

# Freedom of Establishment between „Abuse“ and National Regulatory Concerns

## Overview

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# The Concepts of „Abuse“ in the Case Law of the ECJ

## **ECJ (Centros, para 24):**

“... a Member State is entitled to ... prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (see, in particular ...).”

## **ECJ (Inspire Art, 121):**

„... taking advantage of the more favourable rules of another Member State cannot, in itself, constitute an abuse of the right of establishment but is a right inherent in the exercise of freedom of establishment.“

- **Van de Bijl (130/88):** Certificate wrongly testifies that Mr. van de Bijl had been active in Great Britain as a self-employed painter for a certain period
- **Suat Kol (C-285/95):** A Turkish national obtains a residence permit by means of fraudulent conduct. The period of employment thereafter is not taken into account and can not give rise to any rights under secondary legislation
- **Paletta I/II (C-45/90; C-206/94):** the competent institution is bound in fact and in law by the medical findings of the institution of the place of (temporary) residence concerning the commencement and duration of the incapacity for work, unless the opposite (with regard to this incapacity) is proven

# Fraud and Misrepresentation

## – Assessment –

- Member State restricts fundamental freedoms or legal positions conferred by secondary law
- At the level of justification, fraud and misrepresentation often provide an admissible ground of justification, e.g. under Art. 46 EC, provided that the principle of the country of origin does not apply
- → The level of harmonization as well as the „sensitivity“ of the subject matter are important
- Subjective elements do matter, as they are by necessity part of fraud and misrepresentation
- The burden of proof lies with the Member State

# Scope of fundamental freedoms (U-turns by individuals)

## Cases

- **Leclerc (229/83)**: A French bookseller exports and then directly re-imports his books, hereby challenging the french rules on book-pricing as infringement of the free movement of goods
- **Van Binsbergen (33/74)**: A dutch national transfers its residence to Belgium, but wants to work in the Netherlands als lawyer. Has he to meet the relatively strict dutch professional business rules?

# Scope of fundamental freedoms (U-turns by individuals)

## Assessment

- The „abuse“ lies in the **artificiality of the cross-border dimension**. The fundamental freedoms want to satisfy „real“, not just pretended needs of mobility.
- Here, „abuse“ ist a **matter of interpretation** with regard to the range of the fundamental freedoms as laid down in the Treaty
- **Subjective elements don't matter; neither do harmonisation nor the „sensitivity“ of the case**
- The **burden of proof** (with regard to the cross-border-dimension) lies with the party drawing upon a fundamental freedom

## Scope of fundamental freedoms (corporations – Centros etc.)

### Centros (C-212/97) : Facts and Findings

- Centros Ltd. claims to have established a branch in Denmark, but is denied registration on the ground that Centros conducts no business in Great Britain
- 26+27 The provisions on freedom of establishment are intended specifically to enable companies to pursue activities in other Member States. ... is inherent in the exercise of the freedom of establishment
- 27 Choosing those rules of company law that seem the least restrictive cannot, in itself, constitute an abuse
  - 29 The fact that a company does not conduct any business in the Member State in which it has its registered office is not sufficient to prove the existence of abuse or fraudulent conduct

## Scope of fundamental freedoms (corporations – Centros etc.)

### Assessment

- A first sight Centros seems ad odds with the ECJ-s general take on „abuse“. There does not seem to be a real need for mobility, the cross-border-dimension appears artificial.
- However, this is not a classical U turn-case, as legal persons enjoy the protection of fundamental freedoms in and of themselves. „Centros Ltd.“ crossed the border just once.
- Art. 48 EC: Companies or firms formed in accordance with the law of a Member State ... shall ... be treated in the same way as natural persons who are nationals of Member States

## Scope of fundamental freedoms (rules on trades, professions etc.)

### **The Puzzle continues: TV 10 and Veronica**

- **Veronica (C-148/91):** A dutch company is prohibited from helping set up and running a commercial radio station in Luxembourg only broadcasting to the Netherlands
- **TV 10 (C-23/93):** A company (largely in the hands of Netherlands nationals) formed in Luxembourg with the sole purpose of circumventing dutch provisions is treated as a domestic broadcaster

# Scope of fundamental freedoms (rules on trades, professions etc.)

## Findings of the Court

- **Veronica 12:** ... right to take measures to prevent the exercise of the fundamental freedoms by a person where the activities are entirely or principally directed towards its territory for the purpose of avoiding the professional rules of conduct which would be applicable if he were established within that State
- **TV 10 21:** May regard as domestic ... since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law

# Scope of fundamental freedoms (rules on trades, professions etc.)

## Assessment

- **No U turn-case**, as company (legal entity) is formed in Luxemburg, and only it's programs pass the border once
- **How distinguish this from Segers, Centros, Inspire Art?**  
**Centros:**
  - **26** In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses
  - **27** The fact that a national who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive ... cannot, in itself, constitute an abuse

## Scope of fundamental freedoms (rules on trades, professions etc.)

- **Conclusion:**
  - „Formal“ view: „core rules“ of company law
  - „Substantive“ view: rules governing the exercise of certain trades, professions or businesses
- **Reasons?**
  - Company law specifically deals with the legal entity „corporation“
  - Personal Statute in Private International Law covers similar areas
  - Typically market access of corporations is significantly impaired by rules of company law, whereas business rules might constitute pure „modalities“

# Scope of Secondary Legislation (supporting fundamental freedoms)

- Many directives are aimed at shaping and concretising the fundamental freedoms of the Treaty
- In such a case, legal positions conferred by secondary legislation may legitimately be not applied if there is a U turn-situation
  - Example: A german craftsman, who has been convicted to be unsuitable for his work (e.g. because of having committed crimes) wants to circumvent this national business rule by now acting not indivually, but through a Ltd.
  - Despite the clear wording of the 11. Company-Law-Directive, which does not now such an exception, a German court would be entitled to deny registration of the Ltd-Branch in Germany and thereby to hinder this person from continuing to work as a craftsman

## Scope of Secondary Legislation (other cases of circumvention)

- But also without such an artificial cross-border-dimension secondary provisions can be objects of circumvention, possibly allowing national courts to invoke national provisions as countermeasures
  - See cases Pafitis (C-441/93); Kefalas (C-367/96); Diamantis (C-373/97)
  - Further example for this kind of „abuse“: Art. 11 SE-directive (see later)
  - „Simple“ matter of interpretation of the scope of this secondary law
  - Doesn't differ from the treatment of circumventions of national law

- **Circumventing national „business rules“**
  - Rules on the **eligibility of directors** in corporate law
  - **Professional business rules** (freelancers such as lawyers, doctors, architects etc., when acting not individually, but through corporations)
  - Business rules for **craftsmen etc.** (rules of conduct, payments to the chamber of Crafts)
  - **Not: Rules on Co-Determination**
- **Fraudulent behaviour when establishing/ registering a company/branch by using falsified documents**

## Practical Relevance: Examples

- Fraud and misrepresentation with foreign corporations as a „vehicle“
  - Examples
    - „Cindarella-Model“: Allocating all assets to a German company, while having a Ltd. assume all liabilities (AG Hamburg NJW 2003, 2835)
    - Using a Ltd. to perpetrate fraud (e.g. by using it for „anonymizing“)
    - Using a Ltd. for fraudulent lawsuits, as foreign European companies do not have to provide securities for the costs of litigation (§ 110 ZPO)
  - Consequence: **Lifting/piercing the corporate veil** might be admissible
  - However: rarely a specific aspect of foreign company, the underlying legal issues are general ones directed at all companies, whether foreign or domestic

# Excursus: Art. 11 of the SE-directive

## Art. 11 (Misuse of procedures)

Member States shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights.

### Consideration No 18

It is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the 'before and after' principle). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.