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Jean Monnet Working Paper 1/25

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Abuse of Rights and Corporate Mobility:

(Re)Interpreting the Role of Companies in the European Social Market

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

ISSN 2161-0320 (online) Copy
Editor: Claudia Golden

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

Abuse of Rights and Corporate Mobility: (Re)Interpreting the Role of Companies in the European Social Market

Giulio Dipietro*

Abstract

Freedom of establishment of companies has always been a delicate area of EU law. The challenge of achieving political consensus has delayed the process of harmonization and prompted creative adjudication. The CJEU, particularly in the *Polbud* case, just confirmed in *Edil Work*, has interpreted free movement broadly and allowed companies to relocate registered offices to benefit from more favorable national laws, without moving economic activities. This approach raised doubts about the notion of establishment and complicated national authorities' ability to prevent abusive moves aimed at circumventing stakeholders' protective legislation. Directive 2019/2121 provides a procedural framework for such a control, but lacks a definition of abuse, leaving national courts with interpretative challenges.

This study explores what distinguishes legitimate establishment from its abuse and aims to create a unified model for its identification. At a general level, it expresses the long-standing clash between EU economic as opposed to social legal integration.

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1. Introduction

The economic drive of European integration, manifested in the creation of an internal market, traditionally finds expression in the four "fundamental freedoms". The EU market is based on free movement of goods, workers, establishment and services, and capital. The economic freedoms, regulated in Part Three of the Treaty on the Functioning of the European Union, aim at the optimal allocation of resources in the EU, facilitating the movement of production factors to the geographic area where they are most valued.[1]

Alongside economic integration, the EU constitutional system progressively embraced, within the perspective of a "social market economy",[2] a broader spectrum of non-market values. This has led to a different and more holistic conceptualization of the internal market.[3] In other words, EU legal integration unfolds between market and non-market values, in a dichotomous equilibrium that frequently entails episodes of collision.

Returning to economic Europe, both for legal complexity and economic relevance, a major role in the functioning of the single market is reserved for companies. Companies represent the typical organizational structure for the associated exercise of business activities and thus play a crucial role for the realization of the single market. Indeed, Article 49 TFEU attributes to companies, along with self-employed natural persons, the fundamental freedom known as freedom of establishment.

Article 54 TFEU provides for the freedom of establishment of companies. If a company is formed in accordance with the law of a Member State and has its registered office, central administration, or principal place of business somewhere in the EU, it will accordingly benefit from the Treaty freedom. Moreover, the Treaty envisages two forms of establishment. Primary establishment consists of the right to set up and manage undertakings in a Member State other than the State of origin, while secondary

[1] P. Craig and G. De Búrca. *EU Law: Text, Cases, and Materials*. Seventh edition. (Oxford: Oxford University Press, 2020), p. 642.
[2] Article 3(3) TEU: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".
[3] P. Craig and G. De Búrca, *supra* note 1, p. 667.

establishment consists of setting up agencies, branches, or subsidiaries in another Member State.

While the harmonization process of national company law provisions was delayed, the Court of Justice of the European Union ("the Court" or "the ECJ") took an activist stance in interpreting the fundamental freedom extensively, swiftly transitioning from a non-discrimination approach to incentivizing cross-border mobility and regulatory competition between national legal systems. This line of case law is highly complex and pertains to both substantive and conflict rules for determining the applicable company law (*lex societatis*). However, while its main takeaways will be referred to below, the aim of this paper is much more circumscribed.

Among the numerous aspects that the European Court has dealt with since the establishment of the internal market, one of particular interest is corporate restructuring (and specifically cross-border conversions, mergers, and divisions) for at least three reasons.

Firstly, the topic vouches for a dynamic institutional dialogue between the Court and the European Commission amidst the economic/social market constitutional tension. The former, in the absence of harmonization, has provided for an extensive interpretation of the freedom of establishment, encompassing companies' rights to reorganize their organizational structure across national borders. The latter has promptly elaborated and proposed to the legislator a legal common framework that resul-ted in Directive 2019/2121,[4] so to prevent this right from being exercised in a regulatory *vacuum*, particularly after the seminal judgment in *Polbud* [5] In doing so, the Commission has achieved, alongside a comprehensive harmonized framework for carrying out cross-border operations, the protection of various interests, which might be simplistically identified as stakeholders' interests. Specifically, the Commission highlighted that "corporate restructurings and transformations such as cross-border conversions, mergers, and divisions, are part of companies' life cycle and represent a natural way for

[4] Directive 2019/2121 of 27 November 2019 amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions, O.J. L 321/1.
[5] Judgment of 25 October 2017, *Polbud*, C-106/16, EU:C:2017:804.

companies to grow, adapt to a changing environment and explore opportunities in new markets. At the same time, they also entail consequences for companies' stakeholders, for employees, creditors, and shareholders. Therefore, the protection of stakeholders must keep pace with the ever-growing trans-nationalization of the corporate world. However, today's legal uncertainty, partial inadequacy, and lack of rules governing certain cross-border operations of companies mean that there is no clear framework to ensure effective protection of these stakeholders. In this situation, the protection offered to stakeholders may therefore be ineffective or insufficient. The cross-border operations of companies can also be facilitated by a legal environment that creates trust in the Single Market by providing for safeguards against abuse".[6] Crucially lying between freedom of establishment of companies and protection of stakeholders is the concept of abuse of freedom of establishment. As it will be argued, this notion is fundamentally linked with the scope of the fundamental freedom in the case law of the Court and now poses challenges for how to adapt it to the secondary law framework.

Secondly, in continuity with what has just been mentioned, the subject is extremely topical for EU law since Directive 2019/2121's transposition period elapsed on 31 January 2023, and, due to the complexity of the discipline, it is likely that the Court will soon start receiving preliminary references by national Courts regarding its interpretation.

Thirdly, a preliminary question from the Italian Supreme Court of Cassation related to a cross-border corporate conversion was just answered on 25 April 2024.[7] The case before the "Suprema Corte" (even if the main point is related not to a substantive company law provision, but rather to the Italian conflict rule for companies registered elsewhere but keeping their main activity in Italy[8]) brings back again the question of how to deal with companies that transferred registered office only to obtain the change of applicable law. The judgment confirms *Polbud* and consecrates the possibility of exercising free

[6] Commission proposal of 25 April 2018 to the European Parliament and the Council for a Directive amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions, COM(2018) 241 final.
[7] Judgment of 25 April 2024, *Edil Work*, C-276/22, EU:C:2024:348.
[8] For the incompatibility of the rule before the case arrived before the ECJ see E. Pederzini, *Percorsi di diritto societario europeo*, 4th ed. (Torino: Giappichelli, 2020), p. 23-25.

movement only as regards the registered office (*i.e.*, without transfer of the real seat and therefore of the economic activity).[9]

Corporate restructuring represents, in other words, a complex but fascinating example of the constitutional tension between a competitive and a fair market and raises legal questions still not fully addressed. In the interpretation of the constitutional legal framework and of the Directive lies the extremely delicate balance between an essential operation for the life of competitive companies and the relevant consequences for a plethora of concurring categories of stakeholders equally concerned and in need of protection.

This paper aims firstly at answering the following question: what distinguishes the legitimate exercise of freedom of establishment of companies from its abuse? Secondly, it seeks to develop a unitary framework for the category "abuse of freedom of establishment of companies", applying the ECJ's main findings regarding the general principle of abuse of rights to rulings on free movement, to provide an interpretative and coherent model, especially for the national courts that will be tasked to address this concept when applying the newly implemented national legislation on cross border operations.

The paper is structured as follows. Premised on an overview regarding the relevant case law on freedom of establishment of companies and the way it has dealt with the concept of abuse, it analyses the judgment in *Polbud*, the most relevant and problematic ruling for extrapolating a definition of abuse. Having explored the challenges and the implications of *Polbud*, it follows a description of Directive 2019/2121, the legislative framework for harmonizing cross-border corporate operations in the EU. Some *interim* conclusions are then posed, such as what concept of abuse emerges from the fragmentary references in the case law and the general reference in the Directive. The final part of the paper is concerned with trying to put together the relevant findings of the ECJ as regards the doctrine of abuse of rights to develop a uniform notion and interpretative framework, that the European Court could use to provide national judges a guidance ruling for a well-founded application of national transposition rules on companies' cross-border transfers.

[9] See *infra* §3.4.

2. On free movement of companies and regulatory competition

It is essential to acknowledge that much of the complexity within the pertinent case law stems from the broad formulation of the Treaty.

Firstly, Article 54 TFEU remains neutral on the connecting factors Member States should adopt regarding the application of their own *lex societatis*. Traditionally, two legal approaches of private international law have been used. On one hand, the incorporation theory mandates the application of the company law of the state where its registered office has been established (offering a clear and straightforward approach). On the other hand, the real seat theory, which subjects the company to the law of the state where its business operations are managed (emphasizing substance over form and aiming to prevent artificial arrangements and regulatory arbitrage among Member States). Additionally, the Treaty does not definitely clarify whether freedom of establishment includes or not a right to corporate mobility and the conditions under which it would be possible to exercise such a right. The failure of the EU legislator (as well as Member States[10]) to enact proper rules to address this issue further intensifies the ambiguity. Thirdly, Member States have consistently expressed discomfort with company migration conducted for reasons perceived as illegitimate, such as relocating the registered office to circumvent unfavorable tax or social legislation (referred to as national "law shopping").[11]

In the lack of a Treaty choice and an institutional initiative, the Court of Justice has been tasked with the responsibility of appropriately delineating and specifying (if not essentially shaping) the legal framework. The EU judiciary has undertaken this task seriously, partly addressing the gap in secondary law and taking a stance on the conflict theories regarding applicable law. Consequently, the Court consecrated the right to corporate mobility with minimal restrictions while heightening concerns over "artificial transfers" of corporate seats.[12]

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[10] Article 220 EEC Treaty originally mandated the Member States to negotiate secondary legislation in respect of "mutual recognition of companies (…), the maintenance of legal personality in cases where the registered office is transferred from one country to another and the possibility for companies subject to the national laws of different Member States to form mergers".

[11] L. Schummer and S. Binard. "The Case for Further Flexibility in Matters of Cross-Border Corporate Mobility", *European Company Law* 16, no. 1 (2019), p. 31-37, at p. 31.

[12] *Ibidem*, at p. 32.

2.1. The Court in a vacuum *and early case law*

The Court ruled already in 1986 in *Segers*[13] that Article 54 TFEU "requires only that the companies be formed under the law of a Member State and have their registered office, central administration or principal place of business within the Community. Provided that those requirements are satisfied, the fact that the company conducts its business through an agency, branch, or subsidiary solely in another Member State is immaterial".[14]

The judgment went quite unnoticed because two years later the Court defended the real seat theory as a means of protection against regulatory competition[15] in *Daily Mail*,[16] considering that in the absence of common rules "unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning".[17] In other words, the Member State of origin retains the power to determine under what conditions a company can obtain and maintain the status of a company incorporated under its national law.[18]

2.2. Stretching freedom of establishment, narrowing abuse

Centros[19] indeed marks a radical shift in perspective and, coupled with *Überseering* and *Inspire Art* (which upheld its core principle), truly "heralded a new era",[20] allowing free choice of incorporation and consequently of company law inside the EU. The case

[13] Judgment of 10 July 1986, *Segers*, C-79/85, EU:C:1986:308.
[14] *Ibidem*, para. 16. See also the Opinion of AG Darmon, para. 6, EU:C:1986:233, delivered on June 1986.
[15] M. Gelter, "Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law", in *EU Law Stories*, eds. Fernanda Nicola and Bill Davies, (Cambridge: CUP, 2017), p. 309-337, at p. 324.
[16] Judgment of 27 September 1988, *Daily Mail*, C-81/87, EU:C:1988:456.
[17] *Ibidem*, para. 19.
[18] It must be remarked that, even if the Court did not delve into the possible abuse of freedom of establishment, AG Damon explicitly confronted this possibility in para. 10 and 11 of his Opinion, EU:C:1988:286, delivered on 7 June 1988, claiming that "the fact that the essential activities of a company take place on the territory of a Member State other than that to which it intends to transfer its central management may not be ignored. Such circumstances may, in certain cases, constitute an indication that what is involved is not genuine establishment, in particular when the effect of the transfer of the central management is to cause the company to cease to be subject to legislation which would otherwise apply to it. (...) As a general rule it appears that the national court may assess whether, in a specific case and having regard to the circumstances, there is a suggestion of abuse of a right or circumvention of the law and whether it should decide not to apply Community law".
[19] Judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126.
[20] M. Gelter, *supra* note 15, p. 1.

concerned a company conducting its entire business in Denmark through a branch but incorporated in Britain to escape the Danish minimum share capital requirement. The Court, rejecting the claim of the Danish authorities that had refused to register the branch, held that that operation was covered by freedom of establishment as long as a company registered in a Member State wanted to set up a branch in another, being "immaterial that the company was formed in the first Member State only to establish itself in the second, where its main, or indeed entire, business is to be conducted".[21] In contrast, such an arrangement is precisely what freedom of establishment of companies is meant to allow, which excludes its qualification as "in itself, (…) an abuse of the right of establishment".[22] Interestingly the Court engages with the concept of abuse and adds that even if the host Member State cannot refuse the registration of a branch, it is nonetheless not precluded from adopting any appropriate measure to prevent circumvention of national law (in that case protecting creditors in the Member State of origin).[23] Refusal to registration was simply not proportionate to the purpose of creditors' protection.[24] As a consequence of the "*Centros* triad", one may naturally question the protective measures that remain at the disposal of national legislators to effectively combat claims of real and substantive abuse.[25] That is to say, in what kind of circumstances the host state might impose legitimate restrictions on corporate mobility?

In *Cadbury Schweppes,*[26] the ECJ seemed to suggest that generally speaking artificial arrangements were less likely to be excluded in the context of tax law.[27] The ruling is also engaging on a discussion of the doctrine of abuse of EU law in relation to freedom of establishment of companies, leaning on the judgment (occurred one year after *Centros*) in *Emsland-Stärke*,[28] where the core of the abuse test was established. *Cadbury*

[21] *Centros*, *supra* note 19, para. 17.
[22] *Ibidem*, para. 26-27.
[23] *Ibidem*, para. 38.
[24] See also the Opinion of AG La Pergola, EU:C:1998:380, delivered on 16 July 1998, and Judgment of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512, para. 105, clearly indicating that abuse must be established on a case-by-case basis.
[25] E. Pederzini, *supra* note 8, p. 116.
[26] Judgment of 12 September 2006, *Cadbury Schweppes*, C-196/04, ECLI:EU:C:2006:544.
[27] T. Tridimas, "Abuse of Rights in EU Law: Some Reflections With Particular Reference to Financial Law", in *Prohibition of Abuse of Law: A New General Principle of EU Law?*, eds. S. Vogenauer and R. de la Feria (Oxford: Hart, 2011), p. 169-192 , at p. 178.
[28] Judgment of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695.

Schweppes was a UK company that had set up two subsidiaries in Ireland to benefit from the more favorable Irish tax regime. UK fiscal authorities taxed the profits of the subsidiaries in force of legislation on controlled foreign subsidiaries. Vested in the question, the ECJ held that national law cannot establish a general presumption of tax evasion hindering the exercise of freedom of establishment. Nevertheless, it also added that "a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned".[29] The Court clearly held in this case that the freedom of companies "presupposes actual establishment (…) in the host Member State and the pursuit of genuine economic activity there".[30]

In sum, the exercise of free movement by companies to benefit from a more favorable fiscal or company law regime is entirely legitimate and does not constitute abuse. However, taking improper advantage of EU law is not permitted, therefore a national measure willing to catch wholly artificial arrangements aimed at the circumvention of national legislation is justified. The narrow conceptualization of abuse in free movement is in line with the objectives of the internal market. Firstly, economic integration necessarily entails some degree of deregulation. In addition, regulatory competition is part of the Treaty project and leads to certain economic advantages and legal experimentation, while risks associated with a race to the bottom seem not to have materialized.[31] This overall coherent solution is potentially compromised by *Polbud*.

2.3. Cross-border operations

In *SEVIC Systems*,[32] *Cartesio*[33] , and *VALE Építési*[34], the Court had finally the chance to rule on cross-border operations.

The first judgment interpreted freedom of establishment as encompassing inbound cross-border mergers, ruling that a Member State cannot impede the registration of a company resulting from the merger of one constituted according to its national law and another EU

[29] *Cadbury*, *supra* note 26, para. 51.
[30] *Ibidem*, para. 54.
[31] T. Tridimas, *supra* note 27, p. 174-175.
[32] Judgment of 12 December 2005, *SEVIC Systems*, C-411/03, EU:C:2005:762.
[33] Judgment of 16 December 2008, *Cartesio*, C-210/06, EU:C:2008:723.
[34] Judgment of 12 July 2012, *VALE Építési*, C-378/10, EU:C:2012:440.

company. Moving from the assumption that "the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators",[35] the Court concludes that "cross-border merger operations, like other company transformation operations (…) constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market".[36]

The second ruling, relating to an outbound cross-border conversion, maintains (in continuity with *Daily Mail*) that a Member State can impede a company intending to transfer its real seat in another Member State while retaining the status of company under its national law. However, in an *obiter,* the Court adds that if the conversion had implied the company being subject to the national law of the destination state (in conformity with its legislation), the state of origin would not have disposed of any means to impede it, since the company would be converted into a form governed by the law of the Member State to which it has moved.[37]

The third judgment concerned an inbound cross-border conversion from the point of view of the destination state, and clarifies that it also represents a legitimate exercise of freedom of establishment, therefore the Member State cannot impede cross-border conversions if it allows them internally (*i.e.*, between companies constituted according to national law).[38] This ruling is also relevant because it reaffirms the principle set in *Cadbury Schweppes* according to which the concept of establishment "presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there" beyond the case of tax national legislation.[39]

[35] *SEVIC Systems*, *supra* note 32, para. 18.
[36] *Ibidem*, para. 19.
[37] *Ibidem*, para. 110-111.
[38] *VALE*, *supra* note 34, para. 33: "national legislation which enables national companies to convert, but does not allow companies governed by the law of another Member State to do so, falls within the scope of Articles 49 TFEU and 54 TFEU."
[39] *Ibidem*, para. 34.

3. *Polbud* and its implications, or the triumph of free movement of companies

3.1. Factual background

Polbud was a limited company incorporated under Polish law and established in Poland that decided to carry out a cross-border conversion and transform into a company subject to Luxembourgian law. Having obtained the registration in Luxembourg, it applied for its removal from the Polish register. The application was refused on the grounds that the company had failed to provide certain documents evidencing its liquidation and winding up, which Polish national rules required for de-registration. The action against the refusal reached the Polish Supreme Court, which referred three questions for a preliminary ruling to the Court of Justice essentially regarding the scope of freedom of establishment (does it cover cross-border conversions without transfer of head office?), its compatibility with the national requirement of previous liquidation for the removal from the register and the possible justification of the national measure.

3.2. The Opinion of Advocate General Kokott

Regarding the scope of freedom of establishment, the AG claimed that in case of a cross-border conversion not entailing the actual establishment in the destination Member State freedom of establishment did not apply, being in that sense inherent to this concept the pursuit of a genuine economic activity. This conclusion is supported by the reference to settled case law that interpreted establishment as "the right to participate, on a stable and continuous basis, in the economic life of another Member State and to profit therefrom".[40] More recently, the Court had moreover required "actual establishment" and the pursuit of "genuine economic activity".[41] Explicitly, AG Kokott concludes, as for the question of the scope of the freedom, that "although that freedom gives economic operators in the European Union the right to choose the location of their economic activity, it does not

[40] Opinion of AG Kokott in Case C-106/16, *Polbud*, EU:C:2017:351, delivered on 4 May 2017, para. 33 (referring to the Judgment of 21 June 1974, *Reyners*, C-2/74, EU:C:1974:68, para. 21, and the judgment of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, para. 25.
[41] *Ibidem*, para. 34 (referring to *Cadbury*, *supra* note 26, para 54 and *VALE*, *supra* note 34, para 34 and the judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, para. 51).

give them the right to choose the law applicable to them." A cross-border conversion, not coupled with actual establishment, would just not be covered by the Treaty. Verifying the actual establishment in Luxembourg was a task for the national Court to accomplish. The question of the abuse of EU law, just mentioned by the AG, was of little relevance because the freedom was just deemed inapplicable in the case at hand.[42]

If, contrarily, Polbud was established in Luxembourg, according to the AG, the requirement of liquidation would restrict its freedom of establishment and as regards the last question, the restriction would not be proportionate. Even if the protection of creditors, minority shareholders, and employees are overriding reasons in the public interest, capable of justifying a restriction to the fundamental freedom, the obligation to liquidate a company does not constitute an appropriate means to those ends.[43]

3.3. Judgment

The Grand Chamber of the European Court of Justice did not follow its AG as regards the scope of freedom of establishment, affirming for the first time that cross-border operations are covered by that freedom even if involving only the transfer of registered office and ultimately just motivated by the purpose of changing legal national framework.

To begin with, the Court reminded the national Court that the transfer of the real seat is not a condition for the exercise of freedom of establishment according to Articles 49 and 54 TFEU. As for the judgment in *Daily Mail*, it is just necessary to satisfy the requirements of the destination state to determine the connection of the company with the national legal order.[44] By analogy with *Centros*, where a company was incorporated in a Member State for the sole purpose of setting up a branch in a second Member State and conducting all its business, "a situation in which a company formed in accordance with the legislation of one Member State wants to convert itself into a company under the law of another Member State, with due regard to the [requirements of] the second Member State (…) falls within the scope of freedom of establishment, even though that company conducts its main, if not entire, business in the first Member State".[45] Equally, Polbud's operation

[42] *Ibidem*, para. 53-55.
[43] *Ibidem* para. 66.
[44] *Polbud*, *supra* note 5, para. 34-35.
[45] *Polbud*, *supra* note 5, para. 38.

wouldn't constitute abuse. Member States can always adopt measures to prevent abuse of EU law aimed at evading domestic legislation, but the fact that a company establishes its registered office or its head office in another Member State to benefit from its legislation cannot in itself be regarded as abusive.[46]

As to the restriction of freedom of establishment, the requirement to liquidate the company essentially prevents the possibility of cross-border conversion and therefore constitutes such a restriction.[47]

Finally, and following the AG (as for the second question), the Court held that such a restriction would be admissible only if justified by overriding reasons in the public interest, that the protection of creditors, minority shareholders, and employees did constitute such reasons but that the measure (mandatory liquidation) went beyond what was necessary to achieve their protection.[48]

3.4. Last developments

The approach in *Polbud* was just confirmed by the Third Chamber of the ECJ on 25 April 2024 in *Edil Work*.[49] The case regarded an Italian company that transferred its registered office to Luxembourg while continuing its economic activities in Italy. The main point on which the Suprema Corte asked for interpretative guidance regards the legality of management decisions under a conflict rule that imposed the application of Italian law to a company registered elsewhere but primarily operating in Italy. The Court of Justice considered such legislation in breach of freedom of establishment.[50] Firstly, referring to *Polbud*, it found that the situation at issue is covered by freedom of establishment. Furthermore, despite overriding reasons for creditors, minority shareholders and employees, the ECJ found the restriction disproportionate. Finally, the Court dealt with the argument raised by the Italian Government according to which the Italian rule was intended to combat abusive practices by preventing wholly artificial arrangements that do not reflect economic reality. Confirming again its case law (and particularly *Polbud*),

[46] *Ibidem*, para. 39-40; see also *Centros*, *supra* note 19, para. 27.
[47] *Polbud*, *supra* note 5, para. 51.
[48] *Ibidem*, para. 54-58.
[49] *Edil Work*, *supra* note 7.
[50] *Ibidem*, para. 28.

the ECJ ruled that free movement aimed to benefit from more favorable legislation does not constitute in itself abuse[51] and that Member States, although formally free to adopt legislation against abuse, cannot legitimately establish general presumptions.[52] The Italian rule at issue, applying systematically to any act of a company established elsewhere but carrying out its business in Italy, amounted to a general presumption of abuse and was therefore disproportionate and in breach of Articles 49 and 54 TFEU.

The ruling confirms the disconnection between establishment and genuine economic activity. If *Polbud*, on the point, could have been considered not fully coherent with systematic analysis, the last ruling in April undoubtedly consolidates the way now the Court conceptualizes freedom of establishment of companies.

3.5. Implications of Polbud

The judgment received several comments from national law and EU law jurists,[53] thus this paper will focus on the aspects concerning the abuse of rights.

3.5.1. *Polbud* and *Centros*

Firstly, and foremost, the judgment clarified the scope of the freedom and its applicability to "isolated cross-border conversions", *i.e.*, those conversions that do not entail the transfer of the real seat or economic activity. Before *Polbud*, *Cartesio* and especially *VALE* had suggested, contrarily, that only "physical cross-border conversions" were covered.

This conclusion may not be entirely consistent with previous case law, and authors here tend to diverge. *Prima facie*, it seems reasonable to assert that, if anything, the conclusion in *Polbud* logically builds upon the foundation posed by *Centros*. If a company can establish itself in a state and conduct its business entirely in another state where a branch

[51] *Ibidem*, para. 47.
[52] *Ibidem*, para. 48.
[53] For bibliography, see among others M. Fallon, E. Navez, "La transformation transfrontalière d'une société par transfert du siège statutaire après l'arrêt Polbud", *Revue pratique des sociétés - Tijdschrift voor rechtspersoon en vennootschap*, n. 5 (2018), p. 349-385; I. M. Barsan, "Que reste-t-il du critère du siège social réel après l'arrêt Polbud", *Europe*, Etude 1 (2018), p. 6-13; J. Meeusen, "Freedom of establishment, conflict of laws and the transfer of a company's registered office : towards full cross-border corporate mobility in the internal market ?", *Journ. Pr. Int. Law* 13, no. 2 (2017), p. 294-323; C. Gerner—Beuerle, F. Mucciarelli, E. Schuster et M. Siems, "Cross-border reincorporations in the European Union : the case for comprehensive harmonization", *Journal of Corporate Law Studies* 18, no. 1 (2017), p. 1-42.

has been opened, a pre-existing company should be equally entitled to benefit from more favorable legislation through a cross-border conversion.[54] Following this line of reasoning, *Polbud* does not surpass *Centros* but essentially broadens its implications from secondary to primary establishment, envisaging an equal regime for both ways of exercising the economic freedom. This argument is correct, but it only addresses the issue partially. Looking back to the facts of the cases, there is a significant distinction that the Court seems to have overlooked. In *Centros* (where a branch registration of a UK company was denied in Denmark), the company sought to establish its entire economic activity in the host state (Denmark). Thus, the refusal by national authorities truly hindered the company from establishing a genuine economic activity across borders. Conversely, in *Polbud*, the Polish company did not aim to transfer its economic activities to Luxembourg, but simply to change applicable legislation (in other words, with legal, rather than economic consequences).[55] *Centros* and *Polbud* might be assimilated as both companies aimed to benefit from more favorable company law, but while the former intended to actually establish in a different Member State, this is not the case for the latter. Hence, what is the notion, and what are the limits of freedom of establishment? What purpose does the economic freedom serve in the constitutional design of the internal market?[56] Moreover, the cases differ from the point of view of stakeholders. *Centros* was a newly established company, and as the ECJ itself observed, the protection of potential creditors (and other stakeholders) might have been ensured with proper disclosure of its foreign origin and applicable company law.[57] In contrast, Polbud already had creditors (employees, etc.) contractually linked with the company in the country of origin and in need of protection, as the law applicable to them would have changed after the contractual obligation arose.[58]

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[54] M. Szydlo, "Cross-Border Conversion of Companies under Freedom of Establishment: *Polbud* and Beyond", CMLR, 55, no. 5 (2018), p. 1549-1572, at p. 1560.
[55] A. Mucha and K. Oplustil, "Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud", in ECFR, 15, no. 2 (2018), p. 270-307, at p. 296.
[56] See *infra* §3.5.4.
[57] But see T. Tridimas, *supra* note 27, p. 177, highlighting that to facilitate free movement, the judgment makes transfers greater risk to creditors.
[58] A. Mucha and K. Oplustil, *supra* note 55, p. 297.

3.5.2. *Polbud*, *VALE*, and *Cadbury*

Reconciliating *Polbud* with *VALE* and *Cadbury Schweppes* might also pose difficulties. As regards *VALE*, as also claimed by the AG, that judgment (together with *AGET Iraklis* and the others mentioned by AG Kokott) explicitly implies the actual pursuit of economic activity as a precondition for the establishment itself to be identified. The argument according to which in force of the conversion the home state becomes, suddenly, the host state and vice versa, in not convincing.[59] The identification of home and host state must be linked to the company's relocation, which is indeed under the legal assessment of the European Court, rather than to the desired destination of the company's business projects. As regards *Cadbury Schweppes*, a narrower or wider extension of the notion of abuse and of "wholly artificial arrangements" could in this respect be justified in the light of the different areas of national law concerned. *Centros*/*Polbud* regard the evasion of national company law, while *Cadbury Schweppes* entails a possible circumvention of national fiscal measures. It has been argued that the risk of harm is higher in the latter case potentially involving a wider set of persons and interests, or that this jurisprudence reflects the legislative position. The legislator, by the time, had not adopted any provision to combat letterbox companies aimed at circumventing national company law, but had more seriously engaged in the fight to tax evasion.[60] One could add that, traditionally, fiscal measures lie at the heart of national competence, and therefore the Court has conceptualized abuse in a wider fashion to guarantee a broader space for Member States' interests protection. Despite the national sovereignty considerations, this argument cannot be accepted from a strictly legal perspective, as the notion of abuse of freedom of establishment depends on the limits of the EU right abused, rather than on the area of national legislation that is supposedly evaded. [61]

[59] As it seems to suggest, if the reading of the author is correct, M. Szylo, *supra* note 54, p. 1559, claiming that "a company conducting an isolated cross-border conversion, like Polbud, seeks to pursue – and indeed does pursue – a genuine and permanent economic activity on a stable basis in the host Member State. The point is that after its conversion, the host Member State becomes its previous home Member State (here, Poland)."
[60] M. Szydlo, *supra* note 54, p. 1568.
[61] See *infra* §6.2.1

3.5.3. *Polbud* and the internal market framework of analysis

Subsequently, the Court considered the restriction of the "fundamental" freedom. In this respect, it suffices to consider that the judgment is harmonious with the orthodox approach. Any measure prohibiting, impeding, or rendering less attractive the exercise of the economic freedom must be considered a restriction.[62]

The same decree of legal orthodoxy is shown at the justification stage, particularly in the use of the principle of proportionality. The measure at hand, establishing a blanket obligation to liquidate the company, could not pass the test as less restrictive measures could have been envisaged. [63]

3.5.4. The dilemma: genuine economic activity

The truth is that the main point of dispute lies in the definition of freedom of establishment. As AG Kokott has pointed out, settled case law indicates that establishment entails the right to participate on a stable and continuous basis in the economic life of another Member State and to profit therefrom. Such participation must consist in the actual pursuit of an economic activity in the destination Member State. According to this perspective, whenever a cross-border operation is not aimed at relocating to a Member State for the genuine exercise of economic activity (and thus resulting in the creation of a wholly artificial arrangement), it is not protected by the Treaty and can constitute abuse, as established in *Cadbury*. Nonetheless, this interpretation conflicts with the one in *Polbud* (confirmed in *Edil Work*), where the ECJ explicitly states that the company can rely on the freedom despite the operation only seeks to the transfer of the registered office. Furthermore, even applying the orthodox framework (restriction to access to the market/justification), preventing only the transfer of the registered office to benefit from more favorable legislation does not "prohibit, impede or render less attractive the exercise of freedom of establishment" if establishment corresponds to a genuine economic activity (as held by AG Kokott).

[62] *Polbud*, *supra* note 5, para. 46.
[63] M. Szydlo, *supra* note 54, p. 1566.

In conclusion, three points can be made. Primarily, the conclusion that establishment is independent of a genuine economic activity does not align with the economic spirit of the TFEU and the overall economic objectives of the EU project.

Secondly, the fact that the interpretation inaugurated by *Polbud* has been reaffirmed in *Edil Work*, suggests that the judgments affirming the inextricable connection of establishment with economic activity have been implicitly and (according to the author, incorrectly) overruled.

Thirdly, the novel approach favors the creation of letterbox companies, demonstrating little regard to the protection of the counter-interests of creditors, minority shareholders, and employees and even posing the risk of companies being used for criminal purposes. From a company law perspective, allowing a company to establish itself in a Member State and then change its legal form to evade home state company law causes the alienation of the benefit of limited liability conferred to the company being alienated from the obligations that the state conferring such a benefit regards as its natural counterpart. It is not clear how this can be considered as promoting the internal market. This solution appears excessively market-oriented and, while it would have been reasonable in the context of completing market integration, it seems less so in a legal system that has progressively assimilated non-market values and the compelling need of protecting fundamental rights.

It was evident from the outset that *Polbud* would have paved the way for more regulatory competition, law shopping, and increased risks for the protection of stakeholders, particularly in those Member States lacking specific rules for cross-border conversions. This made legislative intervention imperative. At least, *Polbud* had clarified that cross-border corporate conversions fell within the scope of freedom of establishment, indirectly implying EU competence according to Article 50 TFEU. The judgment is explicitly referenced by the Commission in the Directive proposal, beyond the clarification of the scope of the freedom, "the ECJ, being a judiciary organ, may not create any procedure for making such conversions possible or set out the related substantive conditions".[64] The Court, in other words, had given the input for the legislator to take action,

[64] Commission proposal, *supra* note 6, p. 3.

counterweighting the effects of uncontrolled corporate transfers, as resulting from the rulings, with guarantees and limitations inspired by a social view of the European market.

4. Legislative intervention, or some restored protection of stakeholders

The Explanatory Memorandum adds that, according to the judgment, in the absence of EU harmonization of cross-border conversions, national legislators may adopt measures of protection of minority shareholders, creditors, and workers, but it would still be necessary to assess on a case-by-case basis the compliance of these rules with freedom of establishment. This outcome was unsatisfactory in terms of legal certainty and has repercussions on companies, stakeholders, and national authorities. At the same time, it could lead to an increased use of letterbox companies for fraudulent or even criminal purposes. Not secondarily, as stemming from the 8th principle of the Pillar of European Social Rights,[65] workers' information and consultation in good time on matters related to corporate mobility represents and indefeasible feature of the EU social construction. Shortly, the Directive aims at a two-fold objective: enabling companies to restructure efficiently and effectively while protecting stakeholders.[66] The same logic applies to cross-border divisions, which also lacked a harmonized legal framework, and to cross-border mergers, already harmonized with Directive 2005/56, whose shortcomings are addressed by the current Proposal. Cross-border operations are now coherently systematized in one legislative instrument. After an overview of the procedural mechanism established by the Directive, this paper will focus on how the EU legislator deals (for the first time at the secondary law level) with the category of abuse.

4.1. Directive 2019/2121: an overview

Directive 2019/2121 amends Directive 2017/1132 (originally regulating only cross-border mergers) as regards cross-border conversions, mergers, and divisions of limited liability companies. It provides a detailed common procedural framework for relocations and establishes stakeholders' protection mechanisms.

[65] European Parliament and Council of the European Union, The European Pillar of Social Rights in 20 Principles, proclaimed and signed on 17 November 2017, retrieved 25 Aprile 2024, https://ec.europa.eu/social/main.jsp?catId=1606&langId=en
[66] Commission proposal, *supra* note 6, p. 3.

To begin with, at the beginning of the procedure, the company is supposed to draw up and disclose the draft terms for the proposed operation, with a minimal informative content. In addition, it must prepare a report with specific information for members (shareholders) and employees, explain the legal and economic aspects of the operation, as well as its implication on employees and the future business of the company. An independent expert will then examine the draft terms.

Subsequently, the draft terms and the reports are then transmitted to the general meeting of the members of the company for approval by a solid majority. Member States must establish specific normative guarantees for stakeholders: rights to exit and cash compensation at least for shareholders who voted against the approval of the draft terms; for creditors, a two-year protection period for filing a claim in the departure Member State and a declaration of solvency by the company under personal liability of the board for its accuracy; for employees, rights to be informed and consulted and specific procedural guarantees if the company had implemented an employee participation system to preserve the exercise of the rights of participation.

The next step is an *ex-ante* public control of the operation, consisting in the competent authority issuing a "pre-operation certificate", a necessary condition for the destination state to approve the operation. The authority designated by the Member State of origin issues the certificate after having scrutinized the legality of the operation, and assesses compliance with all relevant conditions, procedures, and formalities. The decision must be taken within three months, unless the competent authority has serious doubts indicating that the operation is set up for abusive purposes leading to the circumvention of Union or national law, according to the criteria specified by the Directive. In that case, the authorization is subject to additional investigations. At this stage, the authority shall be provided with the possibility to recur to an independent expert.

If the certificate is issued, it is to the destination Member State's competent authorities to verify that their legal requirements for registration are fulfilled and, if so, proceed with the registration of the company. The information contained in the pre-operation certificate cannot be disputed. With the registration in the destination state, the operation is perfected, and it cannot be declared null and void. However, such effects are without prejudice to Member States' powers, concerning sensitive matters, to adopt measures and

penalties against abusive or criminal operations, especially in case of new substantive information. Finally, and giving expression to the overarching principle of effective judicial protection, Recital (40) of the Directive requires Member States to ensure possibility of reviewing the decisions of the competent authorities in the proceedings concerning cross-border operations. The reviewability of authorities' assessment is particularly relevant in the context of the denial of pre-operation certificate. In that case, naturally, the conditions set up for authorizing the operation will be subject to judicial control.

4.2. The notion of abuse

The Directive identifies two stages of the procedure for Member States to address potential abuses. The first and most relevant is undoubtedly the assessment of the authority of the departure Member State aimed at issuing the pre-operation certificate. The second is residual, it has the function of a last resort and tasks the authorities of the destination Member State with taking measures to tackle specific risks on the ground of the new information emerged. This last clause is phrased in general terms, while much more legislative guidance is given for the pre-operation assessment. The legislator entrusts therefore mainly the departure state authority with preventing abuse.

Article 86m (for pre-conversion certificate, and articles 127 and 160m *verbatim* for pre-merger and pre-division certificates) provides:

(8) Member States shall ensure that the competent authority does not issue the pre-conversion certificate where it is determined *in compliance with national law* that a cross-border conversion is set up for *abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law*, or for criminal purposes. (emphasis added)

(9) Where the competent authority, during the scrutiny referred to in paragraph 1, has serious doubts indicating that the cross-border conversion is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, *it shall take into consideration relevant facts and circumstances*, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware, in the course of the scrutiny referred

to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a *case-by-case basis*, through a *procedure governed by national law*. (emphasis added)

Interpretative support can be found in the Preamble. Recital (35) emphasizes the importance of counteracting "shell" or "front" companies set up for evading, circumventing, or infringing Union or national law. Recital (36) provides useful guidance for the assessment of abuse by national authorities, requiring considering all relevant facts and circumstances and providing for indicative factors.[67] As mentioned above, the recourse to a judge is always guaranteed, in light of the general principle recalled by Recital (40). If the company is denied the certificate on the ground of alleged abusive purposes, it will be for the judge to examine the allegations.

In conclusion, EU law now appropriately addresses the abuse of corporate mobility and freedom of establishment by placing responsibility on the departure Member State, which is perceived as the jurisdiction more vulnerable to potential abuse, being the country from which the company is relocating. However, despite the interpretative guidance delivered in the Preamble, the Directive lacks any definition of abuse and therefore a uniform notion for the legislators and national courts to rely on. The ambiguity of the anti-abuse clause introduces legal uncertainty and grants very broad discretion to national authorities, raising concerns regarding the potential abuse of the anti-abuse clause itself and, even more relevantly, the concrete possibility of diverging practices in the Member States.[68] Such ambiguities are very likely to result in preliminary ruling proceedings before the European Court of Justice. Furthermore, the possibility of an in-depth assessment poses the risk of prolonging procedures and increasing the workload of the national authorities. Specifically, regarding the anti-abuse clause, questions arise as to whether the solution is in itself reasonable and proportionate, given the very comprehensive tools in place for the protection of stakeholders.[69] Another critique regards the suitability of company law for achieving anti-abuse objectives, which might

[67] See *infra* §6.2.1.
[68] J. Schmidt, "The Mobility Aspects of the EU Commission's Company Law Package: Or – 'The Good, the Bad and the Ugly'', *ECL Journal*, 16, no. 1 (2019), p. 13–17, at p. 15.
[69] *Ibidem*.

arguably be better addressed through specific sectoral instruments (tax, financial, and competition law).[70]

5. *Interim* conclusions

The ruling in *Polbud*, in essence, extends the deregulatory rationale of *Centros* to primary establishment, particularly concerning cross-border conversions. It represents the culmination of a jurisprudence rooted in a market-oriented logic, aimed at fostering corporate mobility within the internal market. EU primary law grants companies the freedom to pursue favorable legislation, whether through cross-border operation or establishing branches in different Member States. Following *Polbud*, this pursuit is disconnected from genuine establishment, as conducting actual economic activity in the destination state is no longer a prerequisite for the legitimate exercise of the economic freedom. However, while the case law has generally acknowledged Member States' authority to prevent abusive operations, a general presumption of abuse is not admitted. The prevention of abuse of EU law is typically addressed by the ECJ at the justification stage, where national measures aimed at preventing the abuse of freedom of establishment will be assessed through the lens of proportionality and on a case-by-case basis. Nonetheless, as the case law stands, there remains legal uncertainty regarding which measures will be deemed legitimate in preventing abuse freedom, and the Directive on cross-border operations lacks a precise definition of such abuse.

To sum up, Member States remain with two avenues to restrict freedom of establishment of companies. The first entails the enduring lasting power of the destination state to freely determine the connecting factor for a company's incorporation and consequent subjection to its laws, as established in *Daily Mail*. The second is the doctrine of abuse of EU law.

As national authorities and courts begin or will soon start to interpret national transposition measures, they will all be confronted with the question of how to define abuse of corporate mobility and may refer interpretative questions to the ECJ. Therefore, it is appropriate to conceptualize the category of abuse of freedom of establishment to

[70] S. M. Bartman, "The Adopted Proposal for an EU Directive on Cross-Border Operations: A Realistic Compromise", *ECL Journal*, 16, no. 5 (2019), p. 140–142, at p. 141.

address the forthcoming complexities that Directive 2019/2121 will present in national jurisdictions. Methodologically, a premise is necessary. The Directive, as noted earlier, establishes a procedural framework for cross-border operations but lacks a definition of abuse. In this regard, secondary law must be regarded as exercising a signaling function, without adding substantive content. Despite criticism, this outcome is not necessarily undesirable. Ultimately, general clauses address the need for flexibility in a legal system, and their potential would not be fully accomplished if they were crystalized by secondary law. Institutionally, one precise function of the judiciary is to interpret general clauses, aligning them harmoniously with the constitutional framework. Therefore, coherent delineation of the category must be grounded on primary law. Such a conceptualization would address an aspect but never comprehensively dealt with by the Court and serve as guidance for national authorities and courts interpreting and applying the transposition measures of the Directive.

6. Towards a uniform doctrine of abuse of establishment of companies

6.1. The general principle of abuse in EU law: overview

The general principle of abuse of law[71] is a newcomer in EU law. The Court developed general principles to fill the gaps in the Treaty on the basis of the rule of law to protect individuals from public power. The principle of abuse in this sense is a peculiar one because it stems from private continental law and is addressed to prevent a person from deriving a benefit from a rule that pursues ends lying beyond its objectives, even though formally complying with it. It is a principle against the circumvention of the law, relatively new for the EU legal system because, at an early stage, in the context of the internal market, the Court opted for a broad definition of the fundamental freedoms. However, a more mature EU legal order, the proliferation of EU rights and legislation, and litigants trying to stretch to the maximum the scope of the economic freedoms made the doctrine evolve. To establish that a right is being abused, is firstly necessary to determine its

[71] For bibliography, see among others S. Vogenauer and R. de la Feria, *supra* note 27; R. N. Ionescu, *L'abus de Droit En Droit de l'Union Européenne* (Bruxelles: Bruylant, 2012).

boundaries, inquiring the objectives of the relative provision, and determining what interests are thereby given protection.[72]

In *Emsland-Stärke*[73] the Court developed a general test to find abuse that is still good law. The test requires first a combination of "objective circumstances in which, despite formal observance of the conditions laid down by the rules, the purpose of those rules has not been achieved". That is an analysis of the purpose of the potentially abused EU rights and its genuine achievement. Secondly, there must be a "subjective element consisting in the intention to obtain an advantage from the rules by creating artificially the conditions laid down for obtaining it". This second element stresses the intention of the individual trying to rely on EU law. Even if, according to the case law, motives for exercising free movement are irrelevant,[74] in the context of abuse they are part of the appraisal.

In *Kofoed,*[75] the ECJ confirmed that the prohibition of abuse of rights is a general principle of EU law. In *Cussens*,[76] the ECJ established that it "displays the general, comprehensive character which is naturally inherent in general principles of EU law", This statement was then consecrated by the three judgments of the Grand Chamber in *Altun*,[77] *T Danmark*[78] , and *N Luxembourg 1.*[79]

As for the articulation of the test, the general framework of *Emsland-Stärke* is not always respected. In some free movement cases, the ECJ has found a restriction and then assessed whether the restriction was justified by the objective of preventing abuse, focusing after on whether the national measure is aimed at wholly artificial arrangements and on its proportionality.[80] This is also the approach prevalently used for the

[72] T. Tridimas, *supra* note 27, p. 164-167.
[73] *Emsland-Stärke*, *supra* note 28.
[74] See, among others, Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639.
[75] Judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, para. 38.
[76] Judgment of 22 November 2017, *Cussens*, C-251/16, EU:C:2017:881.
[77] Judgment of 6 February 2018, *Altun*, C-359/16, EU:C:2018:63.
[78] Judgment of 26 February 2019, *T Danmark*, Joined Cases C-116/16 and C-117/16, EU:C:2019:135.
[79] Judgment of 26 February 2019, *N Luxembourg 1*, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134.
[80] G. Butler and K. E. Sørensen, "The Prohibition of Abuse of EU Law: A Special General Principle", in *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe*, eds. K. S. Ziegler, P. J. Neuvonen and V. Moreno-Lax, (Cheltenham: Edward Elgar Publishing, 2022), p. 402-422), at p. 409.

establishment of companies.[81] There is however a close similarity in the wholly artificial arrangement test and the two-fold examination of *Emsland-Stärke*,[82] as exemplified by *Cadbury*, where the ECJ claims that "in order to find that there is such an arrangement there must be, in addition to a *subjective element* consisting in the intention to obtain a tax advantage, *objective circumstances* showing that, despite formal observance of the conditions laid down by [EU] law, the objective pursued by freedom of establishment (…) has not been achieved" (emphasis added).[83]

Lastly, the general principle, as such, even though mostly developed in the area of free movement, applies to all areas of EU law. It could be also considered reflected in the "misuse of powers" ground of review of Article 263 TFEU, or in the *Foglia/Novello* doctrine[84] according to which the ECJ can refuse to give preliminary rulings where the question essentially corresponds to a misuse of the institution because the controversy was artificially established.

Given this short overview, applying the case law on the general principle of prohibition of EU law to the fragmentary references made to it in the case law of freedom of establishment of companies can constitute a useful tool to shed light on this notion, and an interpretative guidance for the application of Directive 2019/2121 in national legal systems. This approach is coherent with the inherent function of general principles of filling the gaps and providing for interpretative consistency. In doing so, one might identify three kinds of issues worth analyzing, namely substantive, procedural, and operative issues.

6.2. The general principle of abuse and corporate mobility: substantive issues

6.2.1. The objective element

When assessing if a case of corporate transfer constitutes an abuse of freedom of establishment one might first consider whether the purpose of Articles 49 and 54 TFEU, despite formal observance, has been veritably achieved. The question looks back at the

[81] See *supra*, §2.
[82] G. Butler and K. E. Sørensen, *supra* note 80, at p. 409.
[83] *Cadbury Schweppes*, *supra* note 26, para. 51.
[84] Judgment of 11 March 1980, *Foglia v Novello*, C-104/79, EU:C:1980:73 and Judgment of 16 December 1981, *Foglia v Novello II*, C-244/88, EU:C:1981:302.

debate on the purpose of freedom of establishment. The approach that ties the freedom with the exercise of a genuine economic activity appears to align more closely with established case law and the overarching framework of the Treaties and the EU integration project.

Building upon this perspective, whenever a cross-border operation is not intended to relocate to a Member State for the genuine purpose of conducting economic activity (thus resulting in the creation of a wholly artificial arrangement), the objective element of the abuse test would be satisfied. The Court provided some guidance in *Cadbury*, indicating this finding had to be grounded on objective factors, ascertainable by third parties, concerning the extent to which the company physically existed in terms of premises, staff, and equipment; if from those factors the company was found to be a fictitious establishment, not carrying out any genuine economic activity in the destination country, the cross-border operation should have been regarded as an artificial arrangement.[85]

However, in the light of *Polbud* and *Edil Work*, the opposite solution is now deemed preferable by the Court: freedom of establishment is independent of the economic activity. In other words, the freedom would safeguard the pursuit of more favorable legislation even in the presence of an economic link, necessitating a different articulation of the *Emsländ*-test. To meet the objective test for abuse, it would be necessary for the operation to be conducted specifically for circumventing national laws protecting creditors, minority shareholders, and employees, or in violation of national criminal law. This significantly narrows the margins for identifying abuse of EU law.

Regardless of the approach, the test remains somewhat abstract. An enhancement to the objective element of abuse would be the identification of indicative factors to assist national Courts in determining that the objectives of the Treaty freedom are being circumvented. The Court has already provided such guidance (in the context of tax law) in *T Danmark* and *N Luxembourg 1*, two landmark cases regarding multi-tiered group structures and coordinated financing arrangements supposedly aimed to tax avoidance. The Danish tax authorities disputed the grant of a fiscal exemption on the grounds that the foreign entities legally entitled in force of Directive 2003/49 were conduit companies.

[85] *Cadbury Schweppes*, *supra* note 26, para. 67-68.

Addressing the doctrine of abuse and the *Emsland test*, the Grand Chamber considered that an examination of all the relevant facts and circumstances is needed to establish whether the operators carried out "purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefitting from an improper advantage".[86] While it is indeed the responsibility of the national court to evaluate the pertinent facts in the main proceedings, the ECJ has provided certain indicators or criteria: a general assessment of the "absence of actual economic activity, *in the light of the specific features of the economic activity in question*" (emphasis added) is required, rooted on "an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has".[87]

These cases can contribute to the evolution of the abuse doctrine within the realm of company establishment, but directly transposing the indicative factors developed therein is not practicable. The call for a "spill-over effect" of these judgments onto the domain of companies is not accurate, as the definition of abuse is contingent upon the scope of the right under consideration. Therefore, a distinct right would entail a different definition of abuse. As also claimed by AG Bobek in *Cussens*, the principle is not monolithic and it's subject to adaptations to the specific field of EU law to which it is applied.[88] However, at the methodological level, this approach clarifies the criteria for identifying the objective element of abuse and is extremely welcome in terms of legal certainty. Building on this methodology, and in some way complementing *Carbury*, the ECJ, if and when called upon, could similarly offer indicative factors for abusive establishment, in a guidance case.[89] The legislator has conveniently elaborated some in Directive 2019/2121,

[86] *T Danmark*, *supra* note 78, para. 98.
[87] *N Luxembourg 1*, *supra* note 79, para. 131 and *T Danmark*, *supra* note 78, para. 104.
[88] Opinion of AG Bobek in *Cussens*, *supra* note 76, delivered on 7 September 2017, EU:C:2017:648, para. 28-29, even thought this was clear at least since Opinion of AG Tesauro in Case C-367/96, *Kefalas*, delivered on 4 February 1998, EU:C:1998:41, para. 25 and Opinion of AG La Pergola in *Centros*, *supra* note 19, para. 20.
[89] For the distinction between ECJ ruling based on their degree of specificity, see T. Tridimas, "Constitutional review of Member States action The Virtues and Vices of an Incomplete Jurisdiction", International *Journal of Constitutional Law* 9, no. 3–4 (2011), p. 737–56.

particularly in Recital (36),[90] which refers to "the characteristics of the establishment" pursued through the operation, "including the intention of the operator, the sector, the investment, the net turnover and profit or loss, the number of employees, the composition of the balance sheet, the tax residence, the assets and their location, equipment, the beneficial owners of the company, the habitual place of work of the employees, the place where social contributions are due", the number of posted employees or employees "working simultaneously in more than one Member State", and "the commercial risks assumed by the company or the companies before and after the cross-border operation". Eventually, if the cross-border operation were to lead to the company having its effective management or economic activity in the Member State where it is to be registered afterwards, "that would be an indication of an absence of circumstances leading to abuse or fraud". This last part is particularly interesting as it sets up a rebuttable presumption of non-abusive arrangement whenever there is an actual economic link with the destination Member State, in formal compliance with *Polbud*, but qualifying it with the aversion towards letterbox companies. The legislative position, even if strangely relegated in the Preamble alone, makes furtherly questionable and probably worth reconsidering the solution taken by the Court in *Polbud*.

6.2.2. The subjective element

Regarding the second element of the abuse test, the focus is on the intention of the individual invoking EU law. Despite the case law on free movement that has traditionally deemed motives irrelevant, when applying the general principle intentions matter. However, generally, the Court focuses on objective evidence (for which, before the ECJ, the burden falls on the Member State) and particularly on the existence of artificial arrangements.[91] This qualification of the original test has probably its roots in the Opinion of AG Maduro in *Halifax*,[92] and is correct as it focuses on the objective elements of artificiality rather than purely volatile motives. The analysis, in other words, would be

[90] It is interesting to note that this provision, originally included in the text of the Directive in the Commission's Proposal, was moved to the Recitals by the legislator.
[91] G. Butler and K. E. Sørensen, *supra* note 80, at p. 410.
[92] Opinion of AG Poiares Maduro in Case C-255/02, *Halifax*, EU:C:2005:200, delivered on 7 April 2005.

preferably grounded on the abovementioned objective indicators of circumvention and artificiality.

6.3. The general principle of abuse and corporate mobility: procedural issues

The ECJ has also developed a procedural dimension of the principle of abuse. In *Cadbury*, for instance, it clarified that the undertaking "must be given an opportunity to produce evidence" of real establishment (linked to a genuine activity) and that in assessing such evidence national authorities may resort to collaboration procedures with other Member States' administrations.[93] *Kratzer* made clear that the objective and subjective element are verified by the national court "in accordance with the rules of evidence of national law", provided that "the effectiveness of EU law is not undermined". If "it appears objectively (…) that despite formal compliance" with the relevant EU rules the objectives of those rules have not been achieved, reliance on the protection of EU rights must be regarded as abusive.[94] In *Altun*, a case regarding social security schemes, the Grand Chamber furthermore ruled that findings of abuse must be "based on a consistent body of evidence", that in case of exchange of information, the national authority has the duty to review such evidence based on the principle of sincere cooperation and in a reasonable time, and that in any case, "it must be possible for that evidence to be relied on in judicial proceedings". This last finding reflects the right of effective judicial protection accorded by Article 47 of the Charter of Fundamental Rights, even if the ECJ does not explicitly refer to it. Essentially, individuals allegedly abusing EU law must be afforded the opportunity to challenge the evidence, while upholding the guarantees inherent to the right to a fair trial.[95] As for the burden of proof of abuse, the case law on freedom of establishment has not explicitly dealt with the question.[96] However, the Directive on cross-border operations expresses the precise choice of the legislator to leave the matter

[93] *Cadbury*, *supra* note 26, para. 70-71.
[94] Judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, para. 42-43.
[95] *Altun*, *supra* note 77, para. 50 and 54-56.
[96] For direct taxation, see J.F.P. Nogueira, "Abuse, proportionality and the burden of proof in CJEU's case law on direct taxation", in *Taxes Crossing Borders (and Tax Professors Too) - Liber Amicorum Prof. Dr R.G. Prokisch*, eds.,1st ed. (Maastricht: Maastricht University Press, 2022), retrieved 25 April 2024, https://pubpub.maastrichtuniversitypress.nl/pub/abuse-proportionality-and-the-burden-of-proof-in-cjeus-case-law-on-direct-taxation/release/2?readingCollection=77e3489e.

to national procedural law, as Articles 86m(9), 127(9) and 169(9) regarding pre-operations certificates provide: "The assessment for the purposes of this paragraph shall be conducted on a case by case basis, *through a procedure governed by national law*". Naturally, national procedural autonomy is subject to the principles of equivalence and effectiveness.[97]

6.4. The general principle of abuse and corporate mobility: operational issues

At the operational level, preliminary rulings for a clarification of the notion of abuse of freedom of establishment might reach the ECJ via two different routes. The first case regards operations covered by the Directive and would require the Court to interpret the Directive in light of primary law, namely the fundamental freedom and the general principle of abuse of law.

The same framework remains valuable outside the scope of application of the Directive as well. Even if it regulates the main cross-border operations, the Directive does not cover divisions by acquisition or hive-downs. Additionally, it is only applicable to limited liability companies, while freedom of establishment (and corporate mobility) is enjoyed by all legal entities within the meaning of Article 54 TFEU, as partnerships. In both cases, the "existence of a real practical and economic need can hardly be denied".[98] The scenario of corporate mobility not regulated by the Directive is therefore still possible and needs to be addressed, for the sake of the unity of the solution proposed. This latter case will be dealt by the ECJ through the orthodox framework for assessing the compatibility of national measures with the economic freedoms: broad definition of restriction, justification, proportionality.

6.4.1. Interpreting the Directive through the general principle

Secondary law can either fully harmonize the notion of abuse in a given field, or require, or allow Member States to introduce anti-abuse provisions.[99] In the case of cross-border operations, Member States were required to do so. The adoption of secondary legislation

[97] See, *ex multis*, P. Craig and G. De Búrca, *supra* note 1, p. 276-288; F. Martucci, *Droit de l'Union Européenne*, 2nd ed. (Paris: Dalloz, 2019), p. 690-693.
[98] J. Schmidt, *supra* note 68, p. 13.
[99] G. Butler and K. E. Sørensen, *supra* note 80, p. 417-418.

by no means makes the general principle and its interpretative gap-filling function superfluous, especially if, as in the case at stake, secondary legislation just refers generally to the concept of abuse. On the contrary, a sample examination of the implementing measures shows that national legislators have limited their selves to replicating almost *verbatim* the anti-abuse clause of the Directive.[100]

As previously mentioned, it is thus confirmed that national courts will need to recur to EU law for reviewing the abuse appraisal carried out in the context of the pre-operation certificate assessment, as it is still true that the ECJ has yet failed to pronounce a clear and well-founded doctrine of abuse of law in the context of freedom of establishment of legal entities. The conceptualization proposed, combining the relevant case law on freedom of establishment of companies and the distinct features of the general principle of abuse in EU law, addresses the gaps in secondary law. Ideally, the ECJ could establish it in a guidance ruling addressed to national commercial courts called to the application of the transposition measures.

To sum up, the model proposed might develop according to the following hypothesis. A company willing to convert, merge or divide cross border applies for the pre-operation certificate to the national competent authority. The latter, left without decisive interpretative aid by national legislation, refuses to issue the certificate on the ground that the operation is abusive. The company brigs the matter to a national court that, faced with no guidance for the definition of abuse, will most likely refer the question to the ECJ. At this stage, the ECJ will probably need to define once for all the extent of the doctrine of abuse for companies' mobility, given that secondary legislation has meanwhile occurred.

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[100] See, among the other transposition measures of the Directive, Decreto legislativo [legislative decree] 2 marzo 2023, n. 19, Article 29, co. 3, lett. g : "that, based on the information and documents received or acquired, the [operation] is not carried out for manifestly abusive or fraudulent purposes, from which the violation or circumvention of a mandatory rule of Union law or Italian law results, and that it is not aimed at the commission of crimes under Italian law" (author's translation), Code de Commerce, Article L236-42(2°) : "De vérifier que l'opération n'est pas réalisée à des fins abusives ou frauduleuses menant ou visant à se soustraire au droit de l'Union européenne ou au droit français ou à le contourner, ou à des fins criminelles", Umwandlungsgesetz [transformations act], § 316(3) and § 343(3) : "if there are indications that the cross-border [operation] is being carried out for abusive or fraudulent purposes which result or are intended to result in the evasion or avoidance of Union or national law, or for criminal purposes. If such purposes exist, the registration shall be refused" (author's translation), Real Decreto-ley [royal legislative decree] 5/2023, Article 91, "if, as a result of the documentation and information submitted, the Commercial Registrar has reasonable grounds to suspect that the transaction submitted is being carried out for abusive or fraudulent purposes, that its purpose or effect is to circumvent Union or Spanish law, or that it serves criminal purposes" (author's translation).

The ECJ could indicate the following steps to follow. The national court, left aside the motives of the operations, must first focus its analysis on a factual inquiry, based on objective elements, to determine if the company is carrying out purely formal or artificial transactions (lacking any economic and commercial justification, essentially in order to benefit from an undue advantage). For this sake, it will consider, drawing explicitly on the indicative factors in Recital (36) of Directive 2019/2121, the characteristics of the establishment pursued, "the sector, the investment, (…) the number of employees, the composition of the balance sheet, the tax residence, the assets and their location, (…) the habitual place of work of the employees, (…) the place where social contributions are due", the number of posted employees or employees "working simultaneously in more than one Member State", and the "commercial risks assumed by the company or the companies before and after the cross-border operation". Most importantly, "if the operation were to result in the company having its place of effective management or place of economic activity in the Member State in which the company [is] to be registered after the cross-border operation", it is presumed that abuse the is absent. This implies that national authorities must give highly consistent evidence to substantiate any claims of abuse. This presumption is relative, as highlighted by the Directive, and it falls upon the national authority that declined to issue the pre-operation certificate to rebut it. If the relative presumption does not apply, the company should be permitted to present evidence regarding the genuine nature of the operation, in accordance with national procedural regulations.

6.4.2. Residual hypothesis: the orthodox approach revisited

The second hypothesis regards operations not covered by the Directive, either because objectively not contemplated therein or because being carried out by legal entities different than limited liability companies. That case should be dealt by the ECJ according to the orthodox framework of analysis.

In the early case law, the question of abuse was mostly raised in the context of whether the Treaty freedom was applicable at all.[101] In this sense, the principle was operationalized as a form of pre-emption. Over time, the emphasis has increasingly shifted to the justification step, whereby a national measure aimed at preventing abuse must be justified by imperative requirements in the general interest. Such a measure must be deemed suitable for achieving that objective and must not exceed what is necessary to attain it.[102] This approach allowed the Court, both in *Polbud* and *Edil Work*, to subject the national anti-abuse measure to the principle of proportionality and crush down general presumptions of abuse. In addition, applying the principle at this stage could make it possible to weigh and somehow combine it, if the case, with the protection of fundamental rights, by now clearly considered as a possible ground of justification for restricting economic freedoms.[103]

In *Polbud*, the ECJ has explicitly recognized that overriding reasons of public interests include the protection of the interest of workers, minority shareholders, and creditors.[104] The same interests are at the core of the guarantees established by Directive 2019/2121. The abuse of EU law is prevented precisely for guaranteeing the protection of such interests.[105] Moreover, it is settled case law that the exercise of free movement might be restricted for the overarching need of protecting fundamental rights.[106] It seems therefore possible also to combine the application of the general principle with the imperative of the protection of fundamental rights as an additional ground of derogation. This solution guarantees the protection of workers' rights, pursuant to articles 27, 28, 30, and 31 of the

[101] V. Edwards and P. Farmer, "The Concept of Abuse in the Freedom of Establishment of Companies: a Case of Double Standards?", in *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, eds. Anthony Arnull, Piet Eeckhout, and Takis Tridimas, (Oxford: Oxford Academic, 2009), p. 205-227, at p. 208.
[102] *Ibidem*, at p. 215.
[103] See, *ex multis*, P. Craig and G. De Búrca, *supra* note 1, p. 744; P. Van Cleynenbreugel, Droit Matériel de l'Union Européenne : Libertés de Circulation et Marché Intérieur, 2nd ed., (Bruxelles: Larcier, 2023), p. 190-191, 338-339, 372-373.
[104] *Polbud*, *supra* note 5, para. 54.
[105] *Centros*, *supra* note 19, para. 38 and *Polbud*, *supra* note 5, para. 60. In *Polbud* they are addressed as two separate plausible grounds of derogation, while in *Centros*, probably more correctly, they are used together, *i.e.*, the restriction is based on the prevention of abuse of EU law for circumvention of national provisions that protect creditors, workers, etc.
[106] S. Weatherill, ed., "Fundamental Rights and National Identity in the Internal Market", in *The Internal Market as a Legal Concept*, online ed. (Oxford: Oxford Academic, 2017), p. 135-142, at p. 137.

Charter.[107] The Charter, furthermore, reflects the general principle of prohibition of abuse of law in Article 54. This could constitute a decisive interpretative counterweight to the recent tendencies of the case law to protect freedom of establishment beyond its mere quality of economic freedom and in connection with the fundamental right to conduct a business enshrined in Article 16 of the Charter.[108] Article 54, apart from signaling the existence of such a general principle, indeed provides that no right (in our hypothesis, freedom to conduct a business) shall be abused at the expense of any other (in the same hypothesis, social rights).

A final and decisive advantage of the envisaged approach would be the possibility of benefitting from the principle of proportionality when assessing the anti-abuse measure. Proportionality is an instrument of judicial methodology and the main balancing tool in all areas of EU law. It allows the Court to assess the suitability and the necessity of the national (anti-abuse) measures. As a methodological tool, it provides a framework of analysis from which the application of the principle of abuse can benefit. Firstly, it enables the judge to take into account the importance of the right and the public interest pursued by the restriction. Secondly, it incorporates different degrees of scrutiny. Thirdly, in the context of the preliminary reference procedure, when assessing the compatibility of the national measure with Union law, it entails a shared agency basis for the exercise of judicial review as far as the ECJ provides guidelines to the national court but leaves the latter with the ultimate evaluation.[109] This last aspect is decisive, because ultimately it is for the national court to assess the compatibility of EU law, as interpreted by the ECJ, with the national measure.

Nevertheless, the doctrine of abuse is potentially disruptive to the uniform application and the effectiveness of EU law, especially if its application is demanded to national courts, which could thus just prevent the application of the fundamental freedom

[107] As provided by article 51(1) of the Charter and confirmed by the ECJ in Judgment of 26 February 2013, *Akerberg Fransson*, C-617/10, EU:C:2013:105, para. 19-21, Member States are bound to the Charter when implementing Union law, as it would happen in the context of applying the transposition measures of the Directive on cross-border corporate operations.
[108] *AGET Iraklis*, *supra* note 40, para. 90.
[109] T. Tridimas, "The General Principles of Law: Who Needs Them?", *Les Cahiers de Droit*, 52, no. 1 (2015), p. 419-44, at p. 435.

invoking the general principle. It also gives rise to concerns in terms of legal certainty. While providing a clear guideline as how to apply the principle, the Luxembourg Court could orientate the proportionality assessment of national judges and therefore provide an indefeasible counter-balancing device.

Ultimately, the concept of abuse of right underlines the same reasonableness rationale of proportionality, as claimed by AG La Pergola in *Centros*.[110] They both carry an idea of excess: the right ceases to be protected where exercised in a disproportionate manner.[111] Yet, in EU law doctrine of abuse seizes private conduct, while proportionality is a form of control of public power.

Returning to the potentially disruptive nature of the doctrine of abuse, the ECJ has traditionally required the case-by-case assessment of national anti-abuse measures protecting EU law from being incorrectly disapplied. This was recently made clear for instance in *SEGRO*,[112] a case concerned with the free movement of capital, where the ECJ held that, to comply with the principle of proportionality, a national anti-abuse measure should enable the national court to carry out a case-by-case examination, having regard to the particular features of each case and taking objective elements as a basis of the assessment.

7. Conclusions

Since *Centros*, through Treaty amendments, proliferation of Union competences and the entry into force of the Charter, the EU has transcended its initial role as project of mere market integration. Accordingly, there arises a necessity for a shift in the interpretation of market freedoms, coupled with an enhanced awareness about the role of companies in the European "social market". While it remains true that many national measures brought before the Court were undoubtedly disproportionate and detrimental to the market, the disconnection of establishment from the pursuit of genuine economic activity, as determined in *Polbud* and confirmed in *Edil Work*, is not entirely comprehensible.

[110] Opinion of AG La Pergola in *Centros*, *supra* note 24, para. 20.
[111] L. N. Brown, "Is there a General Principle of Abuse of Rights in European Community Law?", in *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, eds. D. Curtin and T. Heukcls (Dordrecht, 1994), p. 515, quoted by AG La Pergola in his Opinion, para. 20.
[112] Judgment of 6 March 2018, *SEGRO*, Joined cases C-52/16 and C-113/16, EU:C:2018:157.

Essentially, it raises valid concerns regarding the type of economic integration this approach would foster. *A fortiori*, it poses problems from the standpoint of a fair and socially conscious market, particularly considering that corporate relocations entail significant consequences for stakeholders, notably workers, and impact the prevention of tax avoidance and criminal behavior.

If the Court perceives itself as having transitioned from a supernational trade judge to a truly constitutional(ised) jurisdiction, it must take charge of this role even in economic law matters, tempering the inclination to prioritize the individual rights of economic actors and providing the EU legal system with a serious component of social consideration. The protection of a various spectrum of fundamental rights is precisely the original rationale of European democratic constitutionalism.

Focusing on freedom of establishment, this constitutional aspiration seems to be eluded, for instance, when the Court interprets the economic freedom and the fundamental right to conduct a business as legitimizing collective redundancy. Outcomes of this kind seem to express, at the opposite, the trend to a Court that, perceiving itself as a rampart of all trade courts, appears more concerned with stretching the freedom of economic actors and little else. Despite the legislative intervention to restore stakeholders' protection, illustrating in a unitary fashion the notion of abuse or corporate mobility seemed desirable for addressing the interpretative ambiguities that national courts will soon be expected to unfold. This conceptualization built on the case law on the general principle of abuse to propose a complex factual and objective assessment for detecting artificial relocation arrangements.

In fact, the doctrine of abuse has mostly been developed and conceptualized in the realm of taxation, a field central to the interests of Member States and therefore granted wider margins for the containment of EU rights through the general principle. The massive presence of EU secondary legislation on tax matters, unlike corporate conversions, has also provided more opportunities for adjudication by the ECJ.

Beside the exception of the tax field, there is a concurrent reason for judicial circumspection regarding abuse. Abuse truly is a "special general principle", with a private rather than a public law origin and aimed at denying rights to individuals. When viewed within the context of the interaction between national and Union legal systems, the application of this general principle, preventing individuals from unduly benefiting

from EU rights, constitutes a deviation from the structural principles of primacy and *effet utile*.[113] Even in such technical matters, if one considers, for instance, the need of protection of workers in companies' relocation, constitutional tensions between structural principles (defining the functional blueprint and the EU legal system) and rule of law principles (concerned with the protection of individuals) seem to emerge.[114] Looking back to the freedom of establishment, the question revolves around reconciling the employment of the doctrine of abuse with its potential effects on primacy and effectiveness of EU law. In this regard, there are two options. The first entails accepting the derogation to primacy and effectiveness through a clearly structured general EU principle defined by the Court in a guidance case. The potential risks associated with abuse would then be addressed through the prudent application of proportionality by the ECJ and, through the latter's orientation, by national courts. The second possibility involves further internalizing in EU law stakeholder's protection, particularly social rights, thereby reducing the relevance of the abuse doctrine as a tool to prevent the unjust invocation of EU law in favor of national law. In this scenario, the balancing operation will become more horizontal, with the ECJ interpreting secondary law by balancing economic freedom with strengthened social protection at the Union level. After all, sixty years of economic integration have made business activities so transnational that initiatives against abuse at the national level are deemed progressively ineffective.

As for another structural principle, the unitary framework for abuse of establishment of companies would undoubtedly benefit the uniformity of EU law. Currently, at the sectoral level, national authorities are empowered to deny relocation on the grounds of a broad concept of abuse. Allowing national authorities flexibility in interpreting this general clause will lead to varying standards of legitimacy for such operations across the Union, and ultimately frustrate the very purpose of harmonization.

Despite the systematic complexities, the EU needs a well-established principle of abuse of rights, particularly in the field of corporate mobility, as "any legal order which aspires

[113] See, among others, Judgement of 12 May 1998, *Kefalas*, C-367/96, EU:C:1998:222, para. 22; Judgement of 12 March 1996, *Pafitis*, C-441/93, EU:C:1996:92, para. 68 and the Opinion of AG Tesauro, delivered on 9 November 1995, EU:C:1995:368, para. 27: "what is at stake is the primacy of Community law over domestic law and the effectiveness of the preliminary rulings given by the Court".

[114] For this categorization, see T. Tridimas, "The general principles of EU law and the Europeanisation of national laws", *REALaw*, 13, n.2 (2020), p. 5-31, at p. 9.

to achieve a minimum level of completion must contain self-protection measures, so to speak, to ensure that the rights it confers are not exercised in a manner which is abusive, excessive or distorted".[115] Its judicious application by national courts, under the guidance of the ECJ, coupled with the principle of proportionality as the primary balancing tool in adjudication, will preserve fairness and consideration of a wider set of interests within the unique European model of a social market economy.

[115]Opinion of AG Tesauro in *Kefalas*, *supra* note 88, para. 24.