

# University of Bologna Law Review

<https://doi.org/10.60923/issn.2531-6133/24304>


Received: 22 Apr. 2025 | Reviewed: 24 Jan. 2026 | Accepted: 24 Jan. 2026 | Published: 04 Jun. 2026

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

Giulio Dipietro

Giulio Dipietro is a Research Fellow of the Fund for Scientific Research (FNRS) (Belgium) conducting a Joint PhD between the European Law Centre at the Free University of Brussels (Belgium) and the Institute for European Law at KU Leuven (Belgium). His doctoral research focuses on the constitutional implications of European Union legislation on fundamental rights of suspects and accused persons in criminal proceedings. He holds an LL.M. in Law from the University of Trento (Italy), obtained in 2023, and an LL.M. from the College of Europe in Bruges (Belgium), obtained in 2024. He previously worked as a teaching assistant and research associate within the ERC-funded RESHUFFLE project at the Institute for European Law, KU Leuven (Belgium), from 2024 to 2025.

@ Giulio.dipietro@kuleuven.be

 0009-0009-5516-1243



## ABSTRACT

Freedom of establishment of companies has always been a delicate area of European Union law. The challenge of achieving political consensus has delayed the harmonisation process and prompted creative adjudication. The Court of Justice of the European Union [hereinafter - C.J.E.U.], particularly in the *Polbud* case, just confirmed in *Edil Work*, has interpreted free movement broadly and allowed companies to relocate their registered offices to benefit from more favourable national laws, without relocating their economic activities. This approach raised doubts about the notion of establishment and complicated the 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 E.U. economic and social legal integration.

## KEYWORDS

*Freedom of Establishment; Abuse of Rights; Cross-border Corporate Operations; Directive (EU) 2019/2121; C.J.E.U. Case Law*

## EDITORIAL NOTE

*An earlier version of this article was made available by the Author as a preprint (Giulio Dipietro, Abuse of Rights and Corporate Mobility: (Re)Interpreting the Role of Companies in the European Social Market, Jean Monnet Working Paper No. 1/25, <https://jeanmonnetprogram.org/paper/abuse-of-rights-and-corporate-mobility-reinterpreting-the-role-of-companies-in-the-european-social-market/>). The present version is the peer-reviewed Version of Record.*

## TABLE OF CONTENTS

1. Introduction . . . . .	166
2. On Free Movement of Companies and Regulatory Competition . . . . .	169
2.1. The Court in a vacuum and early case law . . . . .	170
2.2. Stretching freedom of establishment, narrowing abuse . . . . .	171
2.3. Cross-border operations . . . . .	173
3. Polbud and its Implications, or the Triumph of Free movement of Companies . . . . .	174
3.1. Factual background . . . . .	174
3.2. The Opinion of Advocate General Kokott . . . . .	174
3.3. Judgment . . . . .	175
3.4. Last developments . . . . .	176
3.5. Implications of Polbud . . . . .	177
3.5.1. Polbud and Centros . . . . .	178
3.5.2. Polbud, VALE, and Cadbury . . . . .	179
3.5.3. Polbud and The Internal Market Framework of Analysis . . . . .	180
3.5.4. The Dilemma: Genuine Economic Activity . . . . .	180
4. Legislative Intervention, or Some Restored Protection of Stakeholders . . . . .	182
4.1. Directive (EU) 2019/2121: An Overview . . . . .	183
4.2. The Notion of Abuse . . . . .	184
5. Interim Conclusions . . . . .	186
6. Towards a Uniform Doctrine of Abuse of Establishment of Companies . . . . .	187
6.1. The General Principle of Abuse in E.U. law: Overview . . . . .	187
6.2. The General Principle of Abuse and Corporate Mobility: Substantive Issues . . . . .	189
6.2.1. The Objective Element . . . . .	189
6.2.2. The Subjective Element . . . . .	191
6.3. The General Principle of Abuse and Corporate Mobility: Procedural Issues . . . . .	192
6.4. The General Principle of Abuse and Corporate Mobility: Operational Issues . . . . .	193
6.4.1. Interpreting the Directive Through the General Principle . . . . .	194
6.4.2. Residual Hypothesis: The Orthodox Approach Revisited . . . . .	195
Conclusions . . . . .	198
Funding Details . . . . .	201
Disclosure Statement . . . . .	201
Data Availability Statement . . . . .	201

## 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 E.U. market is based on the free movement of goods, workers, services, and capital. The economic freedoms, regulated in Part Three of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U. or Treaty], aim at the optimal allocation of resources in the E.U., facilitating the movement of production factors to the geographic area where they are most valued.<sup>1</sup>

Alongside economic integration, the E.U. constitutional system progressively embraced, within the perspective of a “social market economy”,<sup>2</sup> a broader spectrum of non-market values. This has led to a different and more holistic conceptualisation of the internal market.<sup>3</sup> In other words, E.U. legal integration unfolds in a somewhat mixed manner between market and non-market values, in a dichotomous equilibrium that frequently entails collisions.

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 organisational structure for conducting business activities and thus play a crucial role in the realisation of the single market. Indeed, Article 49 T.F.E.U. attributes to companies, as well as to self-employed natural persons, the fundamental freedom known as freedom of establishment.

Article 54 T.F.E.U. 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 E.U., 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. In contrast, secondary establishment consists of setting up agencies, branches, or subsidiaries in another Member State.

While the harmonisation process of national company law provisions was delayed, the C.J.E.U. took an activist stance in interpreting fundamental freedom

<sup>1</sup> See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 642 (7th ed. 2020) (U.K.).

<sup>2</sup> Consolidated Version of the Treaty on European Union art. 3(3), Oct. 26, 2012, 2012 O.J. (C 326) 13: “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”.

<sup>3</sup> See Craig & De Búrca, *supra* note 1, at 667.

extensively, swiftly transitioning from a non-discrimination approach to incentivising 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*). The scope of this paper is however much more circumscribed.

Among the numerous aspects that the Court has addressed since the establishment of the internal market, one of particular interest is corporate restructuring (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 [hereinafter - Commission] amidst the economic/social market constitutional tension. The former, in the absence of harmonisation, has provided for an extensive interpretation of the freedom of establishment, encompassing companies' rights to reorganise their organisational structure across national borders. The latter has promptly elaborated and proposed to the legislator a legal common framework that resulted in Directive 2019/2121,<sup>4</sup> so as to prevent this right from being exercised in a regulatory *vacuum*, particularly after the seminal judgment in *Polbud*.<sup>5</sup> In doing so, the Commission has achieved, alongside a comprehensive harmonised 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 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, in particular for employees, creditors, and shareholders. Therefore, the protection of stakeholders must keep pace with the ever-growing transnationalization of the corporate world. However, today, the legal uncertainty, partial inadequacy, and the lack of rules governing certain cross-border operations of companies mean that there is no clear framework to ensure the 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

<sup>4</sup> Directive (EU) 2019/2121, of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, 2019 O.J. (L 321) 1.

<sup>5</sup> Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804 (Oct. 25, 2017).

providing safeguards against abuse.<sup>6</sup> Crucially, lying between the freedom of establishment of companies and the protection of stakeholders is the concept of abuse of freedom of establishment. As will be argued, this notion is fundamentally linked to the scope of the fundamental freedom in the Court's case law and now raises challenges as to how it should be adapted within the secondary-law framework, notably to Directive 2019/2121.

Secondly, in continuity with what has just been mentioned, the subject is extremely topical for E.U. law since Directive 2019/2121's transposition period elapsed on 31 January 2023, and, due to the complexity of the discipline, it is likely, 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.<sup>7</sup> 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)<sup>8</sup> 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 reasserts the possibility of exercising free movement only as regards the registered office (*i.e.*, without transfer of the real seat and therefore of the economic activity).<sup>9</sup>

Corporate restructuring, in other words, is a complex yet fascinating example of the constitutional tension between a competitive and a fair market and entails many legal questions that remain unaddressed. 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, first, to answer the following question: what distinguishes the legitimate exercise of companies' freedom of establishment from its abuse? Secondly, it seeks to develop a unitary framework for the category "abuse of freedom of establishment of companies", applying the C.J.E.U.'s main findings regarding the general

<sup>6</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, COM (2018) 241 final (Apr. 25, 2018).

<sup>7</sup> Case C-276/22, Edil Work 2 Srl. and S.T. Srl v. STE Sàrl, ECLI:EU:C:2024:348 (Apr. 25, 2024).

<sup>8</sup> See generally ELISABETTA PEDERZINI, *PERCORSI DI DIRITTO SOCIETARIO EUROPEO* [STUDIES IN EUROPEAN CORPORATE LAW] 23-25 (4th ed. 2020) (It.) (for the incompatibility of the rule before the case was brought before the C.J.E.U.).

<sup>9</sup> See discussion *infra* Section 3.4.

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. Based on an overview of the relevant case law on the freedom of establishment of companies and how it has addressed the concept of abuse, it analyses the *Polbud* judgment, the most relevant and problematic ruling, to extrapolate a definition of abuse. Having explored the challenges and implications of *Polbud*, the analysis turns to Directive 2019/2121, which establishes the legislative framework for the harmonisation of cross-border corporate operations in the E.U. 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 C.J.E.U. 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 with guidance, ruling for a well-founded application of national transposition rules on companies' cross-border transfers.

## 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 T.F.E.U. remains neutral on the connecting factors that Member States should adopt in applying their own *lex societatis*. Traditionally, two legal approaches of private international law have been used. On the one hand, the incorporation theory mandates the application of the company law of the state in which the company is registered (offering a clear and straightforward approach). On the other hand, the real seat theory subjects the company to the law of the state where its business operations are practically managed (emphasising substance over form and aiming to prevent artificial arrangements and regulatory arbitrage among Member States). Additionally, the Treaty does not definitively clarify whether freedom of establishment includes a right to corporate mobility and, if so, the conditions under which it could be

exercised. The failure of the E.U. legislator (as well as Member States)<sup>10</sup> to enact proper rules to address this issue further intensifies the ambiguity. Thirdly, Member States have consistently expressed discomfort with company migration carried out for reasons perceived as illegitimate, such as relocating the registered office to circumvent unfavourable tax or social legislation (referred to as national “*law shopping*”).<sup>11</sup>

In the absence of a Treaty choice and an institutional initiative, the Court has been tasked with appropriately delineating and specifying (if not essentially shaping) the legal framework. The E.U. judiciary have 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.<sup>12</sup>

## 2.1. THE COURT IN A VACUUM AND EARLY CASE LAW

The Court ruled already in 1986 in *Segers*<sup>13</sup> that Article 54 T.F.E.U. “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”.<sup>14</sup>

The judgment went quite unnoticed because two years later the Court defended the real seat theory as a means of protection against regulatory competition<sup>15</sup> in *Daily Mail*,<sup>16</sup> 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

<sup>10</sup> Treaty establishing the European Economic Community, art. 220 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”.

<sup>11</sup> See Sébastien Binard & Laurent Schummer, *The Case for Further Flexibility in Matters of Cross-Border Corporate Mobility*, 16 EUR. CO. L. 31, 31 (2019) (Neth.).

<sup>12</sup> See *Id.* at 32.

<sup>13</sup> Case 79/85, D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, 1986 E.C.R. I-02375.

<sup>14</sup> *Id.* See also the Case 79/85, D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, Opinion of Mr Advocate General Darmon, 6 1986 E.C.R. I-02375.

<sup>15</sup> See Martin Gelter, *Centros, the Freedom of Establishment for Companies and the Court's Accidental Vision for Corporate Law*, in EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 309, 324 (Fernanda Nicola & Bill Davies eds., 2017) (U.K.).

<sup>16</sup> Case 81/87, *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, 1988 E.C.R. 05483.

determines their incorporation and functioning”.<sup>17</sup> 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.<sup>18</sup>

## 2.2. STRETCHING FREEDOM OF ESTABLISHMENT, NARROWING ABUSE

*Centros*<sup>19</sup> indeed marks a radical shift in perspective and, coupled with *Überseering* and *Inspire Art* (which essentially upheld its core principle), truly “heralded a new era”,<sup>20</sup> allowing free choice of incorporation and consequently of company law inside the E.U. The case concerned a company carrying out 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”.<sup>21</sup> 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”.<sup>22</sup> 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).<sup>23</sup> Refusal to registration was simply not proportionate to

---

<sup>17</sup> *Id.* 19.

<sup>18</sup> It must be remarked that, even if the Court did not delve into the possible abuse of freedom of establishment, A.G. Darmon explicitly confronted this possibility in para. 10 and 11 of his Opinion in *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, Opinion of Mr Advocate General Darmon, E.C.R. 1988 -05483, 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.

<sup>19</sup> Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, E.C.R. 1999 I-01459.

<sup>20</sup> Gelter, *supra* note 15, at 309.

<sup>21</sup> Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 17 E.C.R. 1999 I-01459.

<sup>22</sup> *Id.* 26-27.

<sup>23</sup> *Id.* 38.

the purpose of creditors' protection.<sup>24</sup> 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.<sup>25</sup> That is to say, under what kind of circumstances might the host state impose legitimate restrictions on corporate mobility?

In *Cadbury Schweppes*,<sup>26</sup> the C.J.E.U. seemed to suggest that, generally speaking, artificial arrangements were less likely to be excused in the context of tax law.<sup>27</sup> The ruling also engages in a discussion of the doctrine of abuse of E.U. law in relation to the freedom of establishment of companies, leaning on the judgment (occurring one year after *Centros*) in *Emsland-Stärke*,<sup>28</sup> where the core of the abuse test was established. *Cadbury Schweppes* was a U.K. company that had set up two subsidiaries in Ireland to benefit from the more favourable Irish tax regime. U.K. fiscal authorities taxed the subsidiaries' profits under legislation on controlled foreign subsidiaries. Vested in the question, the C.J.E.U. 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".<sup>29</sup> 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".<sup>30</sup>

In sum, the exercise of free movement by companies to benefit from a more favourable fiscal or company law regime is entirely legitimate and does not constitute abuse. However, taking improper advantage of E.U. law is not permitted; a national measure that catches wholly artificial arrangements aimed at circumventing national legislation is justified. The narrow conceptualisation of abuse in the context of free movement is consistent with the objectives of the internal market. Firstly, economic integration necessarily entails some degree of deregulation. In addition, regulatory

<sup>24</sup> See also C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, Opinion of Mr Advocate General La Pergola, E.C.R. 1999 I-01459 and C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, E.C.R. I-10195, clearly establishing that abuse must be established on a case-by-case basis.

<sup>25</sup> See Pederzini, *supra* note 8, at 116.

<sup>26</sup> Case C-196/04, *Cadbury Schweppes plc & Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, 2006 E.C.R. I-07995.

<sup>27</sup> See Takis 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?* 169, 178 (Rita de la Feria & Stefan Vogenauer eds., 2011).

<sup>28</sup> Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, 2000 E.C.R. I-11569.

<sup>29</sup> See Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, 51 2006 E.C.R. I-07995.

<sup>30</sup> *Id.* 54.

competition is part of the Treaty project and leads to some economic advantages and legal experimentation, while risks associated with a race to the bottom seem not to have materialised.<sup>31</sup> *Polbud* potentially compromises this overall coherent solution.

### 2.3. CROSS-BORDER OPERATIONS

In *SEVIC Systems*,<sup>32</sup> *Cartesio*,<sup>33</sup> and *VALE Építési*,<sup>34</sup> the Court finally had 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 E.U. 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”,<sup>35</sup> 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”.<sup>36</sup>

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.<sup>37</sup>

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, the Member State cannot impede cross-border conversions if it allows them internally (*i.e.*, between companies constituted according to

<sup>31</sup> See *Tridimas*, *supra* note 27, at 174-175.

<sup>32</sup> Case C-411/03, Request for a preliminary ruling from Landgericht Koblenz, 2005 E.C.R. I-10805.

<sup>33</sup> Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.*, 2008 E.C.R. I-09641.

<sup>34</sup> Case C-378/10, *VALE Építési kft.*, ECLI:EU:C:2012:440 (July 12, 2012).

<sup>35</sup> Case C-411/03, Request for a preliminary ruling from Landgericht Koblenz, 18 2005 E.C.R. I-10805.

<sup>36</sup> *Id.* 19.

<sup>37</sup> *Id.* 110-111.

national law).<sup>38</sup> 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 national tax legislation.<sup>39</sup>

### 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 registration in Luxembourg, it applied for its removal from the Polish register. The application was refused because 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 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 A.G. claimed that, in the case of a cross-border conversion not entailing the actual establishment in the host Member State, freedom of establishment did not apply, since the pursuit of a genuine economic activity is inherent in that freedom. 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

<sup>38</sup> See Case C-378/10, *VALE Építési kft.*, 33 ECLI:EU:C:2012:440 (July 12, 2012): (“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 T.F.E.U. and 54 T.F.E.U.”).

<sup>39</sup> *Id.* 34.

therefrom”.<sup>40</sup> More recently, the Court had moreover required “actual establishment” and the pursuit of “genuine economic activity”.<sup>41</sup> Explicitly, A.G. 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 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. The question of the abuse of E.U. law, just mentioned by the A.G., was of little relevance because the freedom was just deemed inapplicable in the case at hand.<sup>42</sup>

If, by contrast, Polbud were established in Luxembourg, according to the A.G., 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 is an overriding reason in the public interest, capable of justifying a restriction on the fundamental freedom, the obligation to liquidate a company does not constitute an appropriate means to those ends.<sup>43</sup>

### 3.3. JUDGMENT

The Grand Chamber of the European Court of Justice did not follow its A.G. as regards the scope of freedom of establishment, affirming for the first time that cross-border operations are covered by that freedom even if they involve only the transfer of the registered office and are ultimately motivated by the purpose of changing the 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 Article 49 and 54 T.F.E.U. 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

---

<sup>40</sup> Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., Opinion of Mrs Advocate General Kokott, 33 ECLI:EU:C:2017:804 (Oct. 25, 2017) (referring to Case 2-74, Jean Reyners v. Belgian State, 21 1974 E.C.R. I-00631 and to Case C-55/94, Gebhard, 25 1995 E.C.R. I-4186).

<sup>41</sup> *Id.* 34 (referring to Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 54 2006 E.C.R. I-07995 and Case C-378/10, VALE Épitési kft., 34 ECLI:EU:C:2012:440 (July 12, 2012) and the Case C-201/15, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis, ECLI:EU:C:2016:972, 51 (Dec. 21, 2016)).

<sup>42</sup> *Id.* 53-55.

<sup>43</sup> *Id.* 66.

the national legal order.<sup>44</sup> 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”.<sup>45</sup> Equally, Polbud’s operation wouldn’t constitute abuse. Member States can always adopt measures to prevent abuse of E.U. 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.<sup>46</sup>

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.<sup>47</sup>

Finally, and following the A.G. (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.<sup>48</sup>

### 3.4. LAST DEVELOPMENTS

The Third Chamber of the C.J.E.U. just confirmed the approach in Polbud on 25 April 2024 in *Edil Work*.<sup>49</sup> The case regarded an Italian company that transferred its registered office to Luxembourg while continuing its economic activities in Italy; it must be stressed, for the sake of completeness, that this case differs from *Polbud* insofar as it concerns the application of Italian company law to a company (Edil Work) registered in Luxembourg, thus involving entry barriers, rather than exit barriers, as in *Polbud*. What the two cases share, as will be argued, is their conception of the scope of freedom of establishment and the notion of abuse of that freedom. The main point on which the Suprema Corte sought

<sup>44</sup> See Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804, 34-35 (Oct. 25, 2017).

<sup>45</sup> *Id.* 38.

<sup>46</sup> *Id.* 39-40; see also *Centros*, *supra* note 19, 27.

<sup>47</sup> Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804, 51 (Oct. 25, 2017).

<sup>48</sup> *Id.* 54-58.

<sup>49</sup> Case C-276/22, *Edil Work 2 Srl. and S.T. Srl v. STE Sàrl*, ECLI:EU:C:2024:348 (Apr. 25, 2024).

interpretative guidance concerns 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 considered such legislation in breach of freedom of establishment.<sup>50</sup> Firstly, regarding *Polbud*, it found that the situation at issue falls under freedom of establishment. Furthermore, despite overriding reasons for creditors, minority shareholders, and employees, the C.J.E.U. 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*), the C.J.E.U. ruled that free movement aimed to benefit from more favourable legislation does not constitute in itself abuse<sup>51</sup> and that Member States, although formally free to adopt legislation against abuse, cannot legitimately establish general presumptions.<sup>52</sup> 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 T.F.E.U.

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 how the Court now conceptualises the freedom of establishment of companies.

### 3.5. IMPLICATIONS OF POLBUD

The judgment received several comments from national law and E.U. law jurists,<sup>53</sup> thus this paper will essentially focus on the aspects concerning abuse of rights.

---

<sup>50</sup> *Id.* 28.

<sup>51</sup> *Id.* 47.

<sup>52</sup> *Id.* 48.

<sup>53</sup> See generally Marc Fallon & Edouard-Jean Navez, *La transformation transfrontalière d'une société par transfert du siège statutaire après l'arrêt Polbud* [The cross-border transformation of a company through the transfer of its registered office after the *Polbud* judgment], 2018 REVUE PRATIQUE DES SOCIÉTÉS - TIJDSCHRIFT VOOR RECHTSPERSOON EN VENNOOTSCHAP 349 (Belg.); Iris Barsan, *Que reste-t-il du critère du siège social réel après l'arrêt Polbud?* [What Remains of the Real Seat Doctrine After the *Polbud* Ruling?], EUROPE: ACTUALITÉ DU DROIT DE L'UNION EUROPÉENNE, Mar. 2018, at 6 (Fr.); Johan 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?*, 13 J. PRIV. INT'L L. 294 (2017) (U.K.); Carsten Gerner-Beuerle et al., *Cross-border Reincorporations in the European Union: The Case for Comprehensive Harmonisation*, 18 J. CORP. L. STUD. 1 (2018) (U.K.).

### 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 has been opened, a pre-existing company should be equally entitled to benefit from more favourable legislation through a cross-border conversion.<sup>54</sup> Following this line of reasoning, *Polbud* does not surpass *Centros* but rather broadens its implications from secondary to primary establishments, envisaging an equal regime for both ways of exercising economic freedom. This argument is correct, but it only partially addresses the issue. Looking back to the circumstances of the cases, there is a significant distinction that the Court seems to have overlooked. In *Centros* (where a branch registration of a U.K. 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).<sup>55</sup> *Centros* and *Polbud* might be assimilated as both companies aimed to benefit from more favourable 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?<sup>56</sup> Moreover, the cases differ from the point of view of stakeholders. *Centros* was a newly established company, and as the C.J.E.U. itself observed, the protection of potential creditors (and other stakeholders) might have been

<sup>54</sup> See Marek Szydło, *Cross-border Conversion of Companies Under Freedom of Establishment: Polbud and Beyond*, 55 COMMON MKT. L. REV. 1549, 1560 (2018) (Neth.).

<sup>55</sup> See Ariel Mucha & Krzysztof 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*, 15 EUR. CO. & FIN. L. REV. 270 (2018)(Ger.).

<sup>56</sup> See discussion *infra* Section 3.5.4.

ensured with proper disclosure of its foreign origin and applicable company law.<sup>57</sup> By contrast, *Polbud* already had creditors and employees in the Member State of origin and in need of protection, as the company law governing their legal position would have changed after the contractual obligation had arisen.<sup>58</sup>

### 3.5.2. POLBUD, VALE, AND CADBURY

Reconciling *Polbud* with *VALE* and *Cadbury Schweppes* might also pose some difficulties. As regards *VALE*, as also claimed by the A.G., that judgment (together with *AGET Iraklis* and the others mentioned by A.G. 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, is not convincing.<sup>59</sup> The identification of the home and host states must be linked to the company's relocation, which is indeed subject to legal assessment by 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.<sup>60</sup> One could add that, traditionally, fiscal measures lie at the heart of national competence, and therefore the Court has conceptualised abuse in a broader fashion to guarantee a broader space for the protection of Member States' interests. 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

<sup>57</sup> But see *Tridimas*, *supra* note 27, at 177 (highlighting that to facilitate free movement, the judgment transfers greater risk to creditors).

<sup>58</sup> See *Mucha & Oplustil*, *supra* note 55, at 297.

<sup>59</sup> As it seems to suggest, if the reading of the author is correct, M. Szydło, *supra* note 54, at 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)".

<sup>60</sup> See Szydło, *supra* note 54, at 1568.

limits of the E.U. right abused, rather than on the area of national legislation that is supposedly evaded.<sup>61</sup>

### 3.5.3. POLBUD AND THE INTERNAL MARKET FRAMEWORK OF ANALYSIS

Subsequently, the C.J.E.U. 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.<sup>62</sup>

The same degree 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.<sup>63</sup>

### 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 A.G. 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 C.J.E.U. 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 favourable 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 A.G. Kokott).

---

<sup>61</sup> See discussion *infra* Section 6.2.1.

<sup>62</sup> See Case C-106/16, *Polbud - Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804, 46 (Oct. 25, 2017).

<sup>63</sup> See Szydło, *supra* note 54, at 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 T.F.E.U. and the overall economic objectives of the E.U. project. This argument is supported, as explained above, by the very notion of establishment as the exercise of an economic activity, which implies a degree of involvement in the economic life of the Member State to which the company is relocated, as well as by the case law discussed so far. In this respect, despite the apparent coherence in the C.J.E.U.'s reasoning, a conceptual distinction must be drawn between *Polbud* and the cases *Centros* (where a genuine intention to relocate the economic activity existed), *VALE* (where the actual pursuit of an economic activity is indicated as a precondition for establishment), and *Cadbury Schweppes* (which explicitly excludes wholly artificial arrangements from the legitimate exercise of the freedom of establishment, namely relocations not accompanied by the establishment of an economic activity in another Member State). Secondly, the fact that the interpretation inaugurated by *Polbud* has been reaffirmed in *Edil Work* suggests that the judgments affirming the inextricable connection between establishment and economic activity have been implicitly and (according to the author) incorrectly overruled.

Thirdly, the new approach favours the creation of letterbox companies, showing little regard for 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 subsequently change its legal form effectively evades its home company law, effectively separates the benefit of limited liability from the corresponding obligations that the home State 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 to protect fundamental rights.

It was evident from the outset that *Polbud* would have paved the way for more regulatory competition, law shopping, and increased risks to the protection of stakeholders, particularly in Member States lacking specific rules on 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 E.U. competence under Article 50 T.F.E.U. The judgment is explicitly referenced by the Commission in the Directive proposal, beyond

the clarification of the scope of the freedom, “the C.J.E.U., being a judiciary organ, may not create any procedure for making such conversions possible or set out the related substantive conditions”.<sup>64</sup> The Court, in other words, had provided the input for the legislator to act, counterbalancing the effects of uncontrolled corporate transfers 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 E.U. harmonisation of cross-border conversions, national legislators may adopt measures to protect 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, as mentioned above, the Memorandum acknowledges that *Polbud* 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,<sup>65</sup> workers’ information and consultation in good time on matters related to corporate mobility represents an infeasible feature of the E.U. social construction. Shortly, the Directive aims at a two-fold objective: enabling companies to restructure efficiently and effectively while protecting stakeholders.<sup>66</sup> The same logic applies to cross-border divisions, which also lacked a harmonised legal framework, and to cross-border mergers, already harmonised with Directive 2005/56, whose shortcomings are addressed by the current Proposal. Cross-border operations are now coherently systematised in one legislative instrument. After an overview of the procedural mechanism established by the Directive, this paper will focus on how the E.U. legislator deals (for the first time at the secondary law level) with the category of abuse.

<sup>64</sup> See Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, at 3, COM (2018) 241 final (Apr. 25, 2018).

<sup>65</sup> THE EUROPEAN PILLAR OF SOCIAL RIGHTS IN 20 PRINCIPLES, <https://ec.europa.eu/social/main.jsp?catId=1606&lan> (last visited Apr. 25, 2024).

<sup>66</sup> See *supra* note 64, at 3.

#### 4.1. DIRECTIVE (EU) 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 mechanisms to protect stakeholders.

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, and outline its implications for employees and the company's future business. An independent expert will then examine the draft terms.

Subsequently, the draft terms and the reports are transmitted to the general meeting of the company's members 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 the 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 scrutinizing the legality of the operation and assessing compliance with all relevant conditions, procedures, and formalities. The decision must be taken within three months, unless the competent authority has serious doubts that the operation is set up for abusive purposes, leading to the circumvention of Union or national law, in accordance with 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 registration in the destination state, the operation is perfected and 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 in line with the overarching principle of effective judicial protection, Recital (40) of the Directive requires Member States to ensure the possibility of reviewing the decisions of the competent authorities in 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, the conditions set up to authorize 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 responsible for issuing the pre-operation certificate. The second is residual and operates as a last resort, enabling the authorities of the destination Member State to adopt appropriate measures in response to specific risks on the basis of new information. This last clause is phrased in general terms, while much more legislative guidance is given for the pre-operation assessment. The legislators, therefore, entrust the state authority with the main responsibility for 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) emphasises 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.<sup>67</sup> As mentioned above, it is always guaranteed, in light of the general principle recalled by Recital (40) the recourse to a judge. 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, E.U. 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 provided in the Preamble, the Directive lacks a definition of abuse and therefore a uniform notion for 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 importantly, the concrete possibility of diverging practices in the Member States.<sup>68</sup> 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.<sup>69</sup> Another critique regards the suitability of company law for achieving anti-abuse objectives, which might arguably be better addressed through specific sectoral instruments (tax, financial, and competition law).<sup>70</sup>

---

<sup>67</sup> See discussion *infra* Section 6.2.1.

<sup>68</sup> See Jessica Schmidt, *The Mobility Aspects of the EU Commission's Company Law Package: Or - 'The Good, the Bad and the Ugly*, 16 ECLJ RN L, no. 1, 2019, at 13, 15.

<sup>69</sup> See *id.*

<sup>70</sup> See Steef M. Bartman, *The Adopted Proposal for an EU Directive on Cross-Border Operations: A Realistic Compromise*, 16 ECLJ RN L, no. 5, 2019, at 140, 141.

## 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. E.U. primary law (that is, the T.F.E.U. as interpreted by the Court) thus grants companies the freedom to pursue favourable 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 C.J.E.U. typically deals with the prevention of abuse of E.U. law at the justification stage, where national measures aimed at preventing the abuse of the freedom of establishment are assessed through the lens of proportionality 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 of freedom, and the Directive on cross-border operations lacks a precise definition of such abuse.

To sum up, Member States retain two avenues to restrict companies' freedom of establishment. The first entails the enduring 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 E.U. 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 C.J.E.U. Therefore, it is appropriate to conceptualise the category of abuse of freedom of establishment to 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 signalling 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 conceptualisation would address an aspect that the Court has never dealt with and would 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 E.U. LAW: OVERVIEW

The general principle of abuse of law<sup>71</sup> is a newcomer to E.U. law. General principles were developed by the Court to fill gaps in the Treaty, in accordance with 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 intended to prevent a person from deriving a benefit from a rule that pursues ends lying beyond its objectives, even though it formally complies with it. It is a principle against the circumvention of the law, relatively new to the E.U. legal system because, at an early stage, in the context of the internal market, the Court opted for a very broad definition of the fundamental freedoms. However, a more mature E.U. legal order, the proliferation of E.U. rights and legislation, and litigants seeking to stretch the scope of economic freedoms to the maximum made the doctrine evolve. To establish that a right is being abused, is firstly necessary to determine its boundaries, inquiring into the objectives of the relative provision, and determining what interests are thereby given protection.<sup>72</sup>

In *Emsland-Stärke*<sup>73</sup> 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 E.U. 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 underscores the

<sup>71</sup> See generally Tridimas, *supra* note 27; See RALUCA N. IONESCU, *L'ABUS DE DROIT EN DROIT DE L'UNION EUROPÉENNE* (Bruxelles: Bruylant, 2012).

<sup>72</sup> See Tridimas, *supra* note 27, at 164-167.

<sup>73</sup> Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, 2000 E.C.R. I-11569.

individual's intent to rely on E.U. law. Even if, according to the case law, motives for exercising free movement are irrelevant,<sup>74</sup> in the context of abuse they are part of the appraisal.

In *Kofoed*,<sup>75</sup> the C.J.E.U. confirmed that the prohibition of abuse of rights is a general principle of E.U. law. In *Cussens*,<sup>76</sup> the C.J.E.U. established that it “displays the general, comprehensive character which is naturally inherent in general principles of E.U. law”, This statement was then consecrated by the three judgments of the Grand Chamber in *Altun*,<sup>77</sup> *T Danmark*,<sup>78</sup> and *N Luxembourg 1*.<sup>79</sup>

As for the articulation of the test, the general framework of *Emsland-Stärke* is not always respected. In some free movement cases, the C.J.E.U. 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.<sup>80</sup> This is also the approach prevalently used for the establishment of companies.<sup>81</sup> There is however a close similarity in the wholly artificial arrangement test and the two-fold examination of *Emsland-Stärke*,<sup>82</sup> as exemplified by *Cadbury*, where the C.J.E.U. 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 [E.U.] law, the objective pursued by freedom of establishment (...) has not been achieved” (emphasis added).<sup>83</sup>

Lastly, the general principle, as such, even though mostly developed in the area of free movement, applies to all areas of E.U. law. It could be also considered reflected in the “misuse of powers” ground of review of Article 263 T.F.E.U. and the *Foglia/Novello* doctrine<sup>84</sup> according to which the C.J.E.U. can refuse to give preliminary rulings where

<sup>74</sup> See generally Case C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, 2004 E.C.R. I-09925.

<sup>75</sup> Case C-321/05, Hans Markus Kofoed v. Skatteministeriet, 38 2007 E.C.R. I-5818.

<sup>76</sup> Case C-251/16, Edward Cussens and Others v. T. G. Brosman, ECLI:EU:C:2017:881 (Nov. 22, 2017).

<sup>77</sup> Case C-359/16, Criminal proceedings against Ömer Altun and Others, ECLI:EU:C:2018:63 (Feb. 6, 2018).

<sup>78</sup> Joined Cases C-116/16 and C-117/16, Skatteministeriet v. T Danmark and Y Denmark Aps, ECLI:EU:C:2019:135 (Feb. 26, 2019).

<sup>79</sup> Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1 and Others v. Skatteministeriet, ECLI:EU:C:2019:134 (Feb. 26, 2019).

<sup>80</sup> See Graham Butler & Karsten Engsig Sørensen, *The Prohibition of Abuse of EU Law: A Special General Principle*, in RESEARCH HANDBOOK ON GENERAL PRINCIPLES IN EU LAW 401, 409 (Katja S. Ziegler et al. eds., 2022).

<sup>81</sup> See *supra*, §2.

<sup>82</sup> See Butler & Sørensen, *supra* note 80, at 409.

<sup>83</sup> Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 51 2006 E.C.R. I-07995.

<sup>84</sup> Case 104/79, Pasquale Foglia v. Mariella Novello, 1980 E.C.R. -00745; Case 244/80, Pasquale Foglia v. Mariella Novello, 1981 E.C.R. -03045.

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 E.U. 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 consistent with the inherent function of general principles: filling gaps and providing interpretative consistency. In doing so, one might identify three kinds of issues worth analyzing: substantive, procedural, and operative.

## 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 T.F.E.U., despite formal observance, has been veritably achieved. The question looks back at the debate on the purpose of freedom of establishment. The approach that ties 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 E.U. 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.<sup>85</sup>

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

---

<sup>85</sup> See Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, 67-68 2006 E.C.R. I-07995.

economic activity. In other words, the freedom would safeguard the pursuit of more favourable legislation even in the presence of an economic link, necessitating a different articulation of the *Emsland test*. To meet the objective test for abuse, the operation would need to be conducted specifically to circumvent national laws protecting creditors, minority shareholders, and employees, or to violate national criminal law. This significantly narrows the margins for identifying abuse of E.U. 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 at 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. 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”.<sup>86</sup> While it is indeed the responsibility of the national court to evaluate the pertinent facts in the main proceedings, the C.J.E.U. 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”.<sup>87</sup>

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 E.U. law to which it

<sup>86</sup> Joined Cases C-116/16 & C-117/16, *Skatteministeriet v. T Danmark and Y Denmark ApS*, 98 ECLI:EU:C:2019:135 (Feb. 26, 2019).

<sup>87</sup> Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others v. Skatteministeriet*, 131 ECLI:EU:C:2019:134 (Feb. 26, 2019) and *supra* note 86, at 104.

is applied.<sup>88</sup> 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 *Cadbury*, the C.J.E.U., if and when called upon, could similarly offer indicative factors for abusive establishment, in a guidance case.<sup>89</sup> The legislator has conveniently elaborated some in Directive 2019/2121, particularly in Recital 36,<sup>90</sup> 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 was to result in the company having effective management or economic activity in the Member State in which the company is to be registered after, “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 a non-abusive arrangement whenever there is an actual economic link with the destination Member State, in formal compliance with *Polbud*, but subject to an aversion to letterbox companies. The legislative position, even if strangely relegated to the Preamble alone, makes the solution taken by the Court in *Polbud* even more questionable and probably worth reconsidering.

#### 6.2.2. THE SUBJECTIVE ELEMENT

Regarding the second element of the abuse test, the focus is on the intention of the individual invoking E.U. 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

<sup>88</sup> Case C-251/16, *Edward Cussens and Others v. T. G. Brosman*, Opinion of Mr Advocate General Bobek 28–29 ECLI:EU:C:2017:881 (Nov. 22, 2017); even though this was clear at least since C-367/96 *Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, Opinion of Mr Advocate General Tesouro, ¶ 25 1998 E.C.R. I-02843 and C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, Opinion of Mr Advocate General La Pergola, 20 1999 E.C.R. 1999 I-01459.

<sup>89</sup> See generally Takis Tridimas, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, 9 INT’L J. CONST. L. 737 (2011) (for the distinction between C.J.E.U. ruling based on their degree of specificity).

<sup>90</sup> It is noteworthy that this provision, which formed part of the text of the Directive in the Commission’s proposal, was moved to the recitals as a result of the legislative process.

the C.J.E.U. , the burden falls on the Member State) and particularly on the existence of artificial arrangements.<sup>91</sup> This qualification of the original test has probably its roots in the Opinion of AG Maduro in *Halifax*,<sup>92</sup> and is correct as it focuses on the objective elements of artificiality rather than purely volatile motives. The analysis, in other words, would be preferably grounded on the abovementioned objective indicators of circumvention and artificiality.

### 6.3. THE GENERAL PRINCIPLE OF ABUSE AND CORPORATE MOBILITY: PROCEDURAL ISSUES

The C.J.E.U. has also developed a procedural dimension of the principle of abuse. In *Cadbury*, for instance, it clarified that the undertaking must be given the 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.<sup>93</sup> *Kratzer* made clear that the national court verifies the objective and subjective elements in accordance with the rules of evidence of national law, provided that the effectiveness of E.U. law is not undermined. If it appears objectively that despite formal compliance the objectives pursued by E.U. law have not been achieved, it must be considered that reliance on the protection of E.U. rights is abusive.<sup>94</sup> 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 in the light of the principle of 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 to effective judicial protection under Article 47 of the Charter of Fundamental Rights, even if the C.J.E.U. does not explicitly refer to it. Essentially, individuals allegedly abusing E.U. law must be afforded the opportunity to challenge the evidence, while upholding the safeguards inherent in the right to a fair trial.<sup>95</sup> As for the burden of proof of abuse, the case law on freedom of

<sup>91</sup> See Butler & Engsig Sørensen, *supra* note 80, at 410.

<sup>92</sup> Case C-255/02, *Halifax v. Commissioners of Customs & Excise*, Opinion of Mr Advocate General Maduro 2006 E.C.R. I-01609.

<sup>93</sup> See Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, 70-71 2006 E.C.R. I-07995.

<sup>94</sup> See Case C-423/15, *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG*, ECLI:EU:C:2016:604, 42-43 (July 28, 2016).

<sup>95</sup> See Case C-359/16, *Criminal proceedings against Ömer Altun and Others*, 50 & 54–56 ECLI:EU:C:2018:63 (Feb. 6, 2018).

establishment has not explicitly dealt with the question.<sup>96</sup> However, the Directive on Cross-Border Operations expresses the precise choice of the legislator to leave the matter 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.<sup>97</sup>

#### 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 C.J.E.U. 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 other operations such as divisions by acquisition. Additionally, it applies only to limited liability companies, whereas freedom of establishment (and corporate mobility) is enjoyed by all legal entities within the meaning of Article 54 T.F.E.U., including partnerships. In both cases, the “existence of a real practical and economic need can hardly be denied”.<sup>98</sup> The scenario of corporate mobility not regulated by the Directive is therefore still possible and needs to be addressed, for the sake of the proposed solution unity. The C.J.E.U. will deal with the latter case through the orthodox framework for assessing the compatibility of national measures with the economic freedoms: broad definition of restriction, justification, proportionality.

<sup>96</sup> See João 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 225 (Jasper Korving et al. eds., 2022) (Neth.) (for direct taxation).

<sup>97</sup> See generally Craig & De Búrca, *supra* note 1, at 276-288; F. MARTUCCI, *Droit de l'Union Européenne*, 2d ed. (Paris: Dalloz, 2019), at 690-693. (Fr.).

<sup>98</sup> Schmidt, *supra* note 68, at 13.

#### 6.4.1. INTERPRETING THE DIRECTIVE THROUGH THE GENERAL PRINCIPLE

Secondary law can either fully harmonise the notion of abuse in a given field, or require, or allow Member States to introduce anti-abuse provisions.<sup>99</sup> In the case of cross-border operations, Member States were required to do so. The adoption of secondary legislation 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 often limited themselves to replicating almost *verbatim* the anti-abuse clause of the Directive.<sup>100</sup>

As previously mentioned, it is thus confirmed that national courts will need to recur to E.U. law for reviewing the abuse appraisal carried out in the context of the pre-operation certificate assessment, as it is still true that the C.J.E.U. 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 proposed conceptualisation, combining relevant case law on freedom of establishment of companies with the distinct features of the general principle of abuse in E.U. law, addresses gaps in secondary law. Ideally, the C.J.E.U. 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 brings the matter to a national court that, faced with no guidance for the definition of abuse, will most likely refer the

<sup>99</sup> See Butler et Engsig Sørensen, *supra* note 80, at 417-418.

<sup>100</sup> See among the other transposition measures of the Directive, Decreto legislativo [legislative decree] 2 marzo 2023, n. 19, Art. 29, para. 3, lit. g (It.) (“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); see also Code de Commerce, Article L236-42(2°) (Fr.) (“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) (Ger.) (“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, Art. 91 (Sp.) (“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).

question to the C.J.E.U. At this stage, the C.J.E.U. will probably need to define, once and for all, the extent of the doctrine of abuse in relation to companies' mobility, given that secondary legislation has meanwhile been enacted. The C.J.E.U. could indicate the following steps. The national court, aside from the motives of the operations, must first focus its analysis on a factual inquiry based on objective elements to determine whether the company is carrying out purely formal or artificial transactions (lacking any economic and commercial justification, essentially to benefit from an undue advantage). For this purpose, it will consider 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 was to result in the company having effective management or economic activity in the Member State in which the company is to be registered after, it is presumed that abuse 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 concerns operations not covered by the Directive, either because they are not objectively contemplated therein or because they are carried out by legal entities other than limited liability companies. The C.J.E.U should deal with that case within 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.<sup>101</sup> 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 imperative requirements in the general interest

---

<sup>101</sup>See Vanessa Edwards & Paul 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* 205, 208 (Anthony Arnall et al. eds., 2008).

must justify a national measure aimed at preventing abuse. Such a measure must be deemed suitable for achieving that objective and must not exceed what is necessary to attain it.<sup>102</sup> 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.<sup>103</sup>

In *Polbud*, the C.J.E.U. has explicitly recognised that overriding reasons of public interests include the protection of the interest of workers, minority shareholders, and creditors.<sup>104</sup> The same interests are at the core of the guarantees established by Directive 2019/2121. The abuse of E.U. law is prevented precisely for guaranteeing the protection of such interests.<sup>105</sup> Moreover, it is settled case law that the exercise of free movement might be restricted for the overarching need of protecting fundamental rights.<sup>106</sup> 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 Charter.<sup>107</sup> 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.<sup>108</sup> Article 54, apart from signaling the existence of such a general principle,

---

<sup>102</sup>See *id.* at 215.

<sup>103</sup>See generally, Craig & De Búrca, *supra* note 1, at 744; PIETER VAN CLEYNENBREUGEL, *DROIT MATÉRIEL DE L'UNION EUROPÉENNE: LIBERTÉS DE CIRCULATION ET MARCHÉ INTÉRIEUR* [SUBSTANTIVE LAW OF THE EUROPEAN UNION: FREE MOVEMENT AND THE INTERNAL MARKET] 190-91, 338-39, 372-73 (2d ed. 2023).

<sup>104</sup>Case C-106/16, *Polbud - Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804, 54 (Oct. 25, 2017).

<sup>105</sup>See Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 38 E.C.R. 1999 I-01459 and Case C-106/16, Proceedings brought by *Polbud - Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804, 60 (Oct. 25, 2017). 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 E.U. law for circumvention of national provisions that protect creditors, workers, etc.

<sup>106</sup>See Stephen Weatherill, *Fundamental Rights and National Identity in the Internal Market*, in *The Internal Market as a Legal Concept* 135, 137 (Stephen Weatherill ed., 2017).

<sup>107</sup>As provided by article 51(1) of the Charter and confirmed by the C.J.E.U. in Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 19-21 ECLI:EU:C:2013:105 (Feb. 26, 2013), 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.

<sup>108</sup>See Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis*, C-201/15, ECLI:EU:C:2016:972, 90 (Dec. 21 2016).

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 E.U. 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 for analysis that can benefit from the application of the principle of abuse. Firstly, it enables the judge to take into account the importance of the right and the public interest that the restriction seeks to pursue. Secondly, it incorporates different degrees of scrutiny. Thirdly, in the context of the preliminary reference procedure, the assessment of the compatibility of national measures with Union law rests on a form of shared judicial review: the C.J.E.U. provides interpretative guidance to the national court, while the latter retains responsibility for the final evaluation of the measure at issue.<sup>109</sup> This last aspect is decisive, because ultimately it is for the national court to assess the compatibility of E.U. law, as interpreted by the C.J.E.U., with the national measure.

Nevertheless, the doctrine of abuse is potentially disruptive to the uniform application and effectiveness of E.U. law, especially if its application is demanded of national courts, which could thus prevent the application of the fundamental freedom invoking the general principle. It also raises concerns about 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 infeasible 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*.<sup>110</sup> They both carry an idea of excess: the right ceases to be protected where exercised in a disproportionate manner.<sup>111</sup> Yet, in E.U. law, the doctrine of abuse seizes private conduct, while proportionality is a form of control over public power.

Returning to the potentially disruptive nature of the doctrine of abuse, the C.J.E.U. has traditionally required a case-by-case assessment of national anti-abuse measures to

<sup>109</sup> See Takis Tridimas, *The General Principles of Law: Who Needs Them?*, 52 LES CAHIERS DE DROIT 419, 435 (2015).

<sup>110</sup> C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, Opinion of Mr Advocate General La Pergola, ¶ 20 1999 E.C.R. 1999 I-01459.

<sup>111</sup> See L. Neville Brown, *Is There a General Principle of Abuse of Rights in European Community Law?*, in 2 *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers* 511, 515 (Deirdre Curtin & Ton Heukels eds., 1994), quoted in C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, Opinion of Mr Advocate General La Pergola, ¶ 20 1999 E.C.R. 1999 I-01459.

ensure that E.U. law is not incorrectly applied. This was recently made clear for instance in *SEGRO*,<sup>112</sup> a case concerned with the free movement of capital, where the C.J.E.U. 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.

## CONCLUSIONS

Since *Centros*, through Treaty amendments, proliferation of Union competences, and the entry into force of the Charter, the E.U. has transcended its initial role as a project of mere market integration. Accordingly, there is a need for a shift in the interpretation of market freedoms, coupled with greater awareness of 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. 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 behaviour.

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 E.U. 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 frustrated, for instance, when the Court interprets the economic freedom and the fundamental right to conduct a business as legitimizing collective dismissals of employees for economic reasons. 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

<sup>112</sup>Joined Cases C-52/16 & C-113/16, ‘SEGRO’ Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v. Vas Megyei Kormányhivatal, ECLI:EU:C:2018:157 (Mar. 6, 2018).

concerned with stretching the freedom of economic actors and little else. Despite the legislative intervention to restore stakeholders' protection, illustrating the notion of abuse of corporate mobility in a unitary fashion seemed desirable for addressing the interpretative ambiguities that national courts will soon be expected to resolve. This conceptualisation built on the case law on the general principle of abuse to propose an open and dynamic solution to the C.J.E.U. and national courts: a complex factual and objective assessment for detecting artificial relocation arrangements.

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

Besides 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 E.U. rights, constitutes a deviation from the structural principles of primacy and *effet utile*.<sup>113</sup> 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 E.U. legal system) and rule of law principles (concerned with the protection of individuals) seem to emerge.<sup>114</sup> 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 E.U. law. In this regard, there are two options. The first entails accepting the derogation to primacy and effectiveness through a clearly structured general E.U. principle defined by the Court in a guidance case. The potential risks associated with abuse would then be addressed through the C.J.E.U.'s prudent application of proportionality and, through the latter's orientation, by national courts. The second possibility involves further internalisation of stakeholder protection in E.U. law,

<sup>113</sup>See, e.g., Case C-367/96, *Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, 22 1998 E.C.R. 1998 I-02843; Case C-441/93, *Panagis Pafitis and others v. Trapeza Kentrikis Ellados A.E. and others*, 68 1996 E.C.R. I-01347; Case C-441/93, *Panagis Pafitis and others v. Trapeza Kentrikis Ellados A.E. and others*, Opinion of Mr Advocate General Tesaurò, 27 1996 E.C.R. I-01347 ("[W]hat is at stake is the primacy of Community law over domestic law and the effectiveness of the preliminary rulings given by the Court.").

<sup>114</sup>See Takis Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, REV. EUR. ADMIN. L., July 2020, at 5, 9.

particularly social rights, thereby reducing the relevance of the abuse doctrine as a tool to prevent the unjust invocation of E.U. law in favour of national law. In this scenario, the balancing operation will become more horizontal, with the C.J.E.U. interpreting secondary law by balancing economic freedom with strengthened social protection at the Union level. After all, 60 years of economic integration have made business activities so transnational that initiatives against abuse at the national level are increasingly ineffective.

As for another structural principle, the unitary framework for abuse of establishment of companies would undoubtedly benefit the uniformity of E.U. 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 harmonisation.

Despite the systematic complexities, the E.U. needs a well-established principle of abuse of rights, particularly in the field of corporate mobility, as “any legal order which aspires 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”.<sup>115</sup> Its judicious application by national courts, under the guidance of the C.J.E.U., 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.

---

<sup>115</sup>C-367/96 *Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, Opinion of Mr Advocate General Tesauro, ¶ 24 1998 E.C.R. I-02843.

#### FUNDING DETAILS

The author declares that no funding was received for the research, authorship, and/or publication of this article.

#### DISCLOSURE STATEMENT

The author reports there are no competing interests to declare.

#### DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analysed in this study.