7.

(Council document¹²³ 12831/99, SOC 394). Behind these reservations was a political conviction that, since the Treaty conferred free movement on Community citizens only, the task formulated in the Treaty's Article 2 was to promote a high level of social protection equally applied to citizens of the Community only. These member governments thus found that the primary law of the Community did not contain any competence to extend the personal scope of 1408/71 beyond Community nationals. Such an extension would fundamentally extend the Community's objectives, and thus require a Treaty amendment (Roberts 2000, p. 195).

Until November 2001, the Commission maintained that Article 42 and 308 together constituted the appropriate Treaty base on which to extend 1408 to third country nationals. Both the European Parliament and most member states supported the Commission.¹²⁴ In the autumn of 1999, the Finnish presidency set about getting the negotiations out of deadlock by presenting various types of compromises, in which the extension of the Regulation was restricted in terms of the material scope. None of these compromises, however, were approved. The presidency thus concluded that it was not the substance of the proposal that caused problems, but rather its legal basis. Only Denmark continued to express its political reservations about extending 1408 to third country nationals, whereas all the other member states were, in principal, in favour (Council document¹²⁵ 13186/99, SOC 414). However, as long as no agreement was reached on the legal basis of the proposal, member states were unwilling to continue the discussions on the actual content of the proposal. The question on the legal basis was a dead-end for COM (97) 561, and no progress was made despite the political commitment declared by the great majority. Meanwhile, the Treaty of Amsterdam paved the way for a compromise between the two positions.

3.6: Proposing New Borders of a Personal Scope

In the 1990s, the Commission formulated its agenda for the future personal scope of Regulation 1408. In theoretical terms, the research findings above have shown the Commission to be the

¹²³ Council document of 12 November 1999.

¹²⁴ See Council document of 1 June 1999, no. 8807/99, SOC 228; Council document of 11 November 1999, no. 12830/99, SOC 393; Council document of 12 November 1999, no. 12831/99, SOC 394; Council document of 22 November 1999, no. 13186/99, SOC 414; Parliament document of 7 September 1999, no. A4-0302/98; Parliament document of 5. November 2002, no. A5-0369/2002.

¹²⁵ Council document of 22 November 1999.

supranational organisation which pertinacious attempted to set the agenda. By continually linking coordination rules to the issues of free movement and later to European citizenship, it emphasised that objectives and instruments, were at no stage definitive or literal, but dynamic and contextual. Through issue-linking and creative readings, the Commission pushed, from early on, towards a 'social Europe'. The Commission found Regulation 1408 outdated and incongruous with the Union's development from an economic community to a political union, with rights granted on the basis of citizenship. The argument so far seemed to replicate a traditional communitarian reasoning for granting rights, where social rights strengthen the link between the political centre and its citizens. But the Commission's agenda went beyond such limitations and aimed at including all persons with legal residence on the geographical territory of the Community, independent of economic status *and* nationality.

By proposing a regulatory scope which included non-active persons and third country nationals, the Commission went far beyond the strict wording of the Treaty's Article 42, literally aiming to provide freedom of movement for workers by coordinating their social security rights. According to the Commission, Regulation 1408 had become an instrument of social policy and not merely an instrument which promoted free movement. The Commission did not find that it would be beyond the scope of the Treaty, and thus the competence of the Community, to extend 1408's personal scope to third country nationals legally residing in a member state. This viewpoint was widely supported, though it was opposed by a minority composed of the United Kingdom, Ireland and Denmark. Although the Amsterdam Treaty and the Tampere conclusions gave new momentum to ease the rigid positions, the disagreement on Community competences and the appropriate Treaty base continued until the case-law of the Court, in 2001, came to settle the matter, as shall be demonstrated below.

4.0: Negotiating a Generalised Personal Scope

While the previous section described the Commission's agenda to pursue a more generalised personal scope, this section analyses the subsequent negotiations in the *Council* on including non-active persons and third country nationals in the personal scope. The analysis is presented in five stages. *First*, we examine the reform proposed by the Commission to simplify and modernise 1408/71, and how that proposal was initially negotiated in the Council. *Second*, we look at how the

Commission attempted to overcome a deadlock by proposing a full-scale reform of Article 42 during the Treaty of Nice negotiations. *Third*, we discuss how the political question of the inclusion of third country nationals turned into a legal search for the correct Treaty base. *Fourth*, we describe the case-law solution that emerged out of that legal search. Finally, in the *fifth* part, we analyse how the *Khalil* judgement brought about a breakthrough in negotiations, and how the original Commission proposal was split in two, whereby negotiations on the rights of European citizens were held separate from those of third country nationals. After a decade of negotiations and political-judicial dispute, the Council has recently unanimously adopted a common position on extending the Regulation to non-active persons, thus definitively breaking the link between economic activity and the right to cross border social security. Furthermore, legally residing third country nationals have finally been granted a right to intra-European social security in 14 member states, the exception to this being Denmark. However, without the right of free movement, the extension is, first and foremost, of an abstract and symbolic value, rather than being enforceable in practical terms, as will be argued below.

4.1: Modernisation and Simplification Proposed and Negotiated

With no appreciable progress on the separate proposal concerning third country nationals, the Commission presented its long-announced proposal to simplify and modernise Regulation 1408 in late December 1998, which had been politically mandated at the Edinburgh Council in 1992.¹²⁶ The 6 years between mandate and proposal had been used for detailed discussions in the 'Administrative Commission' and seminars had been held in each individual member state, followed by careful drafting (Interview, German Federal Ministry of Labour and Social Affairs, 19 September 2001). The aim of the proposal was twofold: to *simplify* and *modernise* 1408/71.

The Edinburgh Council recognised the need to simplify the Regulation at the highest political level. This political mandate was followed up by the Commission in its various communications, arguing that, over the years, the instrumental value of the Regulation had decreased by its overwhelming complexity. The many amendments that 1408 had undergone during its almost 30 years of institutional existence, had mainly consisted of modest changes, with no full-scale reforms. The

¹²⁶ COM (1998) 779 final. Proposal for a Council Regulation (EC) on coordination of social security systems of 21 December 1998.

requirement of unanimity had repeatedly hindered major reforms, and the consensus procedure had established a practice whereby a strong political pressure in favour of an exception to the main rule, was met by adding an annex (Interview, DG Employment and Social Affairs, 12 September 2001). However, the practice of adding exceptions had created a situation where very important aspects of the Regulation were found in annexes, and not the main text (Interview, Danish Ministry of Social Affairs, 8 November 2002). Within this procedural context, complexity had gradually been fortified by (Pennings 2001, pp. 45-47), 1) the many exceptions from the main rules formulated in the annexes; 2) the case-law interpretations of how to read the regulatory text, distancing the literal text from the correct interpretation; and 3) the lack of memorandums explaining the rationale of the individual provisions, for which reason administrative institutions and the ECJ have had to continuously interpret the actual content of the Article. The result was that rights and obligations could not be read directly from the text, but had to be 'translated' on the basis of a detailed knowledge of the extensive annexed text and established case-law, as well as of national administrative practises. The complexity of 1408 made it unreadable for the migrant wishing to inform her/himself of her/his rights, difficult to access for those who wished to advise the migrant; and difficult to administer for the respective competent national institutions. In the Commission's proposal, simplification had concretely produced a more accessible regulatory text, in which the 99 governing Articles were reduced to 70.

With simplification as one ambitious purpose, the proposal furthermore aimed at modernising 1408. The negotiations on modernisation highlighted several sensitive political issues. First of all, modernisation concerned an amended personal scope. As originally proposed, the Regulation was meant to "apply to all persons who are or have been covered by the social security legislation of any of the Member States" (COM (1998) 779, p. 4). This formulation meant that 'persons' would be covered irrespective of their economic status *and* of their nationality. In this way, 1408 would come to include non-active persons, students with no separate substantive scope, and third country nationals. By including non-active persons and non-community nationals, the original proposal addressed the two main controversial aspects of the previous proposals (91) 528 and (97) 561. Secondly, the material scope of 1408 was supposed to be modernised so as to cover pre-retirement benefits, besides the classic branches of social security (COM (1998) 779, *ibid*; Eichenhofer 2000, p. 233).

As originally formulated, the proposal added Article 18 to the Treaty base, along with Articles 42 and 308. The Commission thus suggested that, formally, 1408 should be based on the provision on free movement which is included in the Treaty's section on citizenship of the Union. In the explanatory memorandum, the former aim of the Regulation - to promote free movement of *workers* - had now been replaced by the aim of giving "real and tangible value" to the free movement of *persons*:

"Community legislation on social security is a *sine qua non* for exercising the right to *free movement of persons*. Only by ensuring that *persons* moving within the Community do not suffer disadvantages in their social security rights will this freedom guaranteed by the Treaty be of real and tangible value" (COM (1998) 779, p. 1, emphasis added).

From the outset, the Council agreed in principle to simplify the Regulation (Interview, DG Employment and Social Affairs, 13 September 2001). Although the Commission drafted the proposal, the member states had been closely involved in its creation, mandating simplification at the Edinburgh Council, and participating in the preparatory discussions in the 'Administrative Commission' as in the national seminars. The extent of reform could therefore hardly be surprising to the national representatives. Nevertheless, discussions in the Council's 'working party on social questions' progressed slowly.

Negotiations, initiated during the German presidency in the first half of 1999, continued during the Finnish, Portuguese and French presidencies, but without any noticeable result (Interview, Danish Permanent Representation, 18 December 2002). On simplification, progress was difficult when discussing individual provisions or exemptions, which were favoured by a specific member state or group of member states. Discussing the details, national representatives added reservations, and waited for a political mandate or asked for further scrutiny of the matter. Since the current regulatory text reflected a subtle balance of compromises between the member states, even modest changes became delicate issues (Interview, Danish Ministry of Social Affairs, 4 April 2001).

However, the real crux of the matter appeared to be the politically sensitive parts of the proposal (Pennings 2001, 45). The inclusion of third country nationals was again the most controversial issue, and, from the beginning, Denmark and the UK held strong reservations (Roberts 2000,

Council Document¹²⁷ 8807/99, SOC 228). Also, the inclusion of non-active persons caused some trouble, and, furthermore, the extension of the material scope delayed negotiations (Interview, DG Employment and Social Affairs, 12 September 2001).

4.2: Negotiating the Treaty Base

In the meantime, the intergovernmental conference on institutional reform, which negotiated the Treaty of Nice, held out the prospect that the deadlock situation could be resolved by changing the procedure and content of the Treaty's Article 42. Pointing to the prospect of enlargement to up to 28 Member States, the Commission argued that qualified majority voting should be the rule and unanimity the exception.¹²⁸ In its first initiative, the Commission noted that, over the years, the unanimity requirement in Article 42 had often rendered reform of Regulation 1408 impossible.¹²⁹ Ongoing negotiations on COM (1998) 779 suffered the same difficulties, since the unanimity requirement seriously hindered progress. The Commission therefore proposed that the procedure of Article 42 was amended to qualified majority voting. In addition, it argued that it was necessary to broaden the formulation of Article 42, extending its scope *beyond workers*. The amendment of the Regulation to include the self-employed and students, had only been possible with Article 308 as a second legal basis. If a future extension of the personal scope still had to be approved in conjunction with the Treaty's Article 308, which required unanimity, it would make no difference to approve of qualified majority to Article 42. Article 42 would therefore have to be rewritten "to cover not only migrant workers but all *persons* who exercise the right to move and reside freely within the Union" (COM (2000) 114, p. 10, emphasis added).

Finally, in line with the European Council conclusions in Tampere, the redrafted Article should also make it possible for the Council to extend the co-ordination instruments to third country

¹²⁷ Council document of 1 June 1999.

¹²⁸ In COM (2000) 34 final of 26 January 2000. "Adapting the Institutions to make a Success of Enlargement – Commission Opinion in accordance with Article 48 of the Treaty on European Union on the calling of a conference of Representatives of the Governments of the Member States to amend the Treaties".

¹²⁹ COM (2000) 114 final of 14 March 2000. "Communication from the Commission. Supplementary contribution of the Commission to the Intergovernmental Conference on institutional reforms. Qualified majority voting for Single Market aspects in the taxation and social security fields".

nationals.¹³⁰ The Commission set out explicitly that the Treaty's Article 63, as amended by the Treaty of Amsterdam, could *not* be used to provide social protection for third country nationals moving within the Union, since the Article only concerned their admission and residence (COM (2000) 114, *ibid*).

The Commission's approach was backed by the Portuguese presidency, which prepared the agenda for the intergovernmental conference. The presidency suggested that qualified majority voting should be applied to Article 42, holding that, whereas unanimity should still govern the Treaty's social provisions which were regarded as "highly sensitive politically", QMV should be envisaged for the social provisions "closely linked to the establishment and operation of the internal market" (CONFER 4708/00, p. 2)¹³¹. The Portuguese presidency found that qualified majority voting was the appropriate procedure for Article 42, due to its close link with the achievement of the internal market. It furthermore argued that it was institutionally illogical to maintain unanimity side by side with the Parliament's co-decision.

However, as the discussions on the institutional reforms proceeded between Commission, presidency and the other member states, it turned out that the initial Commission proposal was not unanimously supported. The following French presidency tried to formulate a compromise by maintaining qualified majority voting as the procedure, but proposing a less radical change of Article 42's wording. The presidency proposed a compromise whereby the Commission's extension to all persons, including third country nationals, was to be replaced by a more modest Article 42, which covered workers, self-employed, students and pensioners. In other words, the content of the proposed Article 42 embraced all categories of persons currently covered by 1408, as well as those who had been included by the use of Article 308 as legal basis (CONFER 4767/00, CONFER

¹³⁰ The wording of the Commission's proposed Article 42 was:

"The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for persons; to this end it shall notably make arrangements to secure for migrant persons and their dependents:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of several countries;
- (b) payments of benefits to persons resident in the territories of Member States.

[deletion]

The Council may, acting in accordance with the same procedure, extend wholly or partly the benefit of this system to nationals of a third country, who are legally resident within the territory of a Member State".

¹³¹ Presidency note on the extension of qualified majority voting of 22 February 2000.

4776/00)¹³². The proposed formulation of Article 42 would make it possible to reform Regulation 1408 with regard to its current personal scope by qualified majority voting. But any extension beyond that would still require the use of Article 308, and thus unanimity.

However, this effort to change the letter and scope of primary law did not gain sufficient support. In the end, the UK announced that it could not accept any change of procedure or content of Article 42. Despite intense work on the institutional reform of the context, content, and procedural illogic of Article 42, the Article remained as it stood.

Concurrent with the intergovernmental conference's failed attempts to facilitate any approval of the simplification and modernisation of 1408/71 on the grounds of Article 42, was the Treaty of Nice's explicit provision that Article 18(2) of the Treaty could not be used as legal base for the adoption of (1998) 779. The current Article 18(3) of the EC Treaty, as amended by the Treaty of Nice, specifies that Community actions needed to attain the objective of the Union citizen's free movement and residence within the territory of the member states, do not apply to "provisions on social security or social protection". In light of the Nice intergovernmental conference, the Commission had to omit Article 18 as had been suggested Treaty base.

4.3: Searching for a Legal Base

Whereas the Treaty of Nice did not reduce the Treaty limitations in order to extend the personal scope of 1408/71, the Treaty of Amsterdam had already introduced important changes in the primary law premises for negotiating modernisation and simplification. The Amsterdam Treaty amendments made title IV on "Visas, Asylum, Immigration and other Policies related to the Free Movement of Persons", and its Article 63, a possible Treaty base upon which to extend 1408 to non-Community nationals. Furthermore, the Treaty of Amsterdam had already amended Article 42, which still required unanimity, but granted the European Parliament co-decision. The future negotiations on modernisation and simplifications thus counted an extra veto-player.

¹³² Presidency note on the extension of qualified majority voting of 29 August 2000, and of 28 September 2000. In the first note, the presidency formulated the personal scope of Article 42 to cover "workers, self-employed workers and persons treated as such". In the second note, "persons treated as such" was spelled out to "students and pensioners".

In addition to this, the European Council of Tampere, 15-16 October 1999, subjected the status of third country nationals to renewed political attention, and the member states politically committed themselves to work for a treatment of these people which was more equal to that enjoyed by Community nationals:

"The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence (Tampere Presidency Conclusions, point 21)."

With the Tampere conclusions, the Commission's proposal to include non-Community nationals in the personal scope of 1408 should have gained sufficient momentum for progress. Despite the fact that the Tampere conclusions mandated the Commission and the Finnish presidency to proceed with the work, the dispute on the legal basis continued to block any progress. Whereas the qualified majority of 12 member states were in favour of adopting the proposal on the basis of Articles 42 and 308, as had been suggested by the Commission, the UK and Ireland were not, and instead argued that after the Amsterdam Treaty had come into force in May 1999, the appropriate legal basis was the new Article 63(4). Denmark announced that it would accept neither Article 42 in conjunction with 308, nor 63(4) as legal bases for extending 1408 beyond community nationals, and repeated its political problem with the extension, as such (Council document¹³³ 12831/99, SOC 394).

Denmark, the UK and Ireland opposed the use of the legal base that had, traditionally, been used for extensions of 1408. Relying on Article 63(4) as a legal base, however, meant that all three member states could stay outside the extension of 1408. Under the Protocol on the position of the UK and Ireland, these two member states had to opt in, to participate in title IV of the Treaty. Furthermore, the protocol on the Danish position excludes Denmark from participating in title IV. Examining the positions of the three states, it becomes clear that their reservations were differently motivated. Both the UK and Ireland saw Article 42 as limited to EU nationals. Despite this reservation, Ireland emphasised, as early as in November 1999, that for it, it was a question of the appropriate legal base

¹³³ Council document of 12 November 1999.

and that it would choose to 'opt in' on the basis of Article 63.4. The UK also stressed that its problem was purely a legal one, and that, politically, it supported the extension (Council document¹³⁴ 12831/99, SOC 394).

From the outset, Denmark refused both the traditional legal base and the new one, and, politically, opposed any extension of Regulation 1408 to third country nationals (Council document¹³⁵ 12830/99, SOC 393). However, a few months after the coming into force of the Amsterdam Treaty, Article 63(4) was examined and rendered a sufficient legal base by the Council's legal service (Council document¹³⁶ 11043/99, SOC 306). Against this background, Denmark consented to re-examine the use of 63(4), and, two years later, finally accepted it (Council document¹³⁷ 13186/99, SOC 414, Council document¹³⁸ 13027/01, SOC 391). The Danish position changed as negotiations proceeded. Denmark's final decision to change its foot-dragging and isolated position, will be analysed in greater detail in chapter VII. However, it should be noted here that, due to the Danish exemption, such a change of position was politically free of charge.

Together, the Amsterdam Treaty and the Tampere conclusions offered both a legal alternative and a political mandate. Regardless of the momentum this supposedly gave to the negotiations on the inclusion of third country nationals in Regulation 1408, the negotiations did not progress in the Council for the next two years. During that time, the Commission initiated improvements on the general status of non-community nationals, for example by proposing a partial free movement for long-term residents, mandated by the Tampere conclusions (COM (2001) 127).¹³⁹

Among other issues, the question of third country nationals had pushed proposal COM (1998) 779 into a deadlock of political and legal reservations. Faced with the improbability of a political break-

¹³⁴ Council document of 12 November 1999.

¹³⁵ Council document of 11 September 1999.

¹³⁶ Council document of 17 September 1999.

¹³⁷ Council document of 22 November 1999.

¹³⁸ Council document of 25 October 2001.

¹³⁹ Proposal for a Council Directive concerning the status of third country nationals who are long term residents. COM (2001) 127 final, proposed 13 March 2001.

through, the Commission and the Council decided to wait for a legal clarification of the dispute, which they assumed would occur with the *Khalil* case (Interview, DG Employment and Social Affairs, 13 September 2001, Council document¹⁴⁰, 12296/01, SOC 362).

4.4: The Case-Law Solution of a Political Problem

On October 11th 2001, the Court decided in the Joined cases C-95/99 to C-98/99 and C-180/99 *Khalil and others*.¹⁴¹ The concrete cases concerned whether Community law, as stated in Regulation 1408/71, entitled stateless persons to German child benefit and child raising allowance.^{xv} Stateless persons and refugees do not enjoy any right to freedom of movement under Community law, and German law¹⁴² makes foreigners' entitlement to family benefits dependent on their possession of a residence permit. Although not asked directly, the Court laid the preliminary reference out as if to examine whether it was valid to include stateless persons, refugees and their family members in the personal scope of 1408/71, on the Treaty basis of Article 42, although they were not Community nationals. In this examination, the case became relevant to the question of whether Article 42 could be used as the legal base for the extension of 1408 to third country nationals, or whether the Article was limited to granting rights to EU nationals, since only they were entitled to free movement under Community law. The Court found that the inclusion of stateless persons and refugees had to be considered in its historical context. The original inclusion of stateless persons and refugees took place in a historical context of international and European agreements, signed by the six original member states, in which the Geneva Convention¹⁴³, the European interim agreements¹⁴⁴, and the New York Convention¹⁴⁵ formulated, as the norm, the granting of equal treatment to these groups of persons. The European convention on social security

¹⁴⁰ Council document of 28 September 2001.

¹⁴¹ The Joined cases C-95/99 to 98/99 and C-180/99, 11 October 2001. *Mervett Khalil* (C-95 99), *Issa Chaaban* (C-96 99) and *Hassan Osseili* (C-97 99) v *Bundesanstalt für Arbeit* and *Mohamad Nasser* (C-98 99) v *Landeshauptstadt Stuttgart* and *Meriem Adlou* (C-180 99) v *Land Nordrhein-Westfalen*. ECR 2001, p. I-7413.

¹⁴² Bundeskindergeldgesetz (Federal Law on Child Benefit) and Bundeserziehungsgeldgesetz (Federal Law on Child-Raising Allowance).

¹⁴³ The Geneva Convention was signed on July 28th 1951.

¹⁴⁴ The members of the Council of Europe signed the European interim agreements on 11 December 1953.

¹⁴⁵ The New York Convention was signed on 28 September 1954.

of 1957¹⁴⁶, which to a large extent was replicated in Regulation no. 3, was prepared in this context and granted the principle of equal treatment, not only to the nationals of the contracting parties, but to stateless persons and refugees as well (paras. 50 & 51). Regulation 1408 later inherited both the personal scope of Regulation no. 3 and its embedded norm. On the basis of these historical considerations, the Court answered to the first question that its examination had not pointed to any factors making Regulation 1408's inclusion of stateless persons and refugees invalid (para. 58).

The second question put forward by the referring German Court asked the Court whether stateless persons and refugees could rely on the rights granted by Regulation 1408, if they had moved to a member state directly from a third country, i.e. if they might rely on the protection of 1408/71 without having moved within the Community. The Court's answer to the second question was fairly short. The ECJ referred to established case-law, which had concluded that Article 42 of the Treaty and the equal treatment provision of Regulation 1408, did not apply to situations which happen only within the same member state.¹⁴⁷ For the same reason, the Court concluded that stateless persons and refugees could not rely on 1408, if all aspects of their situations referred to one and the same member state (para. 72). The Court thereby affirmed that the Regulation could only be invoked when a Community cross-border movement had taken place.

4.5: Proposal Split in Two

On the basis of the *Khalil* judgement, the Council resumed its discussions on the appropriate legal base for including non-Community nationals in Regulation 1408. Compared with previous considerations on the legal matter, its quick decision on the matter after *Khalil* notably stands out. At the Employment and Social Policy Council, 3 December 2001, the Council stated that, in light of the *Khalil* judgement, Article 42 did not appear to be the appropriate legal basis for extending Regulation 1408 to third country nationals. At the same meeting, the Council instead agreed on the possibility of using Article 63(4) as an alternative legal basis (Council document¹⁴⁸ 15056/01, SOC

¹⁴⁶ The European convention on social security was signed by the 6 member states of the European Coal and Steel Community by 9th December 1957. The convention was, however, never ratified. See chapter III, sections 4.2 and 4.3.

¹⁴⁷ Among other cases, the Court referred to the C-153/91 *Petit* case, in which it had laid down that the principle of equal treatment did not apply to the purely internal situation. See endnote V below.

¹⁴⁸ Council document of 6 December 2001.

530). The case-law decision had thus transformed a 12-15 majority in favour of the traditional legal basis of 1408/71, to an unanimous rejection of that same basis, and an agreement on the new Article 63(4). It was decided that negotiations on third country nationals should be held separately.

Only 2 months after the decisive Council meeting, the Commission presented its second separate proposal on third country nationals, COM (2002) 59¹⁴⁹, with the sole purpose of extending 1408/71 to cover non-community nationals as well. By its quick actions, the Commission seemed to have dismissed all doubts – which had been reflected in its own initial rejection of this possibility - about Article 63 as being the correct Treaty base upon which to proceed with the inclusion of third country nationals. Furthermore, the argumentation in the explanatory memorandum had changed. The fact that the Commission viewed social protection as the other objective of 1408 had been omitted, and instead it was stressed that, in light of the Amsterdam Treaty and the recent case-law of Khalil, the question of the Treaty basis had been re-examined with the conclusion that Article 63(4) now appeared to be the appropriate base upon which to proceed.

By submitting to the new Treaty basis, the Commission clearly compromised its original intentions, where one objective was to clarify a “muddled legal situation” for third country nationals. As part of the Treaty’s title IV, the UK and Ireland had to ‘opt in’ to participate, whereas Denmark remained outside. The proposal therefore accepted a continuation of “multiple protection levels” by allowing variable consent.

The threat of vast complexity with 3 member states not coordinating social security rights for third country nationals was, however, reduced, when the UK and Ireland in May 2002 announced their ‘opt in’ on the adoption and application of proposal COM (2002) 59 (Council document¹⁵⁰ 8482/02, SOC 216). The UK, which had opposed the extension of 1408 to third country nationals from the first proposal on, had finally changed its position.¹⁵¹

¹⁴⁹ Proposal for a Council Regulation extending the provisions of Regulation (EEC) No. 1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality. Proposal of 6 February 2002.

¹⁵⁰ Council document of 2 May 2002.

¹⁵¹ For a detailed description of the traditional position of the UK, see the work of Roberts (2000).

Even though the *Khalil* judgement apparently silenced all the disagreements between the member states and the Commission on the legal basis, the European Parliament did not immediately accept this sudden conciliation. In the Parliament's report on proposal (2002) 59, it noted that it fully supported the original proposal, which had now been "withdrawn by the Commission under pressure from the Council", and that it:

"is not convinced by the argument the Commission is now using, to the effect that it is compelled by the *Khalil* and others judgment (case C-95/99) to use a different legal basis" (EP Report A5-0369/2002¹⁵²).

However, even though the proposal based on Article 63 (4) reduced the Parliament's competence from co-decision to mere consultation, the Parliament chose to behave pragmatically and allow the Council to 'strike while the iron is hot'. The Parliament rapporteur recommended that the proposal be accepted by the Parliament, and thus prioritised political results over 'legal hair-splitting'. The Parliament should:

"not indulge in legal hair-splitting which might impede the rapid resolution of the matter at issue. Particularly since agreement now seems to have been reached in the Council on this proposal, the proverb "strike while the iron is hot" seems to apply more than ever" (EP Report, *ibid*).

Proposal COM (2002) 59 was finally adopted by the Council on May 15th 2003.¹⁵³ Having been on the agenda since as far back as 1993, legally residing third country nationals were finally included within the personal scope of 1408/71.

Returning to the status of Community nationals, the member states at the same December 2001 Council meeting, adopted a text subdividing proposal (98) 779 into 12 parameters¹⁵⁴, each dealing

¹⁵² Report from EP Committee on Employment and Social Affairs of 5 November 2002. Approved by the Parliament on 21 November 2002.

¹⁵³ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

¹⁵⁴ Of the 12 parameters, the 7 first were general ones, which applied horizontally to the whole Regulation and the remaining 5 treated specific topics. The 1st parameter concerned the general objective to simplify the Regulation, improve its readability and make it more accessible to the citizen. The 2nd parameter treated the personal scope of the Regulation. The 3rd parameter dealt with the material scope. Parameter 4 concerned the principle of exportability. Parameter 5 dealt with posted workers, and parameter 6 allowed for the member states to continue making additional social security agreements between them, based on the principles and spirit of 1408. The last general parameter, the 7th one, specified that facts or events occurring outside the territory of the competent state should have the same legal effect as if occurring within its borders. The 8th parameter was the first specific one and concerned the sickness chapter of the Regulation, which had to be simplified. The Council should also consider whether the Regulation needed to be adapted

with individual modernisation and simplification topics, which had been mandated at the Stockholm European Council in March the same year (Stockholm Presidency Conclusions, point 33).

In the text on the parameters, the Council stated the basic principles of coordination to be:

“Subject to the limitations and conditions which it lays down, the Treaty guarantees free movement of *European citizens* within the European Union. This freedom can be fully utilised only if *people* who move between countries are certain that they will not lose their social security entitlements. Freedom of movement was initially limited, in the history of the building of Europe, to *workers* and members of their family. Today it extends to the *citizens of the European Union*” (Council document¹⁵⁵ 15045/01, SOC 529, emphasis added).

The second parameter dealt with the personal scope. It stated that the personal scope should be extended to all European nationals, meaning that in the future, coordination would apply ‘to all those [Community nationals] who are or have been insured by a social security system in a Member State’. The adopted text pointed out that:

“The application of coordination to all insured *persons* also meets the need to adapt it [Regulation 1408/71] to the development of free movement within the Union, which has changed from a right in favour of *workers only* to a *right and a reality for all European citizens*” (Council document *ibid*, emphasis added).

The parameter generalising the personal scope to all Community nationals was provisionally adopted during the Spanish presidency in the first half of 2002 (Interview, Danish Permanent Representation, 18 December 2002). Since then each parameter has been carefully negotiated by the Council (Interview, Danish Ministry of Social Affairs, 8 October 2003). On 26 January 2004, the Council finally managed to unanimously adopt a common position on the amendment proposal as a whole, thus concluding more than five years of intergovernmental negotiations. In the communication from the Commission to the European Parliament on the Council’s common position, it stands out clearly that Regulation 1408 had been transformed from *an instrument to ensure free movement to a social means in its own right*, linked to the building of a ‘*social Europe*’:

“Since its adoption in 1971, the Regulation has undergone a considerable number of amendments [...] The *goal* pursued by coordination must also be *adapted to changes in the European Union* as a whole. Coordination rules

in the light of the more recent case law on the free movement of goods and services. Parameter 9 dealt with the Regulation’s chapter on social pension, and parameter 10 was on unemployment benefits, which should continue to be exportable in up to 3 months, but under facilitated circumstances. The 11th parameter concerned family benefits, and, finally, parameter 12 dealt with transitional arrangements to be adopted to guarantee that more favourable acquired rights were maintained if a person moved to another member state’s less favourable arrangement.

¹⁵⁵ Council document of 6 December 2001.

are not just intended to ensure free movement of employed persons; they are also increasingly about protecting the social security rights of *all persons* moving within the European Union. *Coordination must therefore be seen from the perspective of European citizenship and the building of a social Europe*" (COM (2004) 44, final, emphasis added).

The ultimate step on the path to a generalised personal scope will involve negotiating the Parliament's amendment proposals on the Council's common position. That will presumably take place by April 2004, so that the amended Regulation can finally be co-decided by the Council and Parliament before enlargement May 2004 (Interview, Danish Ministry of Social Affairs, 9 February 2004). Throughout the negotiations, the prospect of enlargement has constituted an important deadline.

By the forthcoming amendment, intra-European social security rights will definitively be detached from its link to market citizenship and extended to all citizens of the European Union. The objective of the Regulation will thus be three-fold: promoting free movement of persons; adding substantive rights to European citizenship; and, in part, realising a 'social Europe'. From a historical point of view the extension stands out as a milestone.

4.6: Negotiating the Borders of a Personal Scope

By May 2004, Regulation 1408 should finally be extended to *all* European citizens (Interview, Danish Ministry of Social Affairs, 9 February 2004). Non-active persons and students will finally, and without exception, enjoy the right to intra-European social security. The future adoption marks a historical move from a privilege held only by workers 'stricto sensu', to a right which reflects European citizenship, and, more over, one constituting a crucial element in the construction of 'social Europe'. In theoretical terms, the fact that non-active persons will be granted the right to cross border social security cannot be interpreted as just another step in the market-making process, but must instead be seen as a concrete and substantive contribution to the social security dimension of the European Union. This ultimate outcome of a long-drawn-out institutionalisation process could, by no means, have been intended in T₀, but has instead evolved out of numerous and detailed steps along the path to social security integration and has been furthered by the purposeful and skilful actions of the supranational organisations. With reference to its ideational and historical past, as explored in the previous chapter, this ultimate outcome is most astonishing.

All the same, before generalising 1408's personal scope to Community nationals, the Council adopted its extension to third country nationals. At first sight, the adoption of Regulation 859/2003 seems to be a radical move towards a more egalitarian clarification of the question of who has access to cross-border welfare in the EU, which disregards a communitarian conception of welfare.

However, there are decisive objections, which mean that the adoption is not a straightforward application of equal treatment between Community and non-Community nationals. In fact, these objections mean that equal treatment of third country nationals in cross-border social security matters, remains merely an idea rather than a fact of life.

First of all, legally residing third country nationals do not enjoy the right to free movement according to Community law. On the contrary, Regulation 859/2003 emphasises that the application of 1408/71 does not give third country nationals "any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market". Furthermore, the Regulation sets out explicitly that, 1408/71 is "not applicable in a situation which is confined in all respects within a single Member State". Only the small number of non-Community nationals who, due to national or international law, or bilateral agreements, move between member states will, therefore, be able to practice their newly granted rights. Thus, the right to intra-European social security appears rather meaningless, since third country nationals lack the underlying right of free movement (Peers 2002). The status of third country nationals will, however, improve with the implementation of the recently adopted directive concerning long-term resident non-Community nationals.¹⁵⁶ The directive, adopted by the Council on 25 November 2003, grants third country nationals, who have resided for five years in one of the member states, an EC statute of long term resident. The statute will, under certain conditions, allow the long-term resident to move from one member state to another. The directive is adopted on the Treaty's Article 63 (3) and (4). The United Kingdom and Ireland have chosen to opt out, and the Danish protocol excepts Denmark from the agreement. The conditioned right of free movement for certain third country nationals, therefore, applies in a far from uniform manner throughout the Union. Multiple protection levels continue to cover non-Community nationals.

¹⁵⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long term residents.

Secondly, the position of Denmark remains unclear. Although Denmark has announced its intentions to commit itself to a parallel agreement, no formal actions have been taken (Jyllands-Posten 5 June 2002; Interview, Danish Ministry of Social Affairs, 8 November 2002; 15 May 2003; 8 October 2003 & 9 February 2004). The Danish position will be examined in more detail in chapter VII.

Thirdly, the extension to third country nationals only applies to the ruling Regulation, and not to future amendments, meaning that non active third country nationals moving between member states will not be covered by 1408/71 (Interview, Danish Ministry of Social Affairs, 9 February 2004).

Finally, as noted by the European Parliament, it is not entirely clear how the *Khalil* judgement settled the dispute on the Treaty basis. In fact, the settlement of the matter appears to be based on the need to mask a pragmatic, and rather dubious political choice, by the apparent neutrality of law. The *Khalil* judgement did not say that Article 42 is inextricably bound to Article 39 of the Treaty, and thus to its nationality requirement. The answer to the case's second question, that 1408/71 cannot be invoked if no movement between member states has taken place, could be argued to simply be an affirmation of precedent, and not a statement which tied the Treaty's Article 42 to the right to exercise free movement. The Court did not conclude that Community nationality was an absolute premise for inclusion in the personal scope of Regulation 1408/71, on the basis of the Treaty's Article 42. On the contrary, it made a contextual analysis, referring to international law, and concluded that the context and political commitment at the time when Regulation no. 3 was formulated and adopted, made it a natural choice to include refugees and stateless persons in 1408's personal scope. The question is whether a similar contextual argument, which referred to the European Convention of Human Rights, the Charter of Fundamental Rights of the EU and the Tampere conclusions, would not, in the year 2003, be of sufficient validity to justify the inclusion of legally residing third country nationals in the personal scope of 1408/71, on the basis of the Treaty's Articles 42 and 308. However, essentially, that seems to have depended on political commitment.

5.0: Concluding Remarks – Extending Equal Treatment for an Ever Wider Personal Scope

The principle of equal treatment and the personal scope of Regulation 1408 have been under debate and negotiation for more than four decades. With regard to the research question '*to what extent*', the analysis of this chapter has demonstrated that, when comparing T_0 and T_2 , the Regulation's principles of equal treatment and personal scope have made a historical move from a most restricted right to cross border social security, to a general one. With worker '*stricto sensu*' as the point of departure, the bits and pieces of a protracted integration process have, taken together, constituted a historical move, up to the point of including the non-active European citizen and the legally residing third country nationals. In the present chapter, a specific integration story has been depicted in detail, in which the right to equal treatment and the scope of those entitled to cross-border social security, have been extended on the basis of flexible concepts and a dynamic perception of the Community's instruments, objectives and competences.

As regards to the research question '*how*', the analysis has pointed out that it is the interaction between the Court, the Commission and the Council which has transformed and furthered the institution from intergovernmental output long before T_0 , to input in the subsequent institutionalisation process. From the chronological, process-tracing study which has been carried out, it is, however, clear that the Court, seconded by the Commission, from early on took the lead in interpreting aims and means dynamically and extensively. Throughout the process, judicial activism and Commission persistency prepared the terrain for unanimous political decision-making, and thus succeeded in modifying national positions and preferences as time unfolded.

From the outset, the judicial activism of the *Court* extended the principles of equal treatment and amplified the meaning of 'employed person', and, at the same time, it interpreted the aim of the legal basis in a most extensive way. When the Council later brought in the self-employed, it merely codified what had already been ruled by the Court, and the member states unanimously agreed that the aim of Regulation 1408 went even further than that which could be drawn from the most extensive reading of the Treaty's Article 51. The Treaty's Article 235 (now art. 308) became the additional legal basis upon which to achieve new policy aims. The agenda-setting capacity of the *Commission* once more assured that the collective perception of aims and means did not stagnate. European citizenship became the next key-concept, substantiating new needs for reform and further

energizing the process. Proposing the generalisation of the personal scope of 1408 to all European citizens was not a fundamental departure from established reasoning, since Community nationals enjoy the underlying right of free movement. That is, however, not the case with third country nationals. By proposing that non-Community nationals be included in 1408's personal scope, the Commission attempted to introduce a path-breaking understanding of the regulatory aim, where the decisive factor was no longer the exercise of the right of free movement, but the right to be insured under a social security scheme. The full consequences of such a break remain a matter of speculation, but were hypothesised by the UK government, which vetoed it on this basis. The intense dispute concerning the appropriate legal basis for including third country nationals can be interpreted as both a Commission defeat, and as an example of successful mediation. On the one hand, the Commission and the large majority of member states were finally forced to accept the Treaty's Article 63 (4) as the legal basis. The final choice of Treaty basis shows that under the unanimity rule, the minority prevails. On the other hand, the Commission managed by compromising its own, and 12 member states initial preferences, to put an end to a long-lasting controversy and achieved the desired political result. In the end, such an outcome transcends a negotiating process which was characterised by political and legal reluctance.

To give a theoretical account, the analysis carried out here substantiates the idea that the *institution* of Regulation 1408 appears to develop according to its own logic, or as if it has a 'life of its own'. Over time, the institution's principle of equal treatment and its personal scope, are furthered by a path dependent processes of increasing returns, in which initial choices are reinforced, but gradually changed (Pierson 1998: 2000b, p. 251). From the statistical information, analysed in chapter III section 3.3, we know that institutionalisation takes place although transnational exchange in terms of migration has not increased correspondingly. Contrary to the proposition of Stone Sweet & Brunell (1998), progressive institutionalisation has not happened as a function of increased mobility. However, since its creation, the basic function or the *raison d'être* of the institution was never re-questioned. The drive for change becomes a matter of interpretations of its efficiency, and dynamic readings of its rationale and its context. Due to these interpretations, the institution itself becomes dynamic. On this basis, it is in a constant process of revision.

Interpretations on the instrumentality of the institution constitute a key-component which decides the path of its evolution. The analysis has demonstrated that interpretations are subjectively

formulated, reversed, clarified and persisted with by the supranational organisations of the European community.

The analysis between T_0 and T_2 accentuates the *Commission* as the skilful actor, successfully coupling Regulation 1408 to the new dimension of European citizenship. In this act, the Commission demonstrates itself as the persistent actor, which, despite political opposition, maintains its course for decades, meanwhile using the institution of citizenship as a new policy window for change (Pollack 2003, p. 51). The Commission's campaign on the need to match intra-European social security with Union citizenship introduces, however, no new policy intensions, but rather rephrases old ones. All the way through, the Commission is ahead of the situation. At the same time, the analysis highlights that, although supranational organisations may pursue own agendas and develop own preferences, their scope of manoeuvre ultimately depends on their principals: the member states. Regarding third country nationals, the Commission's agenda is far more ambitious than the final institutional result. The Commission – and with it, the great majority of member states – is in no position to change rather marginalized, but equally persistent, political or legal preferences, and finally has to accept exactly those interpretations that it first refused.

Between T_0 and T_2 the voice of law resounds authoritatively. Concerning the *Court's* interpretations of the principle of equal treatment and 1408's personal scope, politicians accept its dynamic interpretations and innovative rulings. The legal path dependency which has been constructed over the decades is, in itself, a classic demonstration of how litigation may further integration. The member states do not rein in the Court. Instead the analysis exemplifies how they subsequently codify the legal overrule of national act (the case of *Pinna*). Furthermore, when the Court breaks with its established legal reasoning and extends the principle of equal treatment, no collective political response is mobilised (the case of *Cabanis-Issarte*). The multilateral effect of the new interpretative course will be analysed in further detail in the chapters below. At this stage, however, it is important to note that the Court deliberately limits the financial impact of the judgement by limiting its retrospective effect. Its immediate impact thereby relates to the individual lawsuit only, and a collective reaction appears as unnecessary or even irrelevant. According to a different logic, law has established a binding precedent, and politics has apparently consented with this (Alter 1998, pp. 130-132; 2001, p. 189). In general, the Court has issued generous, teleological interpretations of

the institution and its aim. Through this process, law, rather than politics, has laid down the content, rationale and direction of the *institution*.

Case-notes

^{iv} As emphasised by the Court in the early case 79/76, 31. March 1977. *Carlo Fossi v Bundesknappschaft*. ECR 1977, page 667. *Fossi* was an Italian national, residing in Italy. Between 1942-1943, he worked in the German mines in Sudetenland. In 1970, he applied for disability pension in the Federal Republic of Germany with regard to his previous work in Sudetenland. The Court ruled that no discrimination against Mr. *Fossi* had taken place within the material scope of 1408/71. The competent institution that should have granted Mr. *Fossi* the pension no longer existed, and the right to a possible benefit would be discretionally decided. The benefit could not be regarded as being in the nature of social security, and fell outside the material scope of the Regulation (paras. 7 & 8 of the judgement).

^v This restriction was laid down in case C-153/91, 22. September 1992. *Camille Petit v Office National des Pensions (ONP)*. ECR 1992, page I-4973. *Petit* was a Belgian national, who worked in Belgium, first as an employee, then as a civil servant. When refused a pension for employed persons from the Belgium national pension office, he brought action against the decision. His action was however formulated in French, but should, according to the procedural rules, have been formulated in Dutch. The preliminary questions addressed whether the principle of equal treatment in the Regulation and its Treaty basis was applicable in the domestic situation, and whether Article 84 (4) of 1408/71, obliging member states to accept claims formulated in another member state language, also ruled in the situation where the right to free movement was not exercised. The Court concluded that the principle of equal treatment did not regulate the purely internal case: "As the Court has consistently held, the provisions of the Treaty on freedom of movement and the Regulations implementing those provisions cannot be applied to activities which are confined in all respect within a single member state" (para. 8 of the judgement).

^{vi} That the principle did not rule outside the geographical scope of the Community was laid down in case C-23/92, 2. August 1993. *Maria Grana-Novoa v Landesversicherungsanstalt Hessen*. ECR 1993, page I-4505. *Maria Grana-Novoa* was a Spanish national, who, however, never worked in her state of origin, but both in Germany and Switzerland. Between 1979 to 1982, she had worked for 44 months in Germany and was subject to compulsory insurance during that period. Subsequently, she became permanently incapable of work. In 1983, she applied to the competent German institution for an invalidity pension. The application was turned down, since the national legislative requirement to qualify for the pension was 60 months of insurance. Had, however, *Grana-Novoa's* insurance periods completed in Switzerland been taken into account, she would have qualified. The question was therefore whether Community law obliged Germany to aggregate the periods in Switzerland to the ones fulfilled in Germany, due to the concluded social security convention between Germany and Switzerland from 1964. The Court concluded that the term "legislation" referred to in Article 3 (1) and 1 (j) of 1408/71, did not cover provisions of international social security conventions concluded between the single member state and a non-member state. The only international social security convention that fell within the field of the Regulation was the one that had at least two member states as contracting parties.

^{vii} In case C-28/92, 16. December 1993. *Marie-Helene Leguaye-Neelsen v Bundesversicherungsanstalt für Angestellte*. ECR 1993, page I-6857. The Court made clear that for the principle of non-discrimination to apply, the two situations involved had to be comparable. Ms *Leguaye-Neelsen* was a French national, who paid compulsory contributions to the German Bundesversicherungsanstalt für Angestellte from 1971 to 1977, when employed in Germany. From 1973, she also paid compulsory contributions to the French Civil Service Schemes. When returning to France, she applied for reimbursement for the contributions she paid into the statutory pension scheme in Germany. Her application was, however, turned down, since she was entitled to keep paying voluntary insurance contributions and this fact excluded her from the right of reimbursement. From the written opinion submitted by the German government to the Court, it appeared that a German civil servant would be entitled to reimbursement of benefits paid, because she would no longer have the right to continue in the statutory insurance scheme on a voluntary basis, now being covered by a special scheme for civil servant. According to Article 4 (4) of 1408/71, the schemes for civil servants are exempted from the Regulation. *Leguaye-Neelsen* was therefore to be regarded as a German employee, insured under an ordinary scheme, and thus who retained the right to pay voluntary contributions. In this manner, the German legislation distinguished between the rights and obligations of the two personal categories; employees and civil servants. The Court stated that the rights of the employee and the rights of the civil servant were not comparable, and the German administrative action

did not discriminate according to Article 3 (1) of 1408. Under national legislation, an employee who entered the public administration might be granted reimbursement for contributions previously paid to an insurance scheme to make up for the fact that he lost the rights under that scheme. This situation was not comparable to a person who entered the public administration of another member state, since here the person maintained the right to be affiliated in the previous scheme, and thus to pay voluntary contributions. That the national administration treated the two situations differently did not express discrimination, but two non-comparable case backgrounds.

^{viii} In case C-131/96 *Romero*, the Court found German practice discriminatory [Case C-131/96, 25 June 1997. *Carlos Mora Romero v Landesversicherungsanstalt Rheinprovinz*. ECR 1997, page I-3659]. *Romero* was a Spanish national, born in 1965 and residing in Spain. His father died in 1969 as a result of a work accident, while employed in Germany. Therefore *Romero* received orphan benefit from the German state, until he was called for military service in 1987. Being again in education the year after, payments were re-started. In 1990, *Romero* was, however, notified that he was no longer entitled to the benefits since he had reached the age of 25. According to the German national social security code, orphan benefits were not payable after the age of 25. However, according to the same code, benefits were to be paid after the age of 25 for a corresponding period, if the person had to do statutory duties such as the military service. But this provision had always been interpreted by German courts as only concerning military service in Germany. The European Court of Justice concluded that the outcome of German practice was discriminatory. A person such as *Romero*, in a survivors position, was covered by the Regulation and survivor's benefit was part of the material scope as expressed in Article 4 (1) (d). As laid down in *Toia*, the Court emphasised that the objective of the principle of equal treatment was to eliminate direct as well as indirect discrimination; "...Article 3 (1) of Regulation No. 1408/71 prohibits not only overt discrimination based on nationality of the beneficiaries of social security schemes, but also all covert forms of discrimination, which through the application of other distinguishing criteria, lead in fact to the same result" (para 32 of the judgement). To avoid indirect discrimination, military service in another member state must be assimilated with the same statutory obligation in the competent state.

^{ix} The *Pinna* case concerned *Pietro Pinna*, an Italian national, who resided in France with his wife and two children, where he also worked. In 1977, the children went to Italy with their mother, and stayed there for an extended visit, meaning that the son stayed 3 months in Italy and the daughter stayed abroad 6 months. Thus, the competent French institution denied to pay family benefit within that period, arguing that it should be paid by a competent Italian institution, where the children had stayed in that period.

^x *Maria Masgio* was an Italian widow, whose husband worked in the Belgian, as well as in the German mining industry. Mr *Masgio* was entitled to an accident pension under Belgian legislation and a German old-age pension. The case concerned the method of calculating the old-age pension that *Masgio* received under the German pension scheme. The competent institution calculated the German pension on the basis of the gross amount of the Belgian pension, whereas if *Masgio* had received both pensions under German legislation, the old-age pension would have been calculated on the annual earning figures of the other pension, and the outcome would have been higher.

^{xi} Considering the principle of equal treatment, the Commission has brought infringement procedures against France [Case C-307/89, 11 June 1991. *Commission of the European Communities v French Republic*. ECR 1991, page I-2903], which will be discussed in the next Chapter V, and against Belgium [Case C-326/90, 10 November 1992. *Commission of the European Communities v Kingdom of Belgium*. ECR 1992, page I-5517]. In case C-326/90 against Belgium, the Commission took procedure against the Belgian residence requirements imposed on workers from other member states and their families in order to qualify for the allowances for handicapped persons, the guaranteed income for old people, and the Belgian legislation on the right to a minimum means of subsistence. In its argumentation, the Commission stressed that the Court had already ruled that the Belgian benefits for handicapped people [Case 157/73 *Callemeyn v Belgium* & Case 7/75 *Mr and Mrs Fracas v Belgium*] and the guaranteed income for old people [Case 1/72 *Frilli v Belgium*] fell within the material scope of Regulation 1408/71. Concerning the right to a minimum means of subsistence [Case 249/83 *Hoeckx*], the Court had, however, concluded that the allowance did not constitute a social security benefit within the meaning of 1408/71, but was instead regarded as a social advantage within the meaning of Article 7 (2) of Regulation 1612/68. The Commission found that the requirements of previous residence in Belgium was "obviously disguised discrimination" and, although it applied irrespective of nationality; "...its primary or secondary effect is to exclude nationals of other Member States from the benefits of the allowances in question, even if that is not the intended object. The result is different treatment for nationals of the host State as compared with nationals of other Community countries, which amounts to an objective obstacle to the exercise of the free movement for workers, a right which for every Community national, constitutes a right which does not allow of any restrictions not objectively and legitimately justified" (ECR 1992, page I-5521). When Belgium was due to argue its case, it complied and stated that it

would amend the relevant legislation so that it was brought in line with Community law. In the judgement, the Court declared that the Belgian state had not fulfilled its obligations under Community law as expressed in the Treaty, in Article 7 (2) of 1612/68, and in Article 3 of 1408/71.

^{xii} In the *Cabanis-Issarte* case, the Advocate General Tesaro stated two opinions. In his second opinion, the Advocate General discussed the *Kermaschek* case-law (Opinion on case C-308/93, *Cabanis-Issarte*, ECR 1996, p. I-2111). Among the cases restating the *Kermaschek* line of reasoning are:

- Case 157/84, 6 June 1985. *Maria Frascogna v Caisse des depots et consignations*. ECR 1985, p. 1739. In the case of *Frascogna*, the Court reiterated the authoritative line laid down in *Kermaschek* (para. 15 of the judgement). Mrs *Frascogna* was of Italian nationality but lived with her working son in France. She applied for French old-age allowance, but the application was rejected because she had not resided 15 years in France. The Court referred to *Kermaschek* and concluded that in terms of 1408/71 as legal basis, Mrs *Frascogna* could not claim the allowance because it was not a derived right (para. 17 of the judgement). The Court, however, added the consideration of Regulation 1612/68. The benefit constituted a "social advantage" as defined in Article 7 (2) of this Regulation, and should therefore be granted to the dependent family member.
- Case 94/84, 20 June 1985. *Office national de l'emploi v Jozsef Deak*. ECR 1985, page 1873. The case concerned *Deak*, residing with his Italian mother in Belgium, where she worked. *Deak* did not have member state nationality, being Hungarian. The Court stated that due to the limits in the distinction between personal and derived rights of family-members, Mr. *Deak* was not entitled to the unemployment benefit on the basis of Regulation 1408/71. However, EC-law as formulated in art. 7 (2) of Regulation 1612/68 entitled *Deak* to the unemployment benefit, which the Court laid down to constitute a "social advantage". The benefit could therefore not be refused to the dependent child, although he did not possess member state nationality.
- Case C-243/91, 8 July 1992. *Belgian State v Noushin Taghavi*. ECR 1992, page I-4401. *Taghavi* had Iranian nationality, but was the spouse of an Italian worker. The married couple resided in Belgium where Mrs *Taghavi* applied for disability allowance. Considering Regulation 1408/71, the Court followed the interpretive line expressed in the cases of *Kermaschek*, *Frascogna* and *Deak*, according to which the family member was only entitled to the derived right. Despite being a family member to a Community worker, *Taghavi* was not entitled to the Belgian allowance for the handicapped which was granted as a personal right (para. 12 of the judgement). The Court interpreted moderately and went against the opinion of the Commission. The Commission had argued that the allowance constituted a "social advantage" within the meaning of art. 7 (2) of Regulation 1612/68 (para. 10 of the judgement). The Court concluded to the contrary that in contrast with the cases of *Frascogna* and *Deak*, 1612/68 could not be used as legal basis to grant *Taghavi* the social security allowance. The reason was that *Taghavi* was not a national of a member state and according to Belgian law, a Belgian worker's spouse, who was not a member state national, could not claim the allowance either (para. 11 of the judgement).
- Case C-310/91, 27 May 1993. *Hugo Schmid v Belgian State, represented by the Minister van Sociale Voorz.* ECR 1993, page I-3011. The case of *Schmid* reaffirmed the interpretive approach, demonstrated in *Frascogna* and *Deak*, where Regulation 1408/71 was ruled out as legal basis, but right provision was extended, in any case, on the basis of Regulation 1612/68. As in the case of *Taghavi*, the case concerned the Belgian disability allowance, but here the Court concluded in favour of the family member. Mr. *Schmid* lived with his daughter in Belgium, where he worked. They were both of German nationality. Mr *Schmid* applied for invalidity benefit to his daughter, but the application was refused on the grounds that the daughter did not fulfil the legislative conditions of nationality and residence. The European Court of Justice based its ruling on the distinction between personal rights and derived rights as manifested in case C-40/76 *Kermaschek* (para. 12 of the judgement). Mr. *Schmid's* daughter was not entitled to the Belgian disability benefit, being of German nationality, since the allowance was provided for by the national legislation as a right "in person which are not granted on the ground of status as a member of a worker's family" (para. 10 of the judgement). However, the Court considered Regulation 1612/68 as legal basis and found that the benefit constituted the "social advantage" as formulated in Article 7 (2). On this behalf Mr. *Schmid's* daughter had a right to equal treatment with Belgian nationals.

^{xiii} Mrs *Cabanis-Issarte* was the surviving spouse of a migrant worker. They both had French nationality. The couple had resided in the Netherlands since 1948 while the husband worked there. While residing in the Netherlands, Mrs. *Cabanis-Issarte* was compulsorily insured according to the general Dutch old age insurance law. The married couple spent three years in France between 1960 and 1963, where the wife was still affiliated in the Dutch insurance scheme through voluntary contributions paid by her husband. After retirement in 1969, they moved permanently back to France. The case considered whether Mrs. *Cabanis-Issarte* had the same right to reduced contribution when staying outside the

Dutch borders as Dutch nationals. According to the national legislation, this was a personal right and therefore did not apply to the wife of the migrant worker.

^{xiv} The first preliminary question in the *Cabanis-Issarte* case addressed whether the principle of equal treatment for nationals and migrant workers, as laid down in Article 3 of 1408/71, also applied to the family member in the case of a reduction in contributions that nationals were entitled to. The second question raised concerns about whether discrimination against the family member in the concrete case was compatible with the object of free movement of persons as expressed in particular in Article 48-51 of the Treaty.

^{xv} The Advocate General Pergola discussed in his opinion whether the right to move and reside freely in the Union flows directly from the Treaty. The German government argued that Mrs *Sala* was covered by the residence directive 90/364/EEC, which gives the unemployed a right to reside in another member state, as long as he/she is not a burden to the social security system. The German state argued that Mrs *Sala* did not meet the conditions laid down in the residence directive, and thus could not claim any right of residence under Community law. Her right to remain derived only from the international agreement applied in the German national provisions, which prohibited Germany from repatriating her. At the hearings, this point of view was also held by the French and British governments. The three governments thus argued that Article 8A of the Treaty did not give any greater substance to the free movement of persons. Advocate General Pergola argued to the contrary. Since Article 8A entered into force with the Maastricht Treaty, the right to reside freely could no longer be considered to depend on a directive. It was no longer simply a derived right, but a right stemming directly from primary law and its expression of Union citizenship. "The right to move and reside freely throughout the whole of the Union is enshrined in an act of primary law and does not exist or cease to exist depending on whether or not it has been made subject to limitations under other provisions of Community law, including secondary legislation" (para. 18 of the opinion). Pergola took his opinion further, concluding, on the right to equal treatment, that "the Union as conceived in the Maastricht Treaty, requires that the principle prohibiting discrimination should embrace the domain of the new legal status of Common citizenship" (para. 23 of the opinion). The Court did, however, not discuss whether Mrs *Sala*'s right of residence stemmed directly from the Treaty, but simply concluded that it was evident that she had a right to reside in Germany and therefore it was not necessary to consider the issue any further (para. 60 of the judgement).

^{xvi} Mrs *Sala* had lived in Germany since 1968, except for an interruption of two years. From 1976 to 1986, she was an employee in Germany and again until 1989, however with some unemployed periods. Since 1989, she received social assistance from the Nuremberg local authority. Until 1984, Mrs *Sala* obtained several residence permits. When in 1993, having given birth to her second child, she applied for child raising allowance. The application was, however, refused from the competent office in the state of Bavaria on the ground that she was not a German national nor in possession of a residence permit. The national court, however, found that according to the European Convention on Social and Medical Assistance of 11 December 1953, Mrs *Sala* could not be repatriated. Four preliminary questions were raised to the European Court of Justice on the issue. The first question addressed whether Mrs *Sala* could be classified as a worker, the second and the third whether the German child raising allowance fell within the meaning of family benefit of Regulation 1408/71, the fourth whether the German requirement of a residence permit for other member state nationals to achieve the benefit was compatible with Community law.

^{xvii} Before drawing too far-reaching conclusions on the European migrant's right to equal treatment in another member state, future case-law will have to clarify several points. The pending case C-138/02 *Collins* is likely to clarify new aspects. So far, the Advocate General Ruiz-Jarabo Colomer has stated interesting viewpoints regarding the social security rights of the Union citizen in his opinion of 10 July 2003, where he considers the member state's competence to prevent 'benefit tourism' (para. 75 of the Opinion). The *Collins* case concerns an American citizen, who also has Irish nationality. Collins moved from the US to the United Kingdom to seek work there. 8 days after arrival, he applied for job seeking allowance without having any further connection with the UK, other than being a Community citizen. The application was turned down because he did not fulfil the habitual residence requirement in the British Act. The Advocate General concluded in his opinion that a citizen of the Union cannot automatically rely on the Treaty's Article 18 in conjunction with Article 12. According to the Advocate General, it remained in compliance with Community law when the member state assesses the applicant's connection with the state, such as when requiring 'habitual residence', or when considering his link to the employment market. The Advocate General concluded: "Community law as it now stands does not require that an income-based social security benefit, intended for jobseekers, be provided to a citizen of the Union who enters the territory of a Member State with the purpose of seeking employment while lacking any connection with the State or link with the domestic employment market" (Conclusion of the Opinion).

^{xviii} Those conditions have however been questioned regarding the student residence directive 93/96, by the recent case of *Rudy Grzelczyk* [case C-184/99, 20. September 2001. *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*. ECR 2001, p. 6193]. The case concerned a French national, studying in Belgium. During his first three years of study, he earned his living by various minor jobs. In his fourth year of study, he applied to the Belgian authorities to grant him the Belgian Minimex allowance (minimum means of subsistence). The minimex was first granted, but later withdrawn with reference to the nationality requirement in Belgian law. The Court first concluded, referring to the earlier case 249/83 *Hoeckx*, that the minimex constitutes a social advantage within the meaning of Regulation 1612/68. It then noted that a Belgian student, although not a worker according to 1612/68, but in exactly the same conditions as *Grzelczyk*, would qualify for the minimex. Discrimination solely on the grounds of nationality therefore took place. Despite the conditions of the residence directive, stating that a student must be able to provide for himself: "Articles 6 and 8 of the Treaty preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State" (para. 46 of the judgement).

^{xix} The Court laid down an extensive meaning of Regulation 1612's worker concept in the case of *Levin* [case 53/81, 23 March 1985. *Levin v. staatssecretaris van Justities*. ECR 1982, p. 1035], where the Court clarified that part-time work is not excluded from the definition. Even when part time work is insufficient to fully support the person, it may be classified as 'effective and genuine'. The Court went even further in the case of *Kempf* [case 139/85, 3 June 1986. *R.H. Kempf v. Staatssecretaris van Justitie*. ECR 1987, p. 1741]. *Kempf* was a part time German music teacher, residing in the Netherlands, who supplemented his earnings from public benefit. The Court found his work 'effective and genuine' even though it was only 12 hours a week, and concluded that the status of worker could not be denied simply because the additional funds were public ones. Also in the case of *Lawrie-Blum* [Case 66/85, 3 July 1986. *Deborah Lawrie-Blum v. Land Baden-Württemberg*. ECR 1986, p. 2121], the Court took a broad approach, stating that although a trainee teacher only taught a few hours a week, she was still classified as a worker. The Court ruled that the essential characteristic of an employment relationship is that one person performs an act or service for another person and is paid for it. For an in-depth description of the extensive interpretation by the Court of the worker concept see, among others, O'Leary (1999); Jacobs (2000).

^{xx} Mrs *Hoekstra* (born Unger) was residing in the Netherlands and had been compulsorily insured against sickness as a person with a contract of employment. When she stopped working, she remained voluntarily insured. While visiting her parents in Germany, Mrs *Hoekstra* fell ill, and after her return to the Netherlands, she applied for her medical treatment costs to be reimbursed. She was, however, denied reimbursement with reference to a provision in the Dutch law, according to which the voluntarily insured could not have the costs of medical treatment reimbursed when treated outside the borders of the Netherlands.

^{xxi} Case 7/75 *Fracas* was one of the early case-law where the Court dealt with the rights of family members [case 7/75, 17 June 1975. *Mr and Mrs F. v Belgian State*. ECR 1975, page 679]. Mr and Mrs *Fracas* were Italian nationals, residing in Belgium where Mr *Fracas* had worked since 1947. Their son was handicapped from birth. In 1973, the parents applied for handicap benefit under Belgian law. The application was, however, rejected on the grounds that the son was neither of Belgian nationality nor fulfilled the second criteria under national law: to have resided in Belgium for at least 15 years after having reached the age of 20. In the written observation submitted by the Belgian government, the member state stressed that the benefit was a personal right and not one that could be derived through the status as family member. In the judgement, the Court stated the contrary. The handicapped child had the right to enjoy the same benefits as nationals of the residing member state. The Court also concluded that if the handicapped child could not himself acquire status as worker, the right to equality of treatment continued beyond the end of minority.

^{xxii} The case C-2/89 *Kits van Heijningen* dealt with how much the migrant worker had to work to qualify as 'employed person' [Case C-2/89, 3 May 1990. *Bestuur van de Sociale Verzekeringsbank v G.J. Kits van Heijningen*. ECR 1990, page 1755]. *Kits van Heijningen* resided in Belgium, but worked full-time in the Netherlands, where he also taught two hours twice a week. After he retired from his fulltime activity, he kept teaching. He claimed child allowances under Dutch legislation for his two children who were studying. The competent institution, however, refused the application. The Dutch general law on child allowances administered under two criteria: that the claimant was a resident, or paid income tax for work performed in the Netherlands. The Court concluded that the amount of time spent on a working activity was irrelevant for the inclusion in the personal scope of Regulation 1408/71 as long as the person was insured

in a member state's social security scheme for employed persons. Compared with Regulation 1612/68, the personal scope of 1408 was laid down even wider, since the work activity did not have to be 'effective or genuine'.

^{xxiii} Mr *Brack* was a British national, residing in Britain and insured under the British national insurance scheme for 9 years as an employed person, and thereafter for 17 years as a self-employed person. In September 1974, *Brack* went on holiday in France where he fell ill and received immediate treatment. By the end of October 1974, he returned to the UK and claimed cash sickness benefit for the period when he was ill in France. The claim was refused by the British insurance officer due to the relevant national Act, according to which "a person shall be disqualified for receiving any benefit ... for any period during which that person ... is absent from Great Britain ..." (Section 49 (1) of the British National Insurance Act of 1965).

^{xxiv} *Van Roosmalen* was a priest of Dutch nationality who always worked outside of the geographical borders of the Community. At the age of 22, he moved to Belgium to continue his studies. After becoming a priest, he was sent to Belgian Congo (Zaire), where he remained for 25 years, only interrupted by three years on leave, which he spent with his parents in the Netherlands. During his stay in Zaire, he was supported by his parishioners, but he was, at the same time, voluntarily insured in the Netherlands. However, he did not pay income tax to the Dutch state while residing in Zaire. In January 1981, he became incapable of work and returned to Europe. He settled temporarily in the Netherlands and received invalidity benefit there. In June 1982, he established himself in Belgium, and since he no longer fulfilled the residence requirement in the Dutch law, the competent institution decided to suspend his benefit. The preliminary reference to the European Court of Justice questioned whether *van Roosmalen* fell within the personal scope of the Regulation and whether the residence requirement in national law was compatible with Community law.

^{xxv} All cases concerned third country nationals regarded as stateless persons under German law. Mrs *Khalil* and her husband were Palestinians from Lebanon who had fled the civil war. They had lived continuously in Germany from 1984 and 1986 respectively, but had not been recognised as political refugees. Mr *Chaaban* and his wife were Kurds from Lebanon, who had fled the civil war as well. They arrived in Germany in 1985, where they had lived continuously since, but had not been recognised as political refugees. Mr *Osseili* had a Lebanese travel document for Palestinian refugees. He and his wife had stayed in Germany from 1986. They had not been granted asylum. Also Mr *Nasser* had a Lebanese travel document for Palestinian refugees. He and his family had stayed in Germany from 1985, but had not been recognised as political refugees. In all four cases, child benefit had been stopped, because only foreigners possessing a residence permit were entitled to child benefit under the new version (entered into force on 1 January 1994) of the Federal Law on Child Benefit. Mrs *Addou* was an Algerian, who since 1988 had been living with her husband and children in Germany, whereto she had come from Algeria. The family had not been granted asylum. Mrs *Addou* had been refused child raising allowance, since she did not possess any residence permit which is a requirement under the Federal Law on Child-Raising Allowance.

Chapter V: Social Benefits Beyond National Borders? Institutionalising the Principle of Exportability

This chapter continues the analysis of supranational institutionalisation between T_0 and T_2 , exploring 'to what extent' and 'how' the *material scope* of 1408/71 and its *principle of exportability* have been expanded. The analysis falls in three parts, investigating, 1) the institutionalisation of Regulation 1408's material scope, 2) the dispute on the territorial demarcation or exportability of those special social benefits, which fall between social security and assistance, and finally 3) the specific institutionalisation process of the right to foreign health care.

The empirical analysis will be conducted diachronically, aiming to link decision-making as it happens over time. On the basis of the empirical results, certain theoretical assumptions on institutionalisation and the interaction of law and politics, as depicted in chapter II, will be re-examined. From a theoretical perspective, the analysis traces how the reach and content of an institution are gradually transformed, and thus aims to explore the premises of institutional change. Since judicial decision-making has largely furthered this part of institutionalisation, the role of the Court is brought into focus, and the capacity of law to further integration contrary to the preferences of the member states, will be questioned. Furthermore, following this, the political response to legal innovation will be explored. That is, the following examination of institutionalisation, seen as being determined by the interplay of law and politics, addresses both the dynamics of institutionalisation as well as moments of 'decreasing returns'. Returning to the model built up in order to analyse institutionalisation (chapter II, section 1), the analysis will trace how the material scope of the

institution expands through a repetitive process of legal (re)interpretations and clarifications, and how the principle of exportability evolves and is conditioned through the interaction of law and politics over different stages.

Section one analyses the evolution of the material scope of Regulation 1408, which despite political status quo preferences has been dynamically extended through judicial activism. *Section two* explores the legal-politics game involved in settling the status of 'special non-contributory' benefits. *Section three* analyses intra-European health care as individual theme, and thus examines institutionalisation of a specific policy field in detail and over time. Finally, *section four* concludes with the analytical findings.

All three analytical sections do, in their own respects, draw the same picture. The generation of rules and rights is a continuous process. The clashes between Community law and national policies produce conflict and clarification. However, clarification is the more temporary state of affairs, which lasts until a new situation arises. Institutionalisation is indeed a dynamic process, the content and direction of which form only very gradually over time.

1.0: The Material Scope

On the face of it, the material scope of 1408 appears static. When adopted in 1971, the material content of the Regulation repeated that of the preceding Regulation no. 3, which applied to the traditional branches of social security, as stated in ILO convention no. 102 of 1952. Since its adoption, the Council has only extended the material scope of 1408 once. That was when special schemes for civil servants were included in 1998.¹⁵⁷ However, the recently adopted common position of the Council has furthermore announced that Regulation 1408's material scope will be extended to cover statutory pre-retirement schemes (COM (2004) 44).

From a historical comparative point of view, it could be argued that the substantial scope of 1408 is an institutional repetition, where only one amendment so far has managed to change a scope laid

¹⁵⁷ Council Regulation (EC) No 1606/98 of 29 June 1998 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

down as far back as 1958, and defined as early as 1952. The early settlement of the material scope means that the understanding of 'social security' as expressed in Article 4 of the present Regulation, dates back to the years when the European Coal and Steel Community was founded. At that point of time, the six original Community members shared between them a Bismarkian notion of social security, where social security meant social insurance, and had little in common with social assistance (Pieters 1997, p. 207). Social security schemes have, however, changed much since then. New member states have introduced other welfare traditions into the coordination system. At the same time, the traditionally Bismarkian welfare states have introduced new benefit types and other criteria for entitlement than contribution.

Despite an apparent institutional status quo, the material scope of 1408 has been extended dynamically. At the same time as the Council of Ministers has resisted change on the material substance, the European Court of Justice has expanded it all the same. Throughout the regulatory existence of 1408, the Court has attempted to up-date the institution, and to bring the Regulation into line with contemporary developments at the national level, with new interpretations of supranational primary law, and with its own jurisprudence. The material scope and limits have rather been set by the Court than by the Council, where the radical case-law interpretation of the former has compensated for the political inability or unwillingness of the latter to revise a 50 year old understanding of social security. Whereas 1408 does not acknowledge a modern view of social security, the case-law interpretation thereof aims to do so (Igl 1997, p. 101).

The following sections analyse how the material scope and the principle of exportability of 1408 has been incrementally extended – not through gradual policy reforms – but through piecemeal jurisprudence. Section *one* briefly pictures the legal attempts to define 'social security'. The next three sections analyse how the Court has managed to integrate new welfare schemes into 1408's material scope, at the same time as the Council has neglected to do so. Section *two* treats the issue of special schemes for civil servants, *three*, that of family benefits and, *four*, that of long term care benefits. Section *five* turns to the political reply to proposals on the future material scope. Finally, section *six* concludes on the incremental generation of exportable European social security rights.

1.1: Defining Social Security

Article 4 of Regulation 1408 provides us with an exhaustive list of the social security risks which are materially covered. At the same time, the limits of the material scope are laid down in Article 4 (4), which originally stated that:

"This Regulation shall not apply to social and medical assistance, to benefits schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such".

From the early case-law on, the Court was requested to draw the line between included^{xviii} and excluded^{xviii} benefits. While it is clear that 'social security' benefits are included, and that 'social' and 'medical assistance' are not, the Regulation does not, however, provide a definition of 'social security' as opposed to 'social assistance'.¹⁵⁸ Much of the political, legal and administrative dispute on the material scope of 1408 has concerned defining the boundary between these two benefit types. Setting this boundary concerns much more than clarifying conceptual disagreement. It also decides to which benefits the principle of equal treatment and the principle of exportability apply. It thus decides which benefits the member states can limit to their own citizens or long term residents and can restrict to its own territory.

From the early case-law on, the Court has defined 'social security' extensively. Jurisprudence laid down that 'social security' benefits were benefits granted to a person on the basis of a legally defined position.^{xviii} 'Social assistance', on the other hand, had need as an essential criterion for its application.^{xxix} Since some benefits might have dual characteristics, their nature depended on their 'relating factors', and not on how they were described in national legislation:

"The distinction between benefits which are excluded from the scope of Regulation no 1408/71 and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant, and not on whether the national legislation describes the benefit as a social security benefit or not" (summary of case 249/83 *Hoeckx*¹⁵⁹).

So concluding, the Court emphasised its own role as the last instance for the authoritative interpretation of a social benefit's true character. However, whereas the Court, in its earlier case-

¹⁵⁸ Article 1 of 1408/71 generally defines the various concepts in the Regulation. The Article gives no definition of social security versus assistance.

¹⁵⁹ Case 249/83, 27. March 1985, *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalbthout*. ECR 1985, p. 973.

law, circulated around defining a borderline between social security, on the one hand, and social assistance, on the other, it never gave a precise definition. It was left up to individual cases to consider the relating factors of a benefit, its purpose and the conditions for its being granted. The original attempt to draw the border between the two benefit types has also at the same time, been overtaken by the continuously changing nature of welfare states. Social insurance systems of today entail more means-testing, and social assistance is, to a greater extent, a legally enforceable right, with less space open for administrative discretion. Due to the changing character of the social security schemes at the national level, the would-be borderline between social security and assistance has lost much of its clarity over the years (Pieters 1997b, p. 188). In this context of multiple developments, it has primarily been the task of the ECJ to 'update' the material scope of 1408 to contemporary welfare schemes. The following three sections analyse such 'institutional update', with regard to special schemes for civil servants, new types of family benefits and long term care schemes.

1.2: First Institutional Update – Special Schemes for Civil Servants

Although Article 4(4), up until the late 1990s, explicitly stated that 'special schemes for civil servants' were excluded from the material scope, the Court has, however, considered the status of those schemes on two occasions. Between the early ruling of 1979 and the later one in 1995, a change of legal reasoning took place. Back in 1979, case 129/78 *Lohmann*¹⁶⁰ confirmed the wording of Article 4 (4), excluding "special schemes for civil servants" from the material scope of 1408.^{xxx} In the early judgement, the Court emphasised that *Lohmann* did not have the status as a worker, as he was a civil servant, and therefore could not rely on 1408/71. In the late 1970s, the Court found that Article 4 (4) was the logical consequence of Article 48 (4) of the Treaty, which exempted employment in the public service from the Treaty's objective of promoting the free movement of workers.

In case C-443/93 *Vougioukas*¹⁶¹, the Court, however, changed this point of view. *Vougioukas* was a Greek doctor who, when applying for retirement pension, requested the Greek competent institution

¹⁶⁰ Case 129/78, 8. March 1979. *Bestuur van de Sociale Verzekeringsbank, Amsterdam v A. E. Lohmann*. ECR 1979, p. 853.

¹⁶¹ Case C-443/93, 22. November 1995. *Ioannis Vougioukas v Idrima Koinonikon Asphalisseon (IK4)*. ECR 1995, p. I-4033.

to add his periodical employment in Germany into the calculation of his pension.¹⁶² The Greek government, however, referred to the case of *Lohmann* and argued that the exclusion of special schemes for civil servants was justified under Article 48 (4) of the Treaty.

In contrast to the case of *Lohmann*, the Court first stated that the subject matter and aim of the Treaty's Article 48(4) and 1408's Article 4 (4) were different (Pennings 1998, pp. 59-60).¹⁶³ The Court was furthermore requested to consider whether the exclusion in Article 4 (4) of the special schemes for civil servants, was contrary to Article 48 and 51 of the Treaty. The Court found that since the adoption of 1408/71, its context had changed. At the time of adoption, it might have been justified to exclude special schemes for civil servants, and persons treated as such, because of the profound differences between national schemes (para. 32 of the judgement). According to this new reasoning of the Court, the maintenance of the exclusion of these schemes from the material scope could no longer be justified by the technical difficulties of coordination. Especially not since the Commission had submitted its proposal to bring the schemes into the regulatory scope of 1408 (para. 33 of the judgement).¹⁶⁴ The Court openly reprimanded the Council for not having fulfilled its Treaty obligations:

"The Community legislature, however, has not yet adopted the measure necessary to extend the material scope of Regulation 1408/71 to special schemes for civil servants and persons treated as such, with the result that Article 4 (4) of the Regulation leaves a considerable lacuna in the Community coordination of social security schemes. [...] In any event it must be concluded that, by not introducing any measure for coordination in that sector [...] the Council has not fully discharged its obligation under Article 51 of the Treaty" (paras. 31 & 34 of the judgement).

The specific result of the jurisprudence was that Mr *Vougioukas*, as a doctor, was entitled to have his employment periods in Germany aggregated. The general result was that the Court instructed the Council to coordinate the special schemes for civil servants (Haverkate & Huster 1999, p. 105).

Less than three years later, the Council adopted Regulation 1606/98, which added special schemes for civil servants to the material scope of 1408. In the explanatory memorandum, the Council gave

¹⁶² *Vougioukas* had been employed in German public hospitals between 1964-1965 and subsequently 1966-1969.

¹⁶³ Article 48 (4) aims to take into account the interests member states may have in reserving certain employment posts for their own nationals.

¹⁶⁴ Hereby referring to COM(91) 528.

its reasons for its legislative action with regard to the *Vougioukas* judgement. Due to the jurisprudence of the Court, the personal and material scope was extended to include special schemes for civil servants and people treated as such.¹⁶⁵

The *Vougioukas* case still stands out as a landmark judgement. The ECJ underscored that certain rights stem directly from the Treaty, even though a specific provision which had been adopted – and maintained – by the Council stated to the contrary (Quintin 1997, p. 234). By its judgement, the Court neutralised secondary legislation which had been adopted politically. It is a landmark case because it was clear that the Community legislator had not yet agreed to coordinate these special schemes for civil servants. It, however, became bound to do so by the Court's interpretation of its Treaty obligations and its own respect for the rule of law. It is also a remarkable case because the discrepancies between the cases of *Lohmann* and *Vougioukas* illustrate that Treaty obligations and objectives are not definitively laid down, but are open to further interpretations. In a theoretical perspective, the case is an interesting illustration of the interplay between Court, Commission and Council. Legal innovation became the justification, or the policy window, for the Commission to re-propose that the material scope was extended, and the background against which the Council accepted to do so.¹⁶⁶

1.3: Second Institutional Update – Family Benefits

Later litigation on the material scope depicts in greater detail the encounter between newer national social policies and the co-ordination system. Due to 1408's traditional understanding of social security, new forms of social policies could, qua national definitions and criteria, be placed outside the regulatory scope of 1408. In the second half of the 1990s, such new benefit types appeared as points of conflicts.

¹⁶⁵ Among other changes, Regulation 1606/98 amended parts of Article 1, Article 2 (3) was deleted and the part of Article 4 (4) excluding from the material scope "special schemes of civil servants and persons treated as such" was also deleted.

¹⁶⁶ Regulation 1606/98 was agreed upon against the background of the amendment proposal COM (91) 528, but only concerned its proposed part on special schemes for civil servants, and not the general extension of the personal category. The proposal had been subdivided by the Commission to create compromise. The compromise meant that non-active persons were not included as part of the personal, regulatory scope (Note from the Danish Ministry of Labour to the European Parliamentary Committee, 22 May 1998, annex 293).

The case-law discussion in the present and in the following section, illustrates the Court's capacity to modernise the co-ordination institution despite political unwillingness to do so. *Family benefits* is one policy-area which has gained importance as welfare policy, another is *long term care benefits*. Both policy areas represent national institutional responses which are intended to tackle more recent demographic developments.

Due to its non-contributory character, different policy objectives and territoriality, family benefits have been frequent areas of policy conflict for the co-ordination system. As the analysis of case 41/84 *Pinna* and case C-185/96 *Commission against Greece* in chapter IV section 1.1 demonstrated, the reasons why policies with national demographic aims should equally aim to increase the birth-rates of other member states have not been obvious to national governments or administrations (van Raepenbusch 1997, pp. 82-83). The cluster of case-law addressing family benefits have, however, repeatedly clarified that member states are no longer in a position to adopt policies which respond to demographic developments, without taking the institutionalised principles of Regulation 1408 into consideration.

The case C-78/91 *Hughes*¹⁶⁷ considered the case of British family credit, and to what extent it should be categorised as social assistance or as a social security benefit. The case concerned whether Mrs *Hughes* had the right to the British family credit, despite her residence in Ireland, but due to her husband's work in Britain.^{xxxii} Since the British act on family credit was based on the principle of territoriality, Mrs. *Hughes* did not qualify for the benefit. Before the Court, both the British and the German government defended the residence clause, arguing that family credit was a social assistance type of benefit.^{xxxiii} That national classification was, however, overruled by the judgement. The Court repeated that the distinction between benefits which are included and excluded, depended on the constituent elements, and not on the classification made by the individual state. It pointed to how it consistently had held that a benefit was a social security benefit if it was granted without discretionary assessment of the personal needs, but on the basis of a legally defined position (para. 15 of the judgement).^{xxxiii} The family credit was not granted on basis of an individual assessment of personal needs, and;

¹⁶⁷ Case C-78/91, 16 July 1992. *Rose Hughes v Chief Adjudication Officer, Belfast*. ECR 1992, page I-4839.

"a benefit which is granted automatically to families meeting certain objective criteria, relating in particular to their size, income and capital resources, must be considered as a family benefit for the purposes of Article 4 (1) (h) ... (para. 22 of the Judgment)"

The principle of exportability in Community law entitled Mrs *Hughes* to the family credit, and set aside the residence requirement of British law.^{xxxiv}

During the 1980s, several member states introduced different types of 'child raising' allowances as a new family benefit. A general aim of the benefit was to make it possible for one of the parents to stay at home with the child during its first years. However, neither national nor community law specified the relationship between the new social benefit and Regulation 1408 (Altmaier 1995, p. 86). The joined cases *Hoever & Zachow*¹⁶⁸, C-245/94 & C-312/94 concerned the German child raising allowance, i.e. 'Erziehungsgeld', adopted in December 1985. This type of child care benefit differed from the traditional German family benefit, i. e. 'Kindergeld', in its objective and qualifying conditions (Igl 1997, p. 97). From a German legal, political and administrative perspective, 'Kindergeld' had traditionally been regarded as the only family benefit within the meaning of Regulation 1408 (Eichenhofer 1997, p. 450; Interviews: German Federal Ministry of Labour and Social Affairs, 17 September 2001; German Bundesanstalt für Arbeit und Sozialordnung, 25 September 2001). The child raising allowance had, on the other hand, not been viewed as a classic family benefit, and had thus been regarded as outside the regulatory scope of 1408/71. That point of view was challenged and corrected by the case law of the Court.

The cases of *Hoever and Zachow* concerned two migrant families, residing in the Netherlands, but with the husbands working full-time in Germany. The wives applied for the German child-raising allowance, without personally being affiliated in the German social security system.^{xxxv} The German social court asked the ECJ whether the 'Erziehungsgeld' was a family benefit within the meaning of Article 4 (1) (h) of 1408/71. And, if so, could the wife of a migrant worker who did not possess a personal right to the benefit, claim the benefit with regard to 1408/71?

¹⁶⁸ Joined cases C-245/94 and C-312/94, 10. October 1996. *Ingrid Hoever and Iris Zachow v Land Nordrhein-Westfalen*. ECR 1996, page I-4895. The "Erziehungsgeld" is governed by the German "Bundesgesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub".

Based on the principle of territoriality, the German law on child care benefit denied Mrs. *Hoever* and Mrs. *Zachow* any right to child raising allowance. Among other criteria, the national law specifies that to qualify for the child care benefit one must reside in Germany¹⁶⁹ or, if not residing there, have worked at least 15 hours a week in Germany.¹⁷⁰ Furthermore, one does not qualify if one is in full employment.¹⁷¹ The German government did not find that its "Erziehungsgeld" was a family benefit included in the *ratione materiae* of 1408/71, since its purpose was not to meet family expenses (referred in para. 24 in the opinion of the advocate general Jacobs). In its opinion, the German government argued that the "Erziehungsgeld" is different from the "Kindergeld". The intention of the "Erziehungsgeld" was argued to be to make it possible for one of the parents to stay at home in the first phase of the child's life, and to remunerate such a choice.

Answering the first question which was posed, the Court was clear and short. In its reasoning it referred especially to the case of *Hughes*, and the Court re-stated that it was the constituent elements of each benefit that decided its classification (paras. 17 & 18 of the judgement). Since the German "Erziehungsgeld" was granted automatically to persons fulfilling objective criteria without any individual or discretionary assessment of needs, it was a family benefit within the meaning of Article 4 (1) (h) (para. 27 of the judgement). The second question which was posed concerned the rights of a family member who did not reside in the country where her husband was employed and where the competent institution was situated. She was also not personally subject to German social insurance. According to national law, the plaintiff must be personally eligible for the allowance, i.e. must *personally* fulfil the conditions. In observations given by the German, Spanish and French governments, they all referred to the line of authority laid down in *Kermaschek*, and emphasised that the family member only had a derived right (observations referred in para. 31 of the judgement). However, the Court contradicted the stated opinions by re-stating its conclusions from case *Cabanis-Issarte*, which was analysed in chapter IV section 1.2. The scope of the rule laid down in *Kermaschek* was limited by *Cabanis-Issarte* to provisions which were only applicable to workers, and not to family members, such as unemployment benefit (para. 32 of the judgement). The Court concluded that the distinction between personal and derived right thus did not apply to

¹⁶⁹ Para. 1 (1) of the "Bundesgesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub".

¹⁷⁰ This exception is formulated as para. 1 (4) of the "Bundesgesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub".

¹⁷¹ Para. 1 (1) of the "Bundesgesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub".

family benefits, and Mrs *Hoever* and Mrs *Zachow* were therefore entitled to the child care allowance (para. 33 of the judgement).

The joined *Hoever & Zachow* cases powerfully demonstrate a Court which is both willing and in a position to contradict national opinions and the formulated criteria of national law. In the cases, the Court overruled both the territorial principle of German law, and the criterion that one has to be personally eligible for the child care allowance. It demonstrates that it is a Court that is willing to rule against national preferences, despite the financial implication thereof. To extend 'Erziehungsgeld' beyond German borders is a costly affair (Interview, German Federal Ministry of Labour and Social Affairs, 17 September 2001). Finally, the litigation exemplifies how previous and future case law link up together in a cluster, through which new authoritative lines of reasoning generate new concrete rights for the migrant. The case of *Hughes* was one reference point for the Court when in-cooperating 'Erziehungsgeld' in the material scope of Regulation 1408. Another reference was that of *Cabanis-Issarte*, which extended the principle of equal treatment to family members. In the reasoned opinions of the member states, they requested the Court to reconsider its ruling in the *Cabanis-Issarte* judgement by referring to the *Kermaschek* case-law. The Court did not submit to this request, but applied the conclusions of the very specific case of *Cabanis-Issarte* to the issue of family benefit. Furthermore, the *Hoever & Zachow* cases were the cases to which the Court referred in the case of *Sala*, analysed in chapter IV section 1.2, when concluding that also the non-active Martinez *Sala* had a right to 'Erziehungsgeld', despite the fact that she had no residence permit to stay within Germany. Both the *Hughes* and the *Hoever & Zachow* cases were replicated in the recent case C-333/00 *Maaheimo*¹⁷², in which the Court considered whether Finnish 'home child-care allowance' should be paid out abroad (paras. 22, 32, & 33 of the judgement).^{xxxvi} Previous case-law formed the basis of the line of reasoning upon which the Court found that the Finnish residence requirement in its home child-care policy was inconsistent with Community law. Once again, the Court set aside the national principle of territoriality.

This cluster of case-law has increasingly made it difficult for member states to disregard Community law as clarified by the Court, when trying to territorialise family policies. The cluster of case-law underscores the binding precedent of the Court's previous rulings. On the basis of a

¹⁷² Case C-333/00, 7. November 2002. *Eila Päivikki Maaheimo*. ECR 2002, p. I-10087.

patchwork of litigation, principles and aims are applied uniformly to different cases concerning different social security schemes and welfare traditions.

1.4: Third Institutional Update - Long Term Care Benefits

Long term care benefit represents a benefit which could not easily have been appreciated back when the material scope of 1408 was laid down. Its late inclusion into the Regulation and its stated exportability exemplifies a Court driven process, overruling political preferences and residence requirements.

Long term care has taken some time to find its name. Although 'reliance on care' has always existed as a social phenomenon, long term care did not figure as an independent or conceptualised social security risk in European or international conventions at the end of the 70s (Igl 1998; opinion of advocate general Cosmas in Case C-160/96 *Molenaar*). Although by no means being a 'new' social risk, it is a risk which, in some member states, has only lately become a part of public welfare, and has been institutionalised beyond the more immediate care provided by the family.

Germany adopted its 'Pflegeversicherungsgesetz' as late as 1995, thereby recognising long term care as an independent social risk. Before the adoption of the care insurance law, long term care was publicly granted as a social assistance benefit, or privately provided and financed (Igl & Stadelmann 1998, p. 37). Today any person insured against sickness is compulsory insured in the long-term care scheme. The social insurance is funded from contributions from both worker and employer, and entitles a member¹⁷³ reliant on care to care in a nursing home or in one's own home. If one should desire home care, it is possible to choose either care as a benefit in kind, or as a monthly allowance, i.e. 'Pflegegeld' where oneself purchase the care.

The monthly cash allowance has turned out to be the preferred form of home care. From the outset, 80% of those in home care chose the cash benefit (Igl 1998, p. 23). However, according to national

¹⁷³ The member has to complete an insurance period, which from the outset was one year, but then increased in stages to five years in 2000.

legislation, the entitlement to the German 'Pflegegeld' is suspended if one takes up residence abroad.¹⁷⁴ The 'Pflegegeld' thus relies on the territorial principle.

Whether the territorial demarcation of the German 'Pflegegeld' contradicts Community law was examined in case C-160/96 *Molenaar*¹⁷⁵. The case discussed the right to 'Pflegegeld' of Mr and Mrs *Molenaar*, a Dutch, German couple, working in Germany but living in France. They were both voluntarily insured against sickness in Germany and were, from January 1995, required to pay care insurance contributions, which they did. However, on application, they were informed by the competent German social security fund that they were not entitled to care insurance benefits due to their French residence.

The ECJ initiated its legal reasoning by referring to previous case-law, stating that a benefit was to be regarded as a social security benefit if granted "on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4 (1)" of 1408/71 (para. 20 of the judgement).¹⁷⁶ It added that the list of Article 4 (1) was exhaustive, meaning that a branch of social security not mentioned there was not part of the regulatory scope.¹⁷⁷ Long term care, such as the German 'Pflegeversicherung', was to be regarded as a sickness benefit within the meaning of Article 4 (1) (a) of Regulation 1408. Having thus included the care allowance within the material scope of 1408, the Court continued by examining whether the residence clause of German law could be justified against the Community principle of exportability.

1408's Article 19 (1) (a) & (b)¹⁷⁸ obliges the competent institution to export sickness benefits in cash, but not equally sickness benefit in kind (Huster 1999, p. 12). Although a monthly cash

¹⁷⁴ The residence clause is laid down by § 34 (1) (1) of the German Sozialgesetzbuch (Social Security Code) XI.

¹⁷⁵ Case C-160/96, 5. March 1998. *Manfred Molenaar and Barbara Fath-Molenaar v. Allgemeine Ortskrankenkasse Baden-Württemberg*. ECR 1998, p. I-880.

¹⁷⁶ The Court referred to case 249/83 *Hoeckx*, paras. 12-14; case 122/84 *Scrivner* paras. 19-21; case C-356/89 *Newton* and case C-78/91 *Hughes* para. 15.

¹⁷⁷ In this point, the ECJ here referred to case C-25/95 *Otte*, which will be further mentioned below.

¹⁷⁸ Article 19 (1) states: "Residence in a Member State other than the competent State – General rules [...]:
(a) *benefits in kind* provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he was insured with it
(b) *cash benefits* provided by the competent institution in accordance with the legislation which it administers [...]" (emphasis added).

allowance, 'Pflegegeld' was defined as a benefit in kind in German law. More specifically, the draft of the 'Pflegeversicherungsgesetz' defended the point of view that the care allowance constituted a 'benefit in kind-substitute', a 'Sachleistungssurrogat' (BT-Drucks 12/5262, p. 82; Zuleeg 1998, p. 172). The ECJ did not accept the national classification, but ruled that the German care allowance was indeed a benefit in cash (para. 36 of the judgement). As a consequence thereof, the Court concluded that the residence clause in German law conflicted with the principle of exportability of Regulation 1408.¹⁷⁹ The impact of the *Molenaar* case will be examined in more detail in chapter VII.

The *Molenaar* case is another case among the later jurisprudence, in which the Court corrected the ways in which national politicians classified a benefit. It is another case in which national policy had been drafted and adopted without – at least openly – having taken Community social security coordination into consideration, and which was subsequently corrected by the ECJ. It is thus another case exemplifying how social security policy cannot be autonomously drafted, but is conditioned by the existing European social security law. The obvious attempt by the German government to restrict long term care benefit to its own territory, by classifying it as a 'benefit in-kind substitute' failed. The *Molenaar* case demonstrates the Court's position in the social security field in the late 1990s. It demonstrates a Court capable of expanding the material and exportable rights of the migrant, despite national preferences, despite the financial implications that it may have for the litigating member state, and despite the considerable political importance of that specific member state. The legal activism that the Court carried out in the *Molenaar* case updated the material scope of 1408, and extended its provision of exportability.

1.5: Proposing the Updating of the Material Scope

Since Regulation 1408 was put into place, the Court's litigation has incrementally extended its material scope. However, restrictive legal interpretations are the other part of the description. The case-law setting the material scope admit member states the competence to formulate the criteria for the qualification for a benefit, as long as these do not contradict Community law.^{xxxvii} Case-law has also recognised that not each and every benefit which can be defined as 'social security' is part of

¹⁷⁹ As laid down by Article 19 (1) (b) of 1408/71.

the material scope, if it is not part of Article 4 (1)'s exhaustive list. In case 25/95 *Otte*¹⁸⁰, the Court thus ruled that a pre-retirement benefit was not part of 1408's material scope, since the Council of Ministers had not yet agreed on its inclusion.^{xxxviii} The Court's approach towards the Council of Ministers in the case of *Otte* appeared to be more obliging, than the rather confrontational style it adopted in the earlier case of *Vougioukas*.

The inclusion of pre-retirement benefits has been debated for more than two decades in the Council of Ministers. Back in 1980, the Commission proposed revising the Regulation's chapter on unemployment and inserting provisions including pre-retirement benefits (OJ C no. 169, 9 July 1980). Unanimity could however not be reached on this proposal, among other reasons because the issues of unemployment and pre-retirement benefits were linked in a single proposal (Cornelissen 1997, p. 48). To reopen the discussions on both benefits, the Commission withdrew the original proposal and formulated two independent ones, on unemployment and pre-retirement benefits respectively.¹⁸¹ In the simplified proposal, the Commission, however, abandoned the strategy of treating pre-retirement as an separate issue. COM (98) 779 re-proposed that the benefit was included in the material scope, and the Council has recently adopted a common position on extending Regulation 1408's material scope to also cover pre-retirement benefits. In this way, political approval has finally been given to update the institution, and to embrace a more modern type of social benefit.

1.6: Incremental Generation of Exportable Social Security Rights

The expansion of the material scope does indeed support theoretical assumptions on legal autonomy. It is the legal activism of the European Court of Justice which has settled the material scope of 1408/71 and extended it incrementally. While the strict wording of the substantial scope has only changed once since 1958, rights have been added over the years through case-law. Jurisprudence is the mechanism which – despite political reservations - updates the material content of the institution.

¹⁸⁰ Case C-25/95, 11. July 1996. *Siegfried Otte v Bundesrepublik Deutschland*. ECR 1996, p. I-3745.

¹⁸¹ COM (95) 734 concerned unemployment benefit. COM (95) 735 concerned pre-retirement benefits.

In the case of *Vougioukas*, the Court interpreted both the Regulation, its context, and the Treaty dynamically. The lesson taught by the Court was that while politicians might prefer institutional status quo, that was not, from a legal point of view, in keeping with the times. In concrete terms, status quo deprived the migrant of his rights, and could not be justified in the light of the Treaty's objective to promote the free movement of persons. The case-law neutralised Regulation 1408's exemption on 'special schemes for civil servants', and thereby set aside what had been adopted politically. The innovative ruling was not only accepted by the litigant government, but by the other member governments as well. The individual case of *Vougioukas* led to a subsequently codification by the Council. Judicial decision-making thus dictated political action. This research finding has theoretical implications for the legal politics game, as described by Garrett, Keleman and Schultz, since it exemplifies the outcome of an adverse decision, which is left out of their description. The *Vougioukas* case, first of all, broke with established legal reasoning (stage 1), secondly was accepted by not only the litigant government (in stage 2) but also by the other EU governments (stage 3), which, as a result of the judicial decision-making, amended secondary legislation. The member states chose to collectively codify the new principles laid down by the Court.

Child raising allowances represent one corner of family policy, which with its non-contributory nature and policy aims, does not straightforwardly fit into the classic co-ordination idea of social insurance. The *Hoever-Zachow* judgement must be seen as a key case in a longer line of cases, which together established binding precedent and generated new exportable rights for an extended personal scope. The cluster of case-law regarding family benefits demonstrates that member states can no longer formulate social policies to tackle specific developments, without taking the institutionalised principles of 1408/71 into consideration. The extended principle of exportability with regard to family benefits is, in theoretical terms, another example of the relative autonomy of the Court and its ability to act as a decision-maker, contrary to the preferences of the member states and the financial implications of its decision. The research findings thus reject simple assumptions about political power, whereby the Court should act cautiously towards the preferences of more powerful member states, as suggested by the work of Garrett et al. Its overrule of the territorial principles of British and German family policies, in fact, suggest that also the more powerful member states submit to the legal reasoning of the Court.

That is further confirmed by the case of *Molenaar*. The German 'Pflegegeld' was formulated so as to rely on the principle of territoriality, but the ruling of the Court corrected the way in which national politicians classified a social benefit. Contrary to Conant's findings on the limits of European law, this analytical result suggests that even though member states may attempt to preempt Community obligations when designing policies, such strategies are unlikely to be successful in the long run. The *Molenaar* case is therefore another example demonstrating that social policy cannot be autonomously drafted, but is very much conditioned by Community law.

The analysis of the material scope provides rich examples of how the Community principle of exportability may conflict with member states' social policy preferences, which aim to limit benefits within their own borders. However, this clash has not discouraged the Court from modernising the institution of 1408/71. When analysing the incremental development of 1408's material scope, it becomes clear that the Court has not exerted self-restraint. Neither has it been restrained by the Council. On the contrary, legal innovation has taken place despite political preferences and despite the political, administrative and financial implication thereof.

2.0: De-territorialized Social Benefits?

One of the most controversial issues in the history of the coordination system has been whether benefits characterised as 'special non-contributory' benefits are part of 1408's material scope. And if they are, are these 'special' benefits exportable?

The analysis above on the material scope points out that much of the case-law deals with the classification of social benefits as either 'social security' or as 'social assistance', thereby settling whether concrete benefits are in- or excluded from the regulatory scope, and therefore are exportable – or not. The dispute on definition intensifies with regard to 'special non-contributory' benefits.

When Regulation 1408 was adopted, its substantive scope seemed reasonably clear. On the one hand there were the included social security benefits, exhaustively listed by Article 4 (1) of the Regulation. The prime characteristics of national 'social security' schemes again seemed fairly obvious. The general characteristic of social security was, and still is, that security from social risks

is offered by public schemes through which specific categories of persons are, compulsory or voluntarily, insured against defined social risks. The schemes are generally financed by collectively paid contributions. The beneficiary of social security schemes is entitled to benefits according to a legally defined position, which mirror the individual contributions paid. The level of benefits is likewise legally specified and is independent of income (van der Mei 2002, p. 553).

On the other hand, there were the excluded '*social assistance*' benefits as laid down in Article 4 (4). Social assistance was and is different in nature, being what the state offers its citizens or long-term residents who are not able to provide for themselves, and have no alternative financial means. Social assistance is usually granted on a discretionary basis, within which a means test is likely to play a part. In contrast to social security, social assistance schemes are non-contributory, financed by tax-revenues. However, previous tax payment is not a criteria for entitlement (van der Mei, *ibid*). Social assistance policies have traditionally been based on the principle of territoriality.

The distinction between the two benefit types has become increasingly blurred over the years. As national welfare systems have developed, they have increasingly combined aspects of the two benefit types. The new mixed nature of some benefits means that today's social security may be granted on the basis of a means test, meanwhile social assistance may increasingly be a legally enforceable right (Pieters 1997, p. 207).

The development at the national level is reflected supranationally. Supranational attempts to draw the borderline between 'security' and 'assistance' has not been helped much by the Regulation itself, which contains no definition (Pennings 1998, p. 62). The separation of the two concepts has therefore relied on the Court of Justice's interpretations. From the earliest case-law on, the Court has admitted that certain benefits may have a dual character, somewhere between social 'security' and 'assistance', while it has, at the same time, refused to draw an authoritative distinction between the two. The first case treating this duality was the early case of *Frilli*¹⁸².

"Although it may seem desirable, from the point of view of applying the Regulation, to establish a clear distinction between legislative schemes which come within social security and those which come within assistance, it is possible that certain laws, because of the classes of persons to which they apply, their objectives, and the detailed rules for their application, may simultaneously contain elements belonging to both categories mentioned and thus defy any general classification" (para. 13 of the judgement).

¹⁸² Case 1/72, 22. June 1972, *Rita Frilli v Belgian state*, ECR 1973, page 457.

Due to their affinities with social assistance, member states have insisted that these 'hybrid' benefits are not exportable. As a matter of fact, 1408's predecessor Regulation 3/58 contained an Article 10 (2), which exempted certain non-contributory benefit from the general export clause (van der Mei 2002, p. 558). That specific provision was, however, left out in 1408/71. A central part of the debate between the Court, individual states and the Council, addressed whether Regulation 1408's principle of exportability applied to these benefits of dual character.

This analytical section will carry out a process tracing study, which will identify an intense legal-political dispute on the defining character of individual benefits and their possible exportability. From a theoretical perspective, the study will trace certain propositions on institutionalisation as determined through the interaction of law and politics. The status of 'hybrid benefits' was initially set by innovative litigation, but later corrected politically. Contrary to the development on the material scope, as analysed in this chapter's previous section, the Council managed to mobilise a legislative overrule and reined in the interpretations of the Court. The Council's response was to legislate a 'special rule', which lay down the non-exportability of so-called hybrid benefits. That, however, provided no immediate end to the controversy. The dispute went on, and the compatibility of the 'special rule' with the Treaty text was questioned, as were the limits of the legislated exception.

The following analysis employs a 'stage game' approach in an attempt to depict what happened during individual periods of time and what the subsequent reactions were. The individual stages correspond to the ones depicted theoretically in figure 3 of chapter II, as part of this thesis' model with which to analyse institutionalisation. Together individual stages constitute a development, running from T_0 , over T_1 , to T_2 . Section 1 discusses early legal innovation corresponding to stage 1. Section 2 takes us to the political reaction of non-compliance, occurring in stage 2. Section 3 depicts how the member states collectively restrained the Court and re-territorialised these benefits of dual character in stage 3. Finally, section 4 corresponds to 'beyond stage 3' and includes the latest jurisprudence on the matter. The section concludes on the course of development, which has, by no means, been linear nor automatically given.

2.1: Stage 1 - Legal Innovation

One of the first benefits which came up for examination in the legal, political dispute on 'special non-contributory' benefits, was the Italian social aid pension. The relevant case dealt with the rights of *Mrs Piscitello*¹⁸³, an Italian national who, from 1973, had received social aid pension from the Italian state. The Italian competent institution had, however, stopped payment when she moved to Belgium in 1975 to live with her family.¹⁸⁴ The Italian court now asked the ECJ whether the social aid pension came within the material scope of 1408 and, if so, whether the Community waiver of residence clause applied.

Italian authorities claimed before the Court that the social aid pension fell outside "the spirit, purpose, terms and objective of the Treaty of Rome" (ECR 1983, p. 1431). From their point of view, the right to export a benefit was exclusively related to compulsory social insurance, based on paid employment. The social aid pension could therefore not be interpreted as an old age benefit within the meaning of the Regulation. In addition, the Italian government emphasised the necessity to distinguish between 'social security' and 'social assistance' by drawing out the different functions of the various benefits and the different conditions for their grant. The UK government also submitted an observation, and equally requested the Court to come up with a distinction between 'social security' and 'assistance'. It warned that if the principle of exportability was imposed on social assistance benefits, it would upset the national systems, since no Community mechanism existed to apportion the costs between the member states (ECR 1983, p. 1434).

The national opinions were overruled by the Court. Despite the member states' warnings about the financial implications of exportability, the Court concluded that the social aid pension was an old-age benefit within the meaning of 4 (1) (c) of Regulation 1408. The benefit was granted on objective, legally defined criteria, and was therefore as an old-age benefit exportable beyond Italian borders. The ECJ admitted that the benefit had hybrid characteristics, but this did not interfere with its conclusions. In common with social assistance, a fundamental criterion for entitlement was a lack of means, and that periods of employment or insurance were not part of the requirements. It

¹⁸³ Case 139/82, 5. May 1983. *Paola Piscitello v Istituto Nazionale della Previdenza Sociale (INPS)*. ECR 1983, p. 1427.

¹⁸⁴ By the time of the legal dispute, Italian law granted "pensione sociale" to every Italian citizens more than 65 years old, residing in Italy and whose income from all sources fell below the minimum income as fixed by law. The social pension is provided for in Article 26 of Law No 153 of 30 April 1969.

was, however, still concluded to be part of the supranational regulatory scope, since entitlement was not made conditional on any discretionary, individual assessment (para. 13 of the judgement). In answering the second question, the Court stressed that the regulatory aim of 1408/71 was to promote the free movement of workers and family members. The waiver of residence clauses applied for the Italian pension, and Mrs. *Piscitello* had, as a family-member of a migrant worker, the right to export her allowance to Belgium.

The legal, political confrontation over the nature of ‘special non-contributory’ benefits culminated with the assessment of the French supplementary allowance (Eichenhofer 2001, p. 80; Christensen & Malmstedt 2000, p. 82). The conflict was expressed in the joined cases 379 to 381/85 and 93/86 *Giletti et al.*¹⁸⁵ from February 1987.^{x1} The ordinary French pension scheme is contributory and work-related, and exportable according to 1408/71. However, if the earned pension does not amount a certain level, the pensioner can receive a supplementary allowance from the French “Fond national de solidarite”. The supplementary allowance is awarded to people regardless of former employment, and is tax-financed. When the dispute occurred, French policy on its supplementary allowance did not discriminate against foreigners. However, the French code specified that the benefit ceased if the recipient moved outside the territory of the French republic.

The French court preliminary asked the ECJ to clarify whether the supplementary benefit classified as social security and, if so, did Community law oblige its exportability. The French competent institution and the government found that the nature of the benefit was that of assistance. They held that the benefit could not be classified as social security, because 1) it was not financed by contributions, but by public funds, 2) it was not related to occupation, but was a matter of national solidarity, 3) the objective of the national allowance was to alleviate a state of need and, therefore took the personal income of the receiver into consideration.

Despite this clear political and administrative attempt to define a benefit and the policy objective behind its adoption, the ECJ disregarded the national observations. The Court stated that, although the benefit was financed out of tax revenue and aimed to provide a minimum level of income for the

¹⁸⁵ Joined Cases 379 to 381/85 and 93/86, 24 February 1987. *Caisse régionale d'assurance maladie Rhone-Alpes v Anna Giletti, Directeur régional des affaires sanitaires et sociales de Lorraine v Domenico Giardini, Caisse régionale d'assurance maladie du Nord-Est v Federico Tampan and Severino Severini v Caisse primaire centrale d'assurance maladie*. ECR 1987, p. 955.

recipient, it was an old age benefit as listed in Article 4 (1) (c) of 1408/71. The reason for its inclusion was that it was granted as a legally protected right. Considering the second question, the Court concluded that a right to a benefit could not be denied because the person did not reside in France. The Court therefore overruled the French principle of territoriality. In accordance with Community law the supplementary allowance was exportable.

2.2: Stage 2 - Non-Compliance

However, despite the Court's conclusions, France still refused to comply, and the dispute on the supplementary allowance went on. France's initial response to the adverse decision by the Court was non-compliance. Due to the overt evasion of Community obligations, the Commission initiated infringement procedures against France. After *Giletti et al.*, the Commission reasoned two opinions under art. 169, and finally brought France to the Court. The first case considered the exportability of the allowance. The second case the principle of equal treatment.

At the same time as France, politically and administratively, continued to violate its Community obligations, and while infringement procedures were pending, the Commission sought to find a compromise in the situation. In 1985, the Commission submitted an amendment proposal to 1408/71, where certain non-contributory benefits were covered by the Regulation, but were made non-exportable (ECR 1990, pp. 3166-3167). France responded by further challenging the situation, blocking progression in the Council, while continuing to argue that its supplementary allowance did not fall within the regulatory scope of 1408.

Against this background, the Commission continued its procedure against France. In the infringement procedure case, *C-236/88 against France*¹⁸⁶, the Commission requested the Court to consider the residence clauses in the French legislation. The Commission outlined the history of the legal and political confrontation. French law on supplementary allowance had, for a long time, disregarded the migrant's right to intra-European social security. The history of French non-compliance went as far back as 1974, to the case of *Biason*¹⁸⁷, upon which the Commission, five

¹⁸⁶ Case C-236/88, 12 July 1990. *Commission of the European Communities v French Republic*. ECR 1990, page I-3163.

¹⁸⁷ Case 24/74, 9 October 1974. *Caisse regional d'assurance de Maladie de Paris v Biason*. ECR 1974, page 999.

years later, for the first time requested France to bring its legislation into line with Community law. On this account, in 1980 the Commission issued a reasoned opinion under Article 169, which it, however, suspended one year later, presumably due to the drafting of the amendment proposal as was proposed in 1985. Confronted with the French refusal to support the compromise proposal in the Council, the Commission informed the French government by letter, in April 1988, that it had decided to go on with the infringement procedure that it had suspended back in 1981. In this light, France apparently changed attitude, informing the Commission two months later that it would lift its reservation for the amending proposal on 1408/71. By then, the case had however been admitted by the Court.¹⁸⁸

As the case unfolded, the controversies between the two parties eased. The Commission noted that the French government no longer challenged the applicability of its allowance to 1408/71. France, on the other hand, emphasised in its written observation that it had changed administrative practice in accordance with the case-law of the Court. In November 1987, the government had informed its authorities by ministerial circular that all Community nationals residing in France were entitled to the supplementary allowance on the same conditions as French nationals.¹⁸⁹

The Court did, however, not find French compliance sufficient. Its litigation was clear, and less forthcoming than the more compromising position of the Commission. The Court declared that the French Republic failed to fulfil its obligations under Article 10 of the Regulation, and the fact that an amending proposal had been submitted could not relieve a member state from implementing Community law in force.

The French evasion was further examined in the proceedings of case C-307/89 *against France*¹⁹⁰, which ran parallel to C-236/88. In this judgement of June 1991, the Court again ruled against France, concluding that the French allowance did not live up to the principle of equal treatment, since two criteria conditioned entitlement to the allowance.¹⁹¹ A reciprocal international agreement

¹⁸⁸ The dispute background is described in the Case's report for the hearing, ECR 1990, pp. I-3166-3167.

¹⁸⁹ Circular no. 1370 of 5 November 1987.

¹⁹⁰ Case C-307/89, 11 June 1991. *Commission of the European Communities v French Republic*. ECR 1991, page I-2903.

¹⁹¹ The conditions as laid down in Article L 815 of the French Code de la Securite Sociale.

had to be signed between France and the state in which the person concerned resided. Furthermore, a national legislative amendment of January 1987 required that the pensioner must have resided in France for a specified period.

The Commission reasoned its infringement procedure by the fact that France had continued to administer its legislation in a discriminatory manner. France initially responded to the reasoned opinion of the Commission by noting that the grant of the supplementary allowance no longer depended on a reciprocal international agreement, and that the relevant administrators had been instructed to comply with Community law by the ministerial circular of November 1987.¹⁹² The Commission was, however, not satisfied and in a letter, from April 1988, it observed that the French legislature had now made entitlement depending on residence, arguing that, in consequence, the new conditions were contrary to the principle of equal treatment in Community law. The French reply came two months later, stating its commitment to administer according to the Commission's observation and Community law. The person concerned in the specific case mentioned by the Commission would receive the supplementary allowance. Despite these declared intentions to change administrative practice, in April 1989 another concrete incident was brought to the Commission, in which a person had been refused the supplementary allowance on the ground that she was not a French national. The French authorities replied that this was due to an administrative error.

The infringement procedures against France seemed to have had the intended outcome. In its written observation, France declared that it had initiated a process of policy reform, where several provisions on health and social security would be brought in accordance with Community law. The judgement of the Court, however, considered that the new French approach was not a sufficient fulfilment of its Community obligations. The Court stressed that the fact that France had maintained its incompatible legislation, even though the law might be administered differently, put those subject to the law in a state of uncertainty, not knowing to what extent Community law could be relied upon.

¹⁹² The background of the proceedings is described in the report of the hearing, ECR 1991, pp. 2905-2906.

2.3: Stage 3 - Political Overrule

The exportability of the French supplementary allowance did not last long. On the 30 April 1992, the Council of Ministers unanimously adopted Regulation 1247/92¹⁹³, which overruled the Court's extension of exportability. The collective political response stood out clear. The interpretations by the Court went too far beyond political intentions. The Council managed to overcome the significant threshold of unanimous political action, and the unintended case-law development was reined in.

Regulation 1247/92 amended 1408/71, and added a 'special rule' to the coordination system. The 'special rule' meant that special non-contributory benefits were included in the material scope of Regulation 1408, and rights awarded between member states could thus be aggregated. Additionally, the principle of equal treatment applied to these certain benefits. However, by virtue of Article 10a (1) the benefits remain bound to the territory of the competent state and cannot be exported. For a benefit to be coordinated according to the 'special rule' it has to be listed in annex IIa of the Regulation. Its inclusion in the annex has to be approved by the Council. Among other benefit types, annex IIa lists the French supplementary allowance from the National Solidarity Fund¹⁹⁴, the Italian social pensions for persons without means¹⁹⁵, the British attendance allowance¹⁹⁶, disability living allowance¹⁹⁷ and family credit (see Appendix 5).

The non-exportability of these benefits of dual character has introduced a special co-ordination system within the system. The amendment corrected the expansionary course taken by the Court. However, the fact that the Court could litigate against collective political intentions for almost two decades illustrates that, in the absence of a specific provision stating general or particular political objectives, the Court was left free to interpretate the legislative gap, and did so in line with what it laid down as the interpreted general regulatory purpose. Moreover, the fact that legal innovation

¹⁹³ Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

¹⁹⁴ Law of 30 June 1956.

¹⁹⁵ Law no 153 of 30 April 1969.

¹⁹⁶ Both as formulated in the Social Security Act 1975, section 37A and 35.

¹⁹⁷ Disability Living Allowance and Disability Working Allowance Act 1991.

proceeded for almost two decades illustrates that collectively restraining the Court was indeed a very complicated affair, with significant thresholds to overcome. Legislative overrule thus appeared more as a last solution than as an immediate one.

A political correction of a legally established line of reasoning is, however, not necessarily the last word in the matter. The legislative correction has to be formulated in accordance with the Treaty text and its spirit, which ultimately is for the Court to decide. Soon after the adoption of the 'special rule', the Court was requested to consider whether it contradicted the Treaty's Article 51.

The case of C-20/96 *Snares*¹⁹⁸ of 4. November 1997, questioned the compatibility of the special rule and Article 51 of primary law. Concretely, the case concerned a British national, whose continued right to disability living allowance was made dependent on his residence within British territory.^{xli} The case questioned whether the territorial binding of the benefit was not setting aside the essence and purpose of Article 51; to promote the free movement of migrant workers.

The *Snares* judgement demonstrates how the Court accepted the previous political correction, codified by 1247/92. The ECJ pointed out that the waiver of residence clauses should be taken into account, unless "otherwise provided in this Regulation" (para. 39 of the judgement). The Court reiterated existing case-law, and emphasised that Regulation 1408/71 did not aim to harmonize social security matters and that it was the sole competence of the member state to define the conditions for granting social security benefits, as long as these were non-discriminatory (para. 45 of the judgement). It is remarkable that the Court went one step further in clarifying member states' competencies and, although not asked to do so, it added that a person like Mr *Snares* could actually be refused the right to residence, because he did not fulfil the criteria of sufficient means as laid down by Article 1 in Council directive 90/365/EEC (para. 50 of the judgement).

Case C-297/97 *Partridge*¹⁹⁹ on 11 June 1998 followed up on the *Snares* case, questioning the nature of another British disability allowance, the attendance allowance, which is a care benefit awarded to dependent persons. The preliminary reference concerned whether the answer given by the Court in the case of *Snares* also applied to a benefit type such as the attendance allowance, and concretely

¹⁹⁸ Case C-20/96, 4 November 1997. *Kelvin Albert Snares v. Adjudication Officer*. ECR 1997, p. I-6057.

¹⁹⁹ Case C-297/96, 11 June 1998. *Vera A. Partridge v. Adjudication Officer*. ECR 1998, p. I-3467.

the case treated the situation of Mrs *Partridge*, whose attendance allowance had been withdrawn when she went to live with her son in France. The British social security commissioner noted that if Mrs *Partridge* had been awarded her benefit and had transferred residence before 1247/92 entered into force, she would have been entitled to take her allowance with her. Before 1247/92, the attendance allowance was treated as an invalidity benefit within the meaning of 1408/71, Article 4 (1) (b) (ECR 1998, p. 3470). The judgement of the Court reaffirmed the standpoints taken in *Snares*. The attendance allowance was a special non-contributory benefit, exclusively governed by the rules laid down in Article 10a, and was therefore not exportable outside the territory of the UK.

2.4: Beyond Stage 3 - Rule-discovery and Further Clarification

With the adoption of 1247/92 and the legal approval thereof, in the cases of *Snares* and *Partridge*, 'special non-contributory' benefits seemed to have been definitively re-territorialized. Together the Commission, Court and Council institutionalised that the regulatory text can permit new deviations from the general – but not absolute - principle of exportability. In the absence of political guidance, the Court exerted judicial activism in stages 1 and 2, but its line of interpretation was met by political restraints in stage 3. It subsequently exerted a certain degree of self-restraint.

Temporarily, the special rule seemed to have satisfied all parties and indeed became a popular political solution. When examining the specific development of annex IIa over the years, its initial impact varies to a great degree between the member states. As illustrated in the Appendix 5 "Adding to annex IIa over the years", some member states reacted promptly, and listed a large set of benefit in the annex, thus protecting the residence clauses of their policies. Belgium, Spain, France, Greece, Ireland, Italy, Luxembourg, Portugal and the UK all made prompt, and quite intensive, use of the new rule. Over the years, they added benefits to it, and whereas Denmark and the Netherlands from the outset had no 'non-contributory special benefits', they have also come to make use of the 'special rule' of non-exportability. The only remaining member state without benefits listed in annex IIa is Germany. Adding benefits to annex IIa has made it possible for member states to evade exportability, and, as some governments have intensively used the opportunity, they have prompted others to do the same (Interviews, the Danish Ministry of Social Affairs 4. April 2001; The National Social Security Agency 5. April 2001). The praxis of adding

benefits has its own expansionary logic, and ultimately reflects the member states' defence of the territorial principles of their social policies.

However, despite the political overrule and the creation of another exception, the dispute has continued beyond stage 3. In COM (98) 779, the Commission initially proposed an explicit and rather narrow description of 'special non-contributory' benefits, while the general principle of exportability gained an even more central position in the Regulation, as its scope of application was extended (Christensen & Malmstedt 2000, pp. 88-89).²⁰⁰ According to the formulation of the parameters, the Council seems to have accepted that whereas the 'special rule' will continue to exist in the future, the category of hybrid benefits needs to be delimited and clearly defined (Council document²⁰¹ 15045/01, SOC 529). Also litigation has called for further clarification of what actually constitutes a 'special non-contributory' benefit. Whereas the Court in *Snares* and *Partridge* accepted political restraints, recent cases have called for its re-supervision of the member states' administration of their 'special' benefits. On this later date, the Court has not acted cautiously.

In the recent cases of *Jauch*²⁰² and *Leclere*²⁰³, the Court was requested to clarify the scope of annex IIa. The case of *Jauch* concerned a German national, residing in Germany, but who had worked in Austria where he was affiliated to the social security scheme. The competent Austrian institution had denied him long term care, since he was not usually residing in Austria, and since the care allowance was listed in annex IIa of 1408/71 and thus non-exportable (see Appendix 5). The Austrian government argued before the Court that because the benefit had been admitted in annex IIa, the residence clause of Austrian law did not contradict Community law. The government supported its viewpoints by referring to the previous cases of *Snares* and *Partridge*. The Court's deduction was, however, reasoned in another established reasoning, laid down by the judgement of *Molenaar*.

²⁰⁰ In the new proposal, the principle of exportability is placed as Article 5 and the principle is proposed extended to all social security benefits, except where the Regulation states to the contrary.

²⁰¹ Council document of 6 December 2001.

²⁰² Case C-215/99, 8 March 2001. *Frederich Jauch v Pensionsversicherungsanstalt der Arbeiter*. ECR 2001, p. I-1901.

²⁰³ Case C-43/99, 31 May 2001. *Ghislain Leclere and Alina Deaconescu v Caisse nationale des prestations familiales*. ECR 2001, p. I-4265.

“...while care allowance may possibly have a different legal regime at the national level, it nevertheless remains of the same kind as the German care insurance benefits at issue in *Molenaar*, and is likewise granted objectively on the basis of a legally defined situation” (para. 26 of the judgement).

The Court thus ruled that the character of the Austrian care allowance was no different from the German ‘Pflegegeld’. The Austrian care allowance was therefore to be classified as another sickness benefit in cash, for which reason it was, according to Regulation 1408’s Article 19 (1) (b), exportable and had invalidly been listed in annex IIa. In the case of *Jauch*, the Court put aside not only the Austrian government’s definition of its benefit, but it also overruled the praxis of the Council, which had unanimously agreed to list the care allowance in annex IIa.

Furthermore, the *Leclere* case also delimited the scope of annex IIa. The case interpreted the rights of Mrs *Leclere*, whose husband had formerly worked in Luxembourg, whereas the couple resided in Belgium. The husband was the victim of an accident at work in 1981, and thereafter received an invalidity pension paid by the Luxembourg social security services. With the birth of their child, they applied for various allowances in Luxembourg, among which was the maternity allowance. The application was turned down, since the couple did not fulfil the residence requirement for the benefit, which was one of the benefits explicitly listed in 1408/71’s annex IIa (see Appendix 5). Again the Court ruled that the maternity allowance had been invalidly placed in the annex and, contrary to the opinion of the Luxembourg government, its maternity benefit had to be exported according to Article 19 (1) (b) of Regulation 1408.

2.5: Institutionalisation and its Limits

The rulings of *Jauch* and *Leclere* promise new clarifications on the actual scope of annex IIa. The cases demonstrate that, although it is a political decision which benefits to list in the annex, and although the tendency over the years has been to add benefits, the political autonomy to do so is not free of judicial supervision.

With Regulation 1247/92’s creation of the ‘special rule’, complexity was added to the coordination system. By the amendment, politics overturned previous judicial activism. So far, the institutionalisation process corresponds to Garrett, Kelemen and Schultz’s point about how member states may collectively restrain the Court through an amendment of secondary legislation (stage 3).

The subsequent expansion of national benefits adopted in annex IIa furthermore suggest that the path of 'decreasing returns' or de-institutionalisation was increasingly politically sustained and the impact of the special rule thus expanded. Evidently, this finding fundamentally refutes the assumption of self-sustaining dynamics, and instead proves that when political preferences are strong and fairly homogenous, the Court's scope of manoeuvre is reduced (Stone Sweet & Sandholtz 1998, pp. 4-5; Garrett, Kelemen & Schultz 1998, pp. 150-151). In her work, Conant substantiates her argument on the limits of European law with, among other findings, that of Regulation 1247/92, and suggests it is a final political act which reins in previous legal innovation (Conant 2002, pp. 192-194). According to Conant, the adoption of 1247/92 verifies the hypothesis that the Council ultimately masters decision-making and the outcome of legislation. Although the research findings of the present section similarly demonstrates that, in the end, legal innovation needs to be politically sustained, they nevertheless also point out that, when analysing institutionalisation over an extensive period of time, the path may break anew and a legislative overrule be re-questioned. Due to the fluidity of policy-making, political restraint is unlikely to be a definitive act. The complexity and dynamic character of institutionalisation mean that the processes of (re)defining and (re)clarifying the rule of law continue far beyond a given stage 3, and a legislative act may in fact be vulnerable to further legal challenges and domestic developments, as demonstrated by the *Jauch* and *Leclere* rulings. Likewise self-restraint by the Court may be provisional rather than general or lasting.

3.0: Health Care Beyond National Borders

"The most comprehensive system of access to cross-border care in the field of international social law is, without contest, the social security co-ordination system in place within the European Union. It is the culmination of an historic process of agreements between States and of the construction of the "Common Market", the first stage in the construction of Europe" (Palm et al. 2000, p. 28).

One of the specific social risks regulated by 1408/71 is that of sickness. Chapter 1²⁰⁴ of the Regulation lays down the provisions concerning sickness and maternity. From the outset, the provisions entitle the migrant worker and her/his family to receive immediate medical treatment, if she/he falls sick outside her/his own member state, or to be authorised for treatment in another member state paid for by her/his competent institution. This means that the individual member

²⁰⁴ Chapter 1 of Regulation 1408/71 consists of Articles 18-37.

states place their health care system at disposal of 1408/71's personal scope (Neumann-Duesberg 1999, p. 25). However, apart from the acute health care need, the right to foreign care has to be authorised beforehand by the competent national institution. At first sight, control and discretion therefore remain national. The questions of to whom, whether and under what conditions, health care should be authorised abroad have been the centre of dispute between national health care institutions and interpreters of Community law. How Community law over time has permitted – but at the same time conditioned – national *authorisation policies* will be the focus of the following analysis. The argument is that authorisation policies bridge the territorial principle of national health care and the free movement principles of the Community. On the one hand, prior authorisation constitutes a most powerful means with which to restrict health care within a country's own borders, and is indeed an instrument of national control. Cross-border care is not unlimited, but cautiously planned. On the other hand, authorisation policies are not autonomously defined, but challenged, justified and compromised by Community law.

For decades, the right to health care abroad has primarily been related to Regulation 1408 and the free movement of workers. As emphasised in the quote above, 1408/71 has, over time, constructed the most comprehensive and, without doubt, the most extensive, system of access to foreign health care within international social law. Recent case-law has, however, compromised that comprehensiveness by laying down that intra-European health care is to be seen in the light of the free movement of goods and services. Meanwhile, adding complexity, the Court has – at a preliminary stage – opened the internal market to the patient.

While national policies still hinder the creation of an internal health market as such, it is eminently clear that the policy domain of health care is not an “îlot imperméable à l'influence du droit communautaire”.²⁰⁵ The meeting between national and supranational health policy and law marks tensions and contradictions:

“Health care policy in the European Union has, at its centre, a fundamental contradiction. On the one hand, recent Treaties, which are the definitive statements on the scope of European law, state explicitly that health care is a responsibility for Member States. On the other hand, as health systems involve interaction with people (staff and patients), goods (pharmaceuticals and devices) and services (health care funders and providers), all of whose

²⁰⁵ As formulated by the advocate general Tesauro in the 1998 cases of *Decker* and *Kohll*, which will be analysed in section 3.4 below.

freedom to move across borders is guaranteed by the same Treaty, it is increasingly apparent that many of their activities are subject to European law” (Mossialos et al. 2001, p. 11).

The following sections analyse in detail how the national autonomy to determine authorisation policies over time has been restrained, re-established, challenged, justified and compromised by Community law. Each section depicts a specific political-legal dispute at different points of time. In a theoretical vein, the analysis depicts another ‘stage game’, where cross border health rights are gradually institutionalised through the interaction of law and politics. The *first* section lays down the Community provision granting conditioned access to European health care. Section *two* describes the first meeting between national authorisation policies and Community law as interpreted by the Court. At this early point of institutionalisation, legal activism limited administrative discretion. The political reaction to this legal innovation is subsequently analysed in section *three*. The Council restrained the praxis of the Court and even extended discretionary autonomy. Thereafter, the legal-political dispute stood still for almost two decades. Section *four* examines the 1998 *Decker-Kohl* case-law as a turning point, as it ruled that authorisation policies were a barrier to the free movement of goods and services. In section *five* that development is taken up to the more recent case-law, where the Court has expanded on its logical deduction, justifying, but also compromising, the control instrument of prior authorisation. Section *six* brings in the last incident on the legally established path dependency: the ruling on an internal market for non-hospital care. So far, no collective political response has been voiced in the long aftermath of *Decker-Kohl*. The Court has solely added to the rights of the European patients. Finally, section *seven* concludes on this development and its implications.

On the whole, institutionalisation of intra-European health care between T_0 and T_2 is a most unique and illustrative piece of the path to integration of the ‘less likely case’.

3.1: Authorisation – Conditioned Access to European Health Care

First of all, the established co-ordination of health care protection means that European migrants have access to care in another member state of residence, as a result of the principle of equal treatment. Secondly, European migrants enjoy a conditioned right to access health care outside their state of residence.

Article 22 of Regulation 1408 concerns the right to receive treatment outside one's own competent member state, meaning the state where one is affiliated to the social security scheme. The Article thus treats the scope of the principle of exportability within the policy field of health and, over time, several of its dimensions have been debated before the Court.^{xliii} Due to early Court interpretations and the later Council amendment, the right to health care abroad is more extensive than the general personal scope of Regulation 1408. The *Brack* ruling of 1976, analysed in chapter IV section 2.4, granted to the actual self-employed a right to immediate health care outside the state of residence.^{xliii} Almost 20 years later, the Council extended the entitlement to acute and authorised health services abroad to all European nationals and their family members, who are socially insured in one of the member states.²⁰⁶ The extension adopted specifically concerned the rights granted qua Article 22 (1) (a) and (c), and was thus an early generalisation of the personal scope, but was exclusive to health care. Furthermore, third country nationals have, with the recent amendment Regulation 859/2003, been included among those with access to cross-border health care in all member states, with the exception of Denmark. Again, it has to be emphasised that third country nationals do not, in general, hold the underlying right of free movement.

Exportability, as stated in Article 22, is not an absolute principle, but a conditioned one and therefore, to a certain extent accommodates the national principle of territoriality. Article 22 (1) (c) lays down that if one wishes to be treated in another member state, one must obtain a prior authorisation from the competent health institution, certifying that it will meet the costs after treatment.²⁰⁷ The challenge of Community law to national authorisation policies is reflected in the degree of discretion that the competent institution is allowed to exert when deciding on authorisation. Discretion is a matter of Article 22 (2), which defines the situation where authorisation cannot be refused.

²⁰⁶ Council Regulation (EC) No 3095/95 of 22 December 1995 amending Regulation (EEC) No 1408/71. The Regulation amendment inserted a new Article 22a, saying: "Notwithstanding Article 2 of this Regulation, Article 22 (1) (a) and (c) shall also apply to persons who are nationals of a Member State and are insured under the legislation of a Member State and to the members of their families residing with them".

²⁰⁷ Besides Article 22 (1) (c), 22 (1) (a) entitles the personal scope of 1408/71 to "immediately necessary care" if falling sick outside ones own competent state. The person in need receives treatment at the expense of the competent state, which is certified by form E111, issued by the competent health insurance institution. 22 (1) (b) gives right to health care at the expense of the competent institution, if transferring residence to another member state. The right is certified by form E128. Finally, that authorisation has been given to receive treatment in another member state at the expense of the competent state according to Article 22 (1) (c) is certified by form E112.

Article 22 (2) originally read as follows:

“The authorisation required under paragraph [22] 1 (c) may not be refused where the treatment in question cannot be provided for the person concerned within the territory of the Member State in which he resides” (emphasis added).

Article 22 (2) soon became a matter of contention, and its meaning was questioned before the Court in the early cases of *Pierik*.

3.2: Discretion Limited

In the *Pierik*²⁰⁸ cases, the Court was requested to rule on the situation of Mrs. *Pierik*. Mrs. *Pierik* resided in the Netherlands where she received an invalidity pension. The Dutch competent health insurance institution refused to reimburse the costs of a hydrotherapy treatment that Mrs. *Pierik* had received in Germany. Prior authorisation had not been granted, since hydrotherapy was not a treatment which was offered by the Dutch health system. The cases addressed whether authorisation could be refused on the basis of Article 22 (2), when the specific treatment was not a part of the health security package of the competent state.

The *Pierik* judgements indeed became controversial rulings. The Court disregarded the far-reaching consequences which were depicted in member states' opinions. In *Pierik I*, the British government argued that if Article 22 (2) of the Regulation meant that the competent institution was obliged to pay for the costs of a treatment abroad, which was not provided by its own law, then the;

“scope of those provisions would be distorted since they would have the effect of creating an independent social security law of the Community instead of merely co-ordinating the social security law of the member states” (ECR 1978, p. 831).

Despite such political warnings on harmonisation effects, the Court ruled that, independently of whether the treatment was part of national policy or not, a competent institution was obliged to authorise a treatment in another member state, if the foreign treatment had been recognised as necessary and effective.

²⁰⁸ Case 117/77, 16 March 1978. *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v. G. Pierik*. ECR 1978, page 825 & Case 182/78, 31 May 1979. *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v. G. Pierik*. ECR 1979, page 1977.

“The duty laid down in the second subparagraph of Article 22 (2) to grant the authorisation required under Article 22 (1) (c) covers both cases where the treatment provided in another Member State is *more effective* than that which the person concerned can receive in the Member State where he resides and those in which the treatment in question *cannot be provided* on the territory of the latter State” (Para. 22 of *Pierik I*, emphasis added).

The Court did not change position in *Pierik II*.²⁰⁹ With both *Pierik* judgements, the Court interpreted the decisive element of the authorisation procedure to be the person’s *state of health*, and not whether the relevant treatment was part of the health care scheme in the individual member state. The decisions thus potentially opened up the possibility of “regime shopping” (Ferrera 2003, p. 634). The judgements stand as a very early legal recognition of the patient’s right to travel around in the Community for health care. By limiting the discretionary authorisation power of the competent institution, the long term consequence could have been harmonisation at the highest level. This was a possible scenario, since patients shopping around Europe at the expense of their competent state would indirectly encourage member states to establish the same kind of treatments (Eichenhofer 1999, p. 52).

Such ‘top up’ effects of the *Pierik* cases, however, never happened, due to the political reaction. Among the more immediate and direct consequences of the *Pierik* cases were limited health policy autonomy and the likelihood of large-scale financial implications. The rulings called for a political response.

3.3: Collective Political Response

The Court’s decisions in the *Pierik* cases went far beyond political intentions. By obliging national health insurance institutions to send, at their own expense, patients abroad, even if the necessary treatment was not a part of the national health package, the Court very directly limited the autonomy to set authorisation policy, and even to define autonomously what health care to provide. The legal innovation exerted in *Pierik I & II* clearly demonstrates that competencies can be redefined by individual lawsuit (Bieback 1990, p. 178).

²⁰⁹ The Dutch national Court was not convinced by all aspects of the *Pierik I*, and thus requested the ECJ for another preliminary ruling by *Pierik II*. The ECJ did not modify its previous conclusions, but simply restated that the competent institution had a duty to authorise treatment abroad where a such was recognised as more effective than the ones provided inside own borders, as well as when a treatment could not be provided by the competent state itself (paras. 9 & 10 of *Pierik II*).

On the other hand, the prompt Council reaction to this demonstrates that, if such individual litigation goes too far in terms of financial and political implications, the member states will try to mobilise joint actions against the Court's interpretative course. In this case, the Council succeeded in re-establishing the discretionary power of national authorities. Only two years after the second *Pierik* ruling, the member governments unanimously adopted Regulation 2793/81.²¹⁰ The amendment directly corrected the Court's interpretation, by inserting a new Article 22 (2) 2, which granted a wide discretion for the member states in defining their authorisation policies (Mossialos et al. 2001, p. 44). The new Article clarified the political intentions, and 2793/81 re-balanced competencies in favour of the member state. The Article thus reformulated is the ruling provision today, and specifies that the competent institution is only obliged to authorise treatment abroad, when it is *administratively* and *medically* considered necessary, *and* when that treatment is part of the health care package provided nationally. Article 22 (2) 2 came to read as follows:

"The authorization required under paragraph 1 (c) may not be refused where the treatment in question *is among the benefits provided for* by the legislation of the Member State on whose territory the person concerned resides and where he cannot be given such treatment within the time normally *necessary* for obtaining the treatment in question in the Member State of residence, taking account of his current state of health and the probable course of the disease (emphasis added)."

Having initiated the establishment of a supranational system of health care beyond the control of the member state, and having tried to undermine the member state's ability to decide on the content of national health care, the Court was politically restrained. For almost two decades, national authorisation policies seemed sacred, with an established balance between national and Community competencies. That was before the *Decker Kohll* ruling of 1998.

3.4: Authorisation Policies Before the Internal Market

1998 marked a turning point for the right to intra-European health care. Until 1998, cross-border health care in the Community had generally been based on the free movement of workers and with reference to the instruments of Regulation 1408/71 and 574/72. Apart from those institutions, Community law was generally assumed not to bring about greater entitlement to health care abroad.

²¹⁰ Council Regulation (EEC) No 2793/81 of 17 September 1981 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71

The established order between national health policy and Community law was seriously upset with the rulings of *Decker*²¹¹ and *Kohll*²¹² in 1998, and not least by their aftermath. The *Decker-Kohll* cases were landmark rulings, clarifying that the Community principles on free movement of goods and services also regulate national health policies. The importance of the rulings has been stressed widely, by academics and by national presses, whereas the majority of member states have so far met the judgements with official silence (Eichenhofer 1999b, p. 102; Eichenhofer 2001, p. 237; Hervey 2000, p. 40; Kötter 2000, p. 28; Maydell 1999, p. 9; Mossialos et al. 2001, p. 45; Novak 1998, p. 366; Palm 2000, p. 105). Their full impact is still impossible to detect, since subsequent cases provide answers to some of the questions raised by the *Decker-Kohll* procedure, while themselves posing new ones. Furthermore, a collective political response is still awaited.

The cases of *Decker* and *Kohll* concerned two Luxembourg citizens who went abroad to purchase respectively a pair of corrective spectacles and a dental (orthodontic) treatment. They subsequently claimed for the costs to be reimbursed by their health insurance in Luxembourg, although a prior authorisation had not been given. Both corrective spectacles and dental treatment are benefits reimbursed by the Luxembourg sickness insurance fund when bought within Luxembourg. However, the sickness insurance fund refused to reimburse *Decker* for his pair of spectacles bought in Belgium, since he had not obtained the prior authorisation required according to Luxembourg law. In the case of *Kohll*, the insurance fund equally refused reimbursement of the dental treatment that Mr. *Kohll*'s daughter had received in Germany, because the treatment was not considered urgent and could have been obtained in Luxembourg.²¹³

In the cases before the Court, *Decker* and *Kohll* argued together with the Commission, that the Luxembourg requirement of prior authorisation constituted a barrier against the free movement of goods and services. On the other hand, the Luxembourg government submitted that its prior

²¹¹ Case C-120/95, 28 April 1998. *Nicolas Decker v Caisse de Maladie des Employés de Privés*. ECR 1998, page I-1831.

²¹² Case C-158/96, 28 April 1998. *Raymond Kohll v Union des Caisses de Maladie*. ECR 1998, page I-1931.

²¹³ Mr. *Decker* had not asked for prior authorisation before buying his spectacles in Belgium, whereas *Kohll* had applied but was turned down. Mr. *Kohll*, acting on his daughter's behalf, decided to go ahead anyway.

authorisation policies had been formulated in accordance with Article 22 (1) (c) of Regulation 1408 Luxembourg thus held that if its prior authorisation policy infringed the Treaty principles on free movement of goods and services, so did Regulation 1408.

The political and legal importance of the *Decker* and *Kohll* cases is clear from the many member states who decided to join action with Luxembourg, and delivered opinions. Apart from Luxembourg, no less than 8 member governments submitted opinions in the cases.²¹⁴ The starting point for the joined opinions was that the free movement principles concerned had no influence on the policy field of social security.²¹⁵ Furthermore, the governments justified their viewpoint by arguing that the prior authorisation procedure was a necessary instrument in order to (Mossialos et al. 2001, p. 46 and as discussed in the opinion of advocate general Tesauro, para 44-46).

- Maintain the financial equilibrium of the health care system;²¹⁶
- Ensure the general quality of the health goods and services provided, thus protecting public health;²¹⁷
- Ensure the maintenance of a balanced medical and hospital service open to all²¹⁸

The first point to be discussed by the Court was therefore whether internal market law applied to the field of social security, which has been traditionally understood as the competence of the member state. The ECJ initiated its line of reasoning by stating that “Community law does not detract from the powers of the Member States to organise their social security systems” (para 17 *Kohll*, para 21 *Decker*). That being admitted, the Court nonetheless dismissed that the basic principles of free movement should not apply to the policy field of social security (paras 20-21 *Kohll*, paras 24-25

²¹⁴ In the *Decker* case, Luxembourg, Belgium, Germany, Spain, France, the Netherlands and the United Kingdom gave written opinions and in the *Kohll* case, Luxembourg was joined by Greece, the United Kingdom, Germany, France and Austria.

²¹⁵ So argued by the governments of Luxembourg, Belgium, France and United Kingdom in the case of *Decker* (para 20) and by Luxembourg, Greece and United Kingdom in the case of *Kohll* (para 16).

²¹⁶ That argument is based on the rule of reason (Palm et. al 2000, p. 118).

²¹⁷ Based on Articles 30 and 46 of the Treaty (Palm et. al 2000, p. 118).

²¹⁸ This justification was not aroused in the case of *Decker*. The member governments hereby referred to a derogation under Article 46 of the Treaty, created by the ECJ itself in the case of *Cassis de Dijon* [Case C-120/78, 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECR 1979, p. 649] (Palm et. al 2000, pp. 117-118).

Decker). From the outset, the legal reasoning made clear that member states did retain the discretion to organise the policy domain of social security, but only within certain limits (Palm et al. 2000, p. 70). Next, the Court dismissed the governmental justifications for the prior authorisation procedure, since:

- The reimbursement was requested at the level of national tariffs. It could therefore not have negative impacts on the financial equilibrium of the health care system (para. 40 *Decker*; para. 42 *Kohll*).
- The general quality of public health could not be regarded as being threatened by purchasing goods and services in another member state, since quality has been ensured by the mutual recognition of diplomas and the harmonisation efforts on training requirements for most medical professions (para. 42 & 43 *Decker*; para. 47 - 49 *Kohll*).
- Finally, no proof was provided that general access to the medical and hospital service was really threatened (paras. 52 & 53 *Kohll*).

Against this background, the Court concluded that the Luxembourg requirement of prior authorisation was an unjustified barrier to the principles of free movement. The system of prior authorisation discouraged insured persons to seek health goods and services beyond national borders (para. 36 *Decker*; para. 35 *Kohll*). Moreover, the Court did not support the Luxembourg argument, that to challenge its national authorisation policies was to call the validity of Regulation 1408's corresponding provision into question. The Court simply stated that the authorisation procedure of 1408/71 laid down one possible way of purchasing health care abroad, but which did not take precedence over the Treaty itself. After having regulated intra-European health care for decades, Regulation 1408 should merely be considered as one possible means with which to obtain health care goods and services abroad (Mossialos et. al. 2001, p. 47). The Court thereby emphasised that a national provision may be consistent with secondary European law, but at the same time may contradict the principles of the Treaty. As seen in previous case-law, discussed above, the ECJ could have chosen to annul secondary legislation inconsistent with the Treaty.²¹⁹ It could also have chosen simply to 'neutralise' secondary legislation, by applying Treaty Articles directly.²²⁰ In the

²¹⁹ As in case C-24/75 *Petroni* and case C-41/84 *Pinna*.

²²⁰ As in case C-443/93 *Vougioukas*.

Decker and *Kohll* cases, the Court neither annulled nor neutralised Article 22 (1) (c) of 1408, but accepted its continued existence (Palm et. al. 2000, pp. 135-136).

Nevertheless, the judgements accentuated a conflict between primary law and secondary legislation. In the aftermath of *Decker/Kohll*, two procedures of how to access EU cross-border health care exist. The authorisation procedure of Regulation 1408 remains, but an alternative procedure has been created by the Court whereby the Treaty principles on the free movement of goods and services allow the patient to claim reimbursement for certain, but still undefined, unauthorised health purchases (Mossialos et. al. 2001, p. 47).

The confusion and complexity of a dual system is clear. Before the *Decker/Kohll* judgements, the Commission presented its intention to adapt Regulation 1408 to the rulings (COM (97) 102). However, so far these intentions have not been followed up by a proposal. The continued silence of both the Commission and the Council is remarkable. Meanwhile, experts have pointed to the need to amend Regulation 1408, as a consequence of the *Decker/Kohll* procedure (Langer 1999, p. 537-539; Eichenhofer 1999b, 1999c, 2001).

The intermediate outcome of the now-famous rulings was a new set of questions, which called for administrative, political and legal responses (Schaaf 1999, p. 280; Palm et al. 2000, p. 105; Mossialos et al. 2001, p. 48). What autonomy did the member states now have to condition access to health care abroad? Could prior authorisation under Article 22 (1) (c) of 1408/71 be considered a justified barrier to the free movement of goods and services? Did the conclusions apply to all the different social security systems, or only to systems of reimbursement like Luxembourg? Did the conclusions also apply to hospital services?

While awaiting a reactive political standpoint, new cases were brought before the Court.

3.5: Authorisation Policies Justified, but Compromised

The *Decker* and *Kohll* cases concerned services outside the hospital sector. Furthermore, the cases treated the specific Luxembourg health insurance system, which is characterised by its subsequent

reimbursement of costs for certain services. Ever since the date of the *Decker-Kohl* rulings, the reach of the established procedure has been questioned, and further legal clarification is awaited.

Meanwhile, the *Smits-Peerbooms*²²¹ case of July 2001 clarified some of the aspects which were left open. Case C-157/99 treated the cases of Mrs. *Smits* and Mr. *Peerbooms* and, like the *Pierik* cases, addressed Dutch authorisation policies. Suffering from Parkinson disease, Mrs *Smits* applied to the Dutch competent institution to reimburse her for the costs of a specific, multidisciplinary treatment which she had received in a German hospital. The competent institution refused reimbursement, arguing that a satisfactory and adequate treatment for Parkinson disease was available in the Netherlands. Furthermore, it was not evident to the institution that the German treatment provided an additional advantage, for which reason no medical justification for the treatment abroad was found. The German treatment was regarded by the Dutch sickness insurance as 'non-standard'. Mr *Peerbooms*, on the other hand, fell in a coma after a car accident. He was first treated in the Netherlands but, on the recommendation of his Dutch neurologist, he was sent to an Austrian hospital to undergo a special therapy of intensive neurostimulation. Intensive neurostimulation therapy is a known treatment in the Netherlands, but is only used on an experimental basis, and is only provided for patients less than 25 years old. As he was 36 years old when the accident occurred, *Peerbooms* was not allowed to undergo the therapy in his own country. Although the Austrian treatment proved to be very effective for *Peerbooms*, who came out of his coma, the Dutch sickness insurance refused to reimburse the costs of care. The competent institution based its refusal on the fact that Dutch health policy considered the therapy to be experimental, and that no scientific evidence of its effectiveness was provided.

Both the case of *Smits* and the case of *Peerbooms* concerned treatments which were not considered 'standard' by Dutch health policy, and consequently were not covered by the national social security system. According to Dutch law, prior authorisation for treatment abroad is given if two conditions are fulfilled; 1) the proposed treatment must be among the benefits for which the competent institution assumes responsibility, meaning that the treatment must be regarded as "normal in the professional circles concerned" and, 2) that the required treatment is necessary and not available without "undue delay" in the Netherlands. In the cases, the Dutch government held the

²²¹ Case C-157/99, 12 July 2001. *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*. ECR 2001, page I-05473.

opinion that its refusal to authorise was justified on the basis of 1408's Article 22 (2), because the treatments were not part of the health package in the Netherlands.

The Court was requested to clarify three aspects of the relationship between Community law and national health policy. Did the freedom to provide services apply to hospital care? And, if so, did the national prior authorisation policy violate the Treaty provision? Finally, if affirmed, could the authorisation system still be justified?

As in the *Decker/Kohll* cases, the cases of *Smits* and *Peerbooms* received great political attention from the member states. No less than 10 member governments stated their opinions before the Court.²²² A fundamental aspect of the opinions, which was also found in the opinion of the advocate general, was that the member states did not regard hospital care as a service within the meaning of Article 50 (ex. art. 60) of the Treaty. The opinion advanced was that, since hospital care was an in-kind service, free of charge, it did not constitute an economic activity within the meaning of the Treaty, where remuneration was part of the exchange (paras. 48-49 of the judgement).²²³

The Court did not uphold the national argument. On the contrary, it was stated as settled case-law that medical activities fell within the scope of Article 50 of the Treaty, without distinction to whether the services were provided inside a hospital environment or outside (para. 53 of the judgement).²²⁴ The Court thereby confirmed that the *Decker/Kohll* procedure applied, in principle, to all forms of health care, whether based on in-kind benefits or on reimbursement (*Mossialos et. al.* 2001, p. 49). The Court thus clarified that the alternative procedure of *Decker-Kohll* did have a general scope.

²²² The member states delivering opinions were the Netherlands, Belgium, Denmark, Germany, France, Ireland, Portugal, Finland, Sweden, and the United Kingdom. Furthermore, the EEA states of Iceland and Norway gave opinion.

²²³ The member states relied in particular on the case of *Humbel*, paras. 17 to 19 [Case 263/86, 27 September 1988. *Belgian State v René Humbel and Marie-Thérèse Edel*. ECR 1988, p. 5365], and the case *Society for the Protection of Unborn Children Ireland*, para. 18 [Case C-159/90, 4 October 1991. *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. ECR 1991, p. I-4685].

²²⁴ The Court referred among other case-law to case C-159/90 *Society for the Protection of Unborn Children Ireland*, para. 18, and *Kohll*, paras. 29 and 51.

The ECJ next made it clear that the requirement to apply for a prior authorisation constituted a barrier to the freedom to provide services (para. 69 of the judgement).²²⁵ However, having concluded thus, the Court found that there might be justifications for maintaining national authorisation policies. According to the Court, prior authorisation could in fact be justified as a ‘necessary and reasonable’ instrument to guarantee a balanced and assessable hospital sector, which depended on planning and contracting (paras. 76-80 of the judgement). The conclusions of the Court were clear and did not interfere with the basic right of the member state to maintain prior authorisation as a means of control;

“[...]it is clear that, *if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance fund had no contractual arrangements, whether they were situated in the Netherlands or in another Member State, all the planning which goes into the contractual system in an effort to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardised at a stroke*” (para. 81 of the judgement, emphasis added).

However, the subsequent line of reasoning of the Court conditioned that basic right. The national authorisation policy must be based on objective criteria that do not discriminate against providers established in other member states (para. 89 of the judgement). The Court compromised the discretionary autonomy of the competent institution, when it emphasised that, for a prior authorisation scheme to be justified, it must “be based on *objective, non-discriminatory criteria which are known in advance*, in such a way as to circumscribe the exercise of the national authorities’ discretion, so that it is *not used arbitrarily*”. Furthermore, for a decision on authorisation to be objective and transparent, it must be made within “*reasonable time*” and “refusals to grant authorisation must also be *capable of being challenged in judicial or quasi-judicial proceedings*” (para. 90 of the judgement, emphasis added).

On this basis, the Court found that the decision on what constituted a “normal” treatment must be based on “*international medical science*”, and not just on what is the dominant point of view in national medical circles (para. 108 of the judgement). The Court reasoned this part of the conclusion by arguing that if the scientific views on what is a “normal” treatment is determined only by a national medical viewpoint, it is “likely that Netherlands providers of treatment will always be preferred in practice” (para. 96 of the judgment).

²²⁵ Among other cases, the Court referred to *Kohll*, para. 35 on this point.

The second Dutch condition for authorisation for treatment abroad - that the necessary treatment cannot be delivered in the Netherlands without "undue delay" - was furthermore interpreted on a non-discriminatory basis by the Court. The ECJ concluded that;

"once it is clear that treatment covered by the national insurance system cannot be provided by a contracted establishment, it is *not acceptable that national hospitals not having any contractual arrangements* with the insured person's sickness insurance fund be given *priority over hospitals in other Member States*" (para. 107 of the judgment, emphasis added).

In other words, the Court hereby clarified that, once it is evident that a treatment cannot be provided by a contracted provider in the Netherlands, the Dutch sickness fund cannot favour a non-contracted provider established in the Netherlands over a provider in another member state (Mossialos et al. 2001, p. 53). When purchasing treatment beyond the contracted providers, the principle of non-discrimination rules. Furthermore, when determining whether an effective treatment can be provided without "undue delay" from a contracted provider;

"the national authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought but also of his past record" (para. 104 of the judgement).

With the *Smits-Peerbooms* ruling, the Court confirmed and extended the *Decker-Kohl* procedure to the hospital sector as well as to social security systems based on benefits in kind. Whereas the Court confirmed the member states competence to control the provision of services through the instrument of prior authorisation, it, at the same time, emphasised that the borders of supply must be "fair, objective, transparent and open to challenge" (Mossialos et. al. 2001, p. 52). In this sense, the Court intervened in the national autonomy to set authorisation policies. The ruling limited the discretion of the member states to refuse authorisation and favoured the position of the patient. Among other aspects, the Court emphasised that authorisation policies must be "objective and non-discriminatory", and that a refusal to authorise must be transparent and open to challenge. Moreover, that the conviction of national medicine could not alone decide which treatment was to be regarded as "normal" and that non-contracted providers, established nationally, could not be preferred at the expense of care providers in other member states.^{xliv} Although, in essence, justifying authorisation policies, the *Smit-Peerbooms* case is a powerful demonstration of judicial activism discreetly intervening in, conditioning and compromising the political scope of manoeuvre.

3.6: The Evolving Internal Non-Hospital Health Care Market

The recent case of 13 May 2003, C-385/99 *Müller-Fauré & Van Riet*²²⁶, like the other cases on national health care and Community law, had been long awaited (Interview, Danish Interior and Health Ministry, 12. December). Again, as estimated by the number of member states which gave opinions, the case was given high political priority.²²⁷ The *Müller-Fauré & Van Riet* case continued the considerations on Dutch authorisation policy. The referring social court had, after the *Smit-Peerbooms* ruling, been asked whether it wished to continue the case. The national court wished to maintain its reference, since it found that the *Smit-Peerbooms* ruling did not specifically consider the characteristics of the Netherlands sickness insurance system, which was a benefit-in-kind system based on agreements.

The *Müller-Fauré & Van Riet* ruling indeed went one step further, as it considered authorisation policy in the case of non-hospital care versus hospital care. *Müller-Fauré* was another case about dental treatment which had been purchased abroad without prior authorisation, and for which reason the competent institution refused to reimburse the costs. *Van Riet*, on the other hand, had purchased hospital care at a Belgian hospital without prior authorisation. The Belgian hospital provided an arthroscopy and subsequently an ulnar reduction, much sooner than it could be offered in the Netherlands. In both cases, the Dutch sickness fund refused to reimburse the medical costs, arguing that the necessary and appropriate medical care could have been obtained in the Netherlands, within reasonable time.

The Court restated much of its previous findings. Dutch authorisation policy deterred, or even prevented, insured persons to have health care provided by another member state. The national policy was thus a barrier to the freedom to provide services. The Court confirmed its reasoning from *Smits-Peerbooms*, that such a barrier could be justified by the necessity of cost-containment and planning. However, the Court added to its previous rulings that when laying down upon which criteria such a barrier is justified, a distinction should be drawn between hospital care and non-

²²⁶ Case C-385/99, 13 May 2003. *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen and Van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*. ECR 2003, p. I-04509.

²²⁷ The Netherlands, Belgian, Danish, German, Spanish, Irish, Italian, Swedish, British, Icelandic and Norwegian governments gave opinions in the case.

hospital care. The Court thus went one step further in clarifying its reasoning from *Decker/Kohll*, as well as in *Smits-Peerbooms*. In the case of hospital care, it repeated its conclusions from *Smits-Peerbooms*, stating that the requirement of prior authorisation was justified on the condition that it was exercised proportionally and that national authorities had no scope for acting in an arbitrary manner. The Court explicated its point of view, stating that:

“prior authorisation may be refused only if treatment which is the same or equally effective can be provided to the patient without undue delay in a contracted establishment. National authorities must take account not only of the patient's actual medical condition and, where appropriate, the degree of pain or the nature of the patient's disability, which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history” (Court Press release, 13 May 2003, no. 36/03).

By restating its reasoning from *Smits-Peerbooms*, the Court emphasised that it was not just considering an individual lawsuit, but in fact laying down binding precedent.

Concerning non-hospital care, the *Müller-Fauré & Van Riet* ruling indeed clarified some of the aspects left open by *Decker/Kohll*. The Court concluded that a removal of the prior authorisation requirement for non-hospital care was not likely to;

“give rise to patients travelling to other countries in such large number, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, that the financial balance of the Netherlands social security system would be seriously upset and that, as a result, the overall level of public-health protection would be jeopardised – which *might* constitute proper justification for a barrier to the fundamental principle of freedom to provide services (para. 95 of the judgement, emphasis added).

The Court thus reasoned contextually, considering the political arguments in the light of their socio-economic background, and refused the national justification for maintaining the control instrument of prior authorisation in the case of non-hospital care. Furthermore, the “might” in the last sentence indicates that what ultimately justifies a barrier to the freedom to provide services has, by no means, been finally settled, but is likely to be up for further clarification in future cases.

Whereas the applicability of the *Decker Kohll* procedure may initially have been doubted by the member governments, the *Müller-Fauré & Van Riet* ruling has not left much margin in which to continue to deny that internal market rules apply to non-hospital health care in general, and that the same rules force member states to make some adjustments to their previously autonomous decisions

on authorising hospital care abroad. The Court's conclusions must impact on the large majority of member states:

"it has not been established that removal of the requirement for prior authorisation would undermine the essential characteristics of the Netherlands sickness insurance scheme. The principle of freedom to provide services therefore precludes legislation such as the Netherlands legislation, which requires the insured to obtain prior authorisation, even under a benefits-in-kind scheme, in the case of non-hospital care provided in another Member State by a non-contracted provider" (Court Press release, 13 May 2003, no. 36/03, emphasis added).

The Court has, by its cluster of case-law, made decisive steps on its path to establishing precedent. On the one hand, it admits that the health policy is in the competence of the member states, but, at the same time, it increasingly compromises this very same competence. Legal action has driven integration to the fore, and so far no collective political response has been formulated.

3.7: Institutionalising Free Movement for Patients in the European Union

The development on access to care outside one's member state of residence has not been a linear expansion of Community competencies. Secondary law, as clarified by the Council in 1981, granted the member state a wide discretion on when to authorise health care abroad. Furthermore, the Treaty states that health care is the responsibility of the member states. However, at the same time, recent legal interpretations have delimited the national ability to control and plan the policy domain within its own borders.

After the initial legal innovation introduced by the *Pierik* judgements, and the subsequent political restraint, the Community provision on prior authorisation favoured the discretionary autonomy of the national competent institution. However, the established legal-political reconciliation was much disturbed by the case-law of *Decker-Kohl*. For the first time, it was clearly laid down that the economic rules of the free movement of goods and services *do* apply to social security policies.

Binding precedent was further established by the recent case on *Smits-Peerbooms*, which clarified that hospital care is also a service within the meaning of the Treaty *and* that the *Decker-Kohl* procedure also applies to health care systems based on benefits in kind. Yet, while the Court confirmed that authorisation policies *are* barriers to the free movement of services, they are *not*

unjustified. Prior authorisation was held to be a necessary and reasonable national instrument with which to guarantee a balanced and assessable hospital sector.

That being admitted, the case-law nevertheless restricted the member states' discretion to determine their own authorisation policies. Discretionary autonomy was compromised on several aspects;

- In order to be justified, authorisation policies must be objective, transparent and non-discriminatory.
- Decisions on what is a "normal" treatment cannot be based on national medicine alone, but must rely on "international medical science".
- When a necessary treatment cannot be delivered without "undue delay", the insurance fund cannot discriminate between non-contracted providers established inside its own borders and care providers in another member state.

The *Müller-Fauré & Van Riet* ruling took one further step, by confirming the justified, but conditioned, use of prior authorisation policies for hospital care, but clarifying that the fundamental principle of the freedom to provide services precludes the authorisation requirement, even under benefits-in-kind systems, for non-hospital care. Whereas the national instrument is still justified for hospitalisation, member states can hardly oppose the establishment of an internal health market for non-hospital care.

Interpreted theoretically, the path dependency institutionalising access to foreign health care contains three sequences. First, one of legal innovation. Secondly, one of political overturn. Thirdly – and almost two decades later - one disturbing the established equilibrium by a critical juncture (Krasner 1984; Hall & Taylor 1996). The judicial interpretation, laying down that the free movement of goods and services applies within the policy field of health care, constitutes a legal spill-over, which could not possibly have been anticipated by the politicians adopting Regulation 1408/71 and its Treaty base (Stone Sweet & Brunell 1998, p. 72; Stone Sweet & Sandholtz 1998, pp. 4-5; Pierson 2000a, p. 482). As an unanticipated consequence, the impact of these other internal market principles demonstrate the issue-density of the EU as well as the limits of rational institutional design (Pierson 1998; 2000a). The direction that institutionalisation has taken since the late 1990s indeed substantiates the relative autonomy of the ECJ as a decision-maker. It also exemplifies the complexity of its actions, being capable of acting both cautiously and ambitiously

(Craig & de Búrca 1998, pp. 78-79). In fact, as detailed in the analysis above, this equivocal behaviour occurred in the same case, where the Court not only justified the means of national authorisation, but compromised it at the same time (*Smits-Peerbooms*). From the case itself, it therefore remains difficult to deduct its political and financial impact. Complexity may be one premise that extends the Court's scope of manoeuvre, rather than 'the mask of law' as suggested by Burley and Mattli (Burley & Mattli 1993, p. 44). According to the proposition that politics and law accord to different logics, politicians may find no immediate or medium-run effect of the individual ruling and therefore do not respond, whereas lawyers see a doctrine in formation (Alter 1998, pp. 130-132; Alter 2001, p. 189). Analysing the later line of case-law on foreign health supply as a chain of successive legal reasoning, makes it clear that it is only from case to case that the full extent of the doctrine in formation is revealed (Hartley 1998, p. 79). Whether the Court can continue to define autonomously the scope and content of an internal health market, depends on an eventual political response.

In the meantime, legal clarifications are likely to continue. As with *Decker-Kohl*, the newest case-law have left gaps for future clarification. The issue of definition is a primary source of confusion. What is meant by "international medical science"? Is it a matter of consulting the international medical literature to track down an apparent international consensus on what constitute a "normal" treatment? Is there any such thing as a European-wide consensus on what is an "experimental" and what is a "normal" treatment? If a member state is the only one to classify a treatment as experimental, can it still refuse to authorise such treatment abroad? Or will such a refusal contradict the dominant European medical opinion and thus be against Community law? On this basis, it could be argued that, in the absence of definition and clarity, the *Pierik* procedure has been revitalised, in the sense that *Smits-Peerbooms* re-question the autonomy of the member states to determine the material scope of their health package. Furthermore, the Court did not provide any legal definition of "undue delay". The question is whether "undue delay" is still to be defined by national authorities alone, or if the member states will have to agree upon some common definition. If the latter is the case, but does not occur politically, a legal norm may be established by the Court. The question of what constitutes "undue delay" is highly relevant in relation to the problem of waiting lists in the health sector, and has been brought by the Court onto the European agenda. The Court seems merely to have initiated legal interpretations of an open-ended problematic. Finally, the new legal course places the transnational rights of the patient at its centre, but without defining what is

meant by the obligation to consider the patient's "past records" when granting or refusing treatment abroad. Such "past records" can hardly be sufficiently considered administratively. The wide scope of administrative discretion which was politically put in place by Regulation 2793/81 is thus challenged anew by the Court.

All these aspects call for political reaction, or even proactive strategies on how to integrate foreign health care supply (Mossialos et. al 2001, p. 54). During the Danish presidency in autumn 2002, the Council negotiated parameter 8 of COM (98) 779 on the regulation's sickness chapter. The concrete negotiations turned out to be quite difficult (Interview, Danish Interior and Health Ministry, 12 December 2002). The recent case-law was on the agenda, but the member states did not agree on its general impact, and on what should be the collective political response. However, negotiations reached one important result regarding prior authorisation. In the future, the practice behind granting or refusing authorisation would not be based on administrative discretion, but would only be medically reasoned (Interview, *ibid*). On this aspect, judicial activism has been codified politically, since the member state's discretion to decide on authorisation has been restricted. This first political response suggests that the Council admits to the legal interpretation. Nevertheless, all other aspects still call for political consideration. Should the Council continue the practice of silence, it will be for future legal actions to map the terrain and autonomously decide in the absence of a political voice.

4.0: Concluding Remarks - Expanding Exportable Social Security Rights

Supranational institutionalisation of social security rights and their exportability has, in its individual sequences, been much characterised by ambiguity.

On the research question '*to what extent*', the analysis has demonstrated that the material scope has been extended from covering traditional social security benefits, to covering more contemporary forms of these benefits. The institutional update has, however, been mainly legally conducted. To what extent the principle of exportability has been extended is disputable. For special schemes for civil servants, family benefits, long term care and health care, it has clearly been extended. But for special non-contributory benefits it has not, although the territoriality of certain benefits have recently been questioned anew. The analysis points to the fact that, from the 1990s, the national

principle of territoriality versus the Community principle of exportability stands out as the bone of contention between member states and supranational organisations.

On the research question '*how*', we are taken to the judicial activism of the Court which for long periods has autonomously decided on the scope and exportability of social security rights. However, concerning 'hybrid' benefits and access to foreign health care, politics has collectively reined in the Court. Thus the interaction of law and politics has been decisive for both the scope and direction of institutionalisation in its entirety.

From the outset, it has been the task of the Court to up-date the *material scope* of Regulation 1408, and bring it in line with the contemporary social policy developments at the national level. While the non-activism of the Council would have led to a static institution, the Court's contextual reading of 1408/71 has continuously expanded its material scope. The empirical findings on the institutionalisation of the material scope refutes the theoretical propositions of the political power approach as presented by Garrett et. al. Instead the analysis points to a relatively high degree of legal autonomy, where the Court acts as decision-maker in its own right. It points to a dynamic institution which develops as if according to its own logic, but where the path of institutionalisation is decided by the continual interpretations by the Court of its meaning and reach. It also demonstrates a Court capable of interpreting against the explicit preferences of the member states, including the more powerful of them, and despite the financial implication of its rulings. Concerning the material scope, the Court has not exerted self-restraint, nor has it been restrained. On the contrary, its legal innovation has meant a successful expansion of exportable intra-European social security rights.

However, a conclusion that emphasises legal autonomy at the expense of politics does not apply to the issue of '*special non-contributory*' benefits. The analysis on the institutionalisation of these 'hybrid' benefits demonstrate a receptive Court. The Court could have interpreted the 'special rule', adopted by the Council, to have contradicted the Treaty. It could have chosen a confrontational style. Instead it accepted the political restraint, and permitted an exception to the principle of exportability. Analysed in an isolated fashion, the collective restraint supports a political power approach of Garrett et al. Nevertheless, bringing in the very recent case-law suggests that the 'special rule' is up for another legal – political dispute. Nevertheless, the specific institutionalisation

process of 'hybrid' benefits is foremost a challenge to the theoretical assumptions of Stone Sweet et al. The political response in 1992 substantiates that institutionalisation is not driven by a straightforward progressive logic, or by a virtuous cycle as suggested by Stone Sweet and Brunell (1998). In fact, the adoption of the 'special rule' exemplifies the de-creasing returns on the path to cross border social security rights. Rather than being self-sustained, the dynamics of institutionalisation needs ultimately to be politically sustained.

On the face of it, the analysis of the specific policy field of *health care* points in the same direction. Again the Council managed to collectively restrain a Court, which had gone too far beyond political intentions. But most certainly, this was an intermediate result. The $T_0 - T_2$ analysis carried out shows that national authorisation policies are anew challenged by Community law. The Court authoritatively ruled that the internal market rules on free movement of goods and services did apply to the policy field of social security. At the same time, it justified, but compromised, the control instrument of prior authorisation. In addition, recent legal deductions have taken a decisive step towards establishing an internal market for non-hospital care. So far, the Court has been able to autonomously establish precedent. Politics has not interfered. Voices have been heard, but not in unison. In the absence of political guidance, the Court has continued to decide autonomously on the scope and limits of an internal health market. The institutionalisation of the right to access foreign health care thus not only demonstrates a high degree of legal autonomy, but it also exemplifies that what appears as a reconciliation between law and politics, an established institutional equilibrium, may suddenly be disturbed by a legal spill-over, caused by internal market dynamics and which further energizes the process. A development which could not possibly have been anticipated in T_0 (Stone Sweet & Brunell 1998; Stone Sweet & Sandholtz 1998; Pierson 2000a). Not only may rational institutional design be limited by the short-sightedness of the political actors, but control may equally escape politicians by the dynamism and fluidity of the institution itself, as well as by the complexity and embeddedness of the whole European institutional construct.

As depicted in chapter II's model which was constructed to analyse institutionalisation, the analysis which has been conducted on Regulation 1408's material scope and principle of exportability has demonstrated institutionalisation to be a repetitive process, the final output of which initially appears as being impossible to predict, but the contours of which are gradually drawn. Furthermore, the direction has not been linear, but decided by continuous disputes between national courts, the

ECJ and the member states, which sets the course back and fourth. The content of institutionalisation is laid down along the path consisting of individual stages 1, 2, 3 and much beyond. When a direction seems to have formed, the path may be broken by a new reading of the Treaty, by a different institutional emphasis, by a national policy change, or by a collective political response. However, precedent is established along that path. So far the path taken has expanded, although not progressively, exportable social security rights for the European migrant, while holding out the prospect of further clarification and the further generation of rights.

The two following chapters will explore the impact on domestic institutions of the supranational institutionalisation process which has been identified.

Case-notes

^{xxvi} In the early cases, the Court laid down a broad understanding of sickness and unemployment benefits.

- In case 69/79 *Jordens-Vosters*, the Court considered the characteristic of "sickness" benefits within the meaning of Article 4 (1) (a) of Regulation 1408/71 [Case 69/79, 10. January 1980, *W. Jordens-Vosters v Bestuur van de Bedrijfsvereniging voor de Leder- en Lederverwerkende Industrie*, ECR 1980, p. 75]. Mrs *Jordan-Vosters* resided in Belgium, but worked in the Netherlands between 1966 and 1970. In 1970, she became incapable of work and was granted an invalidity benefit from the competent Dutch institution. In 1973, Mrs *Jordan-Vosters* stayed in a hospital clinic in Belgium and between 1973 – 1974 she had significant medicine expenses. She applied for the reimbursement of the costs from the Dutch institution, which, however, refused to reimburse the expenses, even though Mrs *Jordan-Vosters* received the pension for the incapacity of work. The Court stated that the words "sickness and maternity benefits" also applied to medical provisions even if they were set out in legislation on invalidity benefits, for which reason the competent institution was obliged to reimburse the costs.
- Judgement 375/85 *Campana* laid down an extensive understanding of unemployment benefit [Case 375/85, 4. June 1987, *Angelo Campana v Bundesanstalt für Arbeit*, ECR 1987, p. 2387]. The case considered whether assistance for vocational training was to be regarded as unemployment benefit within the meaning of 4 (1) (g). *Campana* was an Italian national who worked in Germany from 1964 to 1977, and from then until 1980 in Italy. In the late summer of 1980, he was again employed in Germany, where he applied for vocational training. The competent German institution turned down the application, on the argument that *Campana* had not carried out an activity subject to compulsory contributions under the German employment law for a period of two years, nor had he received unemployment benefits. The European Court of Justice found the rejection inconsistent with Community law, since Article 4 (1) (g) did not state that "unemployment benefits" relate only to benefits, granted because of present unemployment. Article 4 (1) (g) must be read in the context of the fundamental aim of Article 51, "which is to establish the most favourable conditions for achieving freedom of movement and employment for Community workers within the territory of each member state" (para. 8 of the judgement). According to the Court, it would therefore be against the aim of Article 51 to exclude a benefit from the material scope of the Regulation the aim of which was to prevent future unemployment. Article 4 (1) (g) included assistance for vocational training, granted to a person still in employment but facing the risk of becoming unemployed.

^{xxvii} In several cases amongst the earlier case-law, the Court interpreted the material scope restrictively.

- As in *Campana*, case 39/76 *Mouthaan* considered the extent of "unemployment benefits" within the meaning of Article 4 (1) (g), but this time the Court interpreted restrictively [Case 39/76, 15. December 1976, *Bestuur der Bedrijfsvereniging voor de Metaalnijverheid v L. J. Mouthaan*, ECR 1976, p. 1901]. *Mouthaan* was a Dutch national, who worked in the Netherlands until 1972. He then became employed for a Dutch firm in Germany, but still resided in the Netherlands. At the end of 1972, he lost his job after financial difficulties for the firm. Being unemployed, he claimed unemployment benefit from the relevant Dutch institution, as well as a specific benefit

paid to the workers of an insolvent employer, who owed pay. Having first paid *Mouthaan* the ordinary unemployment benefit, the competent institution in the Netherlands demanded him to repay the amount, with the argument that he had no rights to draw the benefits, having not been insured in Germany while working there, although subject to German law. The first question asked by the national court concerned the definition of worker, and asked whether a worker who became unemployed could still be regarded as a worker within the meaning of Article 1 (a), even though he had not been insured under German law. The European Court of Justice answered that the worker did not actually have to be affiliated in a social security schemes to be employed, but be eligible for one: "... the said provision [Article 1 (a) of 1408/71] does not seek to restrict the status of worker within the meaning of that Regulation to persons who are in fact insured under one of the abovementioned schemes but is intended to define as a worker all persons to whom such schemes are applicable" (para. 8 of the judgment). Thus possessing the status of worker, *Mouthaan* could claim ordinary unemployment benefit under the national legislation of the state where he resided and where he was available for work, i.e. the Netherlands, although his last employment was in Germany. The restrictive part of the Courts interpretation concerned the benefit paid under Dutch law to compensate for the non-paid wage to workers of an insolvent employer. This benefit type did not constitute an unemployment benefit within the meaning of Article 4 (1) (g).

- 70/80 *Vigier* was another earlier case which considered the material scope in connection with the status as a worker [Case 70/80, 27 January 1981. *Tamara Vigier v Bundesversicherungsanstalt für Angestellte*. ECR 1981, p. 229]. Mrs. Tamara *Vigier* was born in Germany in 1922 but left the country at the age of 10 due to persecution by the Nazi regime. She received compensation for loss of educational opportunities from Germany. As an adult, she lived and worked in France, where she was affiliated in the social security system. In 1975, she applied for the authorisation to pay contributions to the invalidity and old-age insurance under the special German scheme for reparation of injustice committed under national socialism. The German court questioned whether the reparation law fell outside the scope of the Regulation as part of Article 4 (4), and whether *Vigier* had status as an insured person. In the initial part of the judgement, the ECJ stated that although the reparation law aimed to ease the injustice caused by national socialism, it did not fall outside the scope of the Regulation as part of Article 4 (4), because it was not granted on basis of a discretionary assessment of the personal situation or because of consideration of individual needs (para. 16 of the judgement). It was therefore a social security benefit. But this did not give *Vigier* the right to pay contributions. The German reparation law specified that in order to have the status as an insured person, one must have paid at least one contribution as worker to a German social insurance institution. The Court referred to its jurisprudence as formulated especially in 110/79 *Coonan*, and confirmed that where national legislation made affiliation to one specific scheme dependent on prior affiliation in another social security scheme, 1408/71 did not compel the member state to treat contribution periods fulfilled in another member state as equivalent to those which had been completed in the national territory (para. 19 of the judgement). *Vigier* could therefore not claim the status as an insured person on the basis of 1408/71, and since the member state set the conditions for affiliation, she did not have a right to pay contributions on behalf of Community law.

Two cases among the earlier jurisprudence confirmed that benefits for victims of war were held outside the material scope of the Regulation as laid down in Article 4 (4).

- Paulin *Gillard* was a Belgian citizen, residing in Belgium, but who worked in France [Case 9/78, 6. July 1978. *Directeur Régional de la Sécurité Sociale de Nancy v Paulin Gillard and Caisse Régionale d'Assurance Maladie du Nord-Est, Nancy*. ECR 1978, p. 661]. Between 1940 and 1945, he was a war prisoner in Germany as a member of the Belgian armed forces. When he became 60 years old, he received a partial pension from the French competent authorities, reflecting his periods of employment in France. However, had *Gillard's* pension from France been calculated on the basis of the French law on old-age-pensions to former prisoners of war [French law no. 73-1051 of 21 November 1973], he would have received double the amount. The Court considered whether this French old-age benefit should be considered a social security benefit within the meaning of Article 4 (1) (c) or fell under 4 (4). The Court concluded that it agreed with the French competent institution that the benefit was not a social security one within the meaning of 4 (1) (c), since its essential purpose was to provide for former prisoners of war. It thus remained outside the substantive scope of 1408/71, as formulated in Article 4 (4). The Court emphasised that the distinction between included and excluded benefits rests entirely on the relating factors of a benefit, in particular its purpose and the conditions for its grant.
- Case 207/78 *Even* drew on the conclusions in *Gillard* and confirmed these [Case 207/78, 31. May 1979. *Ministère Public v Gilbert Even and Office National des Pensions pour Travailleurs Salariés (O.N.P.T.S.)* ECR 1979, p. 2019]. *Gilbert Even* was a French national, residing in Belgium, but who received a 10% invalidity pension in France because of a wound he got as a soldier in 1940. When he became 60 years old, he applied for an early retirement pension in Belgium. As he had worked in France and Belgium, the pension was calculated by aggregation. His Belgian pension became 25% less than a full pension would have been. *Even* claimed that he was entitled to a full early retirement pension, since Belgian legislation [The Belgian Royal Decree of 27 June 1967]

specified that reduction did not apply to persons of Belgian nationality, who served in the allied forces between 1940 and 1945, and were receiving an invalidity pension for their war service. The Court restated the essence of the *Gillard* case, i.e. that the distinction between included or excluded benefits relied on the relating factors of each benefit, especially the purpose and conditions for its grant (para. 11 of the judgment). In the present case, the objective of the benefit was to offer a "national recognition of some of the hardship suffered" from action of war (para. 12 of the judgment). In the view of the objective, the benefit fell outside the material scope of the Regulation and constituted a benefit for victims of war as formulated in Article 4 (4). Moreover, the Court concluded that a scheme based on national recognition of an act, did not fulfill the essential characteristics of a "social advantage" within the meaning of Article 7 (2), Regulation 1612/68.

Besides the benefits, which are held outside the material scope as a consequence of Article 4 (4), the Court affirmed that a private agreement is not part of Regulation 1408/71.

- In case 313/82 *NI' Tiel-Utrecht Schadeverzekering*, the Court concluded that a relationship which exists between an insured person and a private insurance company on a purely contractual basis did not fall within the substantial scope of 1408/71 [Case 313/82, 15 March 1984. *NI' Tiel-Utrecht Schadeverzekering v Gemeenschappelijk motorwaarborgfonds*. ECR 1984, p. 1389]. The case considered the situation of Mrs Kenis, a Dutch national who resided in the Netherlands, but was injured in a car accident in Belgium. She was insured by a health-care insurance policy from the private insurance company *NI' Tiel-Utrecht Schadeverzekering*. *Tiel-Utrecht* reimbursed Kenis' medical expenses. However an unidentified car was involved in the accident in Belgium. The private insurance company *Tiel Utrecht* sued the Belgian Burgerlijke Rechtbank for the reimbursement of the expenses, relying on the Belgian law of 9. August 1963. In the judgment, the Court defined the term "institution" in Article 1 (n) as the member state "body or authority responsible for administering all or part of the legislation" (para. 14 of the judgment). It did therefore not apply to the private body, which did not have legislative administering responsibility or authority.

xxviii 187/73 *Callemeyn* was one of the first cases where the Court considered whether a benefit was to be characterised as social security or social assistance [Case 187/73, 28 May 1974. *Odette Callemeyn v Belgian State*. ECR 1974, p. 533]. The case concerned Mrs *Callemeyn*'s right, as a French national residing in Belgium, to the ordinary Belgian benefit for handicapped persons [as set up under Belgian law of 27 June 1969]. Although suffering from a permanent incapacity to work, Mrs *Callemeyn*'s application for the Belgian invalidity benefit was turned down, because she did not fulfil the nationality requirement laid down by Belgian law. The national Court questioned whether the benefit for handicapped person was included as a social security scheme within the meaning of 4 (1). The European Court of Justice emphasised that some benefits fell between social security and assistance, and that ambiguous characteristics of a benefit might be due to its class of persons, its objectives, or manner of application. Such an ambiguity made it difficult to draw a clear distinction (para. 6 of the judgement). The features of the Belgian benefit for handicapped persons might, in some aspects, make it akin to social assistance, having need as an essential criterion and since the benefit was not granted upon previous periods of employment, of membership or of contribution. Yet other features might bring it closer to social security, such as when the benefit was granted to the person on a legally defined position (para. 7 of the judgement). The Court overruled the Belgian definition of its invalidity benefit. The legally protected right of *Callemeyn* to the benefit was the determining factor that made the benefit fall within the material scope of Regulation 1408/71 (para. 15 of the judgement). The nationality requirements in Belgian law were thus ruled as being incompatible with EC-law and its principle of equal treatment.

xxix This was emphasised in the important case 249/83 *Hoeckx*, which concerned an unemployed Dutch national, who although born in Belgium, and until 1981 habitually residing there, was denied the Belgian minimum means of subsistence. In April 1983, Mrs *Hoeckx* returned to Belgium after a stay in France. On her return, she applied for the minimum means of subsistence, also known as the 'minimex'. Although the grant of the minimex had been extended to Community nationals by a royal decree of 1976, her application was turned down. The refusal of the competent institution was reasoned by the conditions in Belgian law that Community nationals must have lived five years in Belgium immediately before the 'minimex' could be awarded. This was, however, not a requirement for Belgian nationals. The Court interpreted the defining features of the minimum allowance. On the one hand, the minimex was granted on the basis of a legally defined position, which gave it a similarity to the social security benefit. On the other hand, it was granted to persons who had inadequate means. Need was therefore an essential criterion for its application, which is a characteristic of social assistance. Having these dual characteristics, the minimex could not be classified as a social security risk under Article 4 (1) (para. 14 of the judgement). However, the Court classified the minimex as a social advantage within the meaning of Article 7 (2) of Regulation 1612/68 (paras. 20, 21 & 22 of the judgement). It stressed the principle of non-discrimination to be the fundamental principle in the context of free movement, as

formulated in 1612/68 as well as the Treaty's Article 48 (2). The right of the foreign worker to the Belgian minimex was thus granted on the basis of 1612/68, and the prior residence requirements as an extra condition for the foreign worker was ruled out as discrimination by the Court.

"The residence requirement is an additional condition imposed on workers who are nationals of a member state but not national workers. It therefore constitutes a clear case of discrimination on the basis of the nationality of the workers" (para. 24 of the judgement).

Mrs *Hoeckx* was thus entitled to the hybrid benefit on the same conditions as the national worker qua the regulatory text of 1612/68.

The controversies on the minimex were, however, not finally settled by the *Hoeckx* case. The requirement of five years residence for Community nationals only were further disputed in the later case 122/84 *Scrivner* where the conclusions made by the Court in *Hoeckx* were restated [Case 122/84, 27. March 1985. *Kenneth Scrivner and Carol Cole v Centre public d'aide sociale de Chastre*. ECR 1985, p. 1027]. The residence requirements were - many years later - removed from Belgian law after the Commission brought infringement proceeding against the member state [Case C-326/90, 10 November 1992. *Commission of the European Communities v Kingdom of Belgium*. ECR 1992, p. I-5517]. For a short discussion of this infringement procedure, see endnote xi above in chapter IV.

^{xxx} *Lohmann* was an official of a municipality in the Netherlands. In 1971, he received an invalidity pension. In 1974, he moved to Belgium to reside there, but his daughter stayed in the Netherlands, where she studied. *Lohmann* applied to the competent Dutch institution for family allowances for his daughter. The application was however rejected, with the argument that he did not reside in the Netherlands and could not rely on 1408/71, since he did not possess status as a worker.

^{xxxi} Mrs Rose *Hughes* resided with her husband and three children in Ireland, but held no employment. Her husband was a British citizen, who worked in Northern Ireland. In 1988, she applied for the British family credit. Her application was, however, refused by the adjudication officer, since she did not satisfy the residence requirement formulated in the British legislation.

^{xxxii} The British government clarified that the main purpose of the family credit, which is a weekly non-contributory cash benefit, was to supplement the incomes of low-paid workers whose income would otherwise be lower than if they were unemployed. The aim of the benefit was to keep low paid workers in employment, for which reason the government did not find that it was a social security benefit.

^{xxxiii} The court referred in particular to case C-356/89, 20 June 1991. *Roger Stanton Newton v Chief Adjudication Officer*. ECR 1991, p. I-3017; the joined cases 379/85 to 381/85 & 93/86 *Giletti*; and 249/83 *Hoeckx*. The *Giletti* case will be analysed in greater detail in section 2.1 below. The case of *Hoeckx* was discussed in endnote xxix above.

^{xxxiv} Also C-66/92, the case of *Accardi*, discussed the reach of Community law when the family resided in another member state than the state of work [Case C-66/92, 2 August 1993. *Genaro Accardi v Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland*. ECR 1993, p. I-4567]. The case of *Accardi* considered the Dutch law on income for unemployed workers, who are elderly or suffer from a partial incapacity to work, the IOAW. *Accardi* was of Italian nationality, living in the Netherlands, where he used to be employed. His wife and son lived in Italy. From July 1987, he received the IOAW allowance. Under the IOAW, he had, however, been classified as a single person, because his wife and child resided outside the Netherlands. According to the IOAW, an unemployed person with a child was entitled to 90% of the net minimum wage as benefit, whereas the single person only got 70% of the net minimum wage. Article 5 of the IOAW spelled out the IOAW as conditioned by residence in the Netherlands for the worker him/herself as well as the dependent family. The Dutch government held that the IOAW fell outside the material scope of 1408/71 as part of Article 4 (4), since its objective was to guarantee a minimum level of subsistence to the elderly unemployed or those partially incapable of work. The Court disagreed with this interpretation. It admitted that the IOAW varied according to the income of the plaintiff and the spouse, but this was an objective and legally defined criteria (para. 15 of the judgement). Furthermore, the Court stressed that it was irrelevant that the scheme was financed by the public authorities. Article 4 (2) of the Regulation specifies that it applies to non-contributory benefits as well. The IOAW thus constituted an unemployment benefit within the meaning of 1408/71, and even though the family was residing in another member state, they were still to be taken into account when the payable amount was being calculated.

^{xxxv} The case dealt with Mr and Mrs *Hoever* and Mr and Mrs *Zachow* of German nationality who had been residing in the Netherlands since the 1980s. Mr *Hoever* and Mr *Zachow* worked full time in Germany. Mrs *Hoever* had had 10 hours work a week in Germany, but had never been subject to German social insurance. Mrs *Zachow* had never been employed. When both wives applied for the German "Erziehungsgeld", the applications were rejected with reference to the residence requirement of German law in the case of *Zachow* and the 15 hours work a week rule, concerning *Hoever*.

^{xxxvi} According to Finnish law no. 36/1973 on Day Care of Children, parents who choose not to claim a day care place are entitled to home child care allowance (under art. 11(2) of national law). That allowance is, however, subject to a residence requirement in Finland. When Ms *Maaheimo* went to stay with her husband working in Germany together with her children, the Finnish authorities stopped the payment of home child care allowance, reasoned in the residence requirement of national law.

^{xxxvii} In the joined cases C-88/95, C-102/95 and C-103/95 *Losada, Balado and Paredes*, the Court made it clear that it was for the national legislators to decide the conditions for granting a social security benefit [Joined cases C-88/95, C-102/95 and C-103/95, 20 February 1997. *Bernardina Martinez Losada and Others v Instituto Nacional de Empleo (Inem) and Instituto Nacional de la Seguridad Social (INSS)*. ECR 1997, p. I-869]. All three cases concerned the right to the Spanish unemployment allowance, for persons more than 52 years old, for three migrant workers who had made no employment based periods of contribution to the Spanish social security scheme, but had spend most of their working life in Germany and the Netherlands respectively and made social security contributions there. The former migrant workers later settled in Spain. Spanish law lays down that in order to be eligible for unemployment benefit, one must have paid 6 years of unemployment insurance contributions and in order to be granted retirement pension one must have made at least 15 years of contributions, of which two must be in the foregoing 8 years. The Court's answer to the 1st question, was that the fact that the Spanish government had listed the special unemployment benefit in its declaration, referred to in Article 5 of 1408/71, was proof enough that it was a social security benefit within the meaning of 1408/71 (para. 21 of the judgement). However, the 2nd and the 3rd questions concerned to what extent the competent institution could claim that contributions must have been paid to be entitled to the benefit. The Court admitted that while Article 51 of the Treaty laid down the principle of aggregation, it did not define the expression "periods of insurance" (para. 33 of the judgement). However, this was done in Article 1 (r) of 1408/71 where "periods of insurance" was defined as "periods of contributions or periods of employment" (para. 34 of the judgement): "Consequently, a Member State is entitled to make the award of unemployment allowance conditional on the person concerned having last completed periods classed as "periods of insurance" or "periods of employment" under its own legislation" (para. 36 of the judgement).

^{xxxviii} Case C-25/95, *Otte* discussed if the German "Anpassungsgeld" was an old age benefit or an unemployment benefit within the meaning of Article 4 (1), or a pre-retirement benefit outside the material scope of the Regulation. Mr *Otte* had Dutch nationality, but had, as a migrant worker, been employed for long periods in the German mining sector, and been insured in Germany under the miners' sickness and invalidity insurance scheme. In February 1988, he applied for the German adaptation allowance, available for workers in the mining sector until they reach retirement age. In January 1988, he had, however, also received invalidity pension from the Netherlands general social security scheme. In August 1988, the Bundesamt fixed the payable amount of the adaptation allowance, taking both his contribution periods in Germany and in the Netherlands into account. When learning in May 1989 that *Otte* also received an invalidity pension from the Netherlands, the Bundesamt reduced the amount of the allowance and required him to reimburse the sums which in the meantime had been unduly paid to him. *Otte* appealed against this decision, arguing that the calculation methods of the Bundesamt were against Article 51 of the EC Treaty. The response from the national Court was, however, that the adaptation allowance constituted a pre-retirement allowance and therefore fell outside the material scope of the Community's social security Regulations. The European Court of Justice was questioned whether the German allowance could be regarded as a social security benefit within the meaning of 1408/71. In the opinion of the German government the "Anpassungsgeld" fell outside the material scope, because it was a pre-retirement pension, which the duration of was limited in time and its grant was closely linked to the present economic situation. The judgement of the Court examined the nature of the benefit. First of all, the adaptation allowance differed from the old-age benefit within the meaning of Article 4 (1) (C), since it pursued an objective directly related to employment policy (para. 31 of the judgment). Furthermore, it differed from an old-age benefit regarding the granting condition. The adaptation allowance "is neither financed nor acquired on the basis of contributions from the recipients themselves" (para. 32 of the judgment). The employment policy objective and the conditions for its grant made it in some respects similar to a pre-retirement benefit, which is not yet covered by 1408/71 but had been proposed included by the Commission in 1980 and 1996 (para. 33 of the judgment). Secondly, the Court concluded that the allowance was not an unemployment benefit, within the meaning of Article 4 (1) (g) because the recipients of the allowance did not have to

make themselves available for the labour market, i.e. register as job-seekers. The employment policy aim, to remove laid off workers from the sphere of unemployment insurance, made it differ from the usual characteristics of unemployment benefit.

^{xxxix} Case 1/72 *Frilli* interpreted Regulation 3/58. The case concerned Mrs *Frilli*, an Italian national living in Belgium, where she received retirement pension. The ordinary retirement pension did, however, not cover her minimum living costs, for which reason *Frilli* applied for the Belgian guaranteed income for old people. Her application was turned down on grounds of her nationality. The Court found that although the Belgian guaranteed income for older people had some affinities with social assistance having need as an essential criteria for entitlement, it was to be classified as social security since the benefits was not granted discretionary, but on basis of a legally defined position. On basis of these reflections, the Court concluded that the allowance fell within the material scope of 3/58.

^{xl} All four cases dealt with Italian nationals receiving the French supplementary allowance, but who did not have the right to export it back to their country of origin. Mrs. *Giletti* received a widow's pension from France, where her husband worked from 1930 to 1961. After he died, she moved back to Italy. In 1981, she applied for the supplementary allowance, but her application was rejected because she did not reside in France. In the cases of *Giardini* and *Tampan*, they both received the ordinary French pension and the supplementary one. When they informed their competent institution that they wished to move back to Italy, the response was that in that case it would be without the supplementary allowance. *Severini* received both invalidity pension and supplementary allowance. However, the latter was withdrawn when he moved back to Italy.

^{xli} Albert *Shares* was a British national, who as an employee paid contributions to the British social security scheme for almost 25 years. In 1993, he suffered a serious accident and obtained the British disability living allowance. Shortly after, he decided to leave the UK to live with his mother in Tenerife, Spain. The competent institution informed him that by moving to Spain, he was no longer entitled to the disability allowance. The preliminary questions raised by the British Court first addressed whether the disability living allowance was part of the material scope of 1408/71. Secondly, the reference questioned the validity of the new special rule codified by 1247/92.

^{xlii} The much debated cases of *Paletta* will not be discussed here, since they did not deal with authorisation policies. The Cases C-45/90 *Paletta I* [Case C-45/90, 3. June 1992. *Brennet AG v Vittorio Paletta*. ECR 1992, p. I-3423] & C-206/94 *Paletta II* [Case C-206/94, 2. May 1996. *Brennet AG v Vittorio Paletta*. ECR 1996, p. I-2357] questioned whether wage maintenance benefits paid by the employer to the employee in the event of illness constituted a sickness benefit within the meaning of Article 4 (1), and furthermore whether the competent institution was obliged to accept a medical certificate stating the illness, when the certificate had been issued in another member state. The Court concluded that since the wage maintenance benefit was granted only in the event of illness, it was incontestably a sickness benefit within the meaning of Article 4 (1) (para. 17). Furthermore, the Court concluded that the competent institution was obliged by Community law to accept the medical findings of the doctors abroad.

^{xliii} Case 17/76 *Brack* [Case 17/76, 29. September 1976. *M. L. E. Brack, widow of R. J. Brack v Insurance Officer*. ECR 1976, p. 1429] was the first ruling on the Article to interpret the concept of worker in relation with Article 22, and laid down that also the self-employed were entitled to immediate treatment in another member state. By the *Brack* ruling, the Court issued an early, generous interpretation of who enjoyed the right to health care abroad. The case has been analysed in section 2.4 of chapter IV.

^{xliv} The *Smits-Peerbooms* case did not explicitly deal with Regulation 1408, and therefore did not decide on the future relation between primary and secondary law. As in *Decker-Kohl*, the ruling confirmed a dual system of how to access health care abroad. The *Vanbraekel* case, ruled at the same date as *Smits-Peerbooms*, was a further legal confirmation of this duality [Case C-368/98, 12 July 2001. *Abdon Vanbraekel and others v Alliance Nationale des Mutualites Chretiennes (ANMC)*. ECR 2001, p. I-05363]. The *Vanbraekel* case concerned the level of reimbursement for health care purchased abroad, concretely regarding the reimbursement tariff for an operation that the Belgium resident, Ms *Descamps*, had had carried out in France. According to Article 22 (1) (c) of 1408/71, health care abroad is paid as the price of the treatment provided, i.e. as the tariffs in the member state of treatment. The *Decker-Kohl* procedure, on the other hand, reimburses costs according to tariffs set by the competent state. In the *Vanbraekel* case, the Court concluded that Regulation 1408 did not prevent the competent state from reimbursing according to its own tariffs when these were more favourable (para. 36 of the judgement). The Court even found that the more favourable reimbursement was a necessary condition for the free movement of services: "In the present case, there is no doubt that the fact that a person

has a lower level of cover when he receives hospital treatment in another Member State than when he undergoes the same treatment in the Member State in which he is insured may deter, or even prevent, that person from applying to providers of medical services established in other Member States and constitutes, both for insured persons and for service providers, a barrier to freedom to provide services" (para. 45 of the judgement). As in *Smits-Peerbooms*, the *Vanbraekel* case favoured the position of the patient in order to ensure non-discrimination, when a foreign treatment was found necessary. The Court considered a specific aspect of 1408 and the newly established procedure, and confirmed that 1408/71 was not exhaustive. Still, however, the recent case-law merely indicated details on the relationship between Treaty provisions and secondary legislation, and much was left open by the individual judgement of *Vanbraekel*.

Chapter VI: Adaptive Pressure on National Social Security Schemes

This chapter initiates the analysis of the domestic impact of the European institutionalisation of social security rights. It should be read in conjunction with the following chapter VII, which is also concerned with addressing this thesis' research question, '*with what impact*'. Both chapters concern the second layer of institutionalisation. The present chapter identifies the *adaptive pressure* on the Danish and German welfare models emerging from the possible incompatibility between the principles of the European institution and those contained in national social security institutions. Chapter VII continues the analysis focusing on *national response* to, and the *domestic impact* of, supranational institutionalisation.

'Adaptive pressure' can be defined as being constituted by the degree of compatibility (the 'fit') between the principles and obligations of a given European integration process and those of national institutions (Risse, Cowles & Caporaso 2001, pp. 6-7). The extent of adaptive pressure is therefore not only determined by supranational institutionalisation, but equally by how that process relates to established national institutions. To examine *adaptive pressure* thus requires that both the specific integration process and national institutions are identified. Since national institutions are particularly diverse among the member states of the European Union, European integration does not exert the same degree of adaptive pressure:

"A country whose domestic institutions are perfectly compatible with Europeanisation experiences no adaptational pressure. In such a case, we expect no domestic institutional change" (Risse, Cowles & Caporaso 2001, p. 2).

Then on the other hand:

"The lower the compatibility (fit) between European institutions, on the one hand, and national institutions, on the other, the higher the adaptational pressures" (Risse Cowles & Caporaso 2001, p. 7; Börzel & Risse 2000, p. 6).

However, although adaptive pressure is exerted against national institutions, it may not cause significant domestic impact in terms of change, since national actors may not respond in accordance with the adaptive pressure (Risse Cowles & Caporaso 2001, p. 2; Goetz 2001, pp. 214-215, 227). To the extent that we find no straightforward connection between adaptive pressure, adaptive response and impact, such a finding points to the fact that, when implementing supranationally institutionalised obligations and rights, the member states enjoy a considerable degree of national autonomy. In that case, implementation may indeed constitute the second stronghold of national control. Such a finding shall, however, be examined both in the short run and in the long run, assuming that the time variable influences adaptive response and therefore impact.

According to the above definition of 'adaptive pressure', the identification thereof requires a mapping of the relevant process of European integration. That has been conducted in the previous chapters III, IV and V, which detail the main principles of the Regulation, the gradual extension of its personal scope, and the institutionalised compromise between the Community principle of exportability and national principles of territoriality. The analysis of supranational institutionalisation demonstrated the dynamic characteristic of the Community Regulation. In the present chapter, the analysis identifies the principles and criteria of national institutions in order to lay down how these may, or may not, clash with the identified supranational institutionalisation process.

The examination of adaptive pressure in the present chapter will contain both an institutional and a de facto component. In institutional terms, the characteristics of national social security institutions will be identified for the Danish and German member states respectively. The identification will, in brief, examine the *historical reasoning* of national welfare, the *organising principles* and *boundaries for welfare* in the two countries and, finally, lay down the institutional outlook of the four contemporary social security schemes of *statutory pension*, *public health care*, *long term care* and *family benefits*. In a *de facto account*, actual EU-related immigration into the two member states between 1985 and 2000 will be analysed. The argument for including the de facto component is that adaptive pressure and impact cannot only be assessed on an institutional account, but

ultimately depends on how many EU migrants exercise their supranationally established right of free movement into specific countries.

The chapter *begins* by setting up four hypotheses on the domestic impact of European integration. Three of them are general and derived from theoretical propositions. One specifically addresses the difference between the residence-based and the insurance-based welfare state. Furthermore, the choice to compare the Danish and German member states is substantiated. The *second* section of the chapter turns to the identification of adaptive pressure, by detailing the national institutions in place; their historical reasoning as a means of national integration; their organising principles and their boundaries for welfare. The *third* section sets out the contemporary institutional characteristics of the four social security schemes of statutory pension, public health care, long term care and family benefits. The section depicts how contemporary schemes concretely express organising principles and welfare boundaries. The ways in which supranational institutionalisation has impacted on these specific schemes will be analysed in the following chapter. The *fourth* and final section analyses adaptive pressure in *de facto* terms, comparing EU-related immigration into the two member states. The *de facto* examination profoundly challenges the hypothesis of 'welfare tourism', and the assumption that the residence-based welfare state should experience a greater adaptive pressure. Such hypotheses, however, remain alive and well, as will be demonstrated in chapter VII's examination of national response.

1.0: Hypothesis on Domestic Impacts and the Choice of Comparative Cases

In general, legislation on social security is amended more frequently than most other types of legislation. There is a consistent need to adapt to minor changes in the domestic context, such as, for example, wage levels, new treatments, etc., and, from time to time, there will be a more profound reform of policies as a response to demographic change, economic situation, efficiency calls, etc. (Becker 2000, p. 40). To estimate how European institutionalisation may affect national social security policies and have a direct or indirect impact on national legislation would ideally require one to isolate its effect from the effects of other domestic, ideological or international factors. As the policy field of social security is a domain that is constantly adjusted or changed, it is almost an impossible task to estimate the precise impact of Europeanisation, fully purged of other factors.

The following analysis and its conclusions should not be read as having dismissed the importance of other factors. It does not state that European integration, in general, has become the major force driving domestic social security change (Goetz 2001, p. 220). Far from it. However, the analysis does demonstrate and conclude that European institutionalisation exerts adaptive pressure on existing national institutions, requires an adaptive response and is a variable causing change.

1.1: Three General Hypothesis

The theoretical discussion carried out in chapter II depicted competing views on the impact of European integration. Furthermore, the dominant schools on European integration do not provide detailed theorizing on what happens subsequent to supranational political and judicial decision-making. For that reason, a classic neo-functionalist versus intergovernmentalist theoretical discussion is insufficient, to the extent that it disregards the actual consequences of integration on national policies and to the extent that it concentrates on what is still the generation of abstract rights, without considering the process of national implementation where these are translated into enforceable ones.

However, chapter II's discussion on 'what is the national impact of supranational institutionalisation' makes it possible to formulate three general, but competing, hypotheses on the national response to, and impact of, supranational institutionalisation.

Hypothesis 1 and 2 are placed on each side of a continuum stretched out between 'full impact' and 'no impact'. Hypothesis 1 refers to neo-functionalism and its modified variants, including the approach on 'Institutionalisation of Europe' as formulated by Stone Sweet et al. and hypothesis 2 refers to a classic intergovernmentalist viewpoint. Hypothesis 3 is an attempt to formulate an in-between standpoint, which draws on the comparative tradition of historical institutionalism.

- *H₁: Supranational institutionalisation is loyally transposed into national legislation and thus implies a corresponding policy change. When the scope of integration increases, it will produce a greater uniformity in national policies. The adaptive pressure of integration will thus gradually force national policies to converge.*

- *H₂: Member states respond strategically to supranational institutionalisation and thus largely manage to neutralise its effect. National actors control the effective outcome of institutionalisation, both at the supranational and at the national level. Supranational institutionalisation only changes the status quo of national institutions to the extent that it is in the national interest to do so.*
- *H₃: National implementation constitutes the reactive part of decision-making, through which the effective meaning of an institution is established. Supranational institutionalisation may be an independent variable of change, but national implementation steps in as an act of governance, translating supranational rules according to national institutions and perhaps preferences. The impact is therefore not 'perfect, universal or constant'.*

To assess the hypotheses requires an analysis which, 1) identifies the adaptive pressure exerted by supranational institutionalisation, and, on this basis, 2) analyses the national response to, and impact of, supranational institutionalisation. This will be the task of the present and the following chapter.

In general the study of impact invite us to carry out a comparative analysis. Against this background, the following analysis is comparative, investigating the adaptive pressure, the national response and the impact of supranational institutionalisation on the member states of Denmark and Germany respectively.

1.2: The Choice of Comparative Cases and a Fourth Hypothesis

Regulation 1408/71 co-ordinates the social security schemes of 15 member states, each of which has a distinct welfare tradition. Understood as the cause or independent variable, European institutionalisation of social security rights must be assumed to exert a different adaptive pressure on each of the 15 welfare models. If the adaptive pressure varies, so must the adaptive reaction of the member states. In order to account for the differences in adaptive pressure and European impacts a comparative approach has been chosen.

It has often been stated that, since the coordination framework was established by the founding fathers of the ECSC and the European Community, its principles were laid down in accordance with their welfare tradition. Apart from a few exceptions, the social security systems of the six original member states were based on the exercise of work activity and built up as Bismarkian oriented social insurance schemes (Cornelissen 1997, p. 35; Pieters 1997, p. 190). It was therefore a natural choice that *lex loci laboris* became a ruling principle of the Regulation, when deciding the applicable legislation. Furthermore, the Regulation laid down a distinction between contributory and non-contributory financed, i.e. tax-financed, social benefits, where the latter traditionally were held outside the material scope (Ketscher 2002, p. 194).

Assessed against the definition of 'adaptive pressure', the core rationales of the Regulation have been held to 'fit' the social insurance welfare model and, it has been argued, to 'misfit' the principles of the residence-based welfare model (Banke 1998, p. 30; Ketscher 1998, 2002; Abrahamson & Borchorst 2000). On the basis of this comparative assessment, the present study compares the adaptive pressure, national response to, and impact on, the Danish and the German welfare states respectively. The two member states represent diverging welfare schemes. The Danish welfare state is predominantly tax-financed and residence-based, whereas German welfare tradition is basically contribution financed, and linked to the exercise of a work activity. In addition, it is held to be likely that the apparent 'fit' between Community obligations and German welfare institutions had been influenced by the fact that Germany as a Community founding father took part in the original formulation of the regulatory text, whereas Denmark, which became a member in 1973, took over the *acquis communautaire*, and thus its embedded rationale.

The 'misfit' between institutionalised intra-European social security rights and the residence-based welfare state has been debated in sections of Danish academia as well as in public debate. Even the Danish central administration has, from time to time, contributed to the argument that an extension of Regulation 1408 might cause 'welfare tourism'. The argument is trenchant and has successfully influenced the recurring Danish debate for or against further integration, and for or against Union membership. Its effective impact therefore reaches much beyond the isolated scope of 1408. Concretely, it has been argued that, when considering intra-European social security and residence-based welfare, we face two contradicting philosophies. Free movement and Regulation 1408 favour an individualistic insurance principle and will gradually force the residence-based, non-contributory

welfare state to change, i.e. to converge with the dominant social insurance pattern of the EU member states (Ketscher 1998, 2002; P1 Lige Lovligt, 26 November 2003). According to the argument, the adaptive pressure exerted may cause welfare autonomy to be a thing of the past.

"In a long-term perspective, it cannot be doubted that Union membership increasingly will influence the designing of Danish social legislation. That applies to both the designing of individual rights and to the financing of the social security. Concerning individual rights, it must be envisaged that these to a greater degree will become labour market related, but that correspond to the general development in Danish social law. Furthermore, it may be envisaged that rights will be more insurance-based, in which the relation between contributions and benefits becomes more direct. In any case, a process seems already to have started in which social benefits develop differently from traditional tax-financing. [...] it should therefore be concluded, that a greater pressure on the Danish model must be envisaged, because it is very little suited to participate in a Community built on the principle of free movement. That will in itself cause a greater harmonisation of the social protection in the Union" (Ketscher 2002, pp. 221-222, own translation from Danish).

The assumption quoted above is a more specifically applied version of the convergence hypothesis, stated as H₁. In a comparative light, such a hypothesis invites us to think that the insurance-based welfare state would face significantly less adaptive pressure and would feel less the impact of European integration. The choice of comparing two contrasting cases should make it possible to explore variations in adaptive pressure and ultimately domestic impact.

On this basis, a fourth specific hypothesis is formulated:

- *H₄: The institutionalisation of intra-European social security exerts adaptive pressure and impacts primarily on the residence-based welfare state and may gradually force it to converge with the dominating social insurance pattern of the EU member states. The social insurance welfare state, on the other hand, enjoys the compatibility between the coordination system and national institutions in place, and therefore does not experience any significant adaptive pressure nor European impact.*

2.0: Two Welfare Models in a Historical, Institutional Light

Welfare policies have traditionally been held to be the exclusive competence of the member state. Member states decide on the content and scope of their individual policies. EU interference in this policy realm is therefore limited to 'coordination', as a conceptual contrast to 'harmonisation'. However, as has been demonstrated in the previous chapters, the exact border between the two

concepts is far from given, but it is clear that 'coordination' is not an insignificant, but rather an intervening, policy tool (Christensen & Malmstedt 2000, p. 14). It is furthermore clear that there is no exact separation of national and community social competences, when internal market rules overlap with national prerogatives.

The policy means to favour one's own citizens or long term residents in welfare matters and to demarcate social benefits within one's own borders, have deep-rooted historical and organisational explanations. Against its historical background, the need to defend welfare autonomy may be stronger compared with other policy areas, and European impact on national social institutions may be especially sensitive.

2.1: Welfare as Means of National Integration

The institutionalisation of the modern welfare state mirrors a national process of integration (Ferrera 2003). By the last decades of the 19th century, an institutional watershed began to take form. Previously, protection against social security risks had been attended to by families and local communities but, in the late 19th century, western European nation-states gradually began to adopt national social legislation (Mossialos et al. 2001, p. 12; Ferrera 2003, pp. 622-623)

Germany and Denmark were both pioneer welfare states, being among the first countries to adopt the four constitutive pillars of social security: covering industrial accidents, sickness insurance, pension and unemployment (see appendix 3, table 3). Germany passed its law on sickness insurance in 1883; in 1884, the law on industrial accident insurance; and in 1889, the law on pension insurance. Denmark followed closely after, adopting its pension scheme in 1891; its law on sickness insurance in 1892; and the law on industrial accident insurance in 1898. Denmark was one of the first western European states to have adopted all four constitutive social security pillars, when it agreed on unemployment benefits in 1907. Germany completed the four pillar structures 20 years later, passing its law against the unemployment risk in 1927.

The rise of the modern welfare state has been explained in many ways, since different aspects of a complex political, societal, economical and cultural phenomenon point to different sources. Among

such explanations are those emphasising the innovation of modern social security as means of national integration.

In the 19th century, both the German states and Denmark were societies in transformation. These transforming societies were characterised by the disintegration of traditional social ties, caused by interlinked and separate processes of industrialisation, population growth, increased mobility, emigration, economic crisis and a political fear of socialism. Encouraged by industrialisation, parts of the population sought work opportunities in the bigger cities or industrial areas, and were thus no longer protected by the possible support from family, local employer or community. Between 1850 and 1925, the distribution of the German population that lived respectively in the country and in the cities changed fundamentally (Lampert & Althammer 2001, p. 27).²²⁸ Moreover, the German states experienced dramatic population growth in the 19th century.²²⁹ To escape the poverty of pre-industrial life in the country, migration took place on a large scale.²³⁰ Besides the migration between the German states, 4.4 millions emigrated abroad between 1851 to 1900 (Lampert & Althammer 2001, p. 28). In Denmark, the deep economic crisis that hit the agricultural sector in the 1870s and 1880s was a major factor in the transformation of traditional society (Petersen 1985, p. 42). The agricultural crisis forced a large amount of workers to migrate either to the cities, or to emigrate to the United States in an attempt to escape poverty (Johansen 1986, p. 297). Meanwhile, Germany and Denmark experienced the beginning of the political organisation of the social democratic party, and agitation from the left intensified.²³¹ Established society and its representatives feared socialism to such an extent that social policies were discussed as an effective safeguard against social unrest (Monrad 1930, p. 26; Lampert & Althammer 2001, p. 67).

²²⁸ In 1852, 67.3 % of the population in the German states lived in villages with less than 2000 inhabitants, whereas 6 % lived in cities of 20.000 to 100.000, and only 2.6 % lived in large cities with more than 100.000 inhabitants. In 1925, the distribution had changed to 35.6 % of the population in villages with less than 2.000 inhabitants, 13.7 % in cities between 20.000 and 100.000, and 26.8 % lived in large cities with more than 100.000 inhabitants (Lampert & Althammer 2001, p. 27).

²²⁹ In 1816, the German population was 24,8 millions, in 1855, it had increased to 36.1 millions and the population almost doubled until 1910, where it reached 64,5 millions (Lampert & Althammer 2001, p. 26, Eichenhofer 2000).

²³⁰ The migration from the country to industrial growth areas was an east to west movement. East and West Prussia, Pommern, and Polish migration to the Berlin area and the Ruhr region.

²³¹ The German socialist party, "Sozialistische Arbeiterpartei" was founded in 1875, but its organisation goes back to the foundation of the "Allgemeinen Deutsche Arbeiterverein" in 1863, and the "Sozialdemokratische Arbeiterpartei" in 1869. The Danish social democratic party was founded in 1871 as a Danish fraction of "The First International" and won representation in the Danish lower chamber, the Folketing, for the first time in 1884.

Societies at 19th century's 'Fin du Siecle' were socially and politically fragmented and differentiated. Poverty and the search for opportunities intensified migration to an extent never seen before. Unemployment in the country-side and migration to the city created a 'surplus' population which was not integrated into employment or social structures. Poverty, increased mobility and the growth in the number of marginalized persons without traditional social protection raised new social questions.

The granting of national social security rights became one way of integrating a marginalized working class into society, initiating social solidarity and expecting loyalty in return (Eichenhofer 1999, p. 45). Initially, social security schemes addressed the worker specifically, but were gradually extended 'up-wards' to new groups of persons within the nation and to new types of benefits (Ferrera 2003, p. 623). In this way, the process of welfare nationalisation began. Further institutionalisation extended schemes to the wider personal scope, until social security in some states became a universal, but nation-bound, citizenship right.²³² Self-employed and agricultural workers were generally among the last category to achieve social security protection, but by the 1950s they had finally been included in the many different schemes and the "idea of national solidarity" seemed to have become "the core principle of social security" (Flora & Alber 1981, p. 54).

Gradually social security became a material right, creating stronger ties between the nation-state and its citizens, between national politicians and voters. It can be argued that from the very beginning, welfare was tactically motivated by the need to create an ordered relationship between nation state and citizen, to integrate the marginalized, and to avoid social unrest.

²³² Generally, industrial accident insurance was first limited to workers in dangerous work positions. Then it was gradually extended to new personal categories and occupational risks. Sickness insurance was also initially limited to industrial workers and a few categories of employees below a specified income level. After the initial period, it was extended to groups such as agricultural workers or employees with higher salaries. Between 1930 and 1945, the sickness schemes were extended to family members, and about a decade later, pensioners were included as well. The self-employed generally marked the last inclusion after 1950. The pension insurance was in the initial years granted to workers and some other categories of employees, but then opened up to survivors and self-employed. However, the pension schemes of the Scandinavian countries made the whole population eligible for pension from the beginning but not necessarily entitled to receive it, while other countries did not provide general protection against old age before after World War II. Unemployment benefits follows the pattern of the other social security pillars. The scheme was initially limited to industrial workers or specific industries and then extended to wider groups (Flora & Alber 1981, pp. 52-53).

Eichenhofer has stressed that one important reason why Germany became the first social security state was the foundation of the German state in 1871. The German rulers needed instruments of national integration, and the initiation of the social security laws by Otto von Bismarck had strong political, tactical motives. By granting the worker pension, health security and industrial accident insurance, Germany had the means to create lasting bonds between the state and its working class citizens. Social security thus became a part of German nation-building (Eichenhofer 1999, p. 45). Bismarck's political, tactical motives are evident in the fact that his plans were inspired by Napoleon III and the French program "Extinction du pauperisme". Before the adoption of the old age insurance in 1889, Bismarck declared in the Reichstag;

"I have lived long enough in France to know that the loyalty that most Frenchmen have to the Government, which is there, and which every time has the advantage, also when it governs poorly [...], essentially has to do with the fact that most Frenchmen are pensioners of the state, by small, often by very small amounts" (Eichenhofer 2000, p. 20, own translation from German²³³).

Lidegaard's argument about the Danish welfare state has a certain similarity to Eichenhofer's interpretation, as it stresses welfare as a means of building up the nation (Lidegaard 2003). The argument is, however, different since, in the Danish case, we are speaking about granting new rights to an established, but defeated, nation. Lidegaard argues that the institutionalisation of the Danish welfare state was a matter of the survival of the nation. In 1864, Denmark lost another battle against Prussia and the Southern part of Jutland became Prussian territory. The loss caused a national trauma, but the response was that "what has been lost externally, must be won internally" (Lidegaard 2003, p. 153). The state should invest in - and win - the nation.

"The welfare reforms became a weapon in the battle for the population's unconditional loyalty towards the state and the nation" (Lidegaard 2003, p. 155, own translation from Danish).

Generally, the modern welfare has been proposed, created and institutionalised by the nation, and aims at national integration and coherence;

"the welfare state has always been a national state and this connection is far from coincidental. One of the main factors impelling the development of welfare systems has been the desire on the part of governing authorities to

²³³ The German text reads as follows; "Ich habe lange genug in Frankreich gelebt, um zu wissen, dass die Anhänglichkeit der meisten Franzosen an die Regierung, die gerade da ist, und die jedesmal den Vorsprung hat, auch wenn sie schlecht regiert, oder doch schliesslich auch die an das Land, wesentlich damit in Verbindung steht, dass die meisten Franzosen Rentenempfänger vom Staat sind, in kleinen, oft sehr kleinen Beträgen" (Eichenhofer 2000, p. 20).

promote national solidarity. From early days to late on, welfare systems were constructed as part of a more generalized process of state building. Who says welfare state says nation-state" (Giddens 1994, pp. 136-137).

European coordination of social security challenges this historical meaning of the welfare state. Welfare was, and is still, closely linked to the nation and the national territory. The historical justifications for constructing and extending the welfare state constitute the long perspective of the adaptive pressure exerted by intra-European social security.

2.2: The Organising Principles of Two Welfare States

As typologies, the Danish and the German welfare state represent two different models. Typologies have for long been used as comparative tools in welfare research. Back in the 1950s, Wilensky developed the distinction between the residual and the institutional welfare state. In 1971, the distinction was extended by Titmuss, when he added the performance-oriented scheme as a third model. In 1990, Esping-Andersen emphasised the ideological link of the three welfare ideal-types, and placed them in their broader political-economic contexts. The residual welfare state referred to the liberal ideology, represented by the US and United Kingdom among others. The institutional welfare state was mainly formed by social democracy, and was represented in the Scandinavian states. The performance-oriented model was found in countries where conservative ideology had dominated such as in Germany, Austria, France and Italy. The criteria for Esping-Andersen's distinction between welfare models was the extent of 'de-commodification' that each state granted its citizens. The 'de-commodification' degree is the degree to which the social security of the individual is independent of market performance. A de-commodified welfare state will thus grant social rights on the basis of citizenship rather than on the basis of performance.

"The outstanding criteria for social rights must be the degree to which they permit people to make their living standard independent of pure market forces. It is in this sense that social rights diminish citizens status as "commodities"" (Esping-Andersen 1990, p. 3).

From a more abstract point of view, Denmark and Germany have institutionalised two distinct welfare models with distinct degrees of de-commodification. The Danish welfare state has historically stretched de-commodification to the middle class, and in its attempt to institutionalise universal social solidarity, it has minimised the importance of the market participation in the granting of social rights. In contrast, a key characteristic in the German welfare state is the

preservation of status differentials, where previous contributions decide the level of social security (Esping-Andersen 1990, pp. 27-28).

For analytical purposes here, and due to their different financial forms and criteria for granting social security, the following outline will label the Danish welfare state as a *residence-based model*, and the German welfare state as a *social insurance model*.

A main characteristic of the *residence based welfare model* is that social rights are granted on the basis of residence (Cornelissen 1997, p. 32). A person is entitled to welfare because she/he is a citizen or a habitual resident, and not qua individual contributions paid to a specific scheme. The institutionalisation of welfare has moved in the direction of 'social citizenship' as criteria for entitlements and the residence based model has traditionally vested its citizens "with a basic right to a very broad range of services and benefits which, as a whole, is intended to constitute a democratic right to a socially adequate level of living" (Esping-Andersen & Korpi 1987, pp. 42-43). Most welfare benefits are universally granted. The 'openness' of the system is therefore relatively high, generally giving access to the whole population (Hansen 2002, p. 9). Rights are mainly granted on an objective, legal basis and not on a discretionary one (Goul Andersen 1999, p. 44).²³⁴ The model may, however, positively discriminate and grant additional benefits or services to defined, normally low-income, groups (Goul Andersen 1999, p. 47). Another key-characteristic of the residence model is that benefits are generally not based on contributions, but are tax financed. Yet, tax payment is not a requirement to receive a specific social benefit (Ketcher 1998, pp. 254-255). Apart from when benefits express positive discrimination, they are granted as flat-rate payment which do not reflect previous income, tax-payment or contribution. For that reason, a person who has never contributed to the Danish economy or paid considerable taxes will enjoy the same rights as someone who has been a regular tax payer all through his working life. For the large part of welfare schemes, work position is irrelevant.

A main characteristic in the *social insurance model* is that market participation gives access to a social security scheme, and the degree of this participation decides the level of social entitlements. Those who hold a German work position are compulsorily insured against social security risks. The principle of 'lex loci laboris' is therefore what decides where to be socially insured, and not

²³⁴ If rights were generally granted on a discretionary basis, the model would tilt towards the residual one.

residence (Altmaier 1995, p. 77). The individual earns his social rights qua paying contributions (Goul-Andersen 1999, pp. 42-43). Contributions are calculated according to one's income as, for example, employee, self-employed or employer. As contributions are related to earnings, benefits will be related to previous income. The equivalence between individual contribution and right is therefore high. For example, an aim of the pension scheme is to link the pension level with the previous income level and thus make the maintenance of living standard possible in old age (Schmähl 1991 & 1992). The social insurance scheme is inter-temporally redistributive over the life cycle, and minimises the cost of a social security risk at the individual level. The scheme is, however, also interpersonally redistributive, which makes it differ from private insurance (Schmähl 1992, pp. 6-7).

The organising principles of the two welfare models have proven remarkably persistent, although not static. Core principles have demonstrated continuity for more than a century, but as the welfare state has developed, new methods have been introduced making the borderline between the two models increasingly blurred (Pieters 1997, p. 190). In terms of continuity in Germany, a tax-financed pension system was proposed at several historical moments of change, but the institutions in place were defended and no change was introduced (Schmähl 1992).²³⁵ Also the German adoption in 1994 of the long-term care scheme as a compulsory, insurance primarily for all employees is a continuation of the tradition, whereas the post-war development of family benefit as tax-financed welfare exemplifies the mixed characteristics of the social insurance model. Equally, Denmark has amplified its principles as a residence-based, tax-financed welfare model, based on social citizenship. The pension scheme, the accidental insurance scheme and the unemployment scheme have maintained their founding features for more than a century. Furthermore, the sickness scheme has been reformed along the same path. Whereas it was founded as an insurance scheme, it changed into a publicly administered and financed scheme for all residents, thus becoming a universally accessible scheme for all citizens or residents just like the pension scheme (Sonne Norgaard 1999, p. 18). However, more recent welfare developments have brought change. In 1994,

²³⁵ For example after the First World War, Germany had an intense discussion about reforming the pension system to a tax-financed one. The ideas were expressed and supported especially by the socialist political spectrum but did not gain sufficient support. In 1946, the allied forces presented a plan integrating the different social security branches into an uniform organisation, which was to cover nearly all employees and benefits. The general scheme was to be financed by an integrated contribution for all branches, and the plan was clearly influenced by the Beveridge report from 1942. One argument against the plans for institutional change was that in a time of radical, general change, the German social security system represented a positive tradition (Schmähl 1992, p. 9). In general, the post war years came to reinforce the traditional principle behind the German scheme.

social security contributions were introduced. Employees, self-employed workers and employers are now obliged to contribute with 8% of their wages to the Labour Market Fund. However, the contributions paid do not influence entitlement to benefits, but were introduced as a new general method to finance state spending on sickness, maternity and unemployment benefits. The institutional change does not therefore introduce an equivalence principle into the Danish welfare model, but rather a new financial composition.²³⁶

No matter how accessible welfare may be for the working or residing population, it remains a conditional and restricted right. We will now consider how the boundaries of welfare limit rights to a defined set of beneficiaries, thus making social solidarity conditional on personal and territorial belonging.

2.3: Boundaries for Welfare; the Principles of Territoriality and Social Citizenship

The formation and consolidation of modern social policies took place within the territorial borders of the nation-state. State formation and nation building were thus the initial stages of the long history of the modern welfare state that regulates today. Social policy was, and remains, closely associated with the idea of the nation-state (Eichenhofer 2001, p. 55). The welfare state inherited its sovereignty and strong emphasis on territoriality. Traditionally, the welfare state has autonomously defined who qualifies as its social beneficiaries, targeting benefits for its own citizens, residents or workers. Furthermore, it has been in a sovereign position to exercise spatial control, insisting that social benefits and services should be consumed within its own territory (Leibfried & Pierson 1995). Social citizenship and territoriality have been the demarcating principles for the reach of welfare.

'Social citizenship' was originally conceptualised by T.H. Marshall as part of an evolutionary description of citizenship, through which societal coherence was created (Marshall 1950). Marshall depicted modern citizenship as having developed in three stages, where 'social citizenship' was the

²³⁶ In 1996, approximately 69 % of the social expenses were financed by taxes in Denmark, whereas it for Germany was only 30%. In 1990, the tax financing in Denmark was, however, 80%. From 1990 to 1996, the employees' part of the financing via insurance rose from app. 5% to 15% in Denmark (Abrahamson & Borchorst 2000, p. 226). In the longer institutional perspective, the financing distinction between the two models was thus minimised over a period of relatively few years.

culmination of a long-running process. Civic citizenship rights of the 18th century were supplemented by the political participation rights of the 19th century, which were finally concluded by the social citizenship rights of the 20th century.

However, throughout all stages, 'citizenship' required membership which was and remains a national one. Concepts such as equality and solidarity were not unlimited, but to be understood alongside the original restriction of policies to members of the nation.

"Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed" (Marshall 1992 (1950), p. 18).

The status of citizen has been one traditional condition for social entitlements. Another condition is expressed by the principle of territoriality. Traditionally, social benefits and services of the welfare state have been confined within the nation's own territorial borders (Eichenhofer 2001, pp. 55-56; Mossialos et al. 2001). Social responsibilities were not meant to reach beyond them. Generally, social legislation in both Denmark and Germany remain based on the territorial principle, and the spatial application of welfare has therefore a clearly defined reach (Haverkate & Huster 1999, p. 115).²³⁷ In a globalised world, the territorial principle still finds its justification. Social benefits and services are designed to fulfil domestic policy aims and correspond to domestic living conditions and costs (Tegtmeier 1990, p. 29; Clever 1992, p. 300). Above all, the principle serves as an effective national instrument of control.

- The principle of territoriality is a means to ensure budgetary control. When only those residing and consuming within own borders are entitled to supplied benefits and services, costs are reduced and are more easily controlled.
- The principle of territoriality is a means of framing the intended policy, and to ensure that it is actually pursued. To ensure, for example that long term care benefits are used for actual care, that supplied family benefits meet policy intentions, and that the unemployed are available for the domestic labour market.

²³⁷ Altmaier defines the territorial principle in a German context, writing: "Zum einen umschreibt das Territorialitätsprinzip die Tatsache, dass staatliche Hoheitsgewalt nur innerhalb des eigenen Staatsgebiets ausgeübt werden darf, der räumliche Bereich der Anwendung des deutschen Sozialversicherungsrechts sich somit in der Regel auf das Deutsche Hoheitsgebiet beschränkt. Es handelt sich hierbei um eine Regel des Allgemeinen Völkerrechts, die nicht nur auf den Bereich des Sozialrechts Anwendung findet" (Altmaier 1995, p. 73, emphasis added).

- The principle of territoriality is a means of controlling the quality of the supplied services, since standards are nationally defined.
- The principle of territoriality is a means of facilitating the capacity for planning in the health sector. If health services can only be consumed within national borders, consumption is nationally controlled and foreign supply does not have to be integrated.

The traditional condition for entitlement to welfare protection in Denmark has been Danish citizenship. The nationality clause is maintained in parts of the social legislation. This applies to the law on social pension, whereas for benefits regarding sickness and maternity, habitual residence is the requirement.²³⁸ However, to comply with European and international obligations, national law makes an exception to its own nationality clause. If not a Danish citizen, years of residence in Denmark or the periods of reference, i.e. the periods in which the applicant has been covered by Danish legislation, are taken into account (Banke & Borker Rasmussen 1998, p. 14). The main rule, regulating Danish social policy today is periods of residence. Although residence appears as a non-discriminatory criteria, it clearly favours citizens when long-term residence is required in order to receive a full benefit, as for example, is the case for social pensions. The emphasis on territoriality in the residence based welfare state is strong. As a general rule, one has to reside in Denmark to receive social benefits (Ketscher 1998, p. 261; Den Social Sikringsstyrelse, Hæfte 1, 1997, p. 28).

Denmark has traditionally differentiated legally between Danes and foreigners, thus operating with two welfare demarcations, i.e. that of nationality and that of territoriality. The post war social security code in Germany has not made a distinction between Germans and foreigners, but demarcated rights through the link to the German labour market, or, if one does not hold employment, through habitual residence (Willms 1990, p. 58, Haverkate & Huster 1999, p. 116). The territorial principle for social policy in Germany is concretised in the "Sozial Gesetzbuch" IV, § 3, in which the personal and spatial application of German social insurance law is settled.²³⁹ The

²³⁸ See Law on Social Pension § 2 (Lov om Social Pension) and Laws on Health Insurance (Sygesikringsloven) § 1 and Hospital Treatment (Sygehusloven) § 5.

²³⁹ The general expression of the German principle of Lex Loci Laboris and territoriality is found in Sozialgesetzbuch IV, § 3, and reads: "Personlicher und räumlicher Geltungsbereich. Die Vorschriften über die Versicherungspflicht und die Versicherungsberechtigung gelten,

1. soweit sie eine Beschäftigung oder eine selbständige Tätigkeit voraussetzen, für alle Personen, die im Geltungsbereich dieses Gesetzbuchs beschäftigt sind oder selbständig tätig sind,
2. soweit sie eine Beschäftigung oder eine selbständige Tätigkeit nicht voraussetzen, für alle Personen, die ihren Wohnsitz oder gewöhnlichen Aufenthalt im Geltungsbereich dieses Gesetzbuchs haben".

principle of *lex loci laboris*, however, comes before residence in Germany, which means that where a person works in Germany, but lives abroad that person will still be entitled to certain social benefits in Germany. Where the person lives in Germany, but works abroad, he/she will be covered by the social legislation of the state of work. It is only when a person resides in Germany but is unemployed, that one can be covered by German social insurance, without a work position (Schaaf 1999, p. 275).

The table below compares the different organising and demarcating principles of the Danish and German welfare state.

Table 6: Organising Principles of and Boundaries for Welfare

Denmark	Germany
Citizenship or residence	Labour market related contributions
<i>Lex Loci Domicili</i>	<i>Lex Loci Laboris</i>
Principle of social citizenship	Market citizen
Principle of territoriality	Principle of territoriality
Taxation	Income, earning related contributions
Exemplified by pension; guarantee the basic income of citizens in old age	Exemplified by pension; maintenance of living standard
Primarily interpersonal	Primarily intertemporal

The organising principles and boundaries of welfare find their concrete expression in contemporary social security schemes. The section below depicts some relevant features for the social security schemes of old age, public health care, long term care and family benefits in Denmark and Germany respectively. These schemes' encounters with Community law and policy will be analysed in the subsequent chapter.

3.0: Four Contemporary Welfare Institutions

Welfare models and their general organising principles have their concrete expressions in contemporary schemes. Typologies and principles, explained by history, are operationalised in concrete, contemporary institutions, in which beneficiaries, financial form, granting conditions and other defining characteristics are specified.

This section describes the contemporary schemes of statutory pension, public health care, long term care and family benefits as provided for by legislation in the Danish and German welfare state, in the year 2000.²⁴⁰ In general, the schemes reflect their historical trajectory and persistent patterns, but they also illustrate how politics have responded to more recently posed social questions, which have been either met by institutional consistency or change, as exemplified by long term care and family policy.

3.1: Statutory Pension

All Danish nationals, as well as EU citizens covered by Regulation 1408/71, who have resided in *Denmark* more than three years, are eligible for the statutory retirement pension (folkepension).²⁴¹ Foreigners from third countries are eligible for the public pension after 10 years of residence. The minimum residence period to access the right to 'folkepension' thus discriminates between nationals and persons covered by Regulation 1408 on the one hand, and third country nationals on the other. Close to 100% of all persons who are 65 years or older, residing in Denmark, receive a public old age pension (Ministry of Economic Affairs 2000, p. 25). The pension is entirely tax financed. To be granted a full pension, the pensioner must have resided 40 years in Denmark between the age of 15 and 65 (67).²⁴² The scheme is a universal and purely residence-based scheme. The criterion for access to the scheme is residence and the pension is also calculated on the basis of

²⁴⁰ Where nothing else is referred to, the following figures and contrasts are drawn from the comparative work of the European Commission, General Directorate of Employment and Social Affairs, as printed in "MISSOC 2000 – Social protection in the EU Member States and the European Economic Area, Situation of 1 January 2000" and "Your social security rights when moving within the European Union" 2002 update.

²⁴¹ In addition to the national public pension, Denmark has a statutory labour market related supplementary pension (ATP-pension), which entered into force in 1964. The supplementary pension covers all persons between 16 and 66 years of age, who are employed in Denmark. The supplementary scheme is financed out of contributions. The contributions are, however, not very high, but did in 2000 (MISSOC) amount to DKK 223,25 (EUR 30) monthly, of which the employee paid 1/3 and the employer 2/3.

²⁴² The retirement age has been changed in Denmark. Persons whose 60th birthday falls on or after 1 July 1999 will be entitled to pension at 65. For others, the age of retirement remains 67. Besides the basic amount of the public pension, the pensioner is entitled to a pension supplement. The pension supplement is, however, granted dependent on income. A maximum statutory pension thus consists of the basic amount, the pension supplement and the supplementary pension. In 2000 (MISSOC), a maximum statutory pension would after 40 years of residence in Denmark make the basic pension amount 49 560 DKK (EUR 6667,65) a year, the pension supplement 22 536 DKK (EUR 3031,93) without other income sources, and the supplementary pension, if insured by the ATP scheme since it came into existence in 1964 and working full time since then, would be of 18 972 DKK (EUR 2552,44).

residence periods.²⁴³ The national public pension is fully liable to taxation in the same way as wages. However, to be or have been a tax-payer is not a requirement to be eligible for pension.²⁴⁴

The statutory retirement pension (die gesetzliche Rentenversicherung) is the biggest individual social security scheme in *Germany*, under which employees and certain groups of self-employed are compulsory insured.²⁴⁵ The scheme is financed from contributions paid by employees and the employers and from state subsidies.²⁴⁶ The minimum qualifying period for membership before entitlement to benefits is 5 years. The pension amount will depend on the amount of social security contributions that the member has paid throughout his insurance life, and the equivalence between contributions and benefits is relatively high. The actual income in old age thus varies considerably from person to person. In principle, the pension benefits are partially taxed, but often income tax is not paid because the taxable amount does not exceed the tax-free minimum income level.

²⁴³ For each year, the resident earns a 1/40 fraction pension.

²⁴⁴ The Danish public pension scheme exerts interpersonal redistribution. The replacement rate of the public pension for high income groups is relatively low in Denmark being 42%, whereas it for low-income groups is 70%. The situation is vice versa in Germany, where the replacement rate for the public pension is 81% for high-income groups and 70% for low-income groups (Ministry of Economic Affairs 2000, p. 26).

²⁴⁵ In 1998, the statutory retirement pension had 43,4 Mio. compulsory insured members (Lampert & Althammer 2001, p. 257). Besides the compulsory insured, the insurance scheme counts voluntarily insured members. Employees who work less than 15 hours a week and have a monthly earning of less than DEM 630 (EUR 322) are exempted from the compulsory insurance. High income groups are exempted from compulsory insurance as well. The contribution ceiling was, in 2000, a monthly earning of 8600 DEM (EUR 4397) in the old Länder, and 7100 DEM (EUR 3630) in the new Länder (MISSOC 2000).

²⁴⁶ The contribution in 2000 was 19,30% of the wage from which the employee and the employer each paid 9,65% up to a certain ceiling fixed each year, which year 2000 amounted DEM 8600 (EUR 4397,11) ("Your Social Security Rights When Moving Within The European Union", Update 2002).

Table 7: Organising Principle for Statutory Pension

	Denmark	Germany
Beneficiaries	Persons who have resided a defined set of years in Denmark	Compulsory insurance for employees and self-employed. Dependants. Voluntarily insured
Financing	Tax-financed	Contributions and state subsidy
Conditions	Danish citizens and persons covered by 1408: 3 years of residence Third country nationals: 10 years of residence	5 years of insurance
Taxation	Liable to taxation	Partially taxed
Other	Basic pension: Not income graduated Pension supplement: Income graduated Pension entitlement does not depend on previous or contemporary status as taxpayer	Not income graduated. Relatively high equivalence between contribution paid and benefit received

3.2: Public Health Care

All persons, who have resided 6 weeks in *Denmark*, are entitled to the benefits provided by the public health service. Denmark has two categories of health coverage. The insured person chooses if he wants to belong to group 1, under which he is entitled to free medical care, but only from an assigned doctor, or from a specialist assigned by the generalist. If the person wants to belong to group 2, he chooses the doctor and specialist freely, but has to pay a part of the costs himself. Group 1 is the most popular choice. Only about 1.6% of the residents in Denmark are insured under group 2 (Interview, the Danish Ministry of Health, 3. April 2001; Danish Report on the Decker/Kohl cases 1999, p. 37). The public health system in Denmark is tax-financed. However, there is no requirement to be a tax-payer or employed person in order to benefit from the system, neither are there any requirements of insurance periods or contributions.²⁴⁷ Except for sickness and maternity benefits, Danish health care is offered as a benefit in kind. Generally, the patient is treated free of charge, and the costs for public medical consultation and hospitalisation are paid by the public health insurance. If the patient chooses to be treated by a non-approved private establishment, she/he generally has to pay all costs. Furthermore, the patient insured in group 2 will pay part of the

²⁴⁷ Also cash sickness benefits are mainly tax-financed, but the employer pays for the two first weeks of illness.

expenses, and the insured person in group 1 pays partially for preventive dental care, for treatment by physiotherapist or chiropractor and for pharmaceutical as well as other health care products.²⁴⁸

The public *German* health care is organised as a compulsory insurance scheme (die gesetzliche Krankenversicherung). The compulsorily insured are foremost employed persons with earnings below a defined limit, but also includes a wide set of other personal categories.²⁴⁹ Besides the persons directly insured, 'dependent' family members are provided for from the public health scheme.²⁵⁰ The scheme does not cover persons in low paid employment, who work less than 15 hours a week. Although not a universal scheme, the public health care scheme has a wide coverage. Close to 90% of the German residents are covered by the public health insurance.²⁵¹ Employed persons, who earn more than the legally defined income ceiling may join the scheme as voluntarily insured, but in general they have to have been compulsory insured members before.²⁵² Public health insurance is financed out of contributions paid by employee and employer.²⁵³ There is no requirement of previous periods of work or membership to gain access to the scheme. A main characteristic of the German public health care is that services are offered as benefits in kind (Neumann-Duesberg 1990, p. 84; Mrozynski 1999, p. 222). In general, the insured person does not pay fees for medical treatment, neither that given by a doctor nor by hospitalisation, except for a

²⁴⁸ The persons insured in group 2 pays the part of the costs, which exceeds the amount fixed by the public scheme for group 1. Prosthesis, spectacles and hearing aids are among the other health care products for which the insured person in group 1 pays a part.

²⁴⁹ Among other personal groups, the scheme counts persons in vocational training, unemployed persons receiving unemployment benefit, students of recognised higher education, pensioners with a sufficient period of insurance, trainees in vocational rehabilitation, farmers, handicapped persons in sheltered employment as well as artists and writers.

²⁵⁰ The rule is that the depending family counts as the spouse and children under 18 years of age. However, the dependency of the children can be extended up till 23 years, if they are not active on the labour market and till 25, if they are in vocational training or studying.

²⁵¹ In 1999, 29.3 Mio. employees and 15.3 Mio. pensioners were compulsory health insured. 6.3 Mio. were voluntary insured, and 21 Mio. were covered as dependent family members (Lampert & Althammer 2001, p. 238). That is all together 71.9 Mio. persons out of a total population of 82 Mio. Besides the 90% of German residents covered by the public health scheme, 7-8% are covered by private insurance. The remaining part of 2-3% have no cover at all (Interview, Deutsche Verbindungsstelle, 18. September 2001).

²⁵² If annual earning is beyond DEM 77 400 (EUR 39574) in the old Länder and 63 900 DEM (EUR 32572) in the new Länder, the person is exempted from compulsory insurance, but may join on a voluntary basis (MISSOC 2000).

²⁵³ The contribution varies according to the concerned insurance, but was, in 2000, on average 13% of the wage up to a certain limit fixed each year (DEM 6450 (EUR 3297,83) per month in 2000). Half of the contribution is paid by the employer ("Your Social Security Rights When Moving Within The European Union", Update 2002).

partial payment for physiotherapy, denture, pharmaceuticals and a small fee for hospitalisation, calculated per day of stay.²⁵⁴ Although a main organising principle for the public health system is benefits in kind, legislative change in 1997 made it possible for the sickness funds to introduce cost reimbursement for services, instead of the general principle of offering benefits in kind (Lampert & Althammer 2001, p. 253, die Sozialgesetzbuch V, § 64).²⁵⁵ The principle of cost reimbursement for insured persons, who first pay for a medical consultation, treatment or purchase, is known from the health insurance systems of Luxembourg, France and Belgium, as well as private health insurance in Germany (Langer 1999, pp. 257-258).

Table 8: Organising Principles for Public Health Care

	Denmark	Germany
Beneficiaries	All residents	Close to 90% of German residents
Financing	Tax-financed	Contributions
Conditions	6 weeks of residence	No period of work or membership required
Characteristic	Services offered as benefits in kind	Services offered as benefits in kind
Other	Group 1 insured: General free medical care, restricted choice of doctor and specialist Group 2 insured: Parts of the treatment costs paid by the insured, free choice of doctor and specialist	In general, no fees paid by the beneficiary for services

3.3: Long Term Care

Danish long term care is provided as a social assistance benefit in kind. Long term care such as house-hold assistance or residence in public residential homes for elderly persons are tax-financed social services, for which the beneficiary pays no contribution. All residents in Denmark in need of long-term care are entitled to the assistance (Schultz 1998, p. 100). The benefit in kind is thus a subjective right granted on the basis of a discretionary medical assessment of need. Long term care is regulated as part of the law on social services. The law grants a wide set of services, which traditionally have been regarded as social assistance. Among the services are: benefits to parents

²⁵⁴ The partial fee for hospitalisation per day of stay is up to a maximum of 14 days (MISSOC 2000).

²⁵⁵ One aim of the legislative change, adopted in June 1997, was greater self-administration for the sickness fund: "Erste und zweite Gesetz zur Neuordnung von Selbstverwaltung und Eigenverantwortung in der gesetzlichen Krankenversicherung".

who chose private child care²⁵⁶; parental leave benefits²⁵⁷; compensation for loss of income in order to care for a handicapped child²⁵⁸; sickness care contributions²⁵⁹; compensation for additional expenditures caused by sickness or invalidity²⁶⁰; compensation for the loss of income due to caring for dying relatives²⁶¹. These benefits represent alternatives to traditional public services, offered as benefits in kind by public institutions. Such social alternatives were introduced in the 1980s, originating in the broader policy idea to offer forms of private service supply and to make it possible for the beneficiary to choose an alternative to the public supply (Christoffersen 1998, pp. 14-15).

German long term care insurance (Pflegeversicherung) was introduced in 1995 as the fifth social security pillar, added to the four constitutive ones of pension, sickness, accident and unemployment insurance. Long term care had been politically debated for decades in Germany, with increased intensity (Igl & Stadelmann 1998, p. 37). The organisation of long term care became a political and administrative theme from the 1970s and onwards, due to the very high costs of long term care and the question of its financing. Before 1995, long term care was financed in two ways, either out of personal income or savings, or granted as social assistance on the basis of a means-test. It was politically agreed that both financial forms were insufficient, and a political solution was thus sought. Furthermore, the long term care problem was intensified by increased life-expectancy (Lampert & Althammer 2001, pp. 284-285).²⁶² The demographic perspective and financial problems thus called for a long term political solution in Germany, and the decade-long political discussion centred on how long term care should be supplied and financed. The options proposed ranged from a private insurance, a public service financed out of tax-revenue, or a long term care insurance (Lampert & Althammer 2001, *ibid.*). In May 1994, the long term care insurance was

²⁵⁶ Law on Social Services §§ 26, 26a.

²⁵⁷ Law on Social Services §§ 27, 27a.

²⁵⁸ Law on Social Services § 29.

²⁵⁹ Law on Social Services §§ 76, 77.

²⁶⁰ Law on Social Services § 84.

²⁶¹ Law on Social Services §§ 104-106.

²⁶² The German population over 60 years of age was 15% in 1950, in 1990 20%, in 1995 21%, and in 2040 it is expected to be 35% (Lampert & Althammer 2001, pp. 284-285).

decided upon as an independent social security scheme. Established traditions of the social insurance welfare state were thereby continued (Igl & Stadelmann 1998, p. 38).²⁶³ The SPD, which was able to block its adoption in the Bundesrat, initially favoured a tax funded solution, entitling all residents to the benefit, but finally agreed, after negotiations, on the compromise of a separate long term care insurance (Clasen 1997, p. 77). Long term care in Germany thus became a compulsory insurance scheme, where the persons insured in the compulsory health insurance became obligatory members of the long term care scheme, i.e. around 90% of the German residents (Lampert & Althammer 2001, p. 287). The financial form is contributions, with half paid by both employee and employer.²⁶⁴ The qualification for entitlements is an insurance period of at least 5 years. The main forms of long term care benefits are basic nursing and household assistance by non-residential care institutions, nursing allowances, and partial or full residential care in a care institution. Services are, however, not necessarily offered in kind, but may be granted as cash-benefit, after which the insured person has to pursue the preferred form of caring and pay for it him/herself.²⁶⁵ This long term care benefit is named "Pflegegeld" and its exportability has been questioned before the ECJ in the case of *Molenaar*, as examined in chapter V section 1.4.

²⁶³ The "Pflegeversicherungsgesetz" was decided the 26th May 1994, and formulated in its own "Sozialgesetzbuch" no. XI.

²⁶⁴ The contribution in 2000 was 1.7% of the wage from which the employee and the employer each paid 0.85% (MISSOC 2000). The contribution ceiling is the same as for health insurance.

²⁶⁵ The benefit amount depends on the degree to which the person needs care and on whether it is provided by a nursing home or by a person, chosen by the person in need of care. The amount in 1999 ranged from approximately 400 DEM (EUR 205) pr. month to 2800 DEM (EUR 1432) per month (MISSOC 2000, internet edition: http://europa.eu.int/comm/employment_social/soc-prot/missoc99/english/f_main.htm).

Table 9: Organising Principles for Long Term Care

	Denmark	Germany
Beneficiaries	Residents in Denmark in the need of long-term care	Compulsory insurance for the members of the public health insurance
Financing	Tax-financed	Contributions
Conditions	Granted on basis of a discretionary medical assessment of long-term care need	5 years of insurance
Other	Social assistance benefit in kind	May be granted as benefit in cash, whereby the insured person purchases the preferred form of long term care.

3.4: Family Benefits

The *Danish* child benefit (børnefamilieydelse) is paid to parents with children under 18 years. The family allowance is tax-financed. The general condition for entitlement is that the child must reside in Denmark, and the person with custody must be fully liable to taxation in Denmark. Additionally, to receive child allowance (børnetilskud), the child or the parent must be a Danish citizen or have been ordinarily residing in Denmark.²⁶⁶ The citizenship or residence condition is, however, waived if the parent is a national of another EU member state, but employed in Denmark. If the child resides in another member state, but the parent works in Denmark, the entitlement to Danish child benefit is maintained.²⁶⁷ The child allowance is not subject to taxation, neither is it income graduated.²⁶⁸ However, family benefits exemplify positive discrimination, where the single parent and parents who are pensioners are granted a supplementary allowance.

Family benefits are granted in *Germany* either as a child benefit (Kindergeld) or as a child raising allowance (Erziehungsgeld). In contrast to German social security schemes in general, family benefits are universally granted and are not conditioned by previous contribution. The scheme is

²⁶⁶ The residence period for entitlement is one year to receive the ordinary child allowance, and three years to receive the special children's allowance.

²⁶⁷ However, if the other parent works in the member state where the child lives, child benefits should primarily be granted from the state of residence.

²⁶⁸ In 2000 (MISSOC), the monthly amount for each child was 975 DKK (EUR 131) for children between 0-3 years, 883 DKK (EUR 119) for children between 3-7 years, and 700 DKK (EUR 94) for children between 7-18 years.

tax-financed. Family allowances are granted from the 1st child to parents residing in Germany, or possibly to parents residing in another EU state, but who pay tax in Germany. The parents normally receive child benefits until the child is 18 years old.²⁶⁹ German child benefits are not taxed and are furthermore granted independently of income.²⁷⁰ The other family benefit, child raising allowance, is granted upon the condition that the parent does not work more than 19 hours a week. The paid amount depends on the family income.²⁷¹

Table 10: Organising Principles for Family Benefits

	Denmark	Germany
Beneficiaries	Parents with children under 18 residing in Denmark, or parents paying tax or working in Denmark	Parents residing in or paying tax to Germany
Financing	Tax-financed	Tax-financed
Conditions	Child must be a Danish citizen or the parent. Or they must have habitual residence in Denmark. These conditions are waived for the personal scope of 1408/71	Child benefit: granted to parents residing in Germany or liable to taxation in Germany with children under 18 years of age Child raising allowance: Parent working less than 19 hours a week. The child is under 2 years of age
Other	Granted independently of income	Child-benefit: Granted independently of income Child-raising allowance: Income dependent

3.5: Adaptive Pressures on Contemporary Schemes

Statutory pension and public health care were schemes adopted as the constitutive pillars of the welfare state. Since then, their organising principles have been reformulated, clarified and confirmed. From the period of their origins, pension and health care have shaped and expressed the welfare identities of the two states. The two Danish schemes no longer exclusively favour low-income groups, but are now universally inclusive, according to long-term or short-term residence

²⁶⁹ The age limit is, however, prolonged to 21, if the child is unemployed. If the child is in vocational training or takes up further education, the age limit is extended to 27. For handicapped children, there is no age limit.

²⁷⁰ The monthly child benefit allowance for 2000 (MISSOC) was for the first and the second child 270 DEM (EUR 138), for the third child 300 DEM (EUR 153), and for the fourth and subsequent children 350 DEM (EUR 179).

²⁷¹ The maximum child-raising allowance is 600 DEM (EUR 307) a month. The amount is granted for a maximum of two years after the child's birth.

criteria. The two German schemes remain exclusive, and do not include the entire population, but the exclusivity has been minimised, and the beneficiary is no longer only the 'market citizen'. The financial forms of the two schemes have been clarified over the years, and in the Danish case it has been confirmed that tax-financing is the general principle of the Danish model.

The younger schemes of long term care and family benefit are examples of the formulation of new social questions and the responsibilities that have been undertaken to respond to them, and mark the welfare state as a responsive entity. The two later social policies were adopted when the institutional setting of the general models was in place, thus having institutional points of emulation from which to evolve. The Danish schemes stick largely to the tradition, however, making long term care subject to discretionary medical assessment. The adoption of long term care insurance in Germany shows how new social questions can be met by the well-known institutional solution, thus confirming tradition. On the other hand, the granting of family benefit in Germany has introduced flat-rate, tax-financed benefits into the social insurance model, thus blurring the contrast between the two welfare typologies.

For more than a century, the general characteristics of the German and Danish welfare state model have remained largely intact, defining its members of the social community exclusively, as well as the reach of social legislation. European integration, however, challenges the exclusive national demarcation of welfare policies. European institutionalisation of social security rights has extended the borders of welfare wide beyond the national community, initially entitling the worker 'stricto sensu' to intra-European social security, but gradually including new personal categories and welfare policies.

Depending on the principles and criteria of national social security schemes, supranational institutionalisation means more or less adaptive pressure. Those welfare schemes based on social citizenship have experienced adaptive pressure against the Community principle of equality. Equally, those institutions demarcating rights by territoriality are, in principle, incompatible with European obligations. Furthermore, the financing principles behind a scheme become decisive for the extent of adaptive pressure. Those schemes financed in part by contributions are more compatible with the individualised principles of the coordination system, which promotes mobility. Whether adaptive pressure results in a corresponding adaptive response and whether impact

diverges for the Danish and German welfare state as a result of diverging adaptive pressure will be analysed in chapter VII.

However, before that, an analysis of the EU related immigration into Denmark and Germany will be carried out. In the end, the de facto adaptive pressure on the Danish and German welfare will depend on how many persons exercise their European right to free movement and become migrants on foreign territory.

4.0: Adaptive Pressure Expressed as Actual Migration

Eurostat data on EU-immigration to Denmark and Germany provide us with a numerical insight into how many persons from other member states have resided in the two member states between 1985-2000. Concerning Denmark, table 11 below tells us that in absolute figures, and as a percentage of the population, EU-immigration to Denmark has remained low. That is compared with third country nationals residing in Denmark and with intra European migration in general, as was discussed in chapter III, section 3.3. Whereas intra-European migration in general between 1985 and 1998 was 1.5% to 1.6% of the entire Community population, Denmark only hosted 0.71% to 1.01% EU immigrants as a percentage of the Danish population between 1985 to 2000.

Table 11: EU-Immigrants and Third Country Nationals Residing in Denmark and Germany

	Denmark				Germany			
	EU-nat ²⁷²	% ²⁷³	TCN ²⁷⁴	% ²⁷⁵	EU-nat ²⁷⁶	% ²⁷⁷	TCN ²⁷⁸	% ²⁷⁹
1985	36.244	0,71%	71.482	1,40%	1.576.600	2,03%	2.787.300	3,59%
1986	36.509	0,71%	80.440	1,57%	1.549.600	2,00%	2.828.900	3,64%
1987	37.583	0,73%	90.670	1,77%	1.560.300	2,01%	2.952.000	3,80%
1988	37.817	0,74%	98.360	1,92%	1.408.571	1,81%	2.831.961	3,64%
1989	37.381	0,73%	104.635	2,04%	1.449.706	1,85%	3.039.399	3,88%
1990	37.476	0,73%	113.168	2,20%	1.516.842	1,92%	3.329.040	4,21%
1991	38.403	0,75%	122.238	2,38%	1.644.800	2,06%	3.697.700	4,64%
1992	39.189	0,76%	130.336	2,52%	1.698.800	2,12%	4.183.500	5,21%
1993	40.529	0,78%	139.574	2,69%	1.719.200	2,12%	4.776.600	5,90%
1994	42.391	0,82%	146.623	2,82%	1.750.211	2,15%	5.127.906	6,30%
1995	44.610	0,86%	152.095	2,92%	1.779.854	2,18%	5.210.656	6,39%
1996	46.531	0,89%	176.222	3,36%	1.811.748	2,21%	5.362.118	6,55%
1997	48.946	0,93%	188.700	3,58%	1.839.700	2,24%	5.474.300	6,67%
1998	51.224	0,97%	198.349	3,75%	1.850.032	2,25%	5.515.801	6,72%
1999	53.195	1,00%	203.081	3,82%	1.854.321	2,26%	5.465.272	6,66%
2000	53.822	1,01%	205.535	3,86%	1.858.672	2,26%	5.484.919	6,68%

However, in absolute figures, as well as in percentages of the population, there has been an almost steady growth in EU-related immigration to Denmark, as is seen in graph 7 below. The graph compares EU-immigration to Denmark and Germany respectively as a % of the total population.

²⁷² Nationals from other EU member states residing in Denmark.

²⁷³ Nationals from other EU member states residing in Denmark as a % of the total population residing in Denmark.

²⁷⁴ Third country nationals residing in Denmark.

²⁷⁵ Third country nationals residing in Denmark as a % of the total population residing in Denmark.

²⁷⁶ Nationals from other EU member states residing in Germany.

²⁷⁷ Nationals from other EU member states residing in Germany as a % of the total population residing in Germany.

²⁷⁸ Third country nationals residing in Germany.

²⁷⁹ Third country nationals residing in Germany as a % of the total population residing in Germany.

Graph 7: EU-immigration as a % of the total population to Denmark and Germany 1985-2000

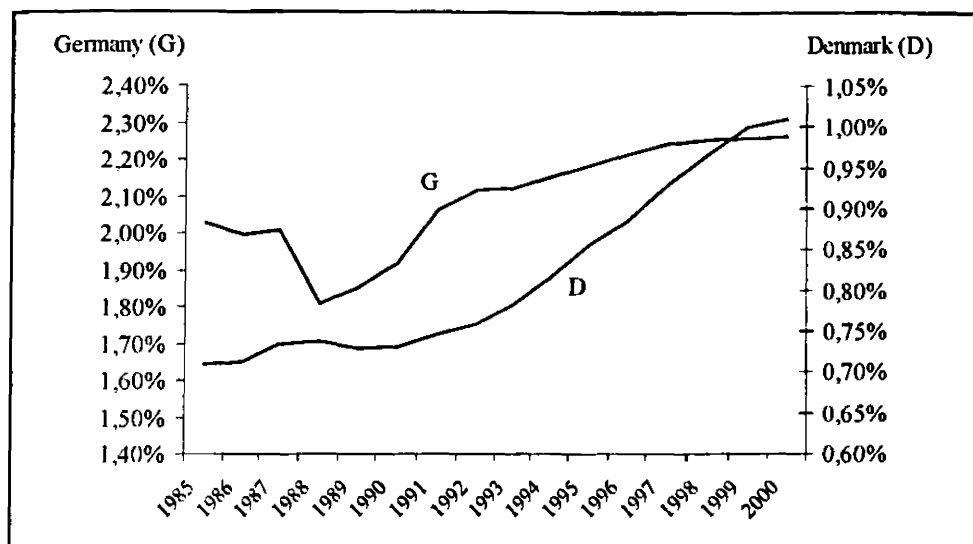


Table 11 and the graph above depict a relative higher EU-immigration to Germany than to Denmark. In 1985, Germany hosted 2.03% EU-immigrants of the total population. That had increased to 2.26% in 2000. Although higher than on average in the EU and although more than twice as high as EU-related immigration to Denmark, it could be argued that the number of EU-immigrants in Germany is low compared with immigrants from third countries.

The table and graph above clarify that, from a comparative point of view, EU-immigration to Denmark remained low up till 2000. On a North-South divide, both Denmark and Germany represent richer northern member states, which for this reason alone, is held to attract immigrants. The aggregated data does not distinguish between the various personal categories under Regulation 1408 and it is therefore not possible, on basis of the data provided, to estimate how many citizens from other member states benefit - and in which way - from the social security systems of their new member state of residence. However, on the basis alone of the low number of EU-immigrants, the hypothesis of 'welfare tourism' should be refuted. Contemporary migration figures do not support that there should be a de facto adaptive pressure on the Danish and German welfare state. Furthermore, contrary to the assumption of hypothesis H₄ stated in section 1.2 above, EU-immigration figures point to higher de facto migratory pressures on the insurance based welfare state, than on the residence based one. Should the residence based welfare state face a relatively

higher adaptational pressure, it must be on the institutional component, as will be examined in chapter VII.

5.0: Concluding Remarks

Defined as the degree of compatibility/incompatibility ('fit'/'misfit') between the principles and obligations of the supranational institutionalisation of social security rights and those of national welfare institutions, it is clear that the Danish and German member state face different *adaptive pressure*. It is equally clear that adaptive pressure diverges depending on which principle or specific institution we consider.

In a *historical light*, there is a fundamental incompatibility between the European institution and the national ones. The former aims to coordinate social responsibilities across national societies, the latter historically aimed to fortify national belongings.

Considered on an *institutional account*, the demarcating welfare principles of both the residence based and the insurance based welfare model face adaptive pressure from the European institutionalisation process. However, the principles and criteria of the residence-based welfare state lead us to assume that it faces a relatively stronger adaptive pressure. Hypothesis H₄ furthermore advances that such adaptive pressure will lead to a corresponding stronger impact.

For the *residence based welfare state*, the above identification of the principles and criteria of individual social security institutions points to an incompatibility between the national principles of social citizenship and territoriality and the Community principles of equal treatment and exportability. National principles are mirrored in the welfare typology, in its historical reasoning, as well as in contemporary social security schemes. In addition, a coordination system, where rights were thought to follow the individual on the basis of work position, appears to be incompatible with a national welfare system, where rights are granted universally independent of work position, and financed by taxation. The residence based model does not require that the beneficiary also contributes, but relies on the stability of the social community and on a strong element of interpersonal redistribution, where unproductive periods of the individual are compensated by later

productive periods or - in case they are not - by those of other community members. On the face of it, the reliance on a stable, and defined, community is incompatible with the idea of mobility.

However, from the identification of the principles and criteria of the *insurance-based welfare state*, it is clear that this social security model is not necessarily a more compatible way to organise national welfare. The model equally faces adaptive pressures from supranational institutionalisation. First of all, it demarcates rights according to the principle of territoriality. In addition, it has likewise institutionalised universally granted, tax-financed social benefits. Furthermore, although the majority of social security institutions have contribution as the fundamental criteria for entitlement, such schemes also contain an element of interpersonal redistributions and are thus not purely individualised social insurance schemes. Contributions may not equal benefits. Therefore, although the model does not have social citizenship as a demarcating principle, it still relies on long term contributors, which mobility and mobilised welfare in principle challenge.

Finally, when we consider *de facto EU-immigration* into Denmark and Germany respectively, Denmark stands out as a member state which, in fact, attracts relatively little EU-immigration. Whereas the residence based welfare state may face a somewhat stronger institutional adaptive pressure, it does not do so in *de facto* terms. In the end, actual EU-immigration should decide national responses to and the impact of intra-European institutionalisation of social security rights. That will be addressed in the analysis offered in the next chapter on the second layer of institutionalisation. The analysis will describe in detail how impact has been perceived, national competences defended, judicial impact initially denied, but gradually admitted. The second layer of institutionalisation is another process of subtle steps, however, one which unfolds more discretely, less systematically and perhaps even more time-dependently than the supranational one.

Chapter VII: Response to and Domestic Impacts of Intra-European Social Security Rights

The present chapter continues the analysis of the domestic impact of the supranational institutionalisation of social security rights. In this part, on the second layer of institutionalisation, the analysis focuses on the *national response to and impact of* established intra-European social security rights.

The chapter aims to explore how those established cross-border welfare rights become concrete enforceable ones through the process of national implementation, and how they have affected national institutions. As with the analysis, which has been conducted on the supranational integration process, a diachronic analysis will be carried out, on the assumption that impact may not reveal itself immediately and that perceptions of impact, which decide national response, may change gradually. The following findings on domestic impact will indeed point out that to study integration as a two layered process, is to study the interplay between two dynamic processes, which make it difficult, if not impossible, to deduce any simple cause – effect relations. Impact may occur with decades of delay, and it may vary strongly between member states, despite having the same cause. Impact may appear more discrete and less systematic in some member states than in others, however, still taking place, but depending much on the national response. This more discrete impact is more difficult to identify and may therefore tend to evade our analytical and theoretical attention.

As on adaptive pressure, the member states of Denmark and Germany have responded differently to supranational institutionalisation, as it has impacted differently on the social security institutions of the two countries.

The definition and identification of adaptive pressure in chapter VI lead us to expect that supranational institutionalisation has had a stronger impact on the residence-based welfare state, since its welfare institutions are less compatible with the principles and criteria of the Community Regulation. This is furthermore the essence of hypothesis H₄, which advances that a relative stronger adaptive pressure on the residence-based member state will lead to a correspondingly stronger and perhaps converging impact. H₁ supports H₄ from a theoretical point of view, as both assume that supranational institutionalisation will cause a greater uniformity in national policies. H₂ assumes the contrary. National strategic response will neutralise the effects of the adaptive pressure. Finally, H₃ hypothesises that since the effective meaning of an institution is established through national implementation, it will be performed as much in line with national institutions as possible.

The following analysis will demonstrate that the compatibility between national institutions and the European one does not alone decide impact, but, in the same way, nor does national response. However, the analysis will also demonstrate that national response varies significantly across member states, and over time. Thus, the same cause impacts differently across member states, their institutions and at different points of time.

The analysis is divided into three main sections. The *first* section analyses how perceptions of impact, and thus political responses, may change fundamentally over time and as supranational institutionalisation proceeds. The section concerns the case of *Denmark*. The analysis is based on a detailed study of, primarily, the Danish government's documents to the Danish Parliament's European Affairs Committee, and substantiates the argument that over time Denmark has changed position from being the actor in defence of the status quo to gradually accepting intra-European social security rights as a substantive part of European citizenship. The *second* section continues the analysis of the *Danish* case. It investigates how political- and judicial decision-making over time have impacted on the four welfare institutions of *statutory pension*, *family benefits*, *long term care* and *health care*. As in chapter V, special attention will be paid to the impact on health care. For all four national institutions, impact is identifiable, but it generally appears with a certain delay and less systematically than what would be expected from a straightforward cause-effect relationship. In between 'cause' and 'effect', national actors translate the effective meaning of the institutions and transpose supranational decision-making in accordance therewith. The *third* section then turns to

Germany. Here, the analytical results are puzzling on the face of it. Whereas the institutional features of the German welfare state apparently are compatible with the main principles of the coordination system, Germany is the member state which has had the second highest number of lawsuits before the European Court of Justice, regarding Regulation 1408 (see chapter II, section 4.5). Germany has, in contrast to Denmark, tested and questioned the scope and impact of the institution by preliminary references, and impact has thus appeared as direct legal injunctions. The legal confrontation has produced a large set of cases, in which national policies have been ruled to contradict supranational law. The domestic impact on the four German welfare institutions of *statutory pension, family benefits, long term care and health care* will be examined in turn. In the *concluding remarks* of the chapter, the analytical results are summed up and considered against the four hypothesis set up in chapter VI.

1.0: Perceptions of Impact

European institutionalisation of social security rights stands out as a remarkable example of how Danish welfare became accessible for workers and citizens from other EU member states and how emigrants from Denmark came to preserve acquired rights and access other member states' social security schemes. That is, of course the case only for those who enjoy the underlying right of free movement; those who, due to the Danish exemption from the Treaty's title IV, possess Community nationality, and those who fulfil certain requirements as formulated in national law. And it could of course be questioned what exactly 'Europe' adds, since bilateral agreements also make a certain accessibility possible, irrespective of the EU.²⁸⁰ The answer thereto is that 'Europe' over time has added a supranational dimension to social security, which most presumably would never have been established and reinforced without the European polity. The concrete impact of bilateral agreements and a supranational right dimension can hardly be compared. The content of the former is decided

²⁸⁰ Before and after Denmark joined the European Community, it has concluded various international social security agreements: • BKI no. 47 of 22/11/1952 Denmark-France, Paris 30 June 1951. • BKI no. 44 of 7/10/1954 Denmark-Germany, Copenhagen 14 August 1953. • BKI no. 37 of 28/6/1958, additional protocol to the agreement with France. • BKI no. 14 of 2/3/1960 Denmark-United Kingdom, 27 August 1959. • BKI no. 44 of 30/6/1978 Denmark-Turkey, 22 January 1976. • BKI no. 76 of 12/6/1979 Denmark-Turkey, amendments to the agreement of 22 January 1976. • BKI no. 87 of 9/7/1979 Denmark-Yugoslavia, 22 June 1977. • BKI no. 75 of 19/8/1983 Denmark-Pakistan, 1 March 1982. • BKI no. 18 of 6/3/1984 Denmark-Switzerland, 5 January 1983. • BKI no. 107 of 11/11/1986 Denmark-Canada, 12 April 1985. • BKI no. 87 of 22/8/1988 Denmark-Austria, 16 June 1987. • BKI no. 99 of 14/9/1989 Denmark-Quebec, 13 November 1987. • BKI no. 83 of 8/9/1994 Denmark, Finland, Iceland, Norway and Sweden, joining of Greenland and the Faeroe Islands, 15 June 1992. • BKI no. 84 of 8/9/1994 Administrative Agreement to the Nordic Social Security Agreement, 18 August 1993. • BKI no. 147 of 30/11/1995 Denmark-Chile, 8 March 1995.

by the national interests and the respective relationship of two partners. The content of the latter is, on the other hand, decided in a multilateral context, which despite unanimity is likely to dissolve the purely national interest or the perception thereof. Furthermore, in the EU context, the Commission and the Court are supranational bodies who guard the rights of the European migrant against the national interests of the member state. The analysis in Chapter IV and V has proven that the activism of the two supranational organisations has had a fundamental impact on the scope, content and enforceability of intra-European social security rights.

For such reasons, European coordination of social security rights has a tremendous impact for a person migrating into or outside the Danish territory. The accessibility and preservation of rights are not decided by national law alone.

This section *first* depicts the EU-citizens granted access to Danish welfare qua Regulation 1408. The analysis *then* turns to a detailed examination of the Danish national response towards supranational institutionalisation of social security rights, highlighting how perceptions of impact have changed gradually over time and therewith the Danish bargaining position in the Council. The analysis of Danish perception will be conducted chronically so as to explore change over time. The examination is divided in six successive sections.

Denmark has indeed responded reluctantly towards further integration, claiming the exposed nature of Danish welfare. It remains the awkward partner, outside the recently adopted agreement to include third country nationals in the personal scope. However, towards other personal groups, the more dramatic perceptions of impact have been played down, allowing a more 'European' and constructive bargaining position.

1.1: EU-Citizens Entitled to Danish Welfare

Due to its universality, Danish social security legislation does not define employed or self-employed persons in order to describe those who are entitled. Therefore, regarding 1408/71, Danish authorities have defined employed and self-employed persons in annex 1 of the Regulation. Any person, who is covered by the supplementary pension scheme (ATP) is defined as an employed person. The self-employed person is covered by the law on cash benefits by sickness or maternity (Den Sociale Sikringsstyrelse, hæfte 1, pp. 23-24). The definition of 'employed person' has not

been static. In 1977, it was narrowed from including those covered by the legislation on accidents at work and occupational diseases to those covered by the ATP scheme (Interview, the Danish Ministry of Social Affairs, 5 April 2001).

However, in 1997 the Danish Social Appeal Authority, 'Den Sociale Ankestyrelse', widened the scope of the definition of who qualifies as an 'employed' person. Before 1996, the national practice was that one had to have been insured under the ATP scheme for at least one year to qualify as an employed person. In the national case SM P-11-97, the Social Appeal Authority laid down that the condition of at least one year of ATP insurance constituted discrimination against citizens from other member states, since Danish citizens did not have to meet the same condition. The Social Appeal Authority thus interpreted and strengthened Regulation 1408/71's principle of equal treatment in relation to national law. The interpretation exemplifies how the European obligation becomes manifest through the interpretation of a national authority, however with a time-lag of about two decades:

"Thus, it was a sufficient basis for equal treatment with Danish citizens that the applicant had been employed in Denmark for a period" (SM P-11-97, own translation).

Those who are covered by the personal scope of 1408, and who fulfil the Danish requirements, are granted equal access to a wide range of Danish social security benefits; medical care²⁸¹, hospital treatment²⁸², maternity care²⁸³, cash benefits for sickness and maternity²⁸⁴, rehabilitation assistance, benefits for accidents at work and occupational diseases²⁸⁵, early and standard retirement pension including pension by invalidity²⁸⁶, supplementary pension²⁸⁷, death grants²⁸⁸, unemployment

²⁸¹ Law no. 311 of 9 June 1971 on the public health service.

²⁸² Law no. 324 of 19 June 1974 on hospital services.

²⁸³ Law no. 282 of 7 June 1972 on pregnancy hygiene and childbirth assistance.

²⁸⁴ Law no. 262 of 7 June 1972 on daily allowances in cases of sickness or childbirth.

²⁸⁵ Law no. 79 of 8 March 1978 on insurance against occupational risks.

²⁸⁶ Law no 217 of 16 March 1984 on social pensions.

²⁸⁷ Law no. 46 of 7 March 1964 on supplementary pensions for employed persons.

²⁸⁸ Law no. 311 of 9 June 1971 on the public health service.

benefits²⁸⁹ and family benefits²⁹⁰ (European Commission “Your Social Security Rights when Moving within the European Union”, 2002 update, pp 23-33). In 1986, Denmark published its last declaration about which of its social benefits and services were included in 1408’s material scope. The declaration remains the official list of 1408’s Danish coverage. The old declaration means that it has been disputed whether Denmark really has an updated list, in line with both supranational and national developments. According to the list, the Danish law on social services is not part of 1408’s material scope, nor is the law on active social policy. From the academic side, it has been argued that Denmark tries to evade its Community obligations by only announcing a limited material scope (Ketscher 1998, p. 259). The question on the adequate implementation of the material scope will be discussed further in the section 2 on domestic impacts below. However, before that, we analyse how Denmark has responded to the collective negotiations in the Council on the coordination of social security rights. The following analysis of the Danish national response to the incremental development of intra-European social security rights demonstrates a national position, which at its point of departure forcefully defended the status quo, but which gradually changed both national perceptions and preferences.

1.2: Danish National Response

One of the key characteristics, which has defined both the Danish debate on, and its position towards the coordination system has been the belief prevalent in political circles, in the phenomenon of ‘welfare tourism’. The reasoning runs as follows; since Denmark is a residence-based welfare state, offering generous social benefits and services without requiring either contributions or tax-payment in return, it is likely to attract ‘welfare opportunists’. For that reason, Denmark has traditionally met proposals on extending the regulatory scope of 1408 reluctantly, and has defended the status quo. The idea of ‘welfare tourism’ remains alive and well, and has recently been brought to the fore in relation to enlargement and potential immigration from Eastern Europe (Interministerial Report “Danish Social Benefits in the Light of Enlargement”, 11 April 2003; Berlingske Tidende, 28 April 2003; DR Nyheder, 15 September 2003; Information, 7 November 2003; P1 Lige Lovligt, 26 November 2003).

²⁸⁹ Law no. 114 of 24 March 1970 on employment services and unemployment insurance.

²⁹⁰ Law no. 350 of 4 June 1986 on family allowances and advances on maintenance pensions due to children & law no. 147 of 19 March 1986 on single payment family pensions.

Another key characteristic of the Danish response towards supranational institutionalisation has been the absence of preliminary rulings by the European Court of Justice on Danish compliance, as requested by national courts. Denmark stands out among its counterparts for being a member state with only one preliminary reference²⁹¹ to the European Court of Justice regarding Regulation 1408 (see chapter I, section 4.5).²⁹² This was a preliminary ruling, which did not question the core of the Regulation, such as its personal or material scope, exportability or equal treatment, but instead addressed the application of 1408's Article 93 (1).²⁹³ Danish national courts have thus contributed very little to enhancing the scope of Community social security law. A detailed examination of why Danish national courts have not addressed EU related social security questions to the ECJ falls beyond the scope of the present study. It is, however, important to point out that instead of assuming that it mirrors high Danish compliance with the European *acquis communautaire*, it is likely to have to do with various factors such as; the litigiousness of Danish society; that Danish lawyers do not plead EU points of law before national courts, which likewise do not refer EU points of law before the ECJ; and the fact that Denmark lacks social courts but instead has a Social Appeal Authority, which considers the implementation and compatibility of national law and administrative practices. Furthermore, Denmark has had no infringement procedures on 1408/71 or its Treaty basis.

Against this background, Denmark seems to have concentrated its action on the political scene, using the tool of unanimity, but to have subsequently accepted and implemented decision-making, to the extent that no infringement procedure or judicial epilogue have been necessary. Nevertheless, as the subsequent analysis demonstrates, over time the Danish political response has undergone significant change, from being the member state acting in defence of welfare sovereignty to one accepting the Commission agenda on extending 1408 to all European citizens and even possibly beyond.

²⁹¹ Case C-428/92, 2 June 1994. *Deutsche Angestellten-Krankenkasse v Lærerstandens Brandforsikring* G S. ECR 1994, Page I-2259.

²⁹² For the examination of the difference in preliminary rulings and infringement procedures on the basis of Regulation 1408/71 between the member states, see chapter II, section 4.5.

²⁹³ Regulation 1408/71's Article 93 (1) concerns "Rights of institutions responsible for benefits against liable third parties".

1.3: In Defence of Status Quo

As far back as 1976, Denmark marked its defensive position on extending the personal scope of 1408. Denmark expressed its reservations in the case of *Brack*²⁹⁴, warning about the consequences for the residence-based welfare state, if 1408's personal scope would be enlarged to include the *self-employed*. In its submitted observation, the Danish government drew attention to the fact that the legislation of the three new member states differed on important aspects, covering either all persons resident in the territory of the competent state or the entire national population irrespective of employment. The Danish government found it unacceptable that the Regulation should also apply to self-employed persons who had formerly been workers. Such an extension of the personal scope would, according to the Danish government:

“bring about an *unreasonable extension* of the area of application of the Regulation in that *most nationals of the Member States have been workers at one time or another*” (ECR 1976, p. 1443, emphasis added).

As analysed in chapter IV, the Court extended the meaning of worker and thus overruled the Danish viewpoint. In the late 1970s, Denmark continued its reservations on the personal scope. When the Commission, in December 1977, proposed that Regulation 1408 be extended to the self-employed, the original proposal also entailed *non-active* persons.²⁹⁵ Denmark strongly opposed such an extension and vetoed the proposal for about two years (Interviews, Danish Ministry of Social Affairs, 5 April 2001; Danish Permanent Representation, 18 December 2002).

Denmark based its veto-position on the use of the Treaty's Article 235 as an additional base. The governmental documents of that time clearly stated that Denmark found that to include non-active persons on the basis of Article 235 would be beyond the competence of the Community and its economic aim. Furthermore, the governmental fear was that granting non-active persons access to intra-European welfare might have a consequential effect on their residence-rights.²⁹⁶ The early Danish stance on the use of Article 235 and thus on the purpose of Regulation 1408 stood out very

²⁹⁴ Case 177/76, 29 September 1976. *M. L. E. Brack, widow of R. J. Brack v Insurance Officer*. ECR 1976, p. 1429. See chapter IV, section 2.5 for a more detailed discussion of the *Brack* case.

²⁹⁵ See OJ C 14/9 of 18 January 1978, proposed to the Council 31 December 1977.

²⁹⁶ As pointed out by the Minister of Justice in the Government's Internal Market Committee (Regeringens Fællesmarkedsudvalg), 29 March 1979 (referred in Judgement of the Supreme Danish Court in the Maastricht case, 6 April 1998, Højesterets Domme 1998, p. 842).

clearly, when the government was asked to describe the borders of Article 235 by the Market Committee of the Danish parliament²⁹⁷:

“Art. 235 may be used where a Community action is necessary to realise one of the Community’s aims within its scope, and where the Treaty has not provided the necessary power. The question about *non-active persons’ right to social security benefits is not within the Community’s objective or scope*, since it has no relation to the economic activities, encompassed by the Treaty. [...] It has been stated that the number of non-active persons which has now been proposed to be covered by Regulation 1408/71 is very small and that for this reason non-active persons can be covered by Regulation 1408/71. That it is only a modest number of persons does not, according to the Danish opinion, justify deviating from the conditions of the Treaty. Moreover, provided that the Council decided on using art. 235 to regulate the case in question, it *cannot be excluded that non-active persons could also be granted rights in different matters by virtue of the Treaty’s provisions*. [...] *Such a development would in reality result in an interpretation of art. 235, which would make the conditions in the provision illusory*” (Note from the Danish Foreign Ministry to the Market Committee of the Parliament, 21 November 1979, own translation, emphasis added).²⁹⁸

Both the Danish observation in the *Brack* case, and the informational note, emphasised the Danish point of departure as characterised by a non-elastic reading of 1408’s purpose, as well as of the competences of the Community. Instead of a more flexible approach, Denmark accentuated the limits of Community competences. Moreover, the member state justified its own rigidity by the likelihood that, if giving in on social security matters, the next Community step would be to grant non-active persons free movement rights. The early national response was thus not explained as an isolated interpretation of 1408’s scope, but also in the context of a wider web of possible consequences and derived effects, and in view of more tactical considerations:

“If Denmark – after more than half a year having rejected the use of the Rome Treaty’s Article 235 as the basis for a Community solution – should abandon its position up till now towards the use of Article 235 – the other member states may doubt the importance of this matter for Denmark. That will without doubt complicate our position in future cases where Denmark would be alone with its view of Article 235’s applicability” (preparatory note from the Danish government’s EC-Committee to a meeting in the Government’s Internal Market Committee (Regeringens Fællesmarkedsudvalg), 15 November 1979, own translation).²⁹⁹

²⁹⁷ As a consequence of the Maastricht Treaty, ‘the Market Committee’ of the Danish Parliament changed its name to ‘the European Affairs Committee’ in 1994.

²⁹⁸ Referred in Judgement of the Supreme Danish Court in the Maastricht case, 6 April 1998, Højesterets Domme 1998, pp. 842-843.

²⁹⁹ Referred in Judgement of the Supreme Danish Court in the Maastricht case, 6 April 1998, Højesterets Domme 1998, p. 842.

After the Commission formulated its second proposal, from which non-active persons had been removed, Denmark and the other member states finally accepted the inclusion of the self-employed.³⁰⁰ By its adoption, Denmark had diverged from its former opinion as formulated in the *Brack* observation. For the inclusion of non-active persons it would take a lot longer.

1.4: The Perception of Financial Impact

In the 1980s no new proposals on the personal scope were formulated. With the proposal COM (91) 528 negotiations on non-active persons were resumed. The research carried out on government notes to the Danish Parliament's European Affairs Committee between 1990 and 2002 reveals that the Danish position continued to be one full of reservations, although these were no longer justified by reference to the appropriate use of Article 235, but on an estimation of the financial impact of such an extension. The analysis of the national response to both COM (91) 528 and (98) 779 thus demonstrates that the focus of concern had shifted from that of community competencies to that of the eventual impact on the national budget. Moreover, the analysis demonstrates that the estimation of financial impact underwent a crucial change over time.

The government first informed the Parliament's European Affairs Committee that:

"The proposal [COM (91) 528] will have a *discernible impact* on the public finances, especially due to groups of non-active citizens in other member states that will more easily gain access to the Danish pension fund" (Note from the Danish Social Ministry to the Parliament's European Affairs Committee, 4 July 1997, own translation, emphasis added).

The financial impact consisted in the fact that, according to existing law, non-active EU citizens gained access to a pension after 10 years of residence in Denmark, in line with other foreigners, whereas the new proposal would grant them pension rights after 3 years of residence. An adoption of the proposal would oblige Denmark to extend the principle of equal treatment to non-active EU-citizens as well. However, the government also noted that not many non-active EU-citizens had residence in Denmark and that the pension amount they would be entitled to after less than ten years of residence would only be a smaller fraction of a pension.

³⁰⁰ Regulation 1390/81.

The Danish government's response to COM (91) 528 was that of modest concern. 'A discernable impact' is not a 'significant impact'. The domestic debate and negotiations on the latest Commission proposal, COM (98) 779, marked a change from the previous moderate view. The initial Danish analysis of COM (98) 779's national impact cautioned about its consequences and considered it in the light of potential future movements. During the first two years of negotiations, Denmark argued strongly against the proposals and warned especially about the consequences of an extended personal scope on the residence-based welfare state and its financial balance. The core of the status quo argument was against including *non-active persons* and *third country nationals*. In March 1999, the government informed the Parliament that:

"The proposed extension of the Regulation's personal scope is estimated to have large consequences for public spending, since non-active persons from other member states will get access to social security and other residence-related social benefits to an unpredictable extent without contributing to the financing of the benefits through the payment of taxes. In addition, the proposal is estimated to cause an increase in the public spending on medical treatment for persons insured under the Danish rules in other member states, especially in connection with the extension of the personal scope entitlement and as a consequence of the easing of the citizens' right to health care authorisation in other member states. The proposal to extend the personal scope to also cover third country nationals is estimated to cause an additional expenditure, especially if this group later becomes entitled to free movement." (Note from the Danish Ministry of Social Affairs to the Parliament's European Affairs Committee, 16 March 1999, own translation, emphasis added).

The initial cautious Danish reaction was founded on the perception of the special and exposed status of the Danish welfare state. The inclusion of non-active persons challenged the solidarity idea in Danish welfare, since they would get access to social schemes without contributing through taxation of income. Furthermore, the Danish position towards third country nationals was not so much based on the likely impact of the proposal in question, but on its future potential when they might be granted the underlying right of free movement. Regarding non-active persons, the social pension was the main focus. Regarding third country nationals, the concerns were mostly future-oriented.

1.5: National Impact of an Enlarged Principle of Equal Treatment

A later government note, concerning COM (97) 561, elaborated on the political reservations concerning the extension to third country nationals. The note concerned the impact of an extended principle of equal treatment. The Regulation in force did not grant third country nationals individual rights, but only derived rights as family members. The note emphasised the crucial difference between individual and derived rights;

"third country nationals cannot rely on the principle of equal treatment and earn the right to a Danish pension, since the right to a social pension in Denmark is an individual right. A third country national can also not apply for – or receive – a Danish pension, when he resides in another member state, since the principle of exportability does not apply" (Note from the Danish Ministry of Labour to the Danish Parliament's European Affairs Committee regarding the forthcoming Labour- and Social Council, 19 November 1999, p. 14, own translation).

The government note illustrates the national impact of an enlarged principle of equal treatment. The Danish position in 1999 was that if third country nationals were only covered indirectly by 1408 as family members, national legislation could still discriminate between them on the one hand and Danish citizens and 1408's 'direct' personal scope on the other hand. It should be noted that, at this point in time, the Danish position disregarded the judicial extension of the principle of non-discrimination to cover family members as developed by the *Cabanis-Issarte* case-law (see chapter IV, section 1.2).

In the same note, the government stated that the financial impact of including third country nationals was rather uncertain, since their current and future pattern of movement was neither documented nor foreseeable, and depended much on whether they would be granted the right to free movement. Nevertheless, an enlarged principle of equal treatment would have an immediate impact, since the principle could be interpreted as entitling third country nationals to aggregate Danish insurance periods with periods from other member states, and thus open access to the Danish social pension within less than three years (*ibid.*, p. 16). Applying the Regulation's principle of aggregation would thus mean that also on behalf of third country nationals, Community law could overrule the condition of three years of residence in Denmark to open access to a social pension, as formulated in Danish policy.

In the press, the Danish position was clear. Despite the Tampere conclusions, Denmark would veto 1408's extension to third country nationals (Information, 30 November 1999).

The Danish government substantiated its political reservations in the beginning of 2000. The Danish Parliament's European Affairs Committee requested the government to analyse the consequences should COM (98) 779 be adopted (question no. 66, 3. December 1999). The governmental response was a very dense analysis of the impact of a simplified and modernised Regulation, especially focusing on the political and financial impact of an extended personal scope on Danish social

policy, substantiated by rich examples. The analysis initially noted that the proposal would extend the principle of equal treatment to both non-active EU-citizens and legally residing third country nationals, and thus grant them individual rights. The impact on national social policies particularly concerned residence-related benefits, to which one would be entitled on the basis of residence alone. Social pension as the greatest item of expenditure was again the focus of attention:

"If the personal scope of the Regulation is extended to cover non-active persons, this will mean that citizens from other member states will be able to earn right to a Danish social pension, irrespective of previous employment in Denmark. This is due to the fact that the principle of equal treatment in the Regulation grants citizens of other member states the same rights as Danish citizens. It is *therefore not possible to reserve the right to earn a Danish social pension to Danish citizens, since citizens from other member states according to the Regulation are entitled to equal treatment*. Example: an Irish citizen resides four years in Denmark for study purposes and thereafter returns to Ireland and begins employment. According to current law in part II of the Regulation, the student has never been covered by Danish legislation on social security. According to the proposed extension, the student will at the age of retirement be entitled to 4/40 of a Danish social pension" (Answer by the Danish Minister of Social Affairs to question no. 66 by the Danish Parliament's European Affairs Committee, 3 February 2000, p. 11, own translation, emphasis added).

Concerning third country nationals, the government re-emphasised that the proposal would mean non-discrimination between non-community nationals and Danish citizens. They would not only be entitled to a social pension after three years of residence in Denmark, but also to aggregate insurance periods from other member states to fulfil the condition of three years. Among other illustrations, the analysis gave the following example:

"A Turkish citizen has lived and worked 35 years in Denmark and earned the right to a Danish social pension during this period. By the age of retirement, he moves to Spain, where he receives 35/40 of a complete Danish old-age pension. In addition, he receives a smaller German pension calculated on the basis of seven years of employment in Germany. Since he has been covered by Danish legislation for a longer time than German legislation, he is entitled to receive health care in Spain paid by Denmark. When staying in Denmark, he is also entitled to receive the necessary health care here. *According to existing rules, the Turkish citizens would not be entitled to receive a Danish pension in another member state*" (Note from the Danish Ministry of Social Affairs to the Danish Parliament's European Affairs Committee, 3 February 2000, p. 23, own translation).

The text is filled with examples of how amended community law would overrule the discriminatory leftovers in Danish social policies. The press referred to this analysis, and clarified to their readers that the government had stated a clear 'no' to the proposal (Politiken, 12 March 2000).

1.6: A Danish Dilemma – Negotiating the Treaty Base

The arguments based on this analysis were reiterated during the Danish debate leading up to the Nice Intergovernmental Conference. Together with art. 137, the negotiations on amending art. 42 to QMV attracted most attention in the domestic debate (Interview, Danish Ministry of Foreign Affairs, 4 April 2001). Denmark did not approve the original Commission proposal. However, lack of flexibility would not favour Denmark in the general negotiations. Neither could Denmark simply be sheltered by the United Kingdom and rely on its veto, since it was unsure if the UK would maintain its opposition to the very end (Interview, Danish Permanent Representation, 18 December 2002). The delicate Danish position was therefore to enter negotiations constructively and not place itself in an unpleasant 14 against 1 situation, but at the same time leave the impression back home that it did not simply ‘sacrifice’ Danish welfare. The fear of ‘welfare tourism’ was a central part of the political rhetoric, as expressed by the Danish no-parties, and the background upon which the parties required the government to exercise its veto (Politiken, 4 October 2000). Furthermore, the Danish government could not possibly become too flexible, as it was politically bounded by its own remarks in defence of Danish welfare during the debate on the EMU referendum 28 September 2000 (Aktuelt, 14 October 2000; interviews).³⁰¹ The widened access to Danish welfare, as highlighted in the analysis of the Danish Ministry of Social Affairs, would be rendered definitively beyond national control by the adoption of QMV (Borsen, 10 October 2000). In the public debate, an eventual extension of 1408 on the basis of QMV to *third country nationals* was pointed out as the main problem. The arguments against such an extension came to a head, which is here expressed by the head of the international section in the Ministry of Social Affairs:

“Will they [third country nationals] stay where they are, or will they go for greater social benefits in Denmark. We have no idea. And this is precisely why we need to maintain unanimity . . . It may be that this group is less rooted and therefore moves more for social benefits than others . . . They [the Commission] will argue that it does not make sense to give immigrants a right to export social security, if they do not have residence- or work permits. The Commission does not like to admit it, but I know that they have a proposal on the extension of residence rights ready. It is the tactic of salami slicing” (Politiken, 25 October 2000, own translation).

This rather political remark of a government representative substantiated the hypothesis of welfare tourism and widened its likelihood in the case of third country nationals. The status quo must be

³⁰¹ Denmark held its referendum on the single currency the 28 September 2000. Although not directly related, the future of the welfare state in relation with the EU became a central theme, among which was the impact of Regulation 1408/71. 46.1% voted ‘no’ against 40.5% voting ‘yes’.

defended due to two unknown factors; the actual mobility of third country nationals and the next supranational step regarding their free movement.

By November 2000, it was clear that Denmark supported the French compromise where QMV would be the procedure for simplification of the Regulation, but unanimity would be maintained for substantial amendments to its personal or material scope (Borsen, 6 november 2000; Borsen, 10 November 2000). The Danish dilemma between, on the one hand, being a constructive partner in negotiations and, on the other hand, a domestic debate restraining the scope of manoeuvre, was thereby solved. However, the Danish balancing act could have been spared since the UK in the end decided to veto the French compromise.

1.7: New Perceptions of Impacts and Recent Negotiations

The Danish estimation of COM (98) 779's financial impact had clearly changed by mid-2001. The financial impact of the proposal, first considered to be 'large', was now 'limited'. Where the uncertainty about the intra-European movement of non-active persons had previously caused a defensive reaction, the Danish approach was now to give non-active persons the benefit of the doubt. Moreover, the question of which Treaty base should be used to include third country nationals, and the Danish opt-out, allowed for new Danish perceptions:

"It is difficult to anticipate the financial impact of the extension of the personal scope to non-active persons, since it is not possible to anticipate how many non-active persons from other member states will apply for Danish pension benefits. It has previously been estimated that the Commission's proposal would have considerable financial consequences. That was because the proposal entailed an extension of the personal scope to third country nationals and non-active persons. It was estimated that a certain number of the third country nationals would be non-active, so that this could have financial consequences. Since the proposal to extend the personal scope to third country nationals will not be binding on Denmark, it is estimated that the financial consequences will be limited" (Note from the Danish Ministry of Labour and the Ministry of Social Affairs to the Danish Parliament's European Affairs Committee regarding the forthcoming Labour- and Social Council, 25 September 2001, p. 32, own translation, emphasis added).

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Furthermore, the note underlined that the proposal would, almost exclusively, have an effect on social pension spending. Provided that the proposal was approved without restrictions, non-active persons would be entitled to a social pension after 1 year of residence in Denmark, i.e. with aggregated periods from other member states. However, Denmark later succeeded in negotiating

that non-active persons will only gain the right to a social pension after a minimum 3 years of residence, as will be detailed below. In December 2001, Denmark proclaimed anew:

"Since the present proposal takes into consideration the member states that have residence-based social security schemes, it is now estimated that the financial consequences will be limited" (Note from the Danish Ministry of Labour and the Ministry of Social Affairs to the Danish Parliament's European Affairs Committee regarding the forthcoming Labour- and Social Council, 4 December 2001, pp. 24-25, own translation, emphasis added).

The quotes thus mark a decisive change in the governmental perception on free movement and welfare. It no longer based its analysis on the hypothesis of welfare tourism. Moreover, it temporarily sheltered itself behind the opt-out on Justice and Home Affairs, for which reason it was no longer relevant to consider the impact of an extension to third country nationals.

The two quotes were formulated by two different Danish governments, the first by the social democratic coalition government and the second by the liberal-conservative coalition government, which came to power 27 November 2001. The change of position thus happened independently of ideology, and other factors must have been decisive. Such a factor is most likely to be that the ongoing negotiations in the Council gradually changed Danish reservations. Concerning non-active persons, the initial Danish position did not find support and the prospect of being a lone member state in an unpleasant spotlight blocking negotiations, is likely to have made Denmark change its stance. Concerning third country nationals, the choice of the new Treaty base was certainly convenient for Denmark, bearing in mind its previous statements on the impact of granting non-community nationals equal treatment.

However, recent negotiations demonstrate that the difference between the original proposal that Denmark declared itself so strongly against, and the outcome that it will in the end commit itself to, may in practical terms be insignificant.

During the Greek presidency of spring 2003, Denmark negotiated the actual content of the special considerations that should be taken into account concerning residence-based schemes regarding non-active persons. The Danish aim was to have an annex adopted to the Regulation, which would lay down that to gain the right to a Danish social pension, one would have to have resided a minimum of 3 years in Denmark (Interview, Danish Ministry of Social Affairs, 15. May 2003). That meant a deviation from the general principle of aggregation. As a starting point, Denmark

wanted the deviation to apply to non-active persons, *and* pensioners receiving a pension from another member state *as well as* family members of employed and self-employed persons. That was, however, not accepted in the Council nor by the Commission, which pointed out that such a discrimination against family members would be against the case-law extension of the principle of equal treatment. Denmark therefore had to accept that the deviation from the principle of aggregation would be for non-active persons only, who as a matter of definition are persons who have never worked in a member state (Interview, *ibid*). In real numbers, 'non-active' persons according to this definition cannot be a large number. The negotiation process is thus another example of the impact on national policy and preferences of a judicially strengthened principle of equal treatment (see case C-308/93 *Cabanis-Issarte*, analysed in chapter IV, section 1.2). The special conditions for how Community non-active persons can gain access to the right to Danish social pension will be inserted in annex XI of the amended Regulation (COM (2004) 44).

Moreover, Denmark has announced its intentions to commit itself to a parallel agreement, according to which the same rights and obligations would apply to third country nationals moving to or from Denmark as in the other 14 member states (Jyllands-Posten 5 June 2002; Interview, Danish Ministry of Social Affairs, 8 November 2002; 15 May 2003; 8 October 2003 & 9 February 2004). Whether or not the announced political commitment will be followed up by political action remains unclear, but if a parallel agreement turns into a future reality, Denmark would certainly have moved far away from its original standpoint.

1.8: Changed Perceptions and Preferences

Despite the fact that EU-related immigration to Denmark remains *low* from a comparative point of view (see chapter VI, section 4), the idea that Denmark would be especially exposed to 'welfare opportunists' has successfully influenced the debate for or against further integration. Despite the fact that Regulation 1408/71 is 'only' an Community instrument *coordinating* social security rights across borders, it has been a very disputed regulatory instrument in the Danish debate on European integration. The long-lasting Danish opposition to extending the regulatory scope of 1408 should be seen within this context.

The analysis of Danish perceptions on the impact of the European legislation has demonstrated that national convictions and preferences may be tenacious but, in the long-term perspective, they are not static. The Danish point of departure was a very non-elastic reading of 1408's purpose as well as of the competencies of the Community, which changed into a reluctant and finally conditional acceptance to grant non-active persons equal rights. Although Denmark officially has changed its political objection to an equal status for legally residing third country nationals, legal reservations hinder the practical effect of this. Denmark stands out as the only member state not granting intra-European social security rights to third country nationals who actually manage to move across borders, and that is despite its announced commitment to the contrary.

Although Denmark gradually has been obliged by European law to open up its welfare borders, the official Danish stance has not been expressed in favour of the migrant. Instead of viewing the migrant as a short term quest or long term resident who takes an interest in and contributes to the Danish community and, on this basis, merits equal rights, the Danish position has been formulated out of the convinced need to defend national welfare and to limit Community competencies in this respect. The historical and symbolic embeddedness of national welfare is part of the explanation. However, even such strong embeddedness has had to yield to the gradual manifestation of European rights, as was evidenced by the gradual diminishing of Danish resistance towards transnational European welfare, and will be evidenced if Denmark grants right to third country nationals by a parallel agreement. In a theoretical light, such a change of position substantiates the dynamism of national preferences (Pierson 1998) and suggests that the progressive supranational institutionalisation, in part, causes such a change of position.

2.0: Domestic Impacts on the Residence-based Welfare State

Over the more than three decades that 1408 has regulated intra-European social security, Denmark has responded in the Council on the basis of political convictions and perceptions. Its gradual change of political standpoint demonstrates that there has been no definitive or rational national interest behind this.

When it comes to the domestic impact, Denmark has adapted national policy in accordance with the political- and judicial decision-making of the European polity. But adaptation has not been passive,

neutral, or always immediate. In its implementation of political decision-making, Denmark has amended national law, both in order to meet its Community obligations, as well as in order to limit its effects. Since Denmark has had only one minor preliminary ruling before the ECJ, its implementation of judicial decision-making exemplifies how member states, other than the referring state, subsequently interpret the general premises of an individual lawsuit. The domestic impact that the ECJ's rulings have had on Danish policies, set out in the research conducted below, therefore demonstrate the multilateral effect of Community law, its effectiveness and eventual uniformity (see the discussion on the binding precedent of Community law, chapter II section 4.3).

The following analysis of the domestic impact on the residence based welfare state will, in the two first sections, explore the impact of supranational decision-making on the Danish *statutory pension*, and then on *family benefits*. Next, the analysis will investigate the possible exportability of certain Danish *social services*. The last four sections examine in greater detail the impact of supranational institutionalisation on national *health care* policy.

2.1: Implementing the Acquis Communautaire – Statutory Pension

When Denmark joined the European Community in 1973, it had to make a fundamental change to its national law on *social pension*. Adopting the *acquis communautaire* on intra-European social security meant that Denmark, with the implementation of the principle of equal treatment, had to waive its own condition of Danish citizenship ('*indfødsret*') for the personal scope of 1408/71, as well as having to allow for the exportation of social benefits (Sakslin 2000, p. 24; Den Sociale Sikringsstyrelse 1997, hæfte 1, p. 26). Danish citizenship and residence in Denmark were, and are, the two general conditions for entitlement to a social pension. Adopting the *acquis* thus meant that Denmark could no longer specifically favour its own citizens, but had to grant equal access to its most costly social security scheme to EC nationals covered by 1408. moreover it could not exert spatial control over the consumption of benefits. The immediate adoption of the *acquis* overruled both the Danish principle of social citizenship and the principle of territoriality.

Whereas Denmark initially only had to see 'social citizenship' extended to a limited scope of migrant workers, the gradual extension of the Community's principle of equal treatment and 1408's personal scope made it increasingly difficult for national policy to 'favour' nationals. As the

analysis above demonstrates, access to social pensions will soon also be open to EU students qua 1408. Under the present formulation of 1408, the principle of aggregation regarding the acquisition of the right to be eligible for a social pension as expressed in 1408's art. 45, does not apply to family members (Den Sociale Sikringsstyrelse 1997, pp. 23-24 & 34). This means that family members will have to reside 3 years in Denmark before they can have the right to a pension. However, when the simplified Regulation is adopted, the principle of aggregation will apply generally (Interview, Danish Ministry of Social Affairs, 15. May 2003). On that account, Denmark will no longer be able to discriminate against family members. In the negotiations on the Danish annex on the social pension, requiring a minimum stay of 3 years in Denmark to acquire pension rights, Denmark did not manage to include all categories of non-active persons, i.e. family members, in particular. The Commission pointed out to Denmark that such a deviation from the principle of equal treatment would not be coherent with the case-law development (i.e. *Cabanis-Issarte*, see section 1.7 above). In the future, it will only be Community nationals who have never been employed and who are not family members of a covered Community national, who will have to have resided 3 years in Denmark to gain access to a social pension. However, they still hold a very privileged position in comparison with other foreigners, who are required to have 10 years of residence for access to the same benefit. The gradual enforcement of equal treatment in the Community means that apart from non-active persons, all other community nationals residing in Denmark will start to earn a Danish pension after 1 year of residence.

2.2: Implementing Judicial Decision-Making – Statutory Pension

Community law has thus had both a more immediate impact and a gradual one. Political decision-making causes an immediate impact, to the extent that national policy and practices are amended in accordance with the amendment of supranational law. Gradual or 'indirect' impact is, however, likely to be just as important when it comes to the generation of rights. Evidently this more discrete impact is more difficult to detect analytically. At first sight, it could be concluded that Community social security law has only impacted on the Danish case when the member state originally adopted the *acquis* and when it had to implement new political decisions. However, the Danish case richly illustrates examples of impact where the national administration has gradually accommodated practices and law in accordance with the legal interpretations of the ECJ.

Regarding the social pension, decisions from the Danish Social Appeal Authority ('Den Sociale Ankestyrelse') have incrementally changed administrative practice and have considered the impact of the European Court of Justice's judgements on Danish law. In an early decision, the Social Appeal Authority interpreted 1408's text restrictively, stating that a person, who had earned *pension rights* both in Denmark and the United Kingdom, would have to choose between either a full Danish pension or a pro-rata pension from both Denmark and the United Kingdom. But the decision concluded that due to the Regulation's prohibition of overlapping benefits, he was not entitled to a full pension from both countries (SM P-24-96³⁰²; Sakslin 2000, p. 36). In two later decisions, the Social Appeal Authority changed its restrictive approach and thereby authoritatively amended the national interpretive practice. Decision SM P-19-02 laid down that a pensioner maintained acquired pension rights from both member states, even if both together amounted to more than a full pension.³⁰³ The later decision annulled the more restrictive decision, SM P-24-96 from 1996. The new practice was confirmed in the recent decision SM P-16-03, which restated the right to receive more than a full pension due to acquired rights from two member states.³⁰⁴

The changed interpretation of the prohibition of overlapping benefits lays down a new Danish administrative practice, regarding cross border pension rights. The development illustrates that the reading of Community law in relation to national policy is dynamic, and that whereas the full impact of supranational rights may not be implemented at the outset, a national authoritative decision may entail a new reading of a Community obligation and thus the adoption of national administrative practices, albeit with a certain delay. National adaptation may require national interpretation and therefore may not take place instantly. Furthermore, the changed Danish reasoning indeed demonstrates how 'Europe' adds to the right of the migrant, and that it may even be an advantage to piece pension rights from different member states together.

³⁰² Date of decision; 9 February 1996.

³⁰³ Date of decision; 17 July 2002. The Social Appeal Authority concluded that a pensioner who though now residing in the United Kingdom had acquired Danish statutory pension by being employed in a Danish firm, had a right to Danish old age pension without deduction of those periods where he earned English pension. The pensioner had earned 38 years of pension from Denmark and 3 years of pension from the United Kingdom, which together amounted more than a full pension.

³⁰⁴ Date of decision; 25 June 2003. The decision considered the complaint from a Danish pensioner. By reference to decision SM P-19-02, the pensioner complained that his Danish fraction pension only amounted 21/40 and did not include the years between 1945-1977 in which he worked for a Danish firm in the United Kingdom and Finland. The Danish Appeal Authority supported his complaint although he also received statutory pension from the United Kingdom and Finland.

Another very recent decision shows how the national Appeal Authority and the National High Court (Vestre Landsret) have interpreted the impact of European judicial decision-making on the question of who has a right to a Danish social pension (Decision SM P-17-03)³⁰⁵. The decision is of great analytical importance since it substantiates the argument that judicial decision-making has a multilateral effect. At the same time, it points out that subsequent national interpretation of the scope and meaning of an individual lawsuit is unlikely to go beyond the conclusions of the European Court of Justice, but will echo the conditions and limits of its impact on national policies and practices as laid down by the ECJ. Although the Social Appeal Authority and the National High Court (Vestre Landsret) did not find that the person concerned was entitled to a Danish old age pension, their line of reasoning reflects how supranational case-law is considered to take precedence over national law. Furthermore, the conclusions will influence future cases.

The decision concerned a pensioner, residing in Portugal, who applied for a Danish old age pension due to her previous residence in Denmark. At the time of application, the person was a Canadian citizen, married to a Danish citizen. The applicant had previously been a Danish citizen. In 1968, she moved to Canada and became Canadian citizen in 1973. In 1983, she moved back to Denmark but retained Canadian citizenship. Two years later, she married a Danish citizen, with whom she moved to Portugal in 1989. Still residing in Portugal, she applied for a Danish old age pension in 1999. The Danish Social Security Board (den Sociale Sikringsstyrelse) initially refused the Danish pension due to her being a Canadian citizen and therefore not part of 1408's personal scope. Against this background, the Social Appeal Authority was requested to consider the case and decide whether the applicant had a right to a pension either individually or as the family member of an employed person. In its decision, the Social Appeal Authority concluded that the applicant did not have an individual right to a Danish pension due to 1408. In the first period of residence in Denmark, i.e. up till 1968, 1408 did not apply since it was before Denmark joined the European Community, neither did it apply in the second period of residence, i.e. between 1983-1989, since she no longer held Community nationality. The Social Appeal Authority referred to the ECJ cases 10/78 *Belbouab*³⁰⁶ and C-105/89 *Buhari Haji*³⁰⁷, which laid down that Community nationality is

³⁰⁵ Date of decision: 29 April 2003. The case involved two decisions. The first decision by the Social Appeal Authority was SM P-24-01 of 18 October 2001. The National High Court later decided in SM P-17-03 which annulled SM P-24-01.

³⁰⁶ Case 10/78, 12 October 1978. *Tayeb Belbouab v Bundesknappschaft*. ECR 1978, p. 1915.

required when rights are earned and not necessarily at the time of application (see chapter III, section 1.2). Concerning the right as a family member of a Danish citizen, the authority likewise rejected that this status entitled her to a Danish social pension. The Appeal Authority reasoned its rejection by reference to judgement C-308/93 *Cabanis-Issarte*, according to which;

“family members due to previous practice alone achieved derived rights and not individual rights, *but by the judgment a certain modification has taken place*. However, it emerges from the judgement, point 2) that it cannot be invoked to support a claim concerning benefits for periods before the date of the judgement, i.e. 30. April 1996. The application concerned exclusively periods before 30. April 1996” (SM P-17-03, page 2, own translation, emphasis added).

The decision of the Appeal Authority was subsequently brought before the National High Court (Vestre Landsret), which, however, supported the previous decision to refuse the pension.³⁰⁸

Although the decision in itself did not extend rights, it should establish a different future practice on the equal treatment of family members. Denmark had previously held that *Cabanis-Issarte* did not have a general effect and did not impact on Danish practice, since it concerned very specific case circumstances (Interviews, Danish Ministry of Social Affairs & National Social Security Agency, 5 April 2001). The early interpretation was that the scope of the judgement was limited to the individual lawsuit. However, by SM P-17-03, Denmark has come close to admitting that a distinction between individual and derived rights cannot be maintained for social pensions. Although, the *Cabanis-Issarte* judgement passed relatively unnoticed, when it was given, it is about to abolish the previous basis upon which discrimination in national policy has been justified. Years after the *Cabanis-Issarte* judgement, member states are incorporating its principle into national practices and have come much closer to recognising its effect as a binding precedent beyond the individual lawsuit and similar cases.

³⁰⁷ C-105/89, 14 November 1990. *Ibrahim Buhari Haji v Institut national d'assurances sociales pour travailleurs indépendants*. ECR 1990, p. I-4211.

³⁰⁸ The High Court added that the husband could not be regarded as an ‘employed’ person according to Regulation 1408, since this status implied that employment had been held in more than one member state. The husband had during his working life held employment in Denmark and Greenland. Concerning its conclusions on the requirement to have worked in more than one member state, the National High Court referred to Case C-189/00, 25 October 2001. *Ruhr v Bundesanstalt für Arbeit*. ECR 2001, p. I-08225. Para. 23.

2.3: Non-Compliance and Subsequent Application – Family Benefits

The policy of *family benefits* is another domain where Denmark has had to change its organising principles and entitlement criteria, in order to comply with Community law. The policy behind the relatively generous child benefit and allowances clearly has both demographic and redistributive aims. The conditions favour 'members' of Danish society, requiring that the child must reside in Denmark and that the parent must be fully liable to pay Danish tax. To receive the additional child allowance, the child or parent must furthermore be a Danish citizen or have habitual residence in Denmark ("Your social security rights when moving within the European Union" (2002 update), p. 31). Although both the territoriality and citizenship clause are waived regarding 1408's personal scope, the Community obligation of exportability and non-discrimination have not readily been fully manifested in Danish administrative practice.

Due to a restrictive national practice, Denmark came close to an infringement procedure before the ECJ. The case concerned a British citizen who worked for a Danish employer on a drilling rig in the North Sea. The worker paid tax in Denmark, but his children resided in the United Kingdom. Denmark refused to pay child benefit, reasoning its refusal by the fact that in Danish social policy there is no connexion between tax payment and social entitlements (Borsen, 22 June 1999). The Commission found that Denmark did not comply with Community law and required Denmark to explain its practice. The government subsequently gave the reasons for its practice before the Commission and announced that it was ready to have its case heard before the Court (Borsen, *ibid*). However, it never came that far. By November 1999, it was clear that Denmark was now willing to comply in order to avoid having the case brought before the Court. Granting social rights to a British citizen working for a Danish employer but outside Community territory had previously been described as having "incalculable financial impact and may ultimately cause an erosion of the Danish social system" (Governmental note to the Parliament's European Affairs Committee, quoted from Borsen, 15 November 1999, own translation). Officially, the perception of impact had now changed and had been interpreted in a limited way. The new interpretation was explained by a senior official in the Danish Ministry of Social Affairs as being due to the fact that Denmark had only specifically admitted new rights for workers at Danish drilling rigs (Borsen, 15 November 1999). However, such an argument would most likely not hold if a new case came up, concerning a similar situation, such as a Danish employer established in a third country, employing Community

workers. In the concrete case, Denmark chose non-confrontation and, so far, a restrictive application of the Community obligation.

2.4: Exportable Social Services?

Long term care and *social services* are policy domains where the recent development of Community law has increasingly impacted on the national principle of territoriality. Long term care in Denmark is part of the national law on social services. According to the Danish list on national legislation included in the material scope of Regulation 1408, social services fall outside the regulatory scope and are, thus, not exportable ("Your social security rights when moving within the European Union" (2002, update), pp. 23-33; Sakslin 2000, p. 11; Christoffersen 1998, p. 12; Ketscher 1998, p. 259). Case C-160/99 *Molenaar* was concluded to have no effect on the Danish service, as it concerned a 'benefit in cash' and Danish long term care is granted as a 'social benefit in kind' (Schultz 1998; Interview, Danish Ministry of Social Affairs, 4 April 2001). The jurisprudence of the Court was thus interpreted in the Danish institutional context and found to have no impact. While it is clear that Community law and the Court's interpretation thereof, in both *Molenaar* and C-215/99 *Jauch*, do not oblige Denmark to pay for long term care services for Danish pensioners in the South of Europe, it is currently being considered administratively the extent to which recent case-law has an impact on other types of social services, which until recently were argued to be outside the regulatory scope of 1408/71 (Interviews, the Danish Ministry of Social Affairs, 8 October 2003 & 5 February 2004). The recent development of legal reasoning, expressed in the line of cases *Molenaar*, *Jauch*, C-43/99 *Leclere & Deaconescu* and C-333/00 *Maaheimo* among others, essentially question the territorial restriction of social services such as: benefits to parents who chose private child care or their own child care; parental leave benefits; compensation for loss of income in order to care for a handicapped child; sickness care contributions; compensation for additional expenditures by sickness or invalidity; compensation for the loss of income due to caring for a dying relative (see Chapter VI, section 3.3). For example, it is clear that the Finnish child care benefit, which the *Maaheimo* judgement made exportable, strongly resembles the Danish child care benefit, legislated in the law on social services §§ 26-26a. The central administration has indicated that, the *Molenaar*, *Jauch*, *Leclere* and *Maaheimo* line of judgements brings further into question the non-exportability of the above mentioned types of social services (Interview, Ministry of Social Affairs, 15. May 2003). Should these considerations result in

exportability, it substantiates once again the fact that individual judgements may constitute a binding precedent and have an impact far beyond the scope of the individual lawsuit.

Both the examples of family benefits and social services suggest that Denmark, when faced with the prospect of having a lawsuit brought against it, chooses to comply beforehand. Danish response to the development of Community law appears to be characterised by a certain, but initial, inclination towards non-compliance or restrictive application, which is later corrected so that Community obligations are fulfilled. Denmark appears to prefer non-confrontation and, over time, accepts the 'erga omnes' and 'ultra partes' effect of ECJ case-law, adapting national policy and practice in accordance therewith.

2.5: Medical Treatment Beyond National Borders

Access to Danish *health care* is generally supplied within Danish borders. Further characteristics are that health care is supplied by the national health service as benefits in kind, and the only requirement for entitlement is Danish residence. The patient is generally treated free of charge.

Although dividing European health models into archetypes hardly does justice to the many nuances of each individual model, it is a useful way of emphasising how national health institutions diverge across Europe, and places the Danish and German models respectively in comparison with their European counterparts. Furthermore, the division into archetypes helps explain the different impact of European institutionalisation. Although both Denmark and Germany provide health care as benefits in kind, they represent two distinct models due to their financing form:

Table 12: Health Care Supply in EU-15³⁰⁹

Social Insurance		National Health Service
<i>Reimbursement</i>	<i>Benefits in Kind</i>	<i>Benefits in Kind</i>
<ul style="list-style-type: none"> • Luxembourg • Belgium • France 	<ul style="list-style-type: none"> • <i>Germany</i> • Austria • Netherlands 	<ul style="list-style-type: none"> • United Kingdom, • Ireland • <i>Denmark</i> • Sweden • Finland • Spain • Portugal • Italy • Greece

Under certain circumstances Denmark waives the general principle of territoriality and grants access to foreign health supply to those who have health care insurance. It is here important to clarify that it is not only European law which may entitle a person to foreign health care, but also national legislation. For example, every person insured for health care in Denmark – disregarding nationality – is entitled to foreign treatment during one month of stay abroad. Furthermore, national law has traditionally allowed necessary, highly specialised treatments to be carried out in other states (Interview, the Danish Ministry of Health, 3. April 2001).

However, Europe has added to such national rules, granting now to all European nationals, their family members³¹⁰ and legally residing third country nationals³¹¹ (i.e. except for third country nationals residing in Denmark), a conditional right to enjoy health care access outside their state of residence. Article 22 (1) (a) of Regulation 1408 obliges Denmark to pay for urgent health care provided in another member state.³¹² The Regulation's Article 22 (1) (c) entitles those who fall

³⁰⁹ The division by archetypes or typologies correspond to the division carried out by Langer (1999, p. 358) and by Palm (2000, p. 17). The archetype division by Langer is based on the MISSOC 1998 data.

³¹⁰ Granted by Regulation 3095/95.

³¹¹ Granted by Regulation 859/2003.

³¹² Certified beforehand by form E111. The entitlement to urgent health care outside Denmark is conditional on the fact that the stay is temporary and does not exceed one year (Sakslin 2000, p. 20). Furthermore, the treatment of a chronic

within 1408's personal scope to treatment in another member state which has been authorised by the national competent institution beforehand.³¹³ As analysed in chapter V section 3, the question of when European law obliges national institutions to authorise treatment in another member state and when national authorisation policies are barriers to the free movement principles of the EU has indeed been a bone of contention between the member states, on the one hand, and the ECJ on the other. Although, no individual case involving Denmark has arisen, it has been an active participator in these disputes.

Authorisation of treatment in another member state is generally restrictively applied, and is only accorded for very specialised treatments and only after all possibilities of national treatment have been exhausted. The governmental executive order lays down the formal procedure for such application, specifying³¹⁴:

- the patient must be examined or treated in a Danish hospital with the most specialised knowledge within the field,
- the hospital must consult the National Health Board (Sundhedsstyrelsen) before authorisation is given.

The restrictive application is underlined by the low numbers of annual authorisations. Around 40-50 authorisations are given pr. year, whereas some 15 are rejected (Palm 2000, p. 50). The reasons for rejection are either that the treatment is available in Denmark, or that the treatment demanded is considered experimental.

Traditionally Denmark has only authorised 'standard' types of treatment abroad, meaning treatments whose effect were recognised by national medicine, and not carried out on a research or experimental basis.³¹⁵ Danish health policy has, however, recently opened up the possibility that patients with life-threatening diseases may be authorised to receive foreign research-related

illness is not regarded as urgent in Denmark, and 1408 does therefore not oblige Denmark to pay for such treatment abroad.

³¹³ Certified beforehand by E112.

³¹⁴ According to executive order (bekendtgørelse) in force no. 564 of 20/06/2003, §§ 21.1 and 21.2.

³¹⁵ See historical executive order (bekendtgørelse) no. 69 of 17/02/1983, § 2.2 & historical executive order no. 1132 of 16/12/1999, § 21.

treatments³¹⁶ or treatments carried out on an experimental basis³¹⁷. It will be further discussed below whether this change of national policy may be seen as an indirect reaction to the recent case-law of the ECJ.

2.6: First Step Towards an Internal Health Market

The 28th April 1998 was the date on which the ECJ stated its two landmark rulings, C-120/95 *Decker* and C-158/96 *Kohll*. It was also the date from which it was irrevocably clear that the free movement principles of goods and services *did* affect the policy field of health care.

In Denmark, the judgements contradicted the Danish perception at that time that internal market rules did not affect health benefits and services. The rulings thus raised a long line of questions concerning their scope and impact on national authorisation policies (Interview, Danish Ministry of Health, 3 April 2001). Against this background, it was decided politically to set up an inter-ministerial working group³¹⁸ to analyse the reach of the judgements and their possible future consequences for Danish health policy. The working group came out with its report in September 1999, titled "Consequences of The European Court of Justice rulings in the *Decker/Kohll* cases – statement by the working group".

In its report, the working group admitted that the rulings were based on general premises for which reason their scope went beyond the individual lawsuits and also had implications for other health systems than that of Luxembourg and other health goods and services than those of a pair of spectacles and dental treatment (Danish Report on the *Decker/Kohll* rulings 1999, p. 22). It thus remained for the report to clarify the limits of such general premises and to interpret what the judgements did not state explicitly, namely under which circumstances national authorisation policies may constitute barriers to the free movement principles of goods and services.

³¹⁶ See historical executive order (bekendtgørelse) no. 299 of 13/05/2002, § 25.

³¹⁷ See historical executive order (bekendtgørelse) no. 1162 of 16/12/2002, § 26.

³¹⁸ The working group consisted of representatives from the Danish Ministry of Health, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Social Affairs and the Negotiating Committee of the Public Health Security Service.

The working group found that the consequences of the Decker/Kohll rulings were that access to health care in another member state should be allowed without authorisation, if two criteria were met (Danish Report on the *Decker/Kohll* rulings 1999, p. 24):

- the health care service must be provided with a view to making a profit and the patients pays the greater part of the costs,
- a fixed reimbursement is offered according to fixed rates.

The Danish interpretation thereby conditioned its concept of service. For a service to be a service according to the meaning of the Treaty's art. 50 (ex. art. 60) there had to be an element of remuneration:

"It is the view of the working group that if, on the other hand, the treatment had been taken care of by the *public hospital sector*, the Treaty's Article 49 would not have applied. The reason is that Article 50 defines services, as *services normally carried out in return for remuneration* [...] The characteristic of a service is thus that a service provider offers a service in return for remuneration" (Danish Report on the *Decker/Kohll* rulings 1999, p. 23, own translation, emphasis added).

The restrictive interpretation of the working group, according to which there had to be an element of private payment for a service to constitute a service within the meaning of the Treaty, was deduced from the *Kohll* judgements para. 29³¹⁹ and previous ECJ judgements regarding services.³²⁰ On the basis of a re-interpretation of previous case-law, the Danish officials came up with their (re)definition of services, allowing the whole public hospital sector to be exempted from the service concept, together with all other health services provided free of charge.

³¹⁹ Para 29 of the *Kohll* judgement stated: "The dispute before the national court concerns treatment provided by an orthodontist established in another Member State, outside any hospital infrastructure. That service, *provided for remuneration*, must be regarded as a service within the meaning of Article 60 of the Treaty, which expressly refers to activities of the professions (emphasis added).

³²⁰ In its considerations on the service definition within the meaning of the Treaty, the working group referred to case C-159/90, 4 October 1991. *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. ECR 1991, p. I-4685, para 18, regarding abortion and to the cases 293/83, 13 February 1985. *Françoise Gravier v City of Liège*. ECR 1985, p. 593; 263/86, 27 September 1988. *Belgian State v René Humbel and Marie-Thérèse Edel*. ECR 1988, p. 5365, para 19 and C-109/92, 7 December 1993. *Stephan Max Wirth v Landeshauptstadt Hannover*. ECR 1993, p. I-6447, para 17, all regarding the education.

Based on its conclusions, the working group stated that services under the Danish Hospital Act were not affected by the EC obligations on free movement of services, nor were a long line of other health care services which were provided free of charge.³²¹

However, the interpretations of the working group marked a very central break with traditional national reasoning, namely in admitting that the internal market principles – under certain conditions – equally applied to health care services. Furthermore, to open the system up to a certain integration of foreign supply was a central break with the principle that public Danish health care only regulated domestic supply (Interview, Danish Ministry of Health, 3 April 2001).

This central break meant that health services, for which the insured person personally paid one part and the competent institution the other, were held to fall under the service concept of the EC Treaty. The conclusions in the report led to a policy-reform, which entered into force on 1 July 2000 and which allowed certain services to be purchased abroad with subsequent fixed reimbursement from the Danish competent institutions.³²² The policy-reform furthermore concluded that if one had purchased one of the following services in another member state within the last 20 years before 1 July 2000, and the purchase could be documented, one would still be entitled to reimbursement. The policy-reform thus applied retrospectively. The services included:

- Dental assistance, except certain preventive services and certain services to the 18-25 years old.
- General medical treatment for persons covered under group 2.
- Specialist medical treatment for persons covered under group 2.
- Physiotherapy, except for certain types of physiotherapy free of charge provided to disabled persons.
- Chiropractic treatment.

³²¹ Other acts excluded on the basis of the working group's interpretation were: The Dental Care Act (concerning primarily dental care for children under 18 years of age); the Act on preventive Health Care for Children and Young People; the Act on Free Vaccination against Certain Diseases; the Act on Home Nursing Schemes; the Act on Prenatal Care and Maternity Care; the Act on Sterilisation and Castration; the Act on Induced Abortion (Danish Report on the *Decker Kohll* rulings 1999, p. 27).

³²² The policy-reform entered into force by law no. 467 of 31 May 2000 and BEK no. 536 of 15 June 2000. The policy reform was followed up by an informative note from the Danish Ministry of Health by 1. January 2001, describing the new entitlements: "Har du fået Behandling mv. i Udlandet? Måske kan du få Tilskud fra Sygesikringen".

The report deferred the decision on whether to include pharmaceuticals on the list. The deferral was explained by the relatively low pharmaceutical consumption in Denmark and thus explained by a desire to control consumption (Danish Report on the *Decker/Kohll* rulings 1999, p. 8). Reconsideration of the deferral has, however, been initiated in autumn 2003 (Interview, the Danish Interior and Health Ministry, 9 October 2003).

From the parliamentary debate on the governmental amendment proposal, it was clear that the development initiated by the *Decker/Kohll* rulings not only addressed what to do with foreign supply, and how far to integrate it, but might also have repercussions for domestic politics. Ex-spokeswomen on health and member of the liberal, now governing party 'Venstre', Tove Fergo emphasised:

"We would very much have liked the proposal to go further so that it also applied to hospital treatment and for the citizens in health insurance group 1. We would also have liked that it applied to pharmaceuticals" (Tove Fergo, 1st reading of proposal in the Danish Parliament, 2 march 2000, own translation).

In the second reading, Tove Fergo continued her argument in favour of a greater liberalisation of health care, however, now turning the argument internally, arguing that *Decker/Kohll* and the Danish reform initiative should in addition have other consequences for domestic policy:

"During the work with the proposal, it has appeared that one can export services to any EU member state, and that one can export those irrespective of whether it is to a private hospital or a public hospital. The only thing required is that it is an authorised health provider. That is fantastic. At last there is a proposal which gives a free choice between public and private hospitals. It is only that citizens in Denmark cannot bring along the same services to a private hospital in Denmark. That means that in reality one is treated differently, should one desire a treatment in Denmark" (Tove Fergo, 2nd reading of proposal in the Danish Parliament, 18 May 2000, own translation).

The now governing party Venstre thus welcomed the proposal, but used the opportunity to criticise its restrictive application and the distinction in domestic politics between public and private hospitals.

The *Decker/Kohll* case-law indeed involved innovative rulings, and marked a turning point. On 28 April 1998, the Court took an initial step towards the construction of a precedent, and – according to the interpretation of some – towards the construction of an internal market in health care. The subsequent dispute between the ECJ and the member states, between law and politics, further concerned the definition of services and how to agree on the conditions under which national

authorisation policies might be justified. On an initial account, only Denmark, Luxembourg and Belgium changed its national policy as a reaction to *Decker/Kohll* (Mossialos et al. 2001, p. 48). Austria already had a system of reimbursement beyond national borders and thus already complied with the legally developed Community obligations (Palm et. al 2000, pp. 80-81). The remaining member states announced for different reasons that the rulings did not apply to them, as will be exemplified by the German case in the analysis offered in section 3.6 below.

2.7: The Impact of Judicial Decision-Making

In the C-157/99 *Geraets-Smits and Peerbooms* case, the Court went one decisive step further in clarifying the applicability of the internal market rules to health care policies.

Denmark was among the governments which delivered an intervening submission in the case. The Danish opinion restated the conclusions of the *Decker/Kohll* report (Interview, Danish Ministry of Health, 3 April 2001). The argument was that, due to the absence of remuneration, hospital treatment did not constitute a service within the meaning of the Treaty's art. 50 (Report for the Hearing, 76-77).³²³ Besides this point of view, Denmark further argued that another precondition for a service to be Treaty related was that the service must be provided with a view to making a profit (Report for the Hearing, 78).³²⁴

The Court, however, overturned these national assessments and stretched the notion of 'remuneration' in the Treaty's Article 50 to also cover indirect payments such as those transferred by the social security funds to cover health care costs (Hatzopoulos 2002, p. 693). On the basis of this partially revised definition of services, most health care services, including free hospital care, came to constitute services within the meaning of the Treaty, and were therefore not exempted from the rules of freedom to provide services.³²⁵ Furthermore, the Court clarified that the *Decker/Kohll* rulings applied to health care systems in general, i.e. including systems based on benefits in kind and not just those based on reimbursement.

³²³ The member states here relied on the previous case-law 263/86 *Humbel*, para 17-19 and C-159/90 *Grogan*, para 18. See footnote 320 above.

³²⁴ That point of view relied on 293/83 *Gravier* & C-109/92 *Wirth*. See footnote 320 above.

³²⁵ Hatzopoulos argues that the judgement may be seen as a partial revision of the judgement in case 263/86 *Humbel*, due to the stretched notion of 'remuneration' (Hatzopoulos 2002, p. 693).

However, as radical as this step seemed, and as openly as it overruled the opinions of the member governments, the subsequent reasoning of the Court still appeared to be a compromise between law and politics. At the same time as the Court ruled prior authorisation policies to be barriers to the free movement of services, it found that such a barrier may be justified by the need for cost-containment and for capacity planning through contracts with providers. Thus, while not overtly disqualifying the national means of control, the Court stated that prior authorisation policies are only justified under certain conditions. The criteria for granting authorisation must be objective, non-discriminatory and known in advance, so that the discretion of national authorities is not exercised arbitrarily (see furthermore the analysis of chapter V, section 3.5).

The impact of the *Smits-Peerbooms* ruling on the diverging health care schemes has been debated collectively as well as in the individual member states, but still remains to be clarified (Interview, Danish Interior and Health Ministry, 12 December 2002 & 9 October 2003). So far, the effect of the ruling remains somewhat abstract, since there has been no collective political stance, nor clear individual reactions. On the other hand, contradictory analysis of its eventual impact has caused considerable confusion.

Such confusion was represented by the dispute between a professor of social law, Kirsten Ketscher and head of section in the Danish Ministry of Health, John Erik Pedersen. Ketscher did not hesitate to announce that the ruling in principle – and only with few exceptions - had institutionalised a free hospital choice in the European Union (Ugeskrift for Læger, September 2001; Politiken 20 December 2001; Jyllands-Posten 26. May 2002; Politiken 6. June 2002). Her interpretation was immediately rejected by Pedersen, who as the government's representative had a much more literal reading of the ruling (Pedersen 2001; Politiken 20 December 2001; Jyllands-Posten 26 May 2001):

“Contrary to what has been said in the press, the judgement does not oblige the member states to finance hospital treatment outside the planned and agreement covered scope – also not abroad. On the contrary, the essence of the judgement is that access to hospitals outside the planned scope can be conditioned by a prior authorisation, but that the rules on authorisation have to be based on objective criteria and be non-discriminatory, that is hospitals in other EU-member states shall be treated equally with domestic hospitals, which are outside the planned scope” (Pedersen 2001; pp. 6009-6010, own translation).

As also emphasised by Pedersen, the different interpretations of the impact of the judgement seemed to be due to confusion or disagreement as to what were the general premises of the Court's conclusions and which were specifically addressing Dutch legislation. The judgement considered the two Dutch conditions for granting authorisation for a treatment abroad; that the treatment should be regarded as 'normal' within the medical circles concerned, and that authorisation is only given if it appears that appropriate treatment cannot be provided without 'undue delay' in the Netherlands. Thus, the Court concluded that the specific Dutch conditions could only have 'ultra partes' effect if such conditions were equivalent with conditions in the national legislations of other member states.

The government official took the view that the judgement's impact on Danish policy was to be found primarily in its potential. According to Pedersen, the judgement did not question Danish authorisation policy in itself, since it was explained by the need for cost-containment and capacity-planning. At the time of judicial decision-making and the more immediate subsequent dispute, Danish health policy did not have any condition equivalent to the Dutch one that treatment had to be offered without 'undue delay'. The senior official therefore rejected the view that this part of the legal reasoning had any impact on Danish policy. However, regarding the other Dutch condition, that a treatment had to be considered 'normal', it was admitted to have certain similarities with the Danish rule, at the time at which he was writing (October 2001), that authorisation would not be given to 'experimental' treatment abroad.³²⁶ The impact of the Court's reasoning would therefore be that what nationally was held as 'normal', on one hand, and as 'experimental' on the other, should rely on international medical science and not only on Danish medical considerations. The senior official and later the Minister of Health, however, refused to agree that Danish praxis was not already founded on international medical science (Pedersen 2001; Answer by Danish Minister for the Interior and Health, to § 20 Parliamentary Question no. S 1946, 26 February 2003).

Nevertheless, it seems probable that this second premise of the ruling over time has had a derivative effect on Danish authorisation policy. Over the years, Denmark has had cases before the administration, the social appeal authority and national courts concerning patients who had been denied authorisation or cost reimbursement for treatments abroad, because of the treatment's 'experimental' status (Answer by the Danish Minister of Health 10. January 2001 to Parliamentary Question no. 1010; Interviews, Danish Ministry of Health, 3. April 2001 & 12 December 2002;

³²⁶ According to historical executive order no. 31 of 19/02/2001, § 21.

Jyllands-posten 26 May 2002). A derived impact of the *Smits/Peerbooms* ruling may be that the border line between what constitutes a 'normal' treatment, as opposed to an 'experimental' one, has been blurred and is no longer solely nationally defined. If the majority of other member states consider a treatment 'standard', but one or a few member states define it as 'experimental', does this then mean that the latter disregard the stance of 'international medical science'? By questioning the objectivity of definitions, the judicial reasoning thus gave new flesh to a national dispute, exemplified in the cases where Denmark had denied reimbursement of treatment costs for stereo tactical radiation treatment in Sweden, which according to Denmark is an 'experimental' treatment, but which in Sweden and Italy counts as 'standard' (Jyllands-Posten 26. May 2002; Answer by the Danish Minister of Health 10. January 2001 to Parliamentary question no. 1010). By the recent change in the Danish authorisation policy, according to which patients whose lives are at risk may receive experimental treatment at a private Danish hospital or in a hospital abroad, Denmark has opened up its system to non-standard foreign health supply.³²⁷ With this policy reform, Denmark has institutionalised an opportunity to avoid litigation with regard to its definition of 'experimental' and 'standard' treatment by legislating to allow the former. This policy-reform, and the previous one which allowed research-related treatments abroad³²⁸, break fundamentally with recent Danish praxis. Against this background, it is interesting to see how the Minister of Health recently linked the judicial decision-making in *Smits-Peerbooms* and the national policy-reform:

"The Dutch rule has similarities to the Danish rule, according to which a highly specialised treatment abroad cannot be authorised, if the treatment is experimental or alternative. It must be assumed that the European Court of Justice would reason that also this rule should be interpreted on the basis of international medicine. In Denmark, it is the National Board of Health which decides or gives its opinion in such cases based primarily on Danish expertise, but the foundation thereof is international medical science. [...] Besides, I note that the latest amendments of the Danish rules have opened up the possibility that Danish patients in certain cases on the basis of a recommendation from a second-opinion-panel can be authorised to have experimental treatment abroad. The panel may include foreign expertise" (Danish Minister for the Interior and Health, Lars Løkke Rasmussen, answering § 20 Parliamentary Question no. S 1946, 26 February 2003, own translation).

Besides this indirect link, the *Smits-Peerbooms* ruling has had a more direct impact on Danish policy formulation. As part of the liberal/conservative government's programme, patients have, since 1 July 2002, had a right to treatment outside the contracted public hospitals, if these cannot

³²⁷ See executive order no. 564 of 20/06/2003 in force, § 26 and historical executive order no. 1162 of 16/12/2002, § 26.

³²⁸ Historical executive order no. 31 of 19/01/2001, § 22.

provide the necessary treatment within two months. The intentions behind the policy reform were to reduce the waiting lists and ensure the patient a certain free choice, in the case of insufficient public health supply. By this health policy reform, Denmark institutionalised an obligation to refer patients to non-contracted health care providers, if public care could not be provided within the specific time limit of two months. Danish health policy thereby institutionalised a criterion resembling the Dutch one of 'undue delay'. The ECJ's judicial decision-making had thus conditioned national policy-formulation, by laying down that once a treatment cannot be provided by the contracted national provider, the member state must not favour a nationally established non-contracted, i.e. private, provider over a provider in another member state. Remarks in the proposal of this national policy-reform clearly indicate its relation with EC-law:

The European Court of Justice has in a judgement dated 12 July 2001 (C-157/99) taken a stand on certain EU judicial questions regarding hospital treatment. The Court has stated that hospitalisation is part of the EC-Treaty's provisions on free movement of services. The need for planning and cost-containment can, however, justify certain restrictions on access to treatment paid by the public health service or health insurance. Such rules shall, however, be objective, proportional and non-discriminatory. Supposedly, that implies that when access to publicly paid treatment is given to 'independent' hospitals outside public control and planning, as is the case in the present legislative proposal, there has to be given access on an equal footing with hospitals in other EU member states. The legislative proposal is in conformity therewith (Legislative proposal L 64, proposed 29 January 2002. Adopted 19 March 2002. Own translation.).

The adoption of this policy reform and its national re-interpretation demonstrate how the ECJ decision intervened upon national autonomy to decide on the spatial consumption of health care. In its policy formulation, the Danish government re-interpreted its Community obligations to stipulate that free access to private, nationally established hospitals could not be favoured over hospitals in other member states. Furthermore, the national compliance with the Court's decision-making furthermore demonstrates that the impact need not be immediate, but may appear when new policy initiatives are formulated. New policies which have been formulated in accordance with EU obligations cause a greater compatibility over time between supranational and national institutions, thus reducing 'adaptive pressure'. The impact appears more discrete but is equally effective as when for example it appears as a preliminary reference or as the result of an infringement procedure. As the effectiveness of EC law increases, such indirect impacts are more likely to occur, but which may, due to their more discrete appearance, evade our theoretical and analytical attention. They may, however, be very influential on future policy formulation:

"It is of course a completely political question whether a general free choice of private Danish hospitals shall be introduced but should that be the case, the judgement may imply that a free choice of hospitals in other member states on equal conditions will have to be introduced" (Pedersen 2001, p. 6010, own translation).

2.8: An Internal Health Market for Non-Hospital Care

Since member governments respond to judicial decision-making with a certain delay, it is hardly surprising that the *Müller-Fauré & Van Riet* judgement of 13 May 2003 has so far had no identifiable impact on national legislation. The Court's reasoning here is indeed interesting since it answers not only some of the national confusions and questions raised in the wake of the *Decker-Kohll* procedure, but also issues raised by the Danish policy reform in this regard and the *Smit-Peerbooms* ruling. On the one hand, the *Müller-Fauré & Van Riet* case rejects the idea that the previous judicial precedent has institutionalised a free hospital choice within Europe, which had been suggested in academic circles as well as in the press (Ketcher 2002: Jyllands-Posten 26 May, 2002; Information 27 May, 2002). However, on the other hand, the provisional conclusion of this cluster of judgements regarding national health service and Community law makes clear that:

- The fundamental principle of freedom to provide services applies to all health care systems, including those based on benefits in kind. The Danish residence-based, public health care system, providing benefits in kind and financed out of taxes is thus not exempted from the Court's conclusions.
- There need not be an element of remuneration or profit for a service to be a health care service within the meaning of the Treaty. Thus, it is clear that the restrictive application of the *Decker Kohll* ruling, as laid down in the Danish report and the subsequent policy reform, is no longer in line with Community obligations.
- The *Decker Kohll* ruling applies in general to non-hospital provision of health care.

Thus, the conclusions of the *Müller-Fauré & Van Riet* case are a serious blow to the national refusal to reimburse costs for non-hospital care. In the Danish case, this means that the conclusions of the *Decker Kohll* report and the national change of law will have to be revised. It can hardly be upheld that persons insured in group 1 should not enjoy the same freedom as those in group 2 to purchase non-hospital care outside Danish territory, including the long line of health services that the report at first excluded on the basis of its conditional definition of services (see footnote 321 above). The list of health care services which can be purchased in another member state without prior

authorisation should therefore be extended. However, as was evident from the parliamentary debate regarding the restricted application of the *Decker/Kohll* procedure, that should be fully in line with the ideological preferences of the Danish government now in power. Liberalising health care provisions across national borders should therefore involve less conflict nowadays, than when the original step towards an internal health market was taken.

2.9: Domestic Impact Readdressed

The gradual institutionalisation of intra-European social security has impacted on the accessibility and scope of Danish welfare in a most fundamental way, by setting aside the national principles of social citizenship and territoriality.

The effective meaning of institutionalisation as transposed through national implementation has, however, not been immediate nor systematic. Since Danish implementation has not been contested by preliminary references, judicial decision-making should, according to the Conant hypothesis of 'contained compliance', have no significant effect, since preliminary references have no 'erga omnes' (generally binding) or 'ultra partes' (beyond the parties) effects (Conant 2002, p. 63).

My analysis of the impact on the Danish member state, however, points to the contrary conclusion. If analysed over time, judicial decision-making became part of national legal reasoning as well as of national administrative practice. That is, among other examples, proven by the multilateral effect of the *Cabanis-Issarte* ruling, which is likely to, in part, cause the exportability of certain social services which previously were held to be outside the material scope of 1408 and demarcated within Danish borders. The multilateral effect of ECJ ruling is furthermore substantiated by the Danish acceptance of the *Decker Kohll* procedure's general premises, although the procedure has been initially restrictively applied.

The domestic impact of a given political or judicial decision cannot be denied on the basis of a short-term analysis of cause and effect. As in the case of supranational institutionalisation, the domestic impact reveals itself gradually and, at times, very discretely. The time variable stands out as significant since its effective meaning through national implementation may, in one extreme case, be established after a delay of 20 years. As the effectiveness and precise meaning of

Community law institutionalises and becomes more concrete, its impact will likewise increase. In between the original cause and the ultimate effect is the decisive layer of national institutionalisation, in which political and administrative reinterpretation, in the context of national institutions, transforms the sometimes abstract meaning of supranational institutions into concrete enforceable rules.

3.0: Domestic Impacts on the Insurance Based Welfare State

Germany has indeed responded differently from Denmark to the supranational institutionalisation of social security rights. As a founding father of the Community, Germany took part in the original negotiations on the very restricted liberalisation of labour movement and cross border social security entitlements that those very few workers of 'proven qualification' could receive (see chapter III). Since then, German governments, national courts and German migrants have been very active in influencing the development of intra-European social security rights.

In this section, the German response to, and the impact of, the supranational institutionalisation process will be analysed. *First*, the personal and material scope of cross border German welfare will briefly be depicted. *Second*, the German response to supranational institutionalisation will be examined. The German response differs from the Danish response since it contains a very important judicial dimension. German courts have been among the most active formulators of preliminary references to the European Court of Justice, which is likely to have influenced the impact of supranational institutionalisation on German welfare institutions. The next four sections will specifically discuss the European impact on German welfare institutions. The *third* section concerns pension policy, the *fourth* family benefits, the *fifth* long term care benefits and the *final* analytical section compares the impact of the Decker/Kohl ruling on German health care policy with that of the Danish.

3.1: Cross Border German Welfare

An 'employed' person has a most extensive meaning according to the definition given in German legislation. All persons compulsorily or voluntarily insured in the German sickness scheme qualify as an 'employed' person according to Regulation 1408. As described in chapter VI, section 3.2, such a definition entitles a wide set of personal categories to the protection provided by 1408, i.e.

around 90% of the German population. Students and persons employed only a few hours a week in Germany are covered by 1408/71 (Haverlate & Huster 1999, p. 97). Therefore, in comparison with Denmark, Germany never faced the same political problem or financial impact of extending the Regulation to new personal categories, such as, for example, students, since they were already included (Interviews, German Federal Ministry of Labour and Social Affairs, 17 September 2001; Deutsche Verbindungsstelle, 18 September 2001). Furthermore, German legislation does not in principle distinguish between Germans and foreigners (Zuleeg 1985, p. 300). German welfare schemes are therefore not organised along the same nation-based principle of social citizenship as certain Danish schemes, for which reason extensions to the personal scope may not have been as politically problematic for the German government.

Nevertheless, some of the most important case law of the European Court has concerned the personal scope, as implemented in German legislation. Decisive cases such as C-85/96 *Sala* and the joined cases C-95/99 to C-98/99 *Khalil and others*, discussed in chapter IV, have addressed the conditions defined in German law for foreigners' entitlement to the universally granted child benefit and child raising allowance. The cases highlight that while foreigners, in principle, enjoy equal rights, they may still have to fulfil additional conditions, such as the possession of a residence permit. Applying the principle of equal treatment, that condition was overruled by the Court in the *Sala* case, but permitted in the cases of *Khalil* and others, since there had been no movement between member states.

Those persons who, according to the German definition, qualify as 'employed' and fulfil the German conditions for entitlements are granted equal access to a wide range of social security benefits: medical care; hospital care; cash sickness benefits; long term care; benefits for accidents at work and occupational diseases; invalidity pension; death grant; normal retirement pension; early pension; old age pension for women; survivors benefits; unemployment benefits; child benefits and child raising allowance (European Commission: "Your Social Security Rights when Moving Within the European Union" (2002 update), pp. 34-43). A long line of preliminary references before the European Court of Justice and cases before national courts have rendered more precise the material scope according to German legislation. The main point of controversy, as will be demonstrated in the analysis below, has clearly been the contradiction between the Community principle of

exportability and the national principle of territoriality, as formulated in German social security policies.

3.2: Judicial Requests by German Courts

In the context of a Danish - German comparison, the two countries differ most remarkably in their record of referring preliminary questions to the European Court of Justice. In contrast to Denmark, German national courts have continually tested and questioned the scope and content of Regulation 1408/71 by preliminary references, and thus, from time to time, have been forced to admit rights due to a direct legal injunction. However, as pointed out in section 1.2 of the present chapter, this may not simply reflect a higher Danish compliance with its Community obligations, but rather a more litigiousness German society, a greater legal tradition of referring EU points of law to the ECJ, and the fact that Germany has social court at all levels of the federal state. Such cultural and institutional differences must produce a different reference record.

On a political account, Germany likewise contrasts with the Danish case. Germany has generally been in favour of further integration and has been supportive of the Commission's proposals to extend the personal and material scope of the Regulation. The German government thus supported the extension of the regulatory scope to include third country nationals and did not make any political or legal objections to the original proposal COM (98) 779 (Interviews, Deutsche Verbindungsstelle, 18 September 2001; Bundesministerium für Arbeit und Sozialordnung, 17 September 2001). In like manner, the German government has supported the remaining dimension of the simplification proposal, and has thus been in favour of the parts of the proposals that have been controversial for Denmark, such as the inclusion of non-active persons and pre-retirement benefits.

Although this political stance gives the impression that cross border welfare has been an unproblematic issue for Germany, the impression left by its preliminary reference record points to the contrary. As demonstrated in the analysis carried out in chapter II on the European Court of Justice's judgements which concerned Regulation 1408/71, Germany holds the second largest number of preliminary references and infringements procedures of all member states between 1971 and 2002. In total, there have been 338 judgements between 1971 and 2002 in which 1408 was

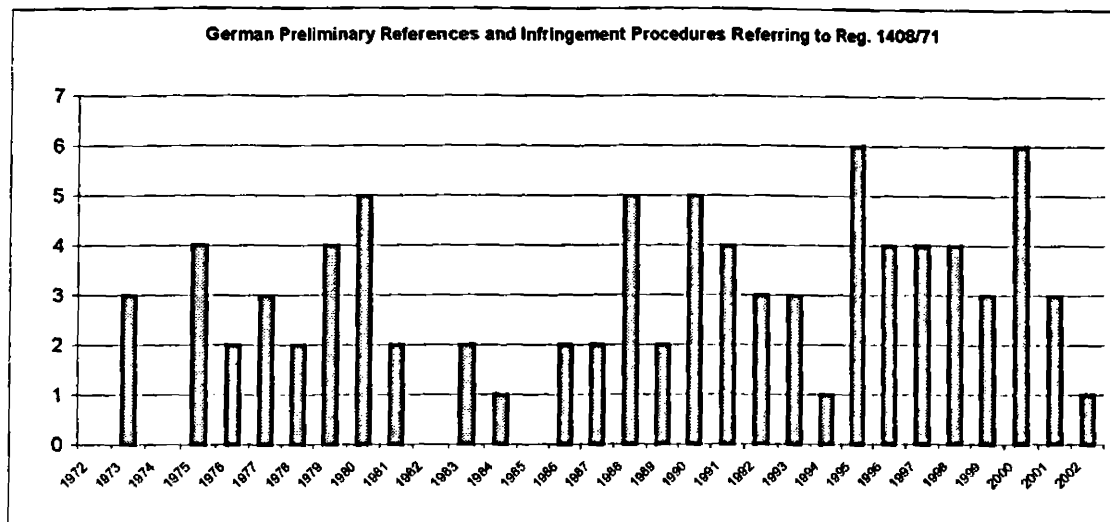
concerned as an instrument. Out of these 338 judgements, 85 were preliminary references by German national courts and 1 judgment was an infringement procedure against Germany. 25% of all the case-law was against Germany. Only Belgium outdoes Germany with 32.5% (see chapter II, section 4.5).

This means that German national courts have taken a most active part in questioning and enhancing the scope, impact and effectiveness of EC-law. Appendix 2 depicts the German share of ECJ litigation with reference to Regulation 1408. The details of the 86 cases are listed in the appendix: that is; the year of judgement, the referring court, and the Article of 1408/71 referred to in the case. Furthermore, those cases concerning Articles 2, 3, 4, 10 and 22³²⁹ have been analysed in more detail, in order to find out whether the ECJ concluded in favour of the migrant or not. This analysis on the basis of these five selected Articles should give us an insight into what extent the European Court generally rules against national legislation and administrative praxis, and finds in favour of the migrant. The cases concerning the five Articles are emphasised in the appendix.

Over the three decades in which 1408 has applied, German national courts have persistently questioned the scope and content of the Regulation, as well as the consistency between national policies and European obligations. Migrants and German national courts have played a vital role in enhancing the effectiveness of EC law and generating concrete intra-European social security rights, as appendix 2 and graph 8 here below illustrate:

³²⁹ Article 2 concerns the personal scope of Regulation 1408/71. Article 3 the principle of equal treatment. Article 4 the material scope. Article 10 the waiver of residence clause. Article 22 concerns medical treatment beyond national borders.

Graph 8: German References and Procedures regarding 1408/71



However, a closer examination of the German preliminary reference record regarding 1408/71 challenges the theoretical propositions put forward by scholars examining the relation between law and politics. The analytical findings of the present study questions the theoretical deductions given by Conant, Stone Sweet et al., as well as by Garrett et al., which were discussed in chapter II.

Firstly, it is not correct that due to its 'fit' between contribution-based social insurance and the logics of Regulation 1408 Germany should have "fewer conflicts with European obligations related to social security", as argued by Conant (Conant 2001, pp. 112-113). Conant's assumption is based on the data base compiled by Stone Sweet according to which Germany only accounts for 8% of all European litigation in the field of 'social security' (Conant 2001, p. 111). What the label 'social security' includes is not specified, but looking at Regulation 1408/71 as the core regulative legislation on social security in the Community, the conclusion is not correct. My findings therefore ultimately question whether the distinction between 'fit'/misfit', or 'compatible'/'incompatible' is very useful when it comes to the instrument of preliminary references. At least, in the context of a Danish/German comparison, the distinction misleads rather than accounts for the extent to which citizens and national courts refer issues to the European Court of Justice. Although the principles and criteria of Danish welfare institutions appear to be more incompatible with European obligations than the German ones, German courts have referred the second highest number of preliminary references. Danish courts, on the other hand, have taken no active part in the enhancement of European law regarding social security. Instead of assuming that differences of

adaptive pressure between national and European institutions make it possible to explain the varying use of the instrument of preliminary references across member states, it seems more likely that such a difference relates to other factors such as the litigiousness of society, legal traditions of referring EU points of law, as well as the existence and accessibility of social courts.

Secondly, the analysis of the Court's conclusions regarding the five Articles does not suggest that a preliminary reference generally means that national policies or administrative practices are deemed to be incompatible, and that European competencies in this regard are extended. Thus, preliminary references may not be the core component which triggers the 'virtuous cycle', or the self-sustaining dynamics towards 'more Europe', as has been argued by Stone Sweet et al. (Stone Sweet & Sandholtz 1998, pp. 4-5, p. 16; Stone Sweet & Brunell 1998, p. 64, p. 72). Out of the 86 German cases, 36 relate to one of these five Articles. As has been argued in the introduction to this thesis, the present study on European institutionalisation of social security rights has chosen to examine the development of precisely these five Articles, because they represent the core contents and principles of the Regulations and directly challenge the organising welfare principles of the member state. However, the examination of these 36 rulings do not support Stone Sweet et al.'s theoretical proposition on self-sustaining dynamics in the relation between law and politics. Out of the 36 cases, 18 were ruled in favour of the migrants, which thus found national law or practice inconsistent with European obligations, but, in the other 18 cases, the Court did not rule in favour of the migrant. Such an empirical finding points to the fact that dispute resolution certainly does not always lead to deeper integration. Therefore – at least in the field of social security – there is no simple self-sustaining dynamic between transnational exchange, judicial activity and rule production. Judicial activism may in fact confirm national rules and practices, thus taking a reactive stance and confirming the status quo.

However, that being said, litigation against Germany contains some of the most important cases in the history of European coordination of social security rights, such as, C-10/90 *Masgio*; C-45/90 *Paletta*; C-245/94 & C-312/94 *Hoever & Zachow*; C-131/96 *Romero*; C-160/96 *Molenaar*; and C-85/96 *Sala*. They were all rulings in favour of the migrant, and some of the cases questioned fundamental aspects of German law and its organising principles. These cases furthermore enhanced the general scope of intra-European social security law. Therefore the ECJ's social security litigation against Germany likewise refutes the theoretical assumption that the Court tends

to act cautiously towards the more powerful member states, as has been put forward by Garrett (Garrett 1992; Garrett 1995). In social security matters, the Court has overtly ruled against the express political preferences of the member state.

In several cases, the ECJ has ruled against the territoriality of the insurance-based welfare state and challenged conditions, formulated in national law, defining who has a right to German welfare. Over the decades, the impact of EC-law has become much more obvious in national policies. When national policies have been constructed so as to evade Community obligations, the national courts and the European Court have subsequently brought them into line. In the formulation of national social policy initiatives, the impact of Community law is increasingly likely to be taken into account, since compliance is subsequently monitored through cases brought before the Court. The impact may, however, also be felt by the omission of particular policy options when alternatives are being considered. The next section demonstrates how Community law came to influence the German discussion on a minimum pension.

3.3: Impact on Domestic Policy Reforms – a German Supplementary Pension?

The case-law of the European Court of Justice has had a major impact on the interaction between German and European social law. As will be demonstrated below, German politicians have constructed national legislation in such a way as to evade Community obligations and have, from time to time, spoken out strongly against the judicial activism of the Court. Likewise, politicians have pointed to the integrative praxis of the Court as an argument against new social initiatives (Langer 1999c, pp. 54-55).

As was seen in chapter VI section 2.2, a minimum pension has recurrently been debated in Germany. In the late 1980s, a *supplementary pension* scheme was proposed (Conant 2002, p. 194). The aim was to allow pensioners, whose income fell below the social assistance level, a supplement to their old-age pension, and thus for them not to depend on social assistance (Zulceeg 1988, pp. 621-622). Initially the proposal enjoyed broad support from both the Social Democrats and the Christian Democrats. The proposal formulated that that all persons with habitual residence in Germany would be entitled to the allowance, but that the principle of territoriality would also apply (Zulceeg 1988, p. 622). The proposal thus clarified that the benefit could not be exported. At the same time as its content was being debated, the European Court of Justice initiated its course of

legal innovation where certain benefits with characteristics which fell between social security and social assistance were ruled to be exportable (see chapter V, sections 2.1 & 2.2). The German government was notified that if a scheme of supplementary pension allowance was adopted, the applied principle of territoriality would most likely be found to contradict Community law (Zuleeg 1988). The prospect of having to make the benefit exportable beyond national borders made the German government abandon its initiative. The gradual clarification of Community law concerning benefits which fell between social security and social assistance, initiated by the Court, thus restricted German policy options. The fact that the innovative ruling of the Court was later overruled politically only substantiates the fact that the relation between Community law and national policies establishes and clarifies itself gradually. It furthermore demonstrates that the domestic impact of Community law may vary over time and thus also the autonomy to formulate national policies according to political preferences.

3.4: Judicial Injunction – the Issue of Family Benefits

One of the social policy areas where Germany has had most confrontation with the European Court of Justice has been concerning *family benefits*. The special nature of the policy scheme within the social insurance welfare model is part of the explanation. German family benefits are granted universally on a non-contributory basis (see chapter VI, section 3.4). As a scheme, family allowances contradict a 'Bismarkian' notion of social security, and therefore also the general principles of 1408.

The national institutionalisation of family benefits constituted an important part of the post-war development of welfare. Parallel institutionalisation patterns are to be found in other member states. German child benefit was introduced in 1955. The grant of the benefit originally depended on work-position and residence in Germany, and was only granted from the third child onward. In 1961, it was extended to the second child. In 1964, the condition of work-position was abandoned and the grant depended only on German residence. From 1975, child benefit was granted from the first child (Interviews, Bundesanstalt für Arbeit und Sozialordnung, 25 September 2001). The principle of territoriality was maintained all through the national institutionalisation process. In 1986, the German child raising allowance became the other family benefit scheme. The grant of a child-raising allowance was also in national policy, made dependent on residence within Germany.

As emphasised in the general description of access to German welfare (see section 3.1 above), German welfare policies are not organised on the principle of social citizenship. However, since 1994, the universal family benefits has clearly restricted accessibility. From January 1994 onwards, the Federal Law on Child Benefit and the Federal Law on Child Raising Allowance, have required foreigners to possess a residence entitlement or permit in order to be eligible for the two family benefits. The insertion of that requirement means that family policies indirectly favour German citizens.

On the other hand, the ECJ's litigation concerning German family allowances has generally favoured the European migrant and has led to various groundbreaking rulings – from which it has become increasingly clear that national conditions and principles have to be formulated in accordance with Community law. As discussed in detail in chapter IV, section 1.2, in the *Sala* case, the Court found the residence requirement incompatible with Community law for a non-active Community national with legal residence in Germany. Taught by experience, Germany has specified, in the recent amendment of 1408 to third country nationals, that only third country nationals with a residence permit are entitled to the German family benefit (annex to Regulation no. 859/2003). The German insertion of this specific condition marks its general cautiousness concerning its universal, non-contributory allowance and the historical experience of when case-law overruled the political intention behind the allowance.

One important case before the Court was 191/83 *Salzano*³³⁰, in which German administrative practice was found to be inconsistent with its Community obligations. The Court concluded that, although the family stayed in another member state, the migrant worker was entitled to child benefit in Germany, since the mother did not fulfil the conditions for entitlement to family allowance from her member state (Italy) of work and the residence place of the children.

Two other notable cases were C-228/88 *Bronzino*³³¹ and C-12/89 *Gatto*³³². The cases laid down that child benefit granted for unemployed youth should not only be paid out within Germany, but also in

³³⁰ Case 191/83, 13 November 1984. *F. A. Salzano v Bundesanstalt für Arbeit - Kindergeldkasse*. ECR 1984, p. 3741.

³³¹ Case C-228/88, 22 February 1990. *Giovanni Bronzino v Kindergeldkasse*. ECR 1990, p. I-0531.

³³² Case C-12/89, 22 February 1990. *Antonio Gatto v Bundesanstalt für Arbeit*. ECR 1990, p. I-0557.

other member states. According to German legislation, unemployed youth are entitled to family benefit if the young person remains available for employment through an unemployment office in Germany. The cases affirmed the de-territorialising effect of the Regulation's Article 73 concerning family benefit, laying down that the unemployed young person of a migrant worker was still entitled to child benefit even though he/she looked for employment in another member state (in this case in Italy) and registered with an unemployment office there (Interviews, Bundesanstalt für Arbeit und Sozialordnung, 25 September 2001; Cornelissen 1997, p. 38; Altmaier 1995, p. 84). The political intention behind granting child benefit to the unemployed youth of workers was to fight youth unemployment and, as pointed out by Steinmeyer, it had hardly been German policy intention to fight also youth unemployment in other member states (Steinmeyer 1995, p. 90). The ruling of the Court is another illustrative example of how Community law restrain policies, which are strictly national in their aim.

Perhaps the most frequently discussed cases concerning German family benefit were the joined cases C-245/94 & C-312/94 *Hoever & Zachow* (for a detailed analysis, see chapter V, section 1.3). When Germany introduced its new social benefit on the child raising allowance, it was not considered to be a family benefit within the meaning of 1408. Child benefit meant family benefit, and the aim of the child raising allowance was considered to be different, not being primarily to support the family, but to make it possible for the parent to stay home with the child during the first two years of its life (Eichenhofer 1997, p. 450; Igl 1997, p. 97). Identical benefits were adopted in other member states during the late 1980s and 1990s, and thus represented a new development in the more generous welfare states where an alternative to (or a compensation for the lack of) public care was institutionalised (Altmaier 1995, p. 86).³³³ The Court ruled that the benefit constituted a family benefit according to the Regulation and that the benefit was exportable. Furthermore, the Court applied the *Cabanis-Issarte* premise, concluding that the distinction between individual and derived rights for the family member did not apply in the case of family benefit. The *Hoever & Zachow* cases are thus another example of the 'ultra partes' effect of a judgement. As likewise demonstrated in the analysis conducted on Denmark, the system of preliminary ruling contains in effect binding precedent. Contrary to the argument of Conant, subsequent case-law, referred by other member states, indicate that the ruling of the Court established a multilateral effect (Conant

³³³ For the Danish case, see the discussion in section 2.4 above. For the case of Finland, an identical type of family allowance was ruled to be exportable in the recent case of C-333/00 *Maaheimo*.

2002, pp. 63-73). In addition, the *Hoever & Zachow* rulings exemplify how a member state subsequently accommodates the individual lawsuit. The *Hoever & Zachow* case-law rejected the way in which national politicians had defined a benefit, and thus impacted on their ability to formulate autonomously the conditions and direct the objectives of a social allowance. Furthermore, the implementation of the litigation was considered to have a large financial impact due to its de-territorialisation and the extension of the right to the family members of the migrant worker (Interview, German Federal Ministry of Labour and Social Affairs, 17 September 2001).

Against this background, the German member state should have every reason to evade the judgement, to apply it restrictively or try to overturn it politically, thus confirming Conant's contained compliance hypothesis, and the assumption of Garrett, Kelemen and Schultz that the more powerful member states will simply not abide by an adverse ruling, but will try to reverse it. The German accommodation of the litigation points to how important the time-variable is when analysing the institutionalisation process, the limits of European law or, on the contrary, the effectiveness thereof. In the short term, Germany did not comply with the judgement, since it did not, by authoritative instruction, implement the decision in national legislation (Becker 2000, p. 14). However, the German member state complied in the longer run. By June 2000, the German parliament adopted an amendment of the federal law on the child raising allowance (*Bundserziehungsgesetz*), where one aim was to comply with the Community law as stated by the Court (Becker 2000, p. 23). The somewhat late German compliance demonstrates that delayed compliance is not the same as non-compliance, just as it is not the same as contained compliance. It thus affirms the need for a diachronic analysis when studying national impact.

3.5: Exportability Imposed – Long Term Care Benefits

Long term care represents another, late institutionalisation by the German welfare state, the relation of which Community law had to be clarified. The classification of long term care as either a social assistance allowance or social security benefit has proven to be far from obvious, and varies between member states according to how the benefit is provided: as benefit in kind, or benefit in cash (Schulte 1998b, p. 144). The German *Molenaar* case, discussed in chapter V section 1.4, laid down that, in order to decide whether a benefit is covered by Regulation 1408 and is exportable,

depends on the characteristics of the national allowance. In the *Molenaar* case, the Court ruled that the German 'Pflegegeld' was to be exported according to the Regulation.

How to provide security against the risk of long term nursing care became one of the most debated welfare policy issues in Germany in the 1980s and 1990s (Igl & Stadelmann 1998, pp. 37-38). The objective behind the adoption of the national policy was to construct a scheme relieving those in need of long term care from the social stigma of receiving social assistance. Many different reform initiatives were discussed, but finally, in accordance with the general tradition of the social insurance welfare state, an insurance-based solution was adopted.

The German legislator had clearly constructed the social scheme so as to avoid the exportability of the allowance (Haverkate & Huster 1999, p. 148; Huster 1999, p. 12; Füsser 1997, p. 32).³³⁴ The German government had attempted to pre-empt exportability by formulating the benefit as a 'benefit in kind-substitute', a 'Sachleistungssurrogat', thus avoiding the Community waiver of the residence clause for benefits in cash (Interview, Deutsche Verbindungsstelle, 18 September 2001; Zulcæg 1998).

The political reaction in the wake of the *Molenaar* case was initially that its implementation would have a significant financial impact (Haverkate & Huster 1999, p. 157). While the possibility of simply not complying with the decision was debated, the German government finally chose to abide by the ruling of the Court (Langer 1999c, p. 54). It later transpired that the financial implication of the *Molenaar* premises proved not to be as extensive as first assumed, since not too many beneficiaries of long term care have applied for the allowance abroad (Interview, German Federal Ministry of Labour and Social Affairs, 17 September 2001). Although the initial national perceptions of the litigation's financial impact later proved to be overstated, the case was another fundamental restriction of the German autonomy to organise a national scheme around the principle of territoriality. It furthermore demonstrates that, although a policy may be constructed in order to evade Community obligations, the sustainability thereof may equally have to be tested before the Court. Pre-emption as a policy response may therefore only hold Community law in check in the short term.

³³⁴ The residence clause was set out explicitly in 34.1.1 in Sozialgesetzbuch XI.

3.6: Towards an Internal Health Market?

German *statutory health care* is supplied to those covered by a health insurance fund, i.e. around 90% of the population, and usually is delivered as benefits in kind by contracted providers (see table 12, in section 2.5 above).

In 1997 those insured under the statutory scheme were given the possibility to choose reimbursement of their health care service, instead of services supplied as benefits in kind. The objective of the policy reform was to make the financing of the system more transparent for the patient and give the health insurance fund more influence over quality, cost-containment and efficiency (Palm 2000, p. 44).

Germany generally provides its statutory health care within its own borders. That means that, as an important main principle, the insured person's entitlement to benefits from the health insurance fund is suspended when that person stays outside the German territory.³³⁵ However, an exception to the general principle is made when a particular treatment is only possible abroad.³³⁶ The exception applies where the treatment is considered medically necessary and cannot be provided in Germany (Interview, Deutsche Verbindungsstelle, 18 September 2001; Becker 1998, p. 362; Becker 2000, p. 15). The German conditions for authorising treatment abroad thus resemble the Danish conditions. Furthermore, the provisions of Regulation 1408/71 set aside the German territorial principle, as in all other member states.

The German government initially spoke out very strongly against the *Decker Kohl* judgements. The former German Minister of Health, Seehofer, argued quite impetuously in the wake of the judgements, saying that the member states had to overturn the rulings by a Treaty amendment and that Germany would not comply with the premises of the judgements (Langer 1999c, p. 54; Borsen, 7. May 1998; Politiken 9. June 1998). The ex-minister found the Decker/Kohl case-law revolutionary and argued that if Germany adopted its premises, it would be a long term threat to the sustainability of the German health system (Spiegel 17/98, Fokus from 4 May 1998; Schaaf 1999,

³³⁵ The territorial principle for German statutory health care is laid down by Sozialgesetzbuch V, § 16 (1) (1) and reads: "Der Anspruch auf Leistungen ruht, solange Versicherte 1) sich im Ausland aufhalten, und zwar auch dann, wenn sie dort während eines vorübergehenden Aufenthalts erkranken, soweit in diesem Gesetzbuch nichts Abweichendes bestimmt ist, [...]".

³³⁶ As laid down in Sozialgesetzbuch V, § 18 (1).

p. 274; Eichenhofer 1999b, p. 114; Eichenhofer 1999c, p. 2; Interview, Deutsche Verbindungsstelle, 18 September 2001).

This initial outburst appears as a sharp contrast to the subsequent political response. As in Denmark, Germany set up a working-group to analyse the implications of the decisions (Palm 2000, p. 79). On the basis of its report³³⁷, the Federal Health Ministry (Bundesministerium für Gesundheit) announced, in the beginning of June 1998, that the *Decker/Kohll* ruling had no effect on the German health insurance system (BMG Pressemitteilung 5 June 1998). The government explained its dismissal of the impact of the *Decker/Kohll* ruling on the German health system by referring to national institutions in place. According to the German government, the decisions applied only to health care systems which provided services through a system of reimbursement such as in Luxembourg, Belgium and France (Berg 1999, p. 588; Mroczynski 1999, p. 222). In other words, the German viewpoint was substantiated by reference to its own social insurance system, which supplies services as benefits in kind (Kötter 2000, p. 30).

However, a subsequent health policy reform may be interpreted as a defensive reaction to the *Decker/Kohll* case-law (Becker 2000, p. 16). In December 1998, the German Parliament adopted a 'solidarity-enforcement-law'³³⁸, where the option to choose cost reimbursement instead of benefits in kind was abolished. The option of cost reimbursement adopted in 1997 had thus only survived one year. Furthermore, the national policy amendment abandoned the flat-rate reimbursement system for dental prostheses and orthodontic treatment and replaced it by providing these services as benefits in kind (Palm 2000, pp. 44-45). This twofold reinforcement of the principle of benefits in kind can be seen as an act intended to prevent any relevance of the *Decker Kohll* procedure to the German health insurance system.

As in Denmark, Germany has not responded to either the *Smits/Peerbooms* or the *Müller-Fauré van Riet* rulings by introducing national policy reforms. The national impact of the *Smits Peerbooms* case was rejected and the general reaction to the case-law was, in fact, rather silent compared with

³³⁷ "Bericht der gemeinsamen Arbeitsgruppe der Länder Brandenburg, Baden-Württemberg, Bayern, Nordrhein-Westfalen und des Saarlandes, der Spitzenverbände der Krankenkassen und des Bundesministerium für Gesundheit zu den Auswirkungen der Rechtsprechungen des EuGH zur Erstattung von Kosten für Medizinprodukte und Behandlung im EU-Ausland durch nationalen Krankenversicherungsträger".

³³⁸ GKV-Solidaritätsstärkungsgesetz, 19 December 1998.

the initial response to the *Decker/Kohll* rulings (Interview, Bundesministerium für Arbeit und Sozialordnung, 19 September 2001). It was emphasised that the *Smits Peerbooms* decision justified national authorisation policies and that the free movement of services applied restrictively within the policy field of health care (Interview, Deutsche Verbindungsstelle, 18 September 2001).

It remains to be seen how the German government will react to the *Müller-Fauré van Riet* case. The German non-compliance with the *Decker/Kohll* procedure can hardly be maintained now that the Court has clarified that it applies in general to the non-hospital provision of health care. Unless a collective political stance is taken against this, the German member state will have to allow certain health care services to be purchased abroad – and reimbursed – without prior authorisation, as long as these services are supplied by the national health insurance funds.

3.7: Variations in Domestic Impacts

German social courts have most actively taken up the invitation to question the scope of Community law against that of national law. Through preliminary references, German national courts have thus enhanced the bilateral as well as the multilateral effect of the supranational dimension of social security.

The analysis of the German case does not sustain the theory that the compatibility between the insurance-based welfare state and the European coordination system should result in less adaptive pressure and less domestic impact. On the contrary, the accessibility and scope of German welfare has been addressed much more frequently than Danish social allowances.

As in the analysis of the Danish case, the research on Germany points to the impact of European law as being delayed, but which gradually establishing itself over time. The German case, however, also exemplifies that implementation – or the refusal to do so – is indeed an act of ‘governance’ and not simply ‘management’ of supranational impositions. With reference to its national institutions, Germany has so far refused to implement the *Decker Kohll* ruling, arguing that it does not apply to the health insurance system based on benefits in kind. In sharp contrast with the Danish affirmation of the multilateral effect of the ruling, German non-implementation demonstrates that the impact of the same cause is far from ‘uniform’ in practice. However, as the contours of the internal health

market, precipitated by the ECJ rulings, become more identifiable, Germany may likewise have to adjust. Thus the uniformity of Community law, across national variations, will begin to take shape.

4.0: Concluding Remarks

The analysis of this chapter has delineated the national response to a dynamic integration process and the impact thereof on selected social security institutions of the Danish and German member states, and has addressed the research question, 'with what impact'.

The analytical findings of the *Danish case* has detailed how impact may be perceived differently over time, thus changing the political response to an ongoing integration process. Generally, Denmark has responded in defence of the status quo, but the research findings substantiate that the isolated position is difficult to maintain in a binding multilateral context. The declared Danish intention to commit itself to a parallel agreement regarding third country nationals clearly suggests that, even when the decision-making rule is unanimity, and even when a member state is shielded behind its exemption, the isolated position is controversial and implies costs. As argued theoretically, perceptions and preferences are dynamic. They are reluctantly influenced by the supranational institutionalisation process itself, which defined and clarifies the Community's aims, means and competencies. Such dynamism may, however, only be revealed in the long run, and so require a diachronic analytical approach.

Regarding the research question 'with what impact', the analysis has found impact on all four examined social security institutions, which however vary in extent, form and identifiable points. Supranational institutionalisation has impacted both immediately and gradually on the *residence-based welfare state's* organising principles of social citizenship and territoriality. In this aspect, actual impact reflects the identified adaptive pressure. From the outset, Denmark had to abolish its principle of social citizenship for 1408's personal scope, regarding *social pensions* and, as institutionalisation has proceeded, it has become increasingly difficult for it to favour own citizens. The same account holds for *family benefits*. The analysis of family benefits, moreover, demonstrates that whereas Denmark initially inclined towards non-compliance or restrictive application, it finally chose to comply when faced with the prospect of having a lawsuit against it. The analysis conducted on *social services* substantiates the multilateral effect of judicial decision-making. A

possible future abolishment of the residence clause in certain Danish social services will indeed support the proposition that legal path dependencies constitute a binding precedent, also in the case when the member state does not face an individual lawsuit. That finding is furthermore supported by the research on *health care*. The analysis on the institution of health care demonstrates how the general premises of judicial decision-making were implemented into national policy, but also that the national reinterpretation of such premises conditioned the extent of impact. Furthermore, the analysis of health care finds that the litigation of the ECJ beforehand conditioned national policy reforms and limited the range of options for its formulation. This finding suggests that gradually, as new policies are formulated in accordance with Community obligations, the compatibility between national and European institutions will increase. This means that 'adaptive pressure' is reduced, but also that the impact of supranational institutionalisation becomes more difficult to identify, as it appears more discretely. To identify the effect of one dynamic process on the other sharpens the need for the diachronic analysis.

The research findings on 'with what impact' for the *German case* demonstrate a very different national response to supranational institutionalisation. Contrary to what we should expect from the apparent compatibility between the principles of the European coordination system and national institutions, German social security institutions have faced both adaptive pressure and the impact of supranational institutionalisation. The findings on Germany, compared with the Danish case, suggest that although a member state faces less adaptive pressure from the outset of a given European integration process, the impact of that process may be strong anyway since supranational institutionalisation takes shape dynamically, and since contemporary institutions are not sheer typologies but contain different principles and criteria, facing different pressures. Furthermore, the German case demonstrates how important the national response is for the effectiveness and reach of European law and policy. The impact on German institutions has been much determined by the response of German national courts, which have taken a most active part in enhancing the bilateral and multilateral effect of Community social security law. Regarding the four individual social security institutions, impact has been identified for at least three of them. The proposal and rejection of a German *supplementary pension* shows how the *acquis communautaire* influenced the policy options considered. The analysis of *family benefits* demonstrates that delayed compliance with an individual lawsuit is not the same as non-compliance or contained compliance. To identify delayed compliance repeats the need for a diachronic analysis so as not to conclude falsely that the

respective member state has evaded its Community obligations. The examination of the impact on *long-term care* points out that although national policy has been constructed so as to evade its Community obligations, such a deliberate attempt may still have to be examined before the Court. Pre-emption as a political response may therefore not be a successful strategy in the long run. Finally, regarding *health care*, Germany has so far rejected the impact of judicial decision-making on its public scheme. However, as Community law gains precision and effect, Germany may equally have to admit to its multilateral effect. Analytical findings, however, points to the fact that Germany has considered, at least indirectly, the implications of the *Decker-Kohl* procedure, which is proven by its reinforcement of the health care principle on benefits in kind. Ultimately, such a defensive response equally reflects impact.

In sum, the analytical findings of this chapter substantiate the idea that the supranational institutionalisation of social security rights has a domestic impact on national welfare institutions. There is, however, no straightforward connection or predictable relation between adaptive pressure, national response and impact. The extent and manner of impact is greatly influenced by national response, which occurs both politically, administratively and legally. With regard to the perception of impact, politics decide the individual bargaining positions. Politics and administration decide how supranational decision-making shall be implemented into national legislation, thus, in the short run, controlling the effective meaning of the supranationally generated right. The litigiousness of a society and the judicial requests by national courts decide if EU points of law should be referred to ECJ and, ultimately, whether the scope of Community law will be enhanced, and enforced on national institutions. However, in the longer run, the effectiveness of Community law may increase and supranational organisations may question national response, for which reason also domestic impact unfolds over time.

These findings refute hypothesis H₄ as stated in chapter VI, section 1.2. Supranational institutionalisation impacts significantly on the institutions of both the residence-based and the insurance-based welfare state. Although it does not impact uniformly or constantly, the analytical findings suggest that, over time and across institutions, institutionalisation of intra-European social security rights causes domestic change and has influenced policy options for both member states. Although significant impact on the institutions of the residence-based welfare state has been identified, it is not an impact which moves the welfare model in a direction which ultimately

converges with the dominant European social-insurance pattern. At least during the last three decades, a convergence effect has not been identifiable. When distinguishing between institutional and financial impact, low EU-immigration to Denmark even suggests that it faces a lower financial impact of intra-European mobility than Germany does. Then, when addressing hypothesis H_1 or H_2 , the research results support neither of the two. National response indeed influences impact, it can, however, not neutralise the effects of supranational institutionalisation in the long run. H_3 remains and is largely confirmed by the research results. Institutionalisation constitutes gradually through a two-layered process, where the supranational level causes domestic change, but where national implementation is the reactive part of decision-making. In this second layer of institutionalisation, member states and societies respond, and their responses feed back into the specific European integration process. Through this two layered process, the effective meaning of supranational rights is established. As national institutions and responses vary, so also does the domestic impact. However, H_3 does not sufficiently emphasise the fact that the uniformity and intensity of impact is likely to increase according to how the efficiency and meaning of Community law also does. According to the analytical results provided by this study, H_3 should thus emphasise the time-variable stronger.

Chapter VIII: Conclusion

The study which has been conducted here on the European institutionalisation of social security rights has aimed at empirically uncovering; *to what extent has the European Union institutionalised social security rights; how, and with what impact on national welfare policies?* Translated theoretically, the research has inquired; *to what extent do institutions matter as inputs in the European integration process, how do they evolve and with what impact on established national institutions?*

This thesis has analysed the rather contradictory meeting between, on the one hand, a European institution aiming to lift national barriers to the free movement of workers/persons by coordinating social responsibilities across national societies, and, on the other hand, national welfare institutions demarcated within the traditional borders of the nation-state and with the historical aim of fortifying national membership.

In conclusion, the study has found that although welfare policies, formally regarded, are national competencies, and although they represent a 'less likely' case of integration, the European Union has gradually, but extensively, established a supranational social security dimension for those who cross borders. Institutionalisation of intra-European social security rights has furthermore added substantial rights to the skeleton of European citizenship and has taken initial – but fundamental – steps on the path towards 'social Europe'. The supranational social security dimension thus established, additionally has effects beyond those relatively few persons crossing borders, since it has directly prohibited certain principles and criteria for the organisation of welfare, as well as having compromised member states' autonomy to formulate their welfare policies. When it comes

to 'prohibition', the impact of the supranational social security dimension moves beyond 'coordination', and becomes 'harmonisation', in light of its consequence.

This overall conclusion is based on the aggregate of several detailed analytical findings from the diachronic study between T_0 and T_2 of Regulation 1408/71's creation, institutionalisation and impact on four domestic social security institutions. Considered individually, each analytical finding refines and details the general conclusion.

1.1: The Analytical Findings of the Study

The empirical analysis of the adoption of Regulation 1408/71 demonstrates that the institution of 1408 *originated* as a historical phenomenon and thus out of a previously propitious socio-economic situation, where foreign labour was requested and the social allocative questions needed to be solved due to a significant increase in migration between the six original member states. Shortly after 1408/71 was adopted, the socio-economic context changed fundamentally and member states started to close their borders to foreign labour. However, since the states were bound by institutionalised obligations, access to foreign labour markets and their social security systems remained open for Community workers. Against their historical background, creation and very early development, the Community institutions on free movement and cross-border social security stand out as unique examples of European Regulation.

On the question 'to what extent' and 'how', the analysis of the subsequent *supranational institutionalisation* has depicted a process whereby an institution was transformed fundamentally between T_0 and T_2 , but only through the accumulated effect of very subtle and piecemeal steps of integration. Institutionalised through a process in which the insufficiency of existing rules is constantly pointed out, Regulation 1408 appears in T_2 as an institution, whose *principle of equal treatment* and *personal scope* are close to being extended to all European citizens; whose *material scope* has been extended and up-dated; and whose *principle of exportability* has been compromised, however, being extended beyond original political intentions. Furthermore, judicial activism has definitively applied internal market rules to national *health care* policies, and has unilaterally drawn up the contours and conditions for an internal health care market. The research on 'how' this gradual evolution has taken place, has pointed out the abilities of the *European Commission* and the *European Court of Justice* to transform the institution from output to furthering input in the

subsequent process, thus driving the integrative path towards 'more Europe'. However, the research results also demonstrate that the supranational organisations have no autonomous capacity to pursue integrative agendas. Their rate of success ultimately depends on the political response to the Commission's proposals and judicial decision-making. Inquiring into 'how' has equally brought both the relations between the Commission and the Council, and that between law and politics, into focus.

The analysis on the institutionalisation of the *principle of equal treatment* and *personal scope* of Regulation 1408 has identified a movement where rights have been gradually decoupled from the exercise of economic activity. The insistent and successive actions of the Court and Commission have cultivated this movement, which has either formally been codified by the Council or at least indirectly confirmed by the absence of political response. The subtle extension of equal treatment and the personal scope stands out as a practical recognition of European citizenship, gradually preparing the member states to extend the Regulation to cover all Community nationals. 2004 will be the year where intra-European social security rights will finally be formally linked to European citizenship and the building of a 'social Europe'. In the meantime, all the member states, besides Denmark, have agreed to extend the Regulation to third country nationals. Although the extension appears as a radical break with a traditional communitarian conception of welfare, third country nationals still, in general, lack the underlying right of free movement. Therefore, the new adoption does not signify any definite move towards equality regardless of nationality, and a political agreement on moral obligations, but rather repeats the complexity of different personal categories. To fulfil the Commission's original agenda on third country nationals will require many more subtle and preparatory steps and, not least, effective political support.

The research results on the institutionalisation of Regulation 1408's *material scope*, its *principle of exportability*, and the *right to health care beyond national borders*, demonstrate that the generation of supranational rules and rights is a continual process, where clashes between Community law and national policies repeatedly produce conflict and clarification. However, as both Community law and national social security policies evolve very dynamically, clarification is a temporary state of affairs which endures until the established equilibrium is disturbed anew. Analytical findings reflect a process much characterised by ambiguity. Whereas the development of 1408's material scope confirms the ECJ's ability to further integration, despite the in-activism of the Council, legal

autonomy is not supported by the research findings on the principle of exportability and health care. At least, that is, not on the face of it. The analysis of the institutionalisation of 'special non-contributory' benefits has depicted a process where politics responded to, and overruled, judicial activism. Whereas the Court at first appeared receptive and accepting of the political restraints, the analysis of very recent litigation demonstrates that politics has not had the last word, but that the Court, on request, reinterprets matters. These reinterpretations are then reasoned against a clarified institutional background, where a binding precedent has been established in the meantime. This pattern of political overrule which is compromised much later by reoriented judicial rulings, is furthermore confirmed by the research results on health care and national authorisation policies. In this part of the research, analytical findings also point to a cautious Court, which does not overtly set aside political preferences. The initial innovative ruling of the Court was restrained early on by the Council and the relation between national authorisation policies and intra-European health care seemed to have been clarified for almost two decades. This long-lasting reconciliation was considerably disturbed by the Court's landmark rulings in 1998, and by subsequent case-law. Between 1998 and 2003, the Court has successively advanced its interpretations, first applying internal market rules to the policy field of health care, then justifying but compromising, national authorisation policies and, most recently, paving the way for an internal health market for non-hospital care. The line of judgments has carefully compromised national autonomy to decide the spatial consumption of health care as well as imposing a certain integration of foreign health supply. So far, a collective political voice has only been announced, but not heard. If politics continues to absent itself, law will alone respond to the requests of European health consumers and thus decide alone on the scope and limits of an internal health market.

The analytical inquiry into '*with what impact*' has found that national implementation constitutes the *second layer of institutionalisation*, where member states, through their transposition of supranationally generated rights and obligations, respond to the European institutionalisation process, and thus decide the more immediate impact thereof. *Domestic impact* is, in part, decided by the degree of *adaptive pressure* exerted by European institutionalisation on national institutions, and in part by the *national response* thereto. The analytical findings from the comparative study of Denmark and Germany have shown how the impacts of the same cause – be it supranational political or judicial decision-making – may vary significantly between two member states and therefore do not appear as 'perfect, universal or constant'. However, as the effectiveness of

Community law and policy increases over time, the uniformity of impact may increase as well, albeit as far as possible in accordance with the differences of national institutions. The study which has been conducted has found that supranational institutionalisation causes domestic institutional change for both of the member states which have been studied. However, instead of moving domestic institutions towards convergence, two distinct processes of change emerge from the same cause. In between supranational institutionalisation and domestic impact, different national institutions and national responses constitute explanatory variables, producing different directions of change.

Although the analysis of domestic impact has found that the welfare institutions of Denmark and Germany face different kinds of adaptive pressure from the European institutionalisation process which has been identified, it furthermore has found that the actual impact cannot be deduced only from the extent of adaptive pressure on national institutions. In between comes the national response, which has a political, administrative and legal dimension. In addition, considered from a de facto perspective, Germany has attracted considerably more EU-immigrants than Denmark. However, EU-immigration to both countries remains low, which explains why the focus is not on the degree of adaptive pressure and impact exercised by actual immigration, but is entirely on the effects on an institutional or symbolic level. This distinction is quite seldom emphasised in discussions on the welfare consequences of the free movement of persons, especially not when arguments have relied on the idea of 'welfare tourism'.

In the *Danish case*, the analysis substantiates how *perceptions of impact*, and thus preferences, may change discretely, but gradually, over time. As supranational institutionalisation has evolved, Denmark has reluctantly changed its political response and allowed integration to proceed. The analysis has furthermore found an *impact* for all four selected social security institutions of *statutory pension*, *family benefits*, *social services* and *public health care*. Supranational institutionalisation has impacted both immediately and gradually on the residence-based welfare state's organising principles of *social citizenship* and *territoriality*. The findings on *Germany* have pointed out that, despite an apparent 'compatibility' between European and national institutions, significant impact of supranational institutionalisation may occur. *Impact* has thus been identified in the context of the debate on a *supplementary pension scheme*, for *family benefits*, for *long term care* as well in a more defensive manner for *health care*. German national courts have been among the

most active participators in deciding both the bilateral and multilateral effect of Community law and policy. Their legal response has enhanced the impact of supranational institutionalisation in a way which differs considerably from the Danish response, where individual lawsuits are lacking. The analysis of Denmark, on the other hand, demonstrates that, in the medium or long run, national politicians, administrations or social appeal authorities are likely to accept the binding precedent of a judicial ruling and implement what it reinterprets as its general premises. These analytical findings concerning Denmark thus substantiate the multilateral effect of the ECJ's previous rulings.

By prohibiting *discrimination on the grounds of nationality*, the impact of Regulation 1408 comes close to harmonising the personal scopes of national social security schemes, since the direct favouring of a state's own citizens is prohibited, and is only possible indirectly through the criteria of habitual or long-term residence. Although not a general principle, the exportability clause of Community law increasingly questions member states' use of territoriality as a means of controlling welfare consumption. Whereas the requirement of equal treatment for Community nationals has been institutionalised as a general principle in member states' legislation, the *principle of exportability* today seems to constitute the bone of contention between supranational organisations and member states, and between Community law and national policies. The conflict is clearly demonstrated by the research findings on 'special non-contributory' benefits, on family benefits, on long term care, on social services and on public health care. Furthermore, the research findings indicate how national policies, from time to time, have been constructed so as to evade the Community obligation of exportability, but have subsequently been brought into line therewith. These different modes of impact compromise the social sovereignty of the member state.

The findings of this study question the *hypothesis* put forward by scholars such as Leibfried, Pierson and Ketscher, which was set up in the introduction of this thesis and as H₄ in chapter VI, which claims that the European coordination system will encourage politicians to follow the welfare program design of Bismarck. This study's comparison between Denmark and Germany over an extensive T₀ and T₂ does not support such a convergence assumption. The findings of my study instead suggest that the supranational social security dimension foremost invites politicians to reinforce the granting of social services as benefits-in-kind, since Community law permits these to be tied to the national territory. Thus a primary impact of the coordination system which has been institutionalised is that it precludes social services being offered as benefit-in-cash, should

politicians still wish to control welfare consumption within own territory. Ultimately, that has ideological consequences for those who aim to make welfare provision something that is decided upon by the free choice of the welfare consumer.

1.2: Analytical Findings in Theoretical Perspective

The study that has been conducted has traced the process through which intra European social security rights have been institutionalised and the domestic impact thereof. Through a protracted process, the bits and pieces of institutional change have gradually integrated the 'less likely' policy field of social security.

From a theoretical perspective, the study has aimed to follow an institution all way through and to inquire into its creation, institutionalisation and impact.

When first addressing how the institution was *created*, the adoption of Regulation 1408 in T_0 , i.e. in 1971, already had an institutional predecessor and thus originated from an established path dependency. When agreed upon in 1971, Regulation 1408/71 was merely a revision of the institution adopted back in 1958, which also originated from an inherited institutional context. The original commitment of the ECSC and EEC members to open up conditionally their labour markets and to grant access to their social security systems mirrored converging national interests in a propitious economic situation, as well as reflecting a functional demand for cross-border coordination due to increased migration. This commitment thus essentially supports a liberal intergovernmentalist theoretical proposition (Moravesik 1991, 1993; Romero 1993). However, when first formulated as a Community objective in the Treaty and in secondary legislation, the Commission and the Court stepped in and have, since this early point, contributed most actively to the development of intra-European social security rights. When innovated in T_0 - 1971, 1408 was not only the output of intergovernmental bargains in the Council, but also the result of the Commission's ability to convince the member states that Regulation no. 3 needed fundamental revision. The need for revision was substantiated by the early and teleological case-law of the Court.

Before and beyond T_0 , a path dependent process of increasing returns unfolded and through this process, the *institutionalisation* of intra-European social security rights began to take shape. The institutionalisation process of Regulation 1408/71 can, to a great extent, be described by the theoretical insights provided by Stone Sweet et al. The institution has constantly needed revision or up-dating, being definitive at no stage. The dynamics of its institutionalisation has thus been a constant revelation or interpretation of the need to rewrite individual provisions or clarify objectives and principles (Stone Sweet & Sandholtz 1998; Fligstein & Stone Sweet 2001; Stone Sweet, Fligstein & Sandholtz 2001). Through this process of constant revision, the Regulation has been extended in scope and substance. Also, the objective which it was originally adopted to achieve has changed scope and direction, so that now, it ultimately aims to promote intra-European mobility for persons and not only for workers.

However, the findings of the present study do not confirm the Stone Sweet and Brunell proposition that a 'virtuous cycle', consisting of transnational exchange, judicial activism and rule-production, progressively drives integration forward (Stone Sweet & Brunell 1998). Apart from the period between 1960 and the early 1970s, cross border migration has not corresponded to the institutionalisation of intra-European rights, as it has remained relatively low. This finding suggests that when first institutionalised, institutionalisation has proceeded in a relatively detached manner from the aim it was originally adopted to fulfil, i.e. promoting the free movement of workers. Such detachedness has been explained by Pierson as the limits of rational institutional design, where the discrepancy between the instrument and its overall function may increase over time (Pierson 2000a). The present study proves that essentially functionality is a matter of interpretation, and that different aims may be added over time.

Instead of arguing that Regulation 1408/71 has developed according to 'a life of its own', the conducted study has found that the path of institutionalisation depends on those who dynamically interpret the meaning, scope and function of the institution. *The European Commission* and the *European Court of Justice* have proven to be the supranational organisations behind institutional transformation. The historical institutional assumption that 'institutions have a life of their own' disregards the fact that institutions cannot change or institutionalise on their own, but depend, at all points of change, on the fact that organisations or actors sustain their *raison d'être*, deduce their need for change, and possess the ability to mediate successfully this change. The *Commission* has

continuously interpreted and adduced the incompleteness of the Regulation. At the same time, it has faced conflicting preferences amongst the member states, which, due to the requirement of unanimity, has hampered the adoption of its proposals, but which at other times, has made it possible to isolate conflicting positions and gradually prepare member states for eventual adoption. Furthermore, the Commission has proved most capable of successfully linking intra-European social security to the free movement of persons, European citizenship and, ultimately, to 'social Europe'. As argued by Pollack, persistency and issue-linking have on this aspect appeared to be the Commission's most powerful skills (Pollack 1997; 1998; 2003). The Commission's scope of manoeuvre has been much more restrained with regard to third country nationals, and the results of a decade of re-proposals and re-negotiations are more ambiguous. On this issue, the Commission's issue-linkage was not institutionalised by primary law, but merely referred to general political commitments. The political mandate was thus a more diffuse one. In the end, it was the Commission which had to change position and accept the agenda of the small minority. The established compromise proves that where political preferences are very intense, persistency and issue-linking have to be combined with pragmatism, for the Commission to get a proposal through.

The role of the *European Court of Justice* has proven even more decisive in the institutionalisation of intra-European social security rights. The Court has acted when politics has been absent. In several incidents, judicial activism has been the precondition for political action. Litigation has indeed constituted a key component for the integration of social security rights in the many incidents where teleological interpretation and the establishment of binding precedent have driven the process forward. On the face of it, such findings support the proposition of Stone Sweet et al. of judicial activity as a key component in the virtuous cycle which drives integration forward (Stone Sweet & Brunell 1998; Stone Sweet & Sandholtz 1998; Stone Sweet, Fligstein & Sandholtz 2001).

However, other research results point to the contrary. By having studied institutional change historically, chronologically and systematically, it becomes clear that the different observations provided by the same case study may, in fact, support and reject counter-posed theoretical propositions. An important part of the institutional path should in fact be described as a path of decreasing returns or de-institutionalisation, where the Council has managed to adopt secondary legislation to overrule the litigation of the Court (most notably in the area of 'special non-contributory' benefits and health care). The political sphere has answered back, despite the

threshold of unanimity which is required in order to do so. Furthermore, all the case-law where the Court found national action to be consistent with Community law, refutes the argument that litigation necessarily furthers integration. Such findings then support the political power argument which is emphasised by Garrett and co-writers, and which argues that integrative dynamics ultimately have to be politically supported, since otherwise politics would act to restrain law (Garrett 1992; 1995; Garrett, Keleman & Schultz 1998). Garrett et. al., however, fail to explain why politics so seldom manage to do so.

My analytical findings suggest that when studying rule-generation from T_0 , over T_1 to T_2 , it becomes clear that a specific *institutionalisation process* is constituted by a lengthy path of discrete changes, where output is continuously re-interpreted, re-negotiated, re-codified and re-clarified. The institutionalisation process is in continual repetition between T_0 , T_1 , and T_2 , where feedback effects between intergovernmental bargains, supranational mediation and rulings, as well as national response, have mutually formulated and reformulated the effective meaning of Regulation 1408/71. This repetitive and protracted two-layered process of institutionalisation has been depicted as figures 2 and 3 in chapter II.

By tracing the process of institutionalisation over time, the time-variable has proven to be most important for the analytical findings. The examination carried out on *institutionalisation as a process of interaction between law and politics* demonstrates that research results very much depend on which period we analyse, and on which responses we include in our analysis. Figure 3 in chapter II on 'Institutionalisation through the Interaction of Law and Politics' has, on the basis of focusing on intra-European social security as a case-study, extended Garrett, Keleman and Schultz's examination of 'the stage game', since their 'legal-politics game', by and large, only depicts those outcomes where politics manage to overturn law (Garrett, Keleman & Schultz 1998). Figure 3 considers both the supranational layer of institutionalisation as well as the second layer, where national institutions and national responses decide the more immediate impact of supranationally generated rights and obligations. Whereas Garrett, Keleman and Schultz focus on the different ways a litigant government may defy an ECJ ruling, figure 3 furthermore points out how other member governments, apart from the litigant, subsequently respond to the litigation and may accept the decision (stage 3). Furthermore, the figure emphasises that for every institutionalisation process

occurring as a result of the interaction between law and politics, there is the stage 'beyond stage 3', where law or politics may again respond to the previous decision-making of the other branch.

The case-study on *European institutionalisation of social security rights* contains findings on the various types of responses over different stages. The empirical findings on the two layers of institutionalisation demonstrate among other findings;

- How a litigant government reacted by contained compliance to an adverse decision, but later responded by policy reform (the initial German reaction after the *Hoever & Zachow* judgement on family benefits).
- How a litigant government reacted by non-compliance to an adverse decision, and pressed for secondary legislation to overturn the ruling (the French reaction to the Court's rulings on its supplementary pension allowance).
- How innovative rulings by the Court have been collectively restrained by the Council (the adoption of reg. 1247/92 on 'special non-contributory' benefits and the adoption of reg. 2793/81 after the *Pierik* judgements conditioned national authorisation policies on the provision of foreign health care).
- How other governments, apart from the litigant government, have denied the impact of judicial decision-making beyond the individual lawsuit (the German reaction to the *Decker/Kohll* rulings, and the Danish initial reaction to the *Cabanis-Issarte* case, as well as its initial reaction to the *Molenaar* case).
- How other governments, apart from the litigant government, have implemented the judicial decision-making, thus in effect accepting its status as a binding precedent (the Danish response to the *Decker/Kohll* rulings; the later Danish response to the *Molenaar* line of case-law regarding social services; the later Danish response to the *Cabanis-Issarte* case regarding the rights of the family member).
- How the member governments, after an adverse decision, have codified its general premises in secondary legislation (by the adoption of reg. 1606/98 after the *Vougioukas* case extending the Regulation to special schemes for civil servants; by reg. 3427/89 after the *Pinna* case abolishing the French exception on family benefits).
- How the ECJ, in a stage 'beyond stage 3', (re)interpreted secondary legislation which was adopted to rein in its previous ruling, as well as reinterpreting its own established legal reasoning (as with the *Jauch* and *Leclere* judgement which interpreted the national use of the

special rule as institutionalised by reg. 1247/92; as in the *Cabanis-Issarte* case, in which the Court reconsidered the *Kermaschek* case-law; as in the *Vougioukas* case where the Court reconsidered the *Lohmann* case).

These findings on *institutionalisation as determined through the interaction of law and politics* point out that ultimately a legal integrative path has to be politically sustained. Where political preferences do not conflict, politics may manage to overturn law. On the face of it, that sustains the political power propositions of Garrett. et al. according to which member states ultimately control the process. However, the fundamental criticism that can be brought against their theoretical interpretations is that they do not sufficiently consider all the failed attempts of political overturn. Furthermore, since their theory suggests that the Court will act with caution when the majority of member states explicitly express themselves against an integrationist legal deduction, as in the case of access to foreign health care, they are unable to explain why the ECJ nevertheless rules against such joined preferences (Garrett, Kelemen & Schultz 1998, pp. 150-151).

Contrary to the political power approach, my research results demonstrate that a legal path dependency of increasing returns is difficult for politics to overturn. The findings point to the existence, in practice, of a 'joint decision trap', whereby member governments do not simply mobilise joint action, since they either individually and collectively disagree, interpret principles and impact differently and tend to react with certain delay. In the meantime, institutionalisation is likely to have moved on and new requests are brought before the Court. To rein in the Court demands either a certain promptness or persistency. Both these types of responses are not easily mobilised through collective political action. The analysis of the national response to, and impact of, supranational institutionalisation suggests that in this process of subtle, but continuous, change, politics finds its own logic working against it. The institutional and financial impact of judicial decision-making may appear with years of delay, at a point of time where it has become too late for politics to mobilise a sufficient degree of support for collective restraint.

What the 'joint decision trap' hampers, may then be compensated for by the member state's individual response as suggested by Conant (Scharpf 1988; Conant 2001, 2001b, 2002). While Conant criticises the assumption of judicial empowerment for not following legal interpretations beyond the Court room, the analysis of the second layer of institutionalisation in this thesis has

aimed to research the *implementation* and *impact* of individual rulings, also beyond the litigant government. Contrary to the arguments of Conant, the research has found that judicial decision-making does indeed impact on national policies and administrative practices, but not in a uniform, immediate or systematic way. Impact may occur with a considerable time-lag. Therefore, the Conant argument that the reach of European law outside the courtroom depends on how member states accommodate those rights, is a short/medium term consideration. As supranational institutionalisation proceeds, the effectiveness and meaning of European law becomes more pronounced and more difficult to ignore by national political actors and administrative practice. The discrepancy found by Conant between what the ECJ justices and what national actors consider to be appropriate practice has, in this study, proven to diminish over time (Conant 2001b, p. 27). Delayed compliance is not the same as non-compliance or 'contained compliance'. In addition, the comparative study of Denmark and Germany refutes the proposition that member states need only comply with rulings that address them individually. Again as supranational institutionalisation has proceeded, as its scope and content has clarified, the binding precedent of previous rulings has gradually caused domestic institutional change. As a final point on the work of Conant, the study of domestic impact has found that 'pre-emption', whereby member states construct domestic policies so as to avoid ECJ interference, is unlikely to be a successful political strategy in the long run. As the scope, effectiveness and reach of Community law increases, deliberate attempts to evade Community obligations are likely to be addressed through new requests to the Court.

At the same time as *implementation* constitutes an act of governance, where national actors do not simply neutrally transpose supranational decision-making, as has been argued by Scott among others, the margin for more individual interpretations of the scope and reach of Community law must have a short/medium and long term dimension (Dimitrova & Steuenberg 2000, p. 215; Scott 2000, p. 259). In the short/medium term, implementation may constitute the second stronghold of national control. In the long term, contained compliance, restrictive application or pre-emption do not appear as sustainable national responses to supranational institutionalisation.

However, since all member states face different *adaptive pressures* from European integration, due to different national institutions, and since *national responses* vary across member states, the *impact* of the same cause is much more likely to unfold as non-systematic and in distinct processes of change rather than in converging ones. On the face of it, it may seem that there is no straightforward

connection between cause and effect as found by Goetz (2001), but, analysed over time, the domestic impact of supranational institutionalisation of social security rights becomes identifiable. Supranational decision-making impacts on future national welfare policies, just as it has impacted on those of the past. As the compatibility between European and national institutions increases, the degree of adaptive pressure and identifiable impact diminishes, thus tending to escape our analytical and theoretical attention. By formulating a two-step research strategy, and by studying two separate, but interlinked and dynamic layers of institutionalisation, this thesis has attempted to avoid such an 'escape' and instead to map the more discrete, delayed and non-systematic impact of the supranational institutionalisation of social security rights.

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Appendix 1: Preliminary References and Infringements Procedures on the Basis of Regulation 1408/71 between 1971-2003

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Appendix 2: German Preliminary References and Infringements Procedures on the Basis of Regulation 1408/71 between 1971-2003

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1978

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1979

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1983

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79. 21 September 2000, Borawitz, Germany, Case C-124/99, 2000 page I-07293. Sozialgericht Münster. Art. 3. In favour.
80. 9 November 2000, Thelen, Germany, Case C-75/99, 2000 page I-09399. Bundessozialgericht. Art. 6, 7, 48, 51, 67, 68, 69, 70, 71
81. 9 November 2000, Plum, Germany, Case C-404/98, 2000 page I-09379. Bundesgerichtshof. Art. 13, 14, 15, 16, 17

82. 23 November 2000, Elsen, Germany, Case C-135/99, 2000 page I-10409. Bundessozialgericht. Art. 3, 10, 13. In favour.

2001

83. 8 March 2001, Commission v Germany, Case C-68/99, 2001 page I-01865. Art. 2, 13, 14. Not in favour.
84. 11 October 2001, Khalil, Chaaban, Osseili & Addou, Germany, Joined cases C-95/99 to C-98/99 and C-180/99, 2001 page I-07413. Bundessozialgericht. Art. 1, 2, 3. Not in favour.
85. 25 October 2001, Ruhr, Germany, Case C-189/00, 2001 page I-08225. Sozialgericht Trier. Art. 2, 67, 68, 69, 70, 71. Not in favour.

2002

86. 24 September 2002, Domínguez, Urbano, Cruz & Fernández, Germany, Case C-471/99, 2002 page 0000. Sozialgericht Nürnberg. Art. 6, 13, 77, 78, 79

Appendix 3: Tables A1-A3

Table A1: Preliminary References made 1961-1998 pr. 1. million people in 11 member states (Luxemburg excluded)¹

	1961-69	1970-79	1980-89	1990-98	Total
Germany	0,37	3,46	4,22	5,65	13,7
France	0,12	1,43	4,8	3,64	9,98
Netherlands	1,38	6,75	11,81	10,88	30,81
Italy	0,05	1,46	2,17	6,41	10,09
Belgium	0,98	7,55	13,9	12,16	34,61
UK		0,33	1,42	2,73	4,48
Ireland		1,65	4,13	4,41	10,19
Denmark		1,13	4,72	8,87	14,72
Greece			1,93	2,94	4,86
Spain			0,12	2,83	2,95
Portugal			0,1	2,91	3,01

¹ The data on the total number of references are the same as used in table 2, chapter II (Alter 2000, p. 499). The data are then divided by the population size of the 11 individual member states. The individual population sizes have been informed by the Danish Foreign Ministry and are the population sizes as of January 2003. That is changes in population sizes between 1961-97 are not taken into account.

Table A2: Preliminary References made 1972-2002 concerning regulation 1408/71 pr. 1. million people in 13 member states (Irish and Portuguese national courts have made no references)²

	1972-81	1982-1991	1992-02	Total
<i>Germany</i>	0,31	0,28	0,45	1,04
<i>France</i>	0,07	0,24	0,05	0,36
<i>Netherlands</i>	0,88	1,32	1,38	3,58
<i>Italy</i>	0,02	0,05	0,09	0,16
<i>Belgium</i>	2,65	3,92	3,73	10,3
<i>UK</i>	0,12	0,11	0,17	0,4
<i>Denmark</i>			0,19	0,19
<i>Greece</i>			0,09	0,09
<i>Spain</i>			0,17	0,17
<i>Luxemburg</i>			8,67	8,67
<i>Sweedden</i>			0,22	0,22
<i>Finland</i>			0,39	0,39
<i>Austria</i>			0,74	0,74

Table A3: Innovation of Core Social Security Institution in Western Europe³

	Industrial Accident		Sickness		Pension		Unemployment		All
	<i>Emp. Liab.</i>	<i>Comp.</i>	<i>Subs. Vol.</i>	<i>Comp.</i>	<i>Subs. Vol.</i>	<i>Comp.</i>	<i>Subs. Vol.</i>	<i>Comp.</i>	
<i>Austria</i>		1887		1888		1906		1920	1920
<i>Belgium</i>	1903		1894	1944	1900	1924	1907	1944	1907
<i>Denmark</i>	1898	1916	1892	1933	1891		1907		1907
<i>Finland</i>		1895		1963		1937	1917		1963
<i>France</i>	1898	1946		1930		1910		1914	1930
<i>Germany</i>		1884		1883		1889		1927	1927
<i>Italy</i>		1898	1886	1928	1898	1919		1919	1919
<i>Netherlands</i>		1901		1913		1913	1916	1949	1916
<i>Norway</i>		1894		1909		1936	1906	1938	1936
<i>Sweden</i>	1901	1916	1891			1913	1934		1934
<i>Switzerland</i>		1911	1911			1946	1924		1946
<i>UK</i>	1906	1946		1911		1908		1911	1911

² The data on the total number of references are aggregated from the data in appendix 1 on "Preliminary References and Infringements Procedures on the Basis of Regulation 1408/71 between 1971-2002". Since table 2 concerns preliminary references, infringements procedures do not appear in the data. The aggregated data are then divided by the population size of the 13 individual member states which made preliminary references between 1972 and 2002, i.e. all member states except Ireland and Portugal. The individual population sizes have been informed by the Danish Foreign Ministry and are the population sizes as of January 2003. That is changes in population sizes between 1972-2002 are not taken into account.

³ Sources: Flora & Alber 1981, p. 59, Sonne Norgaard 1999, p. 17. "Emp. Liab." refers to "employers liability". "Comp." Refers to compulsory. "Subs. Vol." refers to subsidised voluntary.

Appendix 4: Amendments of regulation 1408/71 in the period 1971 to 2002

Year	1408/71 amended by regulation	Specific amendment
1972	2864/72 of 19. December 1972	<p><i>Replacement:</i> Art. 1.B, art. 9.2, art. 18 title, art. 18.1, art. 27, art. 33, art. 37.1, art. 38, art. 38 title, art. 45.1, art. 64, art. 79.2.</p> <p><i>Amendment:</i> Art. 28.2, art. 31, art. 46.1, art. 46.2, art. 77.2, art. 78.2, annex 3, annex 5.</p> <p><i>Addition:</i> Art. 28.</p> <p><i>Completion:</i> Art. 19.2.</p> <p><i>Deletion:</i> Art. 45.4, art. 79.4</p>
1974	1392/74 of 4. June 1974	<p><i>Amendment:</i> Art. 14.1 English text, art. 15.3, art. 38.2 English text, annex 2, annex 3, annex 4, annex 5.</p>
1976	1209/76 of 30. April 1976	<p><i>Amendment:</i> Annex 1, annex 2, annex 4, annex 5.</p>
1977	2595/77 of 21. November 1977	<p><i>Replacement:</i> Art. 14.3, art. 21.</p> <p><i>Amendment:</i> Art. 40.3 to 40.4, art. 44.2, art. 46.2, annex 2, annex 3, annex 5.</p> <p><i>Addition:</i> Art. 40.3.</p> <p><i>Completion:</i> Art. 22.3.</p>
1979	1517/79 of 16. July 1979	<p><i>Replacement:</i> Art. 17.</p> <p><i>Amendment:</i> Art. 13.2, annex 3, annex 5.</p> <p><i>Deletion:</i> Art. 95.</p>
1981	1390/81 of 12. may 1981	<p><i>Replacement:</i> Title, art. 1.A, art. 1.B, art. 1.F, art. 1.S, art. 9.1, art. 13, art. 14, art. 15.1, art. 17, art. 23.1, art. 23.2, art. 34, art. 35.1, art. 39.3, art. 47.1, art. 58.1, art. 58.2, art. 60.1, art. 73, annex 6.</p> <p><i>Amendment:</i> Art. 1.C, art. 1.G, art. 1.R, art. 1.U, art. 2.1, art. 2.2, art. 3.3, art. 7.2, art. 10.2, art. 18.2, art. 19.1, art. 20.5, art. 21.1, art. 21.2, art. 21.4, art. 22.1, art. 22.3, art. 22.4, art. 24.1, art. 25.1, art. 25.2, art. 26.1, art. 35.2 to</p>

		<p>35.3, art. 35.3, art. 35.3 to 35.4, art. 37.1, art. 37.2, art. 38.2, art. 40.1, art. 40.2, art. 40.3, art. 40.4, art. 41.1, art. 41.2, art. 44.1, art. 44.2, art. 45.2, art. 45.3 to 45.4, art. 46.1, art. 46.2, art. 52, art. 53, art. 54.1, art. 54.2, art. 55.1, art. 61.1, art. 62.1, art. 65.1, art. 67.1, art. 67.2, art. 69.1, art. 70.1, art. 71.1, art. 72, art. 74.1, art. 74.2, art. 75.1, art. 75.2, art. 78.2, art. 79.1, art. 79.2, art. 79.3, art. 89, art. 93.2, annex 1 to 2, annex 2 to 3, annex 3 to 4, annex 4 to 5, annex 5 to 6, annex 4.</p> <p><i>Addition:</i> Art. 14, art. 35.2, art. 38.3, art. 45.3, art. 45.5, art. 45.6, annex 7.</p> <p><i>Completion:</i> Art. 1.J, annex 2, annex 3.</p>
1981	2793/81 of 17. September 1981	<p><i>Amendment:</i> Art. 22.2, annex 3, annex 4, annex 5.</p> <p><i>Addition:</i> Art. 93.3.</p> <p><i>Completion:</i> Art. 39.</p>
1983	2000/83 of 2. June 1983	<p><i>Replacement:</i> Art. 61.5.</p> <p><i>Amendment:</i> Annex 7.</p> <p><i>Addition:</i> Art. 61.6.</p> <p><i>Completion:</i> Annex 6.</p>
1983	2001/83 of 2. June 1983	<i>Replacement:</i> Title.
1985	1660/85 of 13. June 1985	<p><i>Amendment:</i> Annex 7.</p> <p><i>Addition:</i> Annex 6.</p>
1986	3811/86 of 11. December 1986	<p><i>Replacement:</i> Art. 14.</p> <p><i>Amendment:</i> Art. 14, annex 7.</p> <p><i>Addition:</i> Art. 14.</p>
1989	1305/89 of 11. May 1989	<i>Replacement:</i> Art. 95
1989	2332/89 of 18. July 1989	<p><i>Replacement:</i> Art. 57.</p> <p><i>Amendment:</i> Art. 7.2, art. 33 to 33.1, art. 60.1, art. 60.2, art. 94.8, annex 3, annex 6.</p>

		<i>Addition:</i> Art. 9, art. 33.2, art. 85.5. <i>Completion:</i> Art. 76, art. 79.3.
1989	3427/89 of 30. October 1989	<i>Replacement:</i> Art. 72, art. 73, art. 74, art. 75, art. 76, 94.9, chapter 7. <i>Amendment:</i> Annex 1, annex 2, annex 6. <i>Deletion:</i> Art. 90, art. 99.
1991	2195/91 of 25. June 1991	<i>Replacement:</i> Art. 17. <i>Amendment:</i> Art. 12.4, annex 1, annex 4, annex 6. <i>Addition:</i> Art. 17, art. 45.8, art. 47.4, art. 72, art. 94.10. <i>Completion:</i> Art. 13.2, art. 39.5.
1992	1247/92 of 30. April 1992	<i>Replacement:</i> Art. 5. <i>Addition:</i> Art. 4.2, art. 10, annex 2. <i>Completion:</i> Art. 1.F, art. 1.J, annex 2.
1992	1248/92 of 30. April 1992	<i>Replacement:</i> Art. 12.2, art. 37, art. 38, art. 39, art. 40, art. 41, art. 42, art. 43, art. 44, art. 45, art. 46, art. 47, art. 48, art. 49, art. 50, art. 51, art. 94.10, recital 7, annex 4. <i>Amendment:</i> Annex 6, title 3. <i>Addition:</i> Art. 95. <i>Completion:</i> Art. 60.1. <i>Deletion:</i> Recital 8.
1992	1249/92 of 30. April 1992	<i>Amendment:</i> Art. 94.9, annex 3, annex 6. <i>Addition:</i> Art. 94.1, art. 94.2, art. 94.3, art. 94.4, art. 94.5, art. 94.6, art. 94.7, art. 95.1, art. 95.2, art. 95.3, art. 95.4, art. 95.5, art. 95.6, art. 95.7, annex 2.
1993	1945/93 of 30. June 1993	<i>Amendment:</i> Annex 1, annex 2, annex 4, annex 6.
1995	3095/95 of 22. December 1995	<i>Amendment:</i> Art. 86 to 86.1, annex 1, annex 2. <i>Addition:</i> Art. 22, art. 25, art. 72, art. 86.2, art. 95.

		<i>Completion:</i> Art. 39.6, art. 45.6, annex 3, annex 6.
1995	3096/95 of 22. December 1995	<i>Amendment:</i> Art. 1.U, art. 36.1, annex 1, annex 2, annex 3, annex 4, annex 5, annex 7. <i>Addition:</i> Art. 22. <i>Completion:</i> Art. 49.1, annex 2, annex 6.
1996	118/97 of 2. December 1996	<i>Replacement:</i> Title, art. 82.4, art. 88.1. <i>Completion:</i> Annex 6. <i>Deletion:</i> Art. 100.
1997	1290/97 of 27. June 1997	<i>Replacement:</i> Art. 2.3, art. 81.D <i>Amendment:</i> Art. 1.F, annex 1, annex 2, annex 4. <i>Addition:</i> Art. 22, art. 85.3. <i>Completion:</i> Annex 6.
1998	1223/98 of 4. June 1998	<i>Amendment:</i> Art. 29.1, annex 1, annex 2, annex 3, annex 4. <i>Addition:</i> Art. 31, annex 2, annex 6.
1998	1606/98 of 29. June 1998	<i>Replacement:</i> Art. 13.1, art. 14.1, art. 44.3. <i>Amendment:</i> Art. 1.A, art. 4.4, annex 4. <i>Addition:</i> Art. 1.J, art. 14, art. 43, art. 51, art. 71, art. 79, art. 95. <i>Completion:</i> Art. 1.S, art. 1.R, annex 6. <i>Deletion:</i> Art. 2.3.
1999	307/99 of 8. February 1999	<i>Replacement:</i> Art. 2. <i>Amendment:</i> Art. 1.F, art. 1.I, art. 1.II, art. 9 German text, art. 10.2, art. 35.3. <i>Addition:</i> Title 3.1.5, title 3.4.5, art. 34, art. 63, art. 66, art. 76, art. 95.

		<i>Completion:</i> Art. 1.C, annex 6. <i>Deletion:</i> Art. 22.
1999	1399/99 of 29. April 1999	<i>Replacement:</i> Art. 44.3, art. 78.1. <i>Amendment:</i> Art. 79, annex 2, 3, 7. <i>Addition:</i> Art. 78, art. 95. <i>Completion:</i> Art. 79, annex 1, 4, 6.
2001	1386/01 of 5. June 2001	<i>Amendment:</i> Annex 2, 4, & 6.

Source: Celex database and Official Journals

Besides the amendments regulation 1408/71 has been presented three times as codified or co-ordinated text:

- 609/80 of 9. June 1980
- 1210/92 of 10. December 1992
- 118/97 of 1. February 1997

Finally, regulation 1408/71 has been changed 1. January 1973 due to the Community membership of Denmark, Ireland and the United Kingdom (Council dir. 101/73) as well as 20. January 1981 due to the Community membership of Greece (Council dir. 196/81). The two amendments do however not mean substantial regulatory change but deals with the general adaptations of Community documents by the Community enlargement.

Appendix 5: Adding to Annex IIa Over the Years

	30. April 1992 – 12/4/92	30. April 1992 – 12/4/92	30. June 1993 – 19/4/93	22. Dec. 1995 – 30/9/95	22. Dec. 1995 – 30/9/95
Belgium	a) Allowances for disabled persons ¹ b) Guaranteed income for elderly persons ² c) Guaranteed family benefits ³				
Denmark				a) The flat-rate rehabilitation benefit ⁴	b) Accommodation expenses for pensioners ⁵
Germany					
Spain	a) Benefits under the Law on the social integration of disabled persons ⁶ b) Cash benefits to assist the elderly and invalids unable to work ⁷	c) non-contributory disablement and retirement pensions and dependent child benefits ⁸			
France	a) Supplementary allowance from the National Solidarity Fund ⁹ b) Disabled adults' allowance ¹⁰	c) the special allowance ¹¹			
Greece	a) Special benefits for elderly persons ¹² b) Allowance for children of non-working mothers whose husbands have been called up for military service ¹³ c) Allowance for children of non-working mothers whose husbands are in prison ¹⁴ d) Allowance for persons suffering from congenital haemolytic anaemia ¹⁵ e) Allowance for the deaf and dumb ¹⁶ f) Allowance for seriously disabled persons ¹⁷				

	g) Allowance for spasmophiliacs ¹⁸ h) Allowance for persons suffering from a serious mental disability ¹⁹ i) Allowance for the blind ²⁰					
Ireland	a) Unemployment assistance ²¹ b) Old age and blind pensions (non-contributory) ²² c) Widows' and orphans' pensions (non-contributory) ²³ d) Lone parent's allowance ²⁴ e) Carer's allowance ²⁵ f) Family income supplement ²⁶ g) Disabled person's maintenance allowance ²⁷ h) Mobility allowance ²⁸ i) Infectious diseases maintenance allowance ²⁹ j) Domiciliary care allowance ³⁰ k) Blind welfare allowance ³¹ l) Disabled person's rehabilitation allowance ³²					
Italy	a) Social pensions for persons without means ³³ b) Pensions and allowances for the civilian disabled or invalids ³⁴ c) Pensions and allowances for the deaf and dumb ³⁵ d) Pensions and allowances for the civilian blind ³⁶ e) Benefits supplementing the minimum pension ³⁷ f) Benefits supplementing disability allowances ³⁸ g) Monthly allowances for continuous personal					

	assistance for those receiving pensions for incapacity for work ³⁹					
Luxembourg	a) Compensatory cost of living allowance ⁴⁰ b) Special severe disablement allowance ⁴¹ c) Maternity allowance ⁴²				(a) shall be deleted and points (b) and (c) become respectively points (a) and (b) ⁴³	
Netherlands						
Austria (1995)						
Portugal	a) Non-contributory family allowances ⁴⁴ b) Nursing mother's allowance ⁴⁵ c) Supplementary allowance for disabled children and young people ⁴⁶ d) Allowance for attendance at special schools ⁴⁷ e) Non-contributory orphan's pension ⁴⁸ f) Non-contributory invalidity pension ⁴⁹ g) Non-contributory old-age pension ⁵⁰ h) Supplementary severe invalidity pension ⁵¹ i) Non-contributory widow's pension ⁵²					
Finland (1995)						
Sweden (1995)						
United Kingdom	a) Mobility allowance ⁵³ b) Invalid care allowance ⁵⁴ c) Family credit ⁵⁵ d) Attendance allowance ⁵⁶ e) Income support ⁵⁷ f) Disability living allowance ⁵⁸ g) Disability working allowance ⁵⁹		a) shall be deleted			h) Income-based allowances for jobseekers ⁶⁰

	2. Dec. 1996 118/97	27. June 1997 1290/97	4. June 1998 1223/98	
Belgium	a) Allowances for disabled persons b) Guaranteed income for elderly persons c) Guaranteed family benefits			
Denmark	a) The flat-rate rehabilitation benefit b) Accommodation expenses for pensioners		c) The temporary benefit for unemployed persons who have been taken on in a "flexible job" for 12 months (ledighedsydelse) ⁶¹	
Germany				
Spain	a) Benefits under the Law on the social integration of disabled persons b) Cash benefits to assist the elderly and invalids unable to work c) non-contributory disablement and retirement pensions and dependent child benefits	c) Shall be replaced by: Non-contributory invalidity and retirement pensions and dependent child benefits ⁶²		
France	a) Supplementary allowance from the National Solidarity Fund b) Disabled adults' allowance c) the special allowance			
Greece	a) Special benefits for elderly persons b) Allowance for children of non-working mothers whose husbands have been called up for military service c) Allowance for children of non-working mothers whose husbands are in prison d) Allowance for persons suffering from congenital haemolytic anaemia e) Allowance for the deaf and		Points (d), (e), (g), (h) and (i) shall be replaced by the following: d) allowance for persons suffering from congenital haemolytic anaemia ⁶³ e) allowance for the deaf and dumb ⁶⁴ g) allowance for spasmophiliacs ⁶⁵ h) allowance for persons suffering from a serious mental disability ⁶⁶	

	dumb f) Allowance for seriously disabled persons g) Allowance for spasmophiliacs h) Allowance for persons suffering from a serious mental disability i) Allowance for the blind			i) allowance for the blind ⁶		
Ireland	a) Unemployment assistance b) Old age and blind pensions (non-contributory) c) Widows' and orphans' pensions (non-contributory) d) Lone parent's allowance e) Carer's allowance f) Family income supplement g) Disabled person's maintenance allowance h) Mobility allowance i) Infectious diseases maintenance allowance j) Domiciliary care allowance k) Blind welfare allowance l) Disabled person's rehabilitation allowance			Points (a) to (g) shall be replaced as follows: a) unemployment assistance ⁶⁸ b) old age and blind pensions (non-contributory) ⁶⁹ c) widow's (non-contributory) pension, widower's (non-contributory) pension and orphan's (non-contributory) pension ⁷⁰ d) lone-parent family payment ⁷¹ e) carer's allowance ⁷² f) family income supplement ⁷³ g) disability allowance ⁷⁴		
Italy	a) Social pensions for persons without means b) Pensions and allowances for the civilian disabled or invalids c) Pensions and allowances for the deaf and dumb d) Pensions and allowances for the civilian blind e) Benefits supplementing the minimum pension f) Benefits supplementing disability allowances g) Monthly allowances for continuous personal assistance for those			h) social allowance ⁷⁵		

	receiving pensions for incapacity for work					
Luxembourg	a) Special severe disablement allowance b) Maternity allowance					
Netherlands				a) incapacity benefits for disabled young people ⁷⁶		
Austria (1995)	a) Compensatory supplement ⁷⁷ b) Care allowance (Pflegegeld) ⁷⁸					
Portugal	a) Non-contributory family allowances b) Nursing mother's allowance c) Supplementary allowance for disabled children and young people d) Allowance for attendance at special schools e) Non-contributory orphan's pension f) Non-contributory invalidity pension g) Non-contributory old-age pension h) Supplementary severe invalidity pension i) Non-contributory widow's pension	h) Shall be replaced by: Attendance allowance for persons receiving invalidity, old-age, widows or orphan's pensions ⁷⁹				
Finland (1995)	a) Child-care allowance ⁸⁰ b) Disability allowance ⁸¹ c) Housing allowance for pensioners ⁸² d) Basic unemployment allowance in cases where a person does not fulfil the corresponding conditions for the earnings-related unemployment allowance ⁸³			d) shall be replaced by: labour market support ⁸⁴		
Sweden (1995)	a) Municipal Housing	a) Shall be replaced by:				

	Supplements to basis pensions ⁸⁵ b) Handicap allowances which are not paid to a person receiving a pension ⁸⁶ c) Care allowance for handicapped children ⁸⁷	Housing supplements for persons receiving a pension ⁸⁸			
United Kingdom	a) b) Invalid care allowance c) Family credit d) Attendance allowance e) Income support f) Disability living allowance g) Disability working allowance h) Income-based allowances for jobseekers				

¹ Law of 27 February 1987

² Law of 1 April 1969

³ Law of 20 July 1971

⁴ As awarded under the Law on Social Welfare for the maintenance of persons receiving rehabilitation treatment

⁵ Law on individual accommodation assistance, consolidated by Law No 204 of 29 March 1995

⁶ Law No 13.82 of 7 April 1982

⁷ Royal Decree No 2620/81 of 24 July 1981

⁸ As provided for in Articles 132 (1), 136a, 137a, 138a, 154a, 155a, 156a, 167, 168 (2), 169 and 170 of the General Law on Social Security, as amended by Law No 26/90 of 20 December 1990 establishing non-contributory social security benefits

⁹ Law of 30 June 1956

¹⁰ Law of 30 June 1975

¹¹ Law of 10 July 1952

¹² Law 1296/82

¹³ Law 1483/84, Article 23 (1)

¹⁴ Law 1483/84, Article 23 (2)

¹⁵ Decree-Law 321/69

¹⁶ Exceptional Law 421/37

¹⁷ Decree-Law 162/73

¹⁸ Decree-Law 162/72

¹⁹ Decree-Law 162/73

²⁰ Law 958/79

²¹ Social Welfare (Consolidation) Act, 1981, Part III, Chapter 2

²² Social Welfare (Consolidation) Act, 1981, Part III, Chapter 3

²³ Social Welfare (Consolidation) Act, 1981, Part III, Chapter 4

²⁴ Social Welfare Act, 1990, Part III

²⁵ Social Welfare Act, 1990, Part IV

²⁶ Social Welfare Act, 1984, Part III

²⁷ Health Act, 1970, Section 69

²⁸ Health Act, 1970, Section 61

²⁹ Health Act, 1947, Sections 5 and 44 (5)

³⁰ Health Act, 1970, Section 61

³¹ Health Act, 1970, Section 61

³² Blind Persons Act, 1920, Chapter 49

³³ Health Act, 1970, Sections 68, 69 and 72

³⁴ Law No 153 of 30 April 1969

³⁵ Laws No 118 of 30 March 1974, No 18 of 11 February 1980 and No 508 of 23 November 1988

³⁶ Laws No 381 of 26 May 1970 and No 508 of 23 November 1988

³⁷ Laws No 382 of 27 May 1970 and No 508 of 23 November 1988

³⁸ Laws No 218 of 4 April 1952, No 638 of 11 November 1983 and No 407 of 29 December 1990

³⁹ Law No 222 of 12 June 1984

⁴⁰ Law No 222 of 12 June 1984

⁴¹ Law of 13 June 1975

⁴² Law of 16 April 1979

⁴³ Law of 30 April 1980

⁴⁴ Compensatory cost of living allowance (Law of 13 June 1975) no longer exist in Luxembourg legislation

⁴⁵ Decree-Law No 160/80 of 27 May 1980

⁴⁶ Decree-Law No 160/80 of 27 May 1980

⁴⁷ Decree-Law No 160/80 of 27 May 1980

⁴⁸ Decree-Law No 160/80 of 27 May 1980

⁴⁹ Decree-Law No 464/80 of 13 October 1980

⁵⁰ Decree-Law No 464/80 of 13 October 1980

⁵¹ Decree-Law No 160/80 of 27 May 1980

⁵² Regulatory Decree No 52/81 of 11 November 1981

⁵³ Social Security Act 1975 of 20 March 1975, Section 37A and Social Security (Northern Ireland) Act 1975 of 20 March 1975, Section 37A

⁵⁴ Social Security Act 1975 of 20 March 1975, Section 37, and Social Security (Northern Ireland) Act 1975 of 20 March 1975, Section 37

⁵⁵ Social Security Act 1986 of 25 July 1986, Sections 20 to 22, and Social Security (Northern Ireland) Order 1986 of 5 November 1986, Articles 21 to 23

⁵⁶ Social Security Act 1975 of 20 March 1975, Section 35 and Social Security (Northern Ireland) Act 1975 of 20 March 1975, Section 35

⁵⁷ Social Security Act 1986 of 25 July 1986, Sections 20 to 22 and Section 23 and Social Security (Northern Ireland) Order 1986 of 5 November 1986, Articles 21 to 28

⁵⁸ Disability Living Allowance and Disability Working Allowance Act 1991 of 27 June 1991, Section 1 and Disability Living Allowance and disability Working Allowance (Northern Ireland) Order 1991 of 24 July 1991, Article 3

⁵⁹ Disability Living Allowance and Disability Working Allowance Act 1991 of 27 June 1991, Section 6 and Disability Living Allowance and Disability Working Allowance (Northern Ireland) Order 1991 of 24 July 1991, Article 8

⁶⁰ Jobseekers Act 1995, 28 June 1995, Sections 1(2)(d) (ii) and 3, and Jobseekers (Northern Ireland) Order 1995, 18 October 1995, Articles 3 (2) (d) (ii) and 5

⁶¹ Law No 455 of 10 June 1997

- ⁶² As provided for in Article 38 (1)(c) and (d) of the Consolidated Text of the General Law on Social Security, approved by Royal Legislative Decree No 1/1994 of 20 June 1994
- ⁶³ Law 2362/1995 common ministerial order G4a F.167/2073/82 and common ministerial order P47/F.222/225 oik. 4711/94
- ⁶⁴ Exceptional law 421/37 common ministerial order D 8b 423/73, common ministerial order G4 F.11.2 oik. 1929/82 and common ministerial order G4 F.422/oik. 1142/85
- ⁶⁵ Decree-law 162/73 common ministerial order G4a F.224 oik. 1434/84
- ⁶⁶ Decree-law 162/73 common ministerial order G4 F.12/oik. 1930/82, common ministerial order G4b/F.423/oik. 1167/84 and common ministerial order G4b/F.423/oik. 529/85
- ⁶⁷ Law 958/79
- ⁶⁸ Social Welfare (Consolidation) Act 1993, Part III, Chapter 2
- ⁶⁹ Social Welfare (Consolidation) Act 1993, Part III, Chapters 4 and 5
- ⁷⁰ Social Welfare (Consolidation) Act 1993, Part III, Chapter 6 as amended by Part V of the Social Welfare Act 1997
- ⁷¹ Social Welfare (Consolidation) Act 1993, Part III, Chapter 9
- ⁷² Social Welfare (Consolidation) Act 1993, Part III, Chapter 10
- ⁷³ Social Welfare (Consolidation) Act 1993, Part V
- ⁷⁴ Social Welfare Act 1996, Part IV
- ⁷⁵ Law No 335 of 8 August 1995
- ⁷⁶ Law of 24 April 1997
- ⁷⁷ Federal Act of 9 September 1955 on General Social Insurance - ASVG, Federal Act of 11 October 1978 on Social Insurance for Persons engaged in Trade and Commerce - GSVG and Federal Act of 11 October 1978 on Social Insurance for Farmers - BSGV).
- ⁷⁸ Under the Austrian Federal Care Allowance Act (Bundespflegegeldgesetz) with the exception of care
- ⁷⁹ Allowance granted by accident insurance institutions where the handicap is caused by an accident at work or occupational disease.
- ⁸⁰ Decree-Law No 160/80 of 27 May 1980 and implementing Order No 1066/94 of 5 December 1994
- ⁸¹ Child-care Allowances Act, 444/69
- ⁸² Disability Allowance Act, 124/88
- ⁸³ Act concerning the Housing Allowance for Pensioners, 591/78
- ⁸⁴ Unemployment Allowance Act, 602/84
- ⁸⁵ Labour Market Support Act 1542/93
- ⁸⁶ Law 1962: 392, reprinted 1976: 1014
- ⁸⁷ Law 1962: 381 reprinted 1982: 120
- ⁸⁸ Law 1962: 381 reprinted 1982: 120
- ⁸⁹ Law 1994: 308

