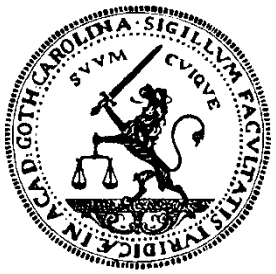

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Law ceases where abuse begins

A study of the principle of abuse of rights in the EU as regards to freedom of establishment and free movement of persons

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Contents

Summary

The doctrine of abuse of rights in a general sense is not a new one. According to some scholars it can be traced back to as early as Roman law and statements by Praetor Cicéro regarding the purchase of property. The influence of Roman law can be seen in many Member States today and the theory of abuse of law has lived on in many states such as France. However, the doctrine of abuse in EU law is a relatively new concept and was not established as a general principle in the EU until quite late.

The principle's role in the broader context of the EU, more specifically relating to free movement provisions, is still debatable, and has been questioned in free movement of persons. The purpose of this thesis is therefore to investigate how the principle of abuse of rights in EU law came to be, how it has been applied in freedom of establishment and free movement of persons, whether the application differs and if so, how come.

The thesis gives an account to the requirements and application of the principle, and the historical developments since its introduction as a doctrine in *Van Binsbergen*, to it being stated as a general principle of EU law in *Kofoed* and its application in more modern times.

To summarize, the principle of abuse, both in freedom of establishment and free movement of persons, is dependent on whether there is a genuine and effective, and not wholly artificial, exercise of the right to free movement. This is to be determined through the application of a dual test established in *Emsland-Stärke* and requires an objective- and subjective element. While the Court has applied the test in several cases regarding freedom of establishment, it has refrained from both applying it, and finding abuse to be present, in the context of free movement of persons.

I argue that this may be due to companies being creatures of law and artificial by nature. A person however is a physical entity which exists in and of itself and has a presence. Therefore, imagining a scenario where a person exists artificially in another Member State seems difficult and may be why the Court has not considered abuse at length within this context. On the other hand, it must be borne in mind that the Court has been adamant in continuously stating that a right granted under Directive 2004/38 may be denied if the exercise is not genuine and effective and marriage contracted for the sole purpose of enjoying the right of free movement and residence under the Directive is prohibited and considered abusive.

However, outside of marriages of conveniences, it is my conclusion that the principle of abuse of rights, as of right now, serves limited practical use in free movement of persons.

Abbreviations

CJEU – Court of Justice of the European Union

EU – European Union

Member State – Member State of the European Union

TEU – The Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

The Court – The Court of Justice of the European Union

The Treaties – The Treaty on the European Union and the Treaty on the Functioning of the European Union

UK – United Kingdom

VAT – Value added tax

1. Introduction

1.1 Background

The doctrine of abuse of rights in a general sense is not a new one. According to some scholars it can be traced back to as early as Roman law and statements by Praetor Cicéro regarding the purchase of property, where the seller knowingly exploits their knowledge of law in order to gain an improper advantage, e.g., when, while the formal conditions of purchase are met, the purchaser enters into the contract on false pretenses.[1] As a consequence, legal remedies were created in order to combat actions which were considered unjust in relation to what was considered righteous. Rufus[2] defined the concept of *dol*[3] as "machinatio quaedam alterius decipiendi cause, cum aliud simulateur et aluid agitur"[4] which can be translated as cunningly acting in a way that disguises the real intent of the action, to the detriment of another.[5] The concept of *dol* was later developed and two separate notions took form: *actio doli*[6] and *exceptio doli*[7].[8] By the introduction of these theories, arguments of righteousness based on moral values were integrated in Roman law and something akin to the doctrine of abuse of rights was taking form.[9] Their purpose, according to Fritz, by reference to Elsener[10], was to remedy unjust reliance on law where the consequences of a literal interpretation of the law would be unreasonable.[11]

The influence of Roman law can be seen in many Member States today and the theory of abuse of law has lived on in many states such as France (see *abus de droit* and *fraude à la loi* below), but also in Germany, Italy, Portugal and Spain.[12] The existence of a doctrine of abuse in Member States may be a basis for the development of a principle in EU law and even

[1] Fritz (2020) p. 29.
[2] Praetor 67 BCE.
[3] Cicéro had described his hypothetical as *dolus malus* which can be translated to *claiming one thing but doing another*.
[4] Fritz (2020) p. 30.
[5] Ibid.
[6] A right of legal action.
[7] A right of defense.
[8] Fritz (2020) p. 31.
[9] Ibid.
[10] Elsener (2004).
[11] Fritz (2020) p. 33.
[12] Ibid. p. 34.

though it is not the same as its Roman counterpart, inspiration has most certainly been taken from it.[13]

However, the doctrine of abuse in EU law is a relatively new concept and was not established as a general principle in the EU until quite late.[14] Therefore, the principle's role in the broader context of the EU, more specifically relating to free movement provisions, is still debatable, and has been questioned in the area of free movement of persons.[15] As such, there exists some uncertainty as to what it specifically entails, and whether it is even relevant in the context of free movement of persons. My aim in this thesis is therefore to shed light on the role of the principle in the EU, its application and whether there may exist some discrepancy of application in the context of different freedoms, specifically freedom of establishment and free movement of persons. This is to be done by a comparison between its application in freedom of establishment and free movement of persons, because, while, as stated above, the principle has been questioned in the context of free movement of persons, it has been widely used in freedom of establishment.

1.2 Purpose and research questions

The purpose of this thesis is to investigate how the principle of abuse of rights in EU law came to be, how it has been applied in freedom of establishment and free movement of persons, whether the application differs and if so, how come. The role of the principle in the context of free movement of persons has been questioned, I therefore aim to examine why this is the case by contrasting its application to freedom of establishment.

The purpose is to be achieved through the following research questions:

1. How has the principle of abuse of rights developed in EU law and what does it entail?
2. What is its scope of application as regards to freedom of establishment and free movement of persons?
3. In light of the answer to question 2, is the standard for finding abuse of rights different depending on whether it regards freedom of establishment or free movement of persons?

[13] Ibid. p. 35 & 36.
[14] Ibid. p. 42.
[15] See e.g. Kroeze in Cambien et. al. (2020) p. 245 & Ziegler in de la Feria and Vogenauer (2011) p. 313.

1.3 Delimitations

Firstly, this essay will only examine the principle of abuse as regards freedom of establishment and free movement of persons, its application in other areas of EU law will therefore not be discussed or developed more than in passing and where it is relevant to do so.

Secondly, the case law discussed in this thesis concerns the relationship between private and public, where a private entity has acted in a way which may be considered abusive to the detriment of the public. Abusive conduct by public entities will not be discussed, likewise when a private individual has acted to the detriment of another private individual.

Thirdly, only EU case law will be examined due to the essay's focus on EU law. While there have been cases in national courts finding abuse of rights to be present,[16] these will not be examined here.

1.4 Methodology and materials

This essay will apply the legal dogmatic method in the context of EU legislation and case law. First, a legal method is a doctrine of the sources of law and their interpretation.[17] However, defining the legal dogmatic method precisely can be quite difficult. Smits describes it as:

> research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyzes the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law.[18]

Furthermore, he identifies three objectives of legal dogmatic research: description, prescription, and justification.[19]

It is important for the purpose of this essay that the usage of the legal dogmatic method fulfills these objectives. My application of the method should serve the goals, and therefore the essay shall aim to describe the current legal system relating to the research questions, rationalize the normative functions of the law analyzed – the doctrine aims to provide clarity on how to decide – and lastly, the essay should put the law in the broader context of the legal

[16] For an examination of such cases, see Szabados (2017).
[17] Neergaard, Nielsen & Roseberry (2011) p. 7.
[18] Smits (2017), p. 5.
[19] Ibid. p. 8.

system, which leads to doctrine acting as a justification of the norms.[20] In doing so, the important role of legal doctrinal research is fulfilled, and my research serves a defined purpose.

What then defines the method that will be used? Kleineman defines the legal dogmatic method as a way of finding the solution to a legal problem, through application of the law and sources of law.[21] In a concrete sense, this entails finding and using the material available to us legal scholars as means of answering a legal problem.[22] Within the context of this essay, abuse of rights is a known concept, but what it means, and its scope is not. This process can be divided into three parts according to Kleineman, the abstract task of establishing a general rule, the task of defining the rule and its relevance within the scope of the problem, and the task of applying it to the specific case at hand.[23] This is done with the help of the sources of law.

As such, this essay aims at first establishing a general rule of abuse of rights, then defining it within the context of free movement of establishment and persons, and lastly applying it to the specific situation i.e., to answer the research questions.

In applying the legal dogmatic method, the sources of law in the context of EU law are applied to the problem. There are four so called main truths[24] of the European legal methodology seen in the CJEU's case law: a teleological interpretation is used (where the objective of the particular provision determines the interpretation of it), it strives for a uniform interpretation of words and concepts, Article 4(3) TEU can be used to support the interpretations, and general principles of EU law, especially fundamental rights, are relevant to the interpretation.[25]

The application of the legal dogmatic method for the purpose of this essay therefore must be in compliance with these four truths.

As for materials, the thesis will primarily use the Court's case law on the subject of abuse to answer the research questions, because the principle has been developed through the Court and not legislation – although some legislation will be discussed where it relates to the concept of abuse in EU law. Furthermore, as support, and as a basis for the thesis' conclusions, doctrine and documents from EU institutions will be used.

[20] Ibid. p. 8-12.
[21] Kleineman in Korling & Zamboni (2013), p. 21.
[22] Ibid. p. 22.
[23] Ibid. p. 29.
[24] The term used by Neergaard, Nielsen & Roseberry.
[25] Neergaard, Nielsen & Roseberry (2011) p. 12.

1.5 Theory

Saydé argues that *abuse of rights* and *abuse of law* are two distinct concepts, where abuse of rights relates to the relationship between private and private, while abuse of law relates to the private-public relationship.[26]

In his view, *abuse of rights* concerns the situation where a private individual abuses a specific legal position or factual circumstance within the legal framework to the detriment of another private individual, which can be e.g., abuse of dominant position in competition law, against consumers or abuse of process before the Court.[27]

On the other hand, *abuse of law* affects communities of individuals and can be classified as frauds and abuses of law.[28] The distinction between these two concepts relates to the fact that fraud concerns the veracity of facts presented, while abuse of law pertains to the applicability of a legal norm to a set of facts.[29]

This thesis only aims to give an account of what Saydé classifies as *abuse of law*. Furthermore, the Court has not made a distinction akin to Saydé, rather, it uses the two concepts interchangeably and no clear terminology can be ascertained.[30] Fritz concludes that this inconsistency of terminology in the Court's case law may relate to the fact that the principle is expressed in different ways in national law.[31] For instance, French law distinguishes between *fraude à la loi* and *abus de droit* which shares its distinction between private-public and private-private relationships with Saydé's.[32]

To provide a consistent representation of the Court's case law, this thesis will use the concepts of abuse of- rights and law interchangeably, however, if one were to make a differentiation, abuse of law (or *fraude à la loi*) would be the appropriate terminology.

[26] Saydé (2014) p. 19.
[27] Ibid. & p. 21.
[28] Ibid. p. 23 & 24.
[29] Ibid. p. 24.
[30] Fritz (2020) p. 23.
[31] Ibid.
[32] Ibid.

1.6 Disposition

Chapter 2 aims to define the principle of abuse of rights within the EU by first establishing what a general principle is, then considering whether abuse of rights can be classified as one and lastly defining it throughout the Court's case law.

I will then examine the principle in two areas of EU law: freedom of establishment and free movement of persons. Each chapter examines how the principle has been applied by the Court in the specific area and tries to establish an understanding of the specific features of each application.

Lastly, the thesis will summarize the findings and compare the principle's aspects of application in the two areas. Furthermore, it aims to explain the differences in application to gain an understanding of the Court's reasoning and give an account of the principle's role in the two areas of EU law.

2. Defining abuse of rights within the EU

As an initial step it is of relevance to define the concept of abuse of rights within the EU. This is important for the application of this thesis, due to it defining the application of the conclusions found.

The CJEU has stated that abuse of rights is a general principle of the Community[33]. In *Kofoed*[34], the Court stated that abuse of rights constitutes a "general Community law principle"[35], which is a continuation of its statements in the *Halifax* judgment where it recognized it as a principle.[36] While this much may be clear, exactly how the concept is defined is not as certain, and neither is what a *general principle* entails.

2.1 What is a general principle, and is abuse of rights one?

First, we need to ascertain what a general principle of EU law is, and what it means for its application to be considered one. As an initial definition it can be said that a principle is a "general proposition of law of some importance from which concrete rules derive"[37]. Principles are a derivation of specific rules or from the legal system as a whole as a way to provide justification for the specific rule, which is a concrete expression of the underlying foundations of the legal system.[38] Tridimas refers to Dworkin's analysis on rights which states that both principles and rules act as guidance towards a decision but differ in the direction they give.[39] Rules are specific and concrete in nature and indicate a result. While principles are not, instead they give a reason to move in a certain direction, but do not point towards a result.[40] They illustrate the values which act as the foundation for the legal system.[41]

In the context of abuse of rights, the principle does not imply that a specific conduct is by its nature necessarily abusive. Instead, it only tells us about the underlying values of the legal system – that you cannot rely on Union rights for abusive purposes – and may guide us to a conclusion.

[33] Used interchangeably with the *EU*.
[34] C-321/05 Kofoed.
[35] Ibid. para. 38.
[36] C-255/02 Halifax para. 70.
[37] Tridimas (1999) p. 1.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.

While this gives us an understanding of what a *principle* is, the next step, for the purpose of this essay, is to also define what *general* and *of EU law* mean in this thesis context. Tridimas considers *general principles*, for the purpose of his book on general principles of EC law, to be "fundamental unwritten principles of law which underlie the Community law edifice. Such principles are derived by the Court of Justice primarily from the laws of the Member States and used by it to supplement and refine the Treaties."[42]

Furthermore, general principles of EU law can be said to have certain distinct features according to Tridimas, namely that they derive from the rule of law, and they primarily refer to the relationship between the state and individuals (although they can under certain conditions be relied upon by Member States and Community institutions). Additionally, the Court derives them from the national law of the Member States. However, their content is adopted to the specific needs of Community law. Lastly, the Treaty provisions which provide for the principles are considered an expression of them, which means that the principles are assumed to predate the provisions.[43]

General principles of EU law therefore underlie the very structure of Community law and supplement and refine the Treaties' provisions. Furthermore, it is of importance to note that they bind not only the Community institutions, but also Member States in implementing Community Law and actions by national institutions.[44]

Would one then be correct in stating that abuse of rights falls under this definition? In *Kofoed*, the Court for the first time referred to the *general principle* of abuse of rights by stating that "Article 11(1)(a) of Directive 90/434[45] reflects the general Community law principle that abuse of rights is prohibited."[46] However, it can be argued that, while this statement seems to suggest so, the principle does not fully satisfy the role of a general principle. This can be seen by looking at the two main functions of a general principle according to Farmer: an interpretative function and as a criterion of review.[47] As such, a general principle can assist in interpreting a substantive EU law provision which may declare a rule or measure incompatible with the provision. Furthermore, a general principle may also declare a rule or measure

[42] Ibid. p. 3.
[43] Ibid. p. 3.
[44] Ibid. p. 7, Joined Cases 201 and 202/85 Klensch, and C-260/89 ERT.
[45] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.
[46] Ibid. para. 38.
[47] Farmer in de la Feria & Vogenauer (2011), p. 3.

unlawful, by reference only to the principle itself e.g., through the measure not respecting the principle of proportionality.[48]

The function of the principle of abuse of rights is solely interpretative.[49] It concerns the interpretation of primary and secondary law, and whether the specific provisions should be interpreted in a way which permits or requires the denial of a right, even though the formal requirements of the right are met, on the ground that the exercise is deemed abusive in the specific case.[50] It has also been applied in a way in which it justifies a restriction of one of the four freedoms by reference to the imperative interest of preventing abuse.[51]

As such, the principle of abuse of rights adheres to some of the functions of a general principle, but not all. A more apt description of the principle is therefore as a general principle of interpretation.

2.2 Two approaches to the principle

The Court of Justice has applied the principle in two different ways throughout its case law.[52] Firstly, it has been used as a method of defining the scope of free movement rights, where it is applied in a way which excludes certain types of movement that could be deemed abusive.[53] The principle was applied this way in *Daily Mail*[54] where a UK company had a desire to set up a branch and move its real seat to the Netherlands, but was denied the right to do so by the UK tax authorities due to the main reason of the transfer being tax avoidance.[55] Instead of focusing on the possibility of finding abuse, the CJEU reasoned on the basis of whether Article 49 TFEU allowed for the situation where a company moved its real seat.[56] The Court found that, due to companies being creatures of national law, national law may set up requirements that the company must have a connecting factor to the state of incorporation. Such requirements may prevent the setting up of branches in another Member State if this means that the connecting

[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid. p. 4.
[52] Sørensen (2019) p. 260.
[53] Ibid.
[54] C-81/87 Daily Mail.
[55] Sørensen (2019) p. 265-266.
[56] Ibid.

factor is lost.[57] Thus, Member States can prohibit certain forms of branching, to ward off abuse.[58]

The Court has on the other hand in several cases stated that the question of abuse should not be considered when dealing with the scope of application of a provision.[59] Instead, these cases seem to indicate that the principle of abuse constitutes an exception to situations where it has been established that the movement is within the scope of the Community right, as such, it should not be considered a principle of interpretation of scope.[60] This is the second way in which the Court has approached the issue of abuse; to allow for an exception to free movement where abuse is found, and is the way in which the principle should be applied according to Sørensen.[61]

The Court's application of abuse of rights has been the subject of major development by the Court in its case law. I shall therefore examine how the Court's approach to the principle has changed throughout history, to analyze the way in which it is used today.

2.3 Historical developments of the application of abuse of rights

As an initial observation, it is important to note how the principle came to be. The doctrine has been a part of EU law since 1974[62] and was introduced to strike a balance between on the one hand the effective use of EU law and judicial protection, and on the other hand, the preservation of Member State's competence to regulate internal situations.[63] As such, the principle of abuse of rights can be seen as a way to protect the competences of Member States. However, its application is regulated by the Court and the scope is dependent on the Court's interpretation of the principle and to what extent it can be used to limit free movement.[64] This is reflected in the way in which the principle has developed throughout the years, where a paradigm shift from an essential purpose doctrine to a sole purpose doctrine can be observed.[65] The first doctrine entails the finding of the essential reason of invoking Union law not being in line with the purpose of the right, regardless of whether there exists other reasons for invoking the right.[66]

[57] Ibid.
[58] Ibid.
[59] Sørensen (2006) p. 430.
[60] Ibid. and C-413/01 Ninni-Orasche para. 32 and C-23/93 TV10 para. 15.
[61] Sørensen (2019) p. 260.
[62] See Case 33/74 Van Binsbergen, which will also be analyzed below.
[63] Kroeze in Cambien et. al. (2020) p. 240.
[64] Ibid.
[65] Ibid.
[66] Ibid.

The latter instead requires that it can be ascertained that the sole purpose for invoking the right was the circumvention of national law.[67] The consequence of the latter doctrine is that the mere fact that the person consciously places himself in a situation to enjoy the right is not in itself enough to constitute a basis to assume that there is an abuse of law.[68] Thus, the scope of application of the principle is very limited, and cannot be relied upon as long as the right is invoked in a genuine and effective way.[69]

2.3.1 Van Binsbergen – abuse of rights as a limitation of the scope of a freedom

As mentioned above, the doctrine was first introduced in 1974 through the *Van Binsbergen* case. In this case, a Dutch national was acting as the legal representative in a case before a Dutch court. During the process he moved to Belgium, which resulted in him, as a consequence of Dutch law, losing his right to act as a representative.[70] While the Court considered this to be an unjustified restriction on the freedom to provide services, it nonetheless left the door open to the possibility of Member States denying the right in order to ensure that the person does not circumvent the professional rules established in that State by establishing in another Member State.[71] The Court concluded that:

> A Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State[72]

This statement seemed to indicate a wide margin of discretion afforded to Member States when it came to handling abuse cases, due to it implying that all circumvention of national rules could be contested and indicate that a restriction of rights could be invoked.[73]

Several cases followed *Van Binsbergen*, confirming that the doctrine applied to the free movement of goods[74], workers[75], establishment[76] and citizens[77].[78] The Court stated in these

[67] Ibid. and C-255/02 Halifax.
[68] Ibid. and C-212/97 Centros.
[69] Ibid., Case 53/81 Levin and C-196/04 Cadbury Schweppes.
[70] Sørensen (2006) p. 425.
[71] Ibid. and Case 33/74 para. 12.
[72] Case 33/74 Van Binsbergen para. 13.
[73] Kroeze in Cambien et. al. (2020) p. 241.
[74] Case 229/83 Leclerc para. 27
[75] Case 39/86 Lair para. 43.
[76] Case 115/78 Knoors para. 25.
[77] C-200/02 Zhu and Chen para. 34.
[78] Sørensen (2006) p. 426.

cases (among other things) that free movement rights cannot be relied upon when the sole purpose of the movement is the circumvention of law[79] and that "Member States are entitled to take measures to prevent individuals from improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation"[80].

The wide discretionary competence that followed from *Van Binsbergen* was subsequently limited in the so-called *Greek Challenge cases*[81].[82] In short, the cases were about the reliance of shareholders of Greek public limited liability companies on Directive 77/91/EEC[83] on the protection of their rights in the context of alterations in the capital of the company.[84] The Greek government had argued that the claims should be classified as abuse under EU law and the Court responded that, while Member States enjoy the right to combat abuse of law and that Community law cannot be relied on for abusive or fraudulent ends, its application must not undermine the effectiveness and uniformity of EU law.[85] This meant that the margin of discretion of Member States when applying the doctrine was limited by the application having to conform to limitations set out by EU law and the doctrine obtaining a more communitarian meaning.[86]

The discretion was further restricted in *Centros*[87]. The Court's decision concerned a Danish company, artificially set up in the UK, which had subsequently formed a branch in Denmark with the purpose of circumventing Danish law.[88] Advocate General La Pergola stated, with reference to previous case law, that the principle that rights conferred under Community law may not be relied on for fraudulent or abusive ends is a general principle of EU law.[89] Furthermore, he stated that the issue of defining the scope of abuse is solved by defining the scope of the right conferred on the individual.[90] "[T]o determine whether or not a

[79] See Case 229/83 Leclerc para. 27 and Case 39/96 Lair para. 43.
[80] C-200/02 Zhu and Chen para. 34.
[81] C-441/93 Pafitis and Others, C-367/96 Kefalas and Others and C-373/97 Diamantis.
[82] Kroeze in Cambien et. al. (2020) p. 241.
[83] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.
[84] Kroeze in Cambien et. al. (2020) p. 241.
[85] Ibid. and C-441/93 Pafitis and Others para. 68, C-367/96 Kefalas and Others paras. 20 & 22-28 and C-373/97 Diamantis paras. 34-39.
[86] Kroeze in Cambien et. al. (2020) p. 242.
[87] C-212/97 Centros.
[88] Ringe in de la Feria & Vogenauer (2011) p. 108.
[89] Opinion of Advocate General La Pergola delivered on 16 July 1998, para. 20.
[90] Ibid.

right is actually being exercised in an abusive manner is simply to define the material scope of the right in question."[91]

The Court agreed that a Member State may take measures to prevent a national from circumventing national law or to prevent improper or fraudulent usage of provisions of Community law and that this is established case law.[92] However, national courts must assess the conduct in the light of the objectives pursued by the specific provisions[93] and merely choosing to establish in the most favorable Member State "cannot, in itself, constitute an abuse of the right of establishment [...] [rather, it] is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty."[94] As such, the Court made a clear distinction between use and abuse of EU law where use cannot lead to a restriction of a right guaranteed by the Treaties.[95]

The *Centros* case can also be used to illustrate the movement from the essential purpose doctrine established in *Van Binsbergen* to the sole purpose doctrine.[96] Both cases related to a so called U-turn situation, where there is movement from one Member State to another and then back to the original Member State in order to obtain a right or circumvent national law.[97] While in *Van Binsbergen*, the Court seemed to indicate that all circumvention may be challenged with reference to the doctrine of abuse, in *Centros*, the Court instead not only declared a conduct which many deemed to be circumvention of national law and abusive legal, but also acknowledged the conduct as a part of the essence of the freedom of establishment.[98] *Centros* is therefore considered a landmark decision on the principle of abuse in EU law and gave rise to many questions, most notably the question of how to distinguish between use and abuse of rights.[99]

2.3.2 Emsland-Stärke – establishing a formal doctrine of abuse

The Court answered this question in *Emsland-Stärke*[100] by setting the necessary conditions in classifying abuse. Similarly to *Van Binsbergen* and *Centros*, *Emsland-Stärke* concerned a U-

[91] Ibid.
[92] C-212/97 Centros para. 24.
[93] Ibid. para. 25.
[94] Ibid. para. 27.
[95] Kroeze in Cambien et. al. (2020) p. 242.
[96] Ibid.
[97] Sørensen (2006) p. 426.
[98] Kroeze in Cambien et. al. (2020) p. 242. and Ringe in de la Feria & Vogenauer (2011) p. 109.
[99] Ibid.
[100] C-110/99/Emsland-Stärke.

turn situation in which a company exported a potato-based product from Germany to Switzerland which resulted in an export refund. The company then sent the product back to Germany and sold them.[101] On the question of whether this constituted abuse which could justify a restriction of the freedom of establishment the Court stated:

> 52 A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.
>
> 53 It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.
>
> 54 It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined.[102]

When applied to the facts of the case, the national court considered that the objective of the Community rules was not achieved. The fact that the exporter did not itself re-import the goods was of no bearing. Furthermore, the circumstance that the purchaser, who was established in a non-member country, resold the product to an undertaking in the same country with whom it had commercial and personal links to, did not preclude the export to the non-member country from being an abuse attributable to the exporter established within the EU.[103] On the contrary, this fact is to be considered an element which the national court should take into account in establishing the artificial nature of the operation.[104]

The doctrine described and applied in *Emsland-Stärke* is the first instance of the Court establishing a formal doctrine of abuse in EU law and entails a test for finding abuse which national courts can apply in the specific case.

While *Emsland-Stärke* did much to clarify the distinction between use and abuse of law, it did receive some criticism due to the difficulty in determining a person's subjective intentions and uncertainty as to whether the test could be applied to other fields of EU law.[105] We will see further below that the Court answered this in the *Halifax* case.

What chapters 2.3.1 and 2.3.2 indicate, is that the doctrine was considered by the Court to be a limitation on the scope of application of the freedoms, rather than an imperative in abuse

[101] Kroeze in Cambien et. al. (2020) p. 242.
[102] C-110/99/Emsland-Stärke paras. 52–54.
[103] Ibid. para. 58 & Ibid. paras. 55-57.
[104] Ibid. para. 58.
[105] Kroeze in Cambien et. al. (2020) p. 243.

cases. As seen above in chapter 2.2, there are two ways of applying the concept of abuse of rights, as a way of interpretation and as an exception. In the early days of the doctrine, the Court seemed to prefer the first method, stating that the rights cannot be relied upon if the conditions for applying the doctrine of abuse are met, and while the Court successively developed the test for finding abuse, it was continuously applied within the scope of having an interpretive function.

Furthermore, *Emsland-Stärke* indicates the Court's willingness at this time to give the doctrine a more general application. The case concerned, as seen above, the export of a potato-based product which relates to the common agricultural policy, not establishment. However, the Court went on to apply the test in freedom of establishment, which meant that the concept of abuse was developed in other areas of EU law.

Later on, the approach to abuse of rights shifted in the *Halifax* and *Kofoed* cases, where the Court in *Kofoed*, with reference to *Halifax,* for the first time stated that abuse of rights is a general principle of EU law.[106] Not only that, the Court seemed to indicate that the application was no longer a matter of determining the scope of application of a freedom, rather, it imposes an obligation to act and as such is an exception to cases where, while the movement is within the scope of a freedom, that freedom is relied upon for abusive purposes, Member States enjoy a discretion to limit the movement.

2.3.3 Halifax and Kofoed – imposing an obligation to act on Member States and establishment of a general principle?

Firstly, the questions of determining subjective intentions and whether the test could be applied to other fields of EU law resulting from the judgment in *Emsland-Stärke* were answered in *Halifax*. *Halifax* dealt with the question of whether the reliance on the right to deduct VAT, when transactions were created solely to achieve this purpose, could constitute abuse of rights.[107]

The Court first of all applied the *Emsland-Stärke* test on the area of VAT, which suggested that the test and the principle had general application, and secondly, objectified the subjective element.[108] The finding of the subjective element was considered reliant on finding that the essential aim of the transactions was to obtain a tax advantage, and this aim should be

[106] C-255/02 Halifax para. 70 & C-321/05 Kofoed para. 38.
[107] Kroeze in Cambien et. al. (2020) p. 243.
[108] Ibid.

apparent from a number of objective factors such as the purely artificial nature of the transactions and the links between operators involved in the scheme.[109]

Secondly, when reading the *Halifax* case in conjunction with the Court's judgment in *Kofoed* a shift in the application of abuse of rights can be seen in my view. *Kofoed* concerned, among other things, the application of Article 11(1)(a) of Directive 90/434 which states that a:

> Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares: […] has as its principal objective or as one of its principal objectives tax evasion or tax avoidance[110]

With reference to its judgment in *Halifax*, the Court in *Kofoed* stated that Article 11(1)(a) reflects the general Community principle that abuse of rights is prohibited.[111] As such, for the first time since its introduction in *Van Binsbergen*, the concept of abuse of rights was formulated as something akin to an obligation on Member States to act and as a general principle. Article 11(1)(a) makes no reference to the scope of application of the freedom, rather, it seems to suggest that while the provision of free movement may apply, a Member State is still permitted to impose restrictions. However, it must be borne in mind here that the Court states that, with reference to the principle of legal certainty, reliance on the principle of abuse must be derived from a transposition of the Directive into national legislation that is sufficiently precise and clear, or from the domestic general legal context.[112]

Reading this in light of the Court's Opinion 2/13[113], one could argue that the reasoning for this change is that the application of general principles of EU law requires that the interpretation respects the structure and objectives of the EU. In its Opinion, the Court states that this is a requirement for the interpretation of fundamental rights. In my opinion, the same should be true for general principles of EU law. This conclusion would rationalize the Court urging the Member States to act in cases of abuse, because it is a general principle of EU law. Therefore, failure to act would lead to the improper application of EU law and Member States must ensure the efficacy of EU law by applying the principle of abuse of rights.

[109] Ibid. and C-255/02 Halifax paras. 74, 75 and 81.
[110] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, Article 11(1)(a) (No longer in force).
[111] C-321/05 Kofoed para. 38.
[112] Ibid. paras. 42 & 44.
[113] OPINION 2/13 OF THE COURT (Full Court) 18 December 2014.

As we will see further below, this conclusion is further supported by Directive 2019/2121 Article 86m(8) and the Court's judgment in the *Danish cases*.

2.3.4 Cadbury Schweppes – further specification of the test in Emsland-Stärke

The *Emsland-Stärke* test was also used in *Cadbury Schweppes*[114]. In short, *Cadbury Schweppes* concerned a UK based company which exercised economic activity on the Irish market.[115] In order to combat tax-avoidance, the UK imposed a tax on income from Ireland which was challenged in the Court.[116] The Court held that, while nationals of Member States are not covered when improperly circumventing national law or improperly or fraudulently taking advantage of Community law, the mere establishment of a branch in another Member state "for the purpose of benefiting from more favorable legislation does not in itself suffice to constitute abuse"[117].[118] As such, Member States can only restrict the freedom of establishment where there exists a wholly artificial arrangement and this is established by applying the *Emsland-Stärke* test.[119]

Cadbury Schweppes can be seen as another step towards the sole purpose doctrine since the existence of a purpose which does not aim to create a wholly artificial situation precludes the finding of abuse of law.[120] Therefore, the action is legitimized if the objective of the free movement right is realized and reflected in economic reality.[121]

To summarize, it can be said that three requirements for the principle of abuse of rights to be applicable thus exist according to Vogenauer. Firstly, formal observance: the natural or legal person must have fulfilled all the legal requirements in the provision which it aims to invoke.[122] Secondly, frustration of purpose: application of the provision would lead to a result contrary to its purpose, spirit, aims and results or objective.[123] Thirdly, abusive reliance: the person has created an artificial arrangement in order to be able to invoke the provision.[124]

[114] C-196/04 Cadbury Schweppes.
[115] Kroeze in Cambien et. al. (2020) p. 244.
[116] Ibid.
[117] C-196/04 Cadbury Schweppes paras. 37.
[118] Ibid. paras. 35-37.
[119] Ibid. paras. 57 & 64.
[120] Kroeze in Cambien et. al. (2020) p. 244.
[121] Ibid.
[122] Vogenauer in de la Feria & Vogenauer (2011) p. 530.
[123] Ibid. & p. 532
[124] Ibid. p. 530.

These requirements have been developed throughout the Court's case law since the *Van Binsbergen* case and when looking at the development of the principle, one can observe a movement from an essential purpose doctrine in *Van Binsbergen* towards a sole purpose doctrine in more recent case law. This substantially narrowed the scope of the provision and limited the Member States discretionary competence.

Lastly, when examining the development of a formal concept of abuse of rights in EU law, it can be seen as consisting of three important steps.[125] Its first distinct manifestation in *Emsland-Stärke*, the extension of it to all internal abuses of law in *Halifax* and *Kofoed*, and to all cross-border situations in *Cadbury Schweppes*. This is exemplified in doctrine through the separation of abuses where an individual seeks to circumvent national law through reliance on Union rights and when an individual aims to take improper advantage of a right granted under Union law.[126]

In the following chapters I will examine how the doctrine of abuse of rights has been applied in the context of freedom of establishment and free movement of persons.

[125] Saydé (2014) p. 48.
[126] Ibid.

3. Abuse of rights and freedom of establishment

In this chapter, I aim to illustrate how the principle established above has been applied within the context of freedom of establishment and elucidate characteristics which are inherent to the principle when it is applied to the area of freedom of establishment. For this purpose, it is necessary to define the scope of the conclusions that will be reached by first defining the concept of legal personhood, second, the scope of Article 49 TFEU.

3.1. Defining *legal person* and *establishment*

Article 54(2) TFEU states that *companies or firms* relate to companies or firms constituted under civil or commercial law, and other legal persons governed by public or private law. Furthermore, Article 54(1) TFEU asserts that it is only companies or firms that are formed in accordance with the law of a Member State which shall be treated the same way as nationals of Member States. As such, whether a company is to be considered a legal person is to be governed by the law of the concerned Member State, which was confirmed in Case 81/87 *Daily Mail*:

> In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.[127]

For the purpose of this thesis, it is sufficient to say that this is not without its problems, due to the differing nature of legal systems in Europe. The concept of *person* in a legal context is what law makes it signify.[128] Yet, in practice, this has been influenced by non-legal considerations such as historical, political, moral, philosophical, and metaphysical considerations,[129] which all differ from culture to culture.

It may be remarked that a starting point for the legal person is that it is a right-and-duty-bearing-unit; it has those rights and duties which the courts declare it to have.[130] As such, what *person* represents in e.g. psychology is without bearing in the legal discussion.[131] However, in

[127] Case 81/87 Daily Mail para. 19.
[128] Dewey (1926) p. 655.
[129] Ibid.
[130] Ibid. p. 656.
[131] Ibid.

applying this, the courts, when justifying a particular decision, may go outside the legal sphere by reference to non-legal considerations to support its decision,[132] which means that in every legal system we may stray further from a legal definition of the corporate person.

As for the concept of *establishment*, the Court held in *Gebhard*[133] that it is a broad concept, under which a Community national is allowed "to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom"[134]. Furthermore, in *Cadbury Schweppes* the Court held that the application of Article 49 TFEU presupposes "actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there."[135] Both of these conditions must be fulfilled in order for Article 49 TFEU to apply.[136] In order for an establishment to not be considered wholly artificial the Court requires "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period."[137]

3.2 Case law on abuse of rights in freedom of establishment and its consequences

3.2.1 Centros and Cadbury Schweppes – where do you draw the line?

The case law on abuse of rights in freedom of establishment is substantial. In this section I aim to further analyze the Court's case law and discuss the consequences of the scope of the principle.

While the doctrine of abuse can be traced back to the *Van Binsbergen* case, *Centros* is a suitable starting point for this part of the thesis, due to its status as one of the landmark cases on the concept of abuse of EU law and the first time – to my knowledge – the Court dealt with a letterbox company. It was also the case that started much of the debate on abuse in company law and it provoked academic responses and change in business behavior all throughout Europe.[138] It set an interesting precedent where a liberal approach in relation to abuse was adopted by the Court, due to it not only considering such an extreme case to not be abusive,

[132] Ibid. p. 657.
[133] C-55/94 Gebhard.
[134] Ibid. para. 25.
[135] Ibid. para. 54.
[136] Barnard (2019) p. 406.
[137] C-221/89 Factortame II para. 20.
[138] Ringe in de la Feria & Vogenauer (2011) p. 107.

but also the conduct to be inherent to the freedom of establishment.[139] If such conduct is declared legal, what scope remains for the principle when applied to freedom of establishment?

Furthermore, the subject matter was of interest to several Member States. In *Centros*, several Member States intervened or expressed their views during the process. For example, the UK argued that "refusal to register the branch [was] tantamount to denying Centros a right which is at the very core of freedom of establishment and that it [was] contrary to the principle of mutual recognition of companies."[140] On the other hand, the Danish French and Swedish governments agreed with the opinion of the Companies Board which had stated that "Centros's application [was] an abusive exercise of the right of establishment and [suggested] that the conclusion reached in Van Binsbergen with regard to the interpretation of Article 59 of the Treaty should apply by analogy"[141].

As seen above, *Centros* concerned a Danish company, Centros Ltd, which was a private limited company registered in England and Wales.[142] The company had set up a branch in Denmark, where the two shareholders Mr. and Mrs. Bryde were nationals and residing, but the Danish Trade and Companies Board had refused to register the branch.[143] It was clear from the facts of the case that Centros had not traded since its formation,[144] and the Danish authorities refused the registration on the grounds that "Centros, which does not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital"[145]. Centros brought an action against the refusal before the Østre Landsret which upheld the Board's decision, Centros appealed this judgment to the Højesteret which referred the following question in substance to the Court:

> [I]s [it] contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State,

[139] Ibid. p. 114.
[140] Opinion of Advocate General La Pergola delivered on 16 July 1998, para. 5.
[141] Ibid. para. 6.
[142] C-212/97 Centros para. 2.
[143] Ibid. paras. 2-3.
[144] Ibid. para. 3.
[145] Ibid. para. 7.

> more restrictive so far as minimum paid-up share capital is concerned.[146]

Advocate General La Pergola initially stated in his opinion that the principle of abuse of rights is a general principle of Community law and entails that "rights conferred under Community law may not be relied on for fraudulent or abusive ends."[147] Furthermore, a person is considered to have abused a right if he has exercised the right in order to derive, to the detriment of others, "an improper advantage manifestly contrary to the objective"[148] pursued.[149]

La Pergola considered that the right of establishment has as its purpose to provide a chance to enter the market of a different Member State, irrespective of any underlying motives.[150] As such, it is the opportunity to exercise business activities that the provision protects.[151] By reference to the Court's judgment in *Levin*[152] he stated that as long as the right is exercised in accordance with the Treaty, the motives, calculations and particular interests behind the choice are irrelevant and not open to judgment.[153] The establishment of a branch by a company incorporated in the UK in order to evade more restrictive paid-up capital provisions was, according to La Pergola, a logical consequence of the rights guaranteed.[154] He therefore considered that Mr. and Mrs. Bryde did not take an improper advantage manifestly contrary to the objective of the provision.[155]

The Court developed this further, first affirming that a Member State may take action in order to prevent improper circumvention of national legislation or to prevent the situation when a Community provision is relied upon for improper or fraudulent purposes.[156] However, in these circumstances, the national court must, on a case-by-case basis, decide on whether to deny the person the right conferred in the light of the objective pursued by the provision.[157] In one of its most famous assertions on the subject of abuse the Court then concluded that:

> the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of

[146] Ibid. para. 14.
[147] Opinion of Advocate General La Pergola delivered on 16 July 1998, para. 20.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Case 53/81 Levin.
[153] Opinion of Advocate General La Pergola delivered on 16 July 1998, para. 20.
[154] Ibid.
[155] Ibid.
[156] C-212/97 Centros para. 24.
[157] Ibid. para. 25.

> establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.[158]

The consequence of this statement was that it severely limited Member States ability to rely on the principle of abuse, and it created a market of legal forms where Member States could compete on the rules.[159] As La Pergola stated in his opinion in *Centros*, "in the absence of harmonisation, competition among rules must be allowed free play in corporate matters"[160] and this is exactly what followed.[161]

After the Court handed down its judgment in *Centros*, legal uncertainty as to what constituted abuse existed.[162] As seen above, case law which clarified the principle followed *Centros*, most notably *Emsland-Stärke* which established a test for finding abuse. However, there was still room for regulatory arbitrage.[163] Furthermore, the doctrine was upheld in e.g., *Inspire Art*[164] which similarly to *Centros* concerned minimum capital requirements in the Netherlands. In this case, the Court held, with reference to *Centros* that the setting up of a company in the Member State with the least restrictive rules and then set up branches in other Member States is inherent to the freedom of establishment.[165] Additionally, the Court stated that it is not enough that a company does not conduct its business in the Member State of registration for the exercise to be considered abusive.[166]

Later, in *Cadbury Schweppes*, the question of legitimizing national legislation aimed at preventing abuse by establishment of a subsidiary or branch was brought up again, and crucially, The Court added a further test.[167]

In *Cadbury Schweppes*, a UK parent company (CS), had set up two subsidiaries (CSTS and CSTI) in Ireland.[168] In the case, both parties agreed that CSTS and CSTI were established in Ireland for the sole purpose of enabling the Cadbury Schweppes group to benefit from a lower corporate tax rate.[169] However, the UK authorities wanted to apply a different tax

[158] Ibid. para. 27.
[159] Ringe in de la Feria & Vogenauer (2011) p. 115.
[160] Opinion of Advocate General La Pergola delivered on 16 July 1998, para. 20.
[161] See Becht et. al. (2007).
[162] Ringe in de la Feria & Vogenauer (2011) p. 110.
[163] Vella in de la Feria & Vogenauer (2011) p. 127.
[164] C-167/01 Inspire Art.
[165] Ibid. para. 138.
[166] Ibid. para. 139.
[167] Vella in de la Feria & Vogenauer (2011) p. 128.
[168] Ibid.
[169] C-196/04 Cadbury Schweppes para. 18.

scheme, the legislation on controlled foreign companies, which provided an exception to the rule that a resident company is not taxed on the profits of a subsidiary.[170]

In *Centros*, the emphasis from the Court was on the conduct having to be *improper* for the circumvention to be objectionable. This would be the case if the circumvention was counter to the objective of the provision, indicating that the objective of the provision is of central importance.[171] Yet, the Court did not further elaborate on the objective of freedom of establishment in *Centros*, rather, it merely stated that the provision is:

> intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.[172]

Nonetheless, one cannot immediately draw the conclusion that the objective of enabling companies to pursue activities in another Member State implies that it is inherent to the exercise for an individual to set up a company in a Member State other than his own, followed by establishing a branch in the Member State which he or she is a national in.[173]

In this context, the judgment in *Cadbury Schweppes* can be seen in two ways, either as a specification of what constitutes an improper circumvention, or as the Court rectifying its narrow abuse test established in *Centros*. The question to be asked is therefore whether, in light of the judgment in *Cadbury Schweppes*, the Court would have still considered the conduct in *Centros* to not be an abuse of the Community provision.

The Court initially reiterated the findings in *Centros*, that the mere fact that a company has established itself in the most favorable Member State in order to benefit from it does not suffice to constitute an abuse.[174] However, The Court applied a different abuse test than the one applied in *Centros*.[175] The Court focused on whether it was an actual establishment in the host state which performed a *genuine economic activity* and which was not a *wholly artificial arrangement*.[176] In order to find that there exists a wholly artificial arrangement, the Member State should apply the test established in *Emsland-Stärke* which requires both a subjective- and

[170] Ibid. paras. 5 & 20.
[171] Vella in de la Feria & Vogenauer (2011) p. 128.
[172] C-212/97 Centros para. 26.
[173] Vella in de la Feria & Vogenauer (2011) p. 129.
[174] C-196/04 Cadbury Schweppes para. 37.
[175] Vella in de la Feria & Vogenauer (2011) p. 129.
[176] Ibid. & C-196/04 Cadbury Schweppes para. 51.

an objective element.[177] In line with its judgment in *Halifax*, the subjective condition is to be determined from a number of objective factors.[178] It stated that this is to be judged based on objectively ascertainable factors such as premises, staff and equipment.[179] The finding, based on these factors, that it is a fictitious establishment which does not perform genuine economic activity in the host Member State, means that it is a wholly artificial arrangement.[180]

While the Court in *Centros* did not elaborate clearly on the objective of the freedom of establishment, it established a more general objective in *Cadbury Schweppes*.[181] The objective of the freedom of establishment was considered to be "to allow a Community national to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin and to profit therefrom."[182] With reference to its judgment in *Factortame II* (among others) it held that "the concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period."[183]

Vella raises three questions in relation to this: do the facts of *Centros* indicate that it is a wholly artificial arrangement? Is the *Cadbury Schweppes* test applicable to company law? And what are the likely effects of *Centros* and *Cadbury Schweppes*? Vella's paper is a response to Ringe's mentioned above, and therefore this thesis will juxtapose their papers to create discussion on the subject.

Ringe seemed to assume that the facts of *Centros* did not constitute abuse in light of the Court's judgment in *Cadbury Schweppes* and concluded that if situations such as *Centros* and *Cadbury Schweppes* do not constitute abuse, then the scope of application of finding abuse is very limited.[184] This is based on the assumption that the setting up of a letterbox company is sufficient to be regarded as genuine economic activity through a fixed establishment for an indefinite period of time.[185]

Vella on the other hand claims that we should not so readily assume that the facts of *Centros* satisfies the test in *Cadbury Schweppes*.[186] Vella states that, while the arrangement in

[177] C-196/04 para. 64.
[178] C-255/02 Halifax para. 75.
[179] C-196/04 Cadbury Schweppes paras. 67 & 68.
[180] Ibid.
[181] Vella in de la Feria & Vogenauer (2011) p. 129.
[182] C-196/04 Cadbury Schweppes para. 53.
[183] Ibid. para. 54.
[184] Vella in de la Feria & Vogenauer (2011) p. 130.
[185] Ringe in de la Feria & Vogenauer (2011) p. 113.
[186] Vella in de la Feria & Vogenauer (2011) p. 130.

Centros was found to be legitimate, a different legal test was applied in *Cadbury Schweppes*, one which relied on a more general objective of the provision, which in turn meant a more onerous test.[187] Wholly artificial arrangements aimed at circumventing national legislation constitute abuse and a Member State restricting the freedom of establishment in order to prevent this is justified in doing so.[188] Here, the focus is on whether there is genuine economic activity.

Vella goes on to argue that, due to Centros not carrying out any trade in the UK, Centros did not perform any genuine economic activity.[189] In support of this argument, he refers to the focus on premises, staff and equipment found in *Cadbury Schweppes* and claims that due to Centros' size and the fact that no trading was done in the UK, these must have been very limited in scope.[190] He also states that the existence of an economic motivation for incorporation in a particular Member State cannot in itself constitute genuine economic activity in the host Member State.[191] Therefore, one must conclude that the facts of *Centros* seem to indicate that it would constitute an abuse, and the Danish authorities could have been justified in their restriction.[192]

As for the second question, whether the *Cadbury Schweppes* test is applicable in company law, a counter argument for the applicability of the *Cadbury Schweppes* test is the fact that it was developed in the field of tax law.[193] A further argument is that *Centros* was about an artificial primary establishment, while *Cadbury Schweppes* a secondary establishment.[194] Vella does not consider these to be convincing arguments. In both *Centros* and *Cadbury Schweppes* the Court referred to the importance of considering the objective of the provision when identifying abuse.[195] He argues that, if we assume that the objective stated in *Cadbury Schweppes* is correct, the creation of wholly artificial arrangements which do not perform any genuine economic activity must be considered abusive.[196] In this context, Vella considers it irrelevant whether it is by means of a primary- or secondary establishment, or in the field of corporate- or tax law.[197] He suggests that the setting up of a letterbox company

[187] Ibid.
[188] Ibid.
[189] Ibid. p. 131.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Ibid. & p. 132.

would be contrary to the freedom of establishment, and that it would be difficult to imagine a situation where the establishment of such companies would not be abusive, regardless of whether it was a primary- or secondary establishment.[198]

Edwards and Farmer support this view, stating that the issue in *Centros* and *Inspire Art* was the same as in *Cadbury Schweppes*, whether incorporation of a company in another Member State than where it carries out its business fulfills the objective of the freedom of establishment. Ergo, does Community law give the right to set up a company in another Member State solely to circumvent company law in the Member State of residence?[199]

Advocate General Poiares Maduro in his opinion in *Cartesio*[200] also seemed to agree with the fact that it is inconsequential whether it is a primary- or secondary establishment and Vella's general argumentation. The case concerned a company, Cartesio, formed under Hungarian law and established in Hungary wishing to transfer its seat to Italy.[201] The application was rejected on the grounds that Hungarian law did not allow for a company incorporated in Hungary to transfer its seat while still being subject to Hungarian law as its personal law. Poiares Maduro stated as regards to the question of abuse that:

> it may not always be possible to rely successfully on the right of establishment in order to establish a company nominally in another Member State for the sole purpose of circumventing one's own national company law. In its recent judgment in Cadbury Schweppes, the Court reiterated that 'the fact that [a] company was established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of [the freedom of establishment]'. However, it also emphasised that Member States may take measures to prevent 'wholly artificial arrangements, which do not reflect economic reality' and which are aimed at circumventing national legislation. In particular, the right of establishment does not preclude Member States from being wary of 'letter box' or 'front' companies. In my view, **this represents a significant qualification of the rulings in Centros and Inspire Art**, as well as a reaffirmation of established case-law on the principle of abuse of Community law, even though the Court continues to use the notion of abuse with considerable restraint – and rightly so.[202] (emphasis added)

While Ringe considers Poiares Maduro's opinion, he bases his conclusion on the assumption that *Centros* would not be considered a wholly artificial arrangement.[203] In contrast to Vella,

[198] Ibid.
[199] Edwards & Farmer in Arnull et. al. (2008) p. 218.
[200] C-210/06 Cartesio.
[201] Ibid. para. 21 & 23.
[202] Opinion of Advocate General Poiares Maduro delivered on 22 May 2008 para. 29.
[203] Ringe in de la Feria & Vogenauer (2011) p. 113.

he also held the economic motivation of profiting from the most favorable legislation to be sufficient to establish economic activity through a fixed establishment for an indefinite period.[204] It is my interpretation that Edwards and Farmer are skeptical of this conclusion. They write that the imposition of the requirement of genuine establishment in *Cadbury Schweppes* diverges significantly from the approach in *Centros* and *Inspire Art*, due to them considering neither *Centros* nor *Inspire Art*s to have genuine economic activity in the incorporation Member State.[205] Not only do they conclude that, as seen above, the issue in the three cases is the same, but also that the requirement of genuine establishment has a direct line from the judgment in *Centros*.[206]

The question of the correct application of *Centros* and *Cadbury Schweppes* was subsequently answered by the Court in *Polbud*[207], which is a much-debated case on this topic.

3.2.2 Polbud – Taking the side of the Centros judgment?

As we have seen in the previous chapter, there existed a scholarly- and interstate debate in relation to the judgments in *Centros* and *Cadbury Schweppes* which led to an uncertainty regarding the relationship between the principle of abuse and letterbox companies. This debate was settled by the Court in its judgment in *Polbud* which answered whether a conversion, which is not a genuine establishment in the destination Member State, would be protected under the freedom of establishment.

This case concerned Polbud, a Polish limited company established in Łąck (Poland), which had decided to transfer its registered office to Luxembourg.[208] When it had applied for removal from the Polish commercial register, the authorities had required several documents, among others documentation that the company had liquidated, and rejected the application when Polbud considered this unnecessary due to the request being a consequence of the transfer and not cessation of the company.[209] Polbud challenged that the transfer of its registered office was made conditional dependent on liquidation documents when the company had no such intention, and claimed that this was an unjustified limitation on their freedom of establishment.[210] The national court referred several questions to the Court and most

[204] Ibid.
[205] Edwards & Farmer in Arnull et. al. (2008) p. 218.
[206] Ibid. p. 219.
[207] C-106/16 Polbud.
[208] Ibid. para. 8.
[209] Ibid. paras. 11 & 12.
[210] Sørensen (2019) p. 276.

importantly asked whether Articles 49 and 54 TFEU must be "interpreted as meaning that restrictions on freedom of establishment cover a situation in which [...] a company transfers its registered office to that other Member State without changing its main head office, which remains in the State of initial incorporation?"[211]

When answering the question, the Court and Advocate General Kokott were of different opinions. Therefore, both will be examined.

In her opinion, Kokott argues that the Court has held that the concept of establishment entails the actual pursuit of an economic activity through a fixed establishment in the host State for an indefinite period.[212] This presupposes actual establishment in the host Member State and the pursuit of genuine economic activity there. Consequently, freedom of establishment should only apply to conduct which involves actual establishment.[213] Kokott also states that it is established case law that "the mere existence in the host Member State of a level of infrastructure such as to enable an economic activity to be pursued there on a stable and continuous basis"[214] is sufficient to qualify as an establishment.

When this is applied to the present case, where it is clear that the center of operations and commercial activity remained in Poland, Kokott argues that Polbud cannot rely on the freedom of establishment if they will not or do not intend to pursue genuine economic activity in Luxembourg.[215] According to her, while the freedom of establishment "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."[216] As such, when a cross-border conversion is an end in itself, the provision on freedom of establishment does not apply, if it does not entail actual establishment in the meaning of the Court's case law.[217]

In addition to Kokotts arguments, the Polish and Austrian governments argued, with reference to the Court's case law in *Daily Mail* and *Cartesio*, that freedom of establishment cannot be relied upon when the purpose of the transfer of the registered office is not actual establishment in the host state, therefore, a transfer such as in this case should not fall within the scope of Articles 49 and 54 TFEU.[218] The Court reached a different conclusion than Kokott, Poland and Austria.

[211] C-106/16 Polbud para. 18(3).
[212] Opinion of Advocate General Kokott delivered on 4 May 2017 para. 34.
[213] Ibid. & para. 35.
[214] Ibid. para. 36.
[215] Ibid. paras. 36 and 37.
[216] Ibid. para. 38.
[217] Ibid.
[218] C-106/16 Polbud para. 30.

First, the Court stated that the freedom provides the right for a company incorporated under Polish law to transfer itself to a company under Luxembourg law, if the conditions in the host Member States are met.[219] This statement was not a point of contention.

However, more controversially, the Court dismissed the argument that practices which do not entail the actual pursuit of actual business in the host Member State are not covered by the provision.[220] It held that freedom of establishment covers the situation when a company is formed in a Member State for the sole purpose of setting up a branch in another Member State, where its main or entire business is conducted.[221] This is also true for situations where a company converts itself into a company governed by the law of another Member State, while still conducting most or all of its business in the departure Member State.[222]

At a first glance, this seems like a controversial statement, both following Kokott's opinion and the Court's case law in *Cadbury Schweppes*. Despite this, it is my view that it can be reconciled when examining what the Court answers. We saw above that the Court held in *Cadbury Schweppes* that the freedom of establishment presupposes actual establishment in the host Member State and the pursuit of genuine economic activity there.[223] Member States are then justified in restricting conduct which, while fulfilling these conditions, is to be considered a wholly artificial arrangement on the basis of the test established in *Emsland-Stärke*.[224] Application of the test established in *Cadbury Schweppes* thus requires the formal conditions of freedom of establishment to be fulfilled. The finding of a wholly artificial arrangement is not a question of defining the scope of application of the provision, rather, it is an exception.

The Court held in *Centros* that the scope of freedom of establishment extends to so-called letterbox companies, but Member States may be justified in restricting the freedom where there exists a wholly artificial arrangement. This must be done on a case-by-case basis and based on objective evidence.[225] As such, general legislation cannot be considered justified.

This is wholly in line with the Court's findings in *Polbud* where the question raised was whether Articles 49 and 54 TFEU were applicable.[226] The question was not whether Member States are, reliant on abuse of rights, justified in restricting conduct such as that in *Polbud* on a case-by-case basis. It was whether the conduct was covered by the freedom of establishment.

[219] Ibid. para. 35.
[220] Ibid. paras. 37 & 38.
[221] Ibid. para. 38 & C-212/97 Centros para. 17.
[222] C-106/16 Polbud para. 38.
[223] C-196/04 Cadbury Schweppes para. 54.
[224] Ibid. paras. 55 & 64.
[225] C-212/97 Centros para. 25.
[226] C-106/16 Polbud para. 29.

As such, I argue that the Court in *Polbud* does not apply the general principle of abuse, rather, it only discusses whether the scope of freedom of establishment covers abusive practices. *Polbud* does not refer to *Emsland-Stärke* or *Cadbury Schweppes*. Instead it referred to its judgment in *Daily Mail*, which we have seen above relates to the scope of freedom of establishment.[227] Therefore, it should come as no surprise that the Court first held that Articles 49 and 54 TFEU encompass conduct such as that in *Polbud* and secondly, that Poland was not justified in requiring a liquidation procedure, due to it establishing a presumption of abuse which is in itself disproportionate – as seen in *Centros*.

What *Polbud* controversially establishes – even though it is in line with the decision in *Centros* – is that the conversion into a company governed by the law of another Member State, while still conducting most or all its business in the departure Member State, is to be considered actual establishment in the host Member State and the pursuit of genuine economic activity there. This is the main take-away of the case and could be interpreted as meaning that freedom of establishment requires either the pursuit of genuine economic activity, or the transfer of a registered office.[228] While this conforms to the decision in *Centros*, it opens up for conversions that only involve the transfer of registered office.

As for the real-world impact of the *Polbud* judgment, the opening of the scope of freedom of establishment to not only cover genuine economic activity, but also registration of the company means that more practices are covered by the freedom of establishment. This widening of the scope may however be limited by the incorporation of Directive 2019/2121[229] due to it imposing an obligation on the departure state to conduct an in-depth examination of whether the conversion is an artificial arrangement and if it finds abuse to be present, deny the conversion.[230]

To conclude, at a first glance the *Polbud* judgment seems difficult to reconcile with earlier case law, especially when one is faced with the contrasting opinions of Advocate General Kokott and the Court. Still, one must distinguish between the two approaches to the principle seen above in 2.2, as an interpretative function and as an exception. When it is applied to the discussion on the scope of application on a freedom, we have seen in cases such as *Centros* that its application is very limited and that the scope of the provisions is wide. This is

[227] See C-106/16 Polbud para. 33 & C-81/87 Daily Mail.
[228] Sørensen (2019) p. 280.
[229] 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.
[230] Ibid. Article 86m(8).

the stance taken by the Court in *Polbud*, where it concludes that the Polish company's conduct is within the scope of application of the freedom of establishment.

Kokott instead applies the principle through the form of being a justification of restrictions, and it should therefore not be surprising that she reaches a different opinion. Instead of applying the precedents of *Daily Mail* and *Centros*, she applied the test established in *Cadbury Schweppes* which requires the formal conditions of freedom of establishment to be fulfilled.[231] A comparison of Kokott's opinion and the Court's judgment is therefore a very good summary of the two applications of the principle's standing at the time of the judgment, where its interpretative function was very limited, but there existed some room for application of it in the form of a justification. If the question raised by the national court had not been whether freedom of establishment *covers* Polbud's conversion, but rather whether a Member State would be *justified* in restricting it based on the principle of abuse of rights, we may have seen a different result, or more certainly, different argumentation from the Court.[232] The Court even seem to point to this conclusion in *Polbud* where it states that:

> the question of the applicability of Articles 49 and 54 TFEU is different from the question of whether a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation, given that, in accordance with settled case-law, it is open to a Member State to adopt such measures.[233]

3.2.3 Directive 2019/2121 – imposing an obligation to act on Member States

Perhaps as a direct response to the Court's decision in *Polbud* Directive 2017/1132 regarding cross-border mergers and division was amended in 2019 to also deal with the subject of cross-border conversions. We have seen above that the Court in *Kofoed* calls for Member States to act in cases of abuse, and this can be motivated by reference to Member States obligation to ensure the efficacy of EU law and the principle of sincere cooperation in Article 4(3) TEU.

The Commission states in its proposal that the judgment in *Polbud* meant that it became possible for companies to convert without exercising any economic activity in the host Member State (as long as the Member State doesn't require this), as such, when there is a transfer of registered office, Article 49 TFEU does not require an economic activity as a precondition for

[231] See C-196/04 Cadbury Schweppes paras. 55 where the Court says that a Member State would be *justified* in restricting the freedom when it is to prevent wholly artificial arrangements.
[232] However, the present case concerned national legislation, we have seen in e.g. *Centros* that the principle should be applied on a case-by-case basis, therefore general rules are not proportional when applying the principle of abuse.
[233] See C-106/16 Polbud para. 39.

its applicability.[234] The Commission pointed out the need for a harmonized procedure for cross border conversions to protect among other things stakeholders, creditors or workers.[235] Without a harmonized procedure and relevant safeguards, the protection would often be ineffective or insufficient, and it may lead to an increase in letterbox companies which would authorize, inter alia, "organised crime organisations to hide and obscure the beneficial ownership of companies to launder proceeds of crime."[236] Therefore the Commission called for "rules on cross-border conversion with adequate and proportionate safeguards for employees, creditors and shareholders to create a dynamic and fair Single Market."[237]

This is to be mainly achieved through a requirement that the departure Member State conducts an in-depth examination of whether the conversion is an artificial arrangement.[238] This to be done by an independent expert. However, it is the departure Member State which establishes whether abuse is present.[239] This decision should be based on an assessment of several indicative factors mentioned in recital 36 of the preamble to the Directive. The departure Member State is obliged to perform this investigation, and if it considers abuse to be present, it should not allow the conversion.[240] This can be seen as a codification of the judgments in *Halifax* and *Kofoed* where the Court can be interpreted as calling for Member States to prohibit companies from relying on Community provisions for abusive purposes.

It is therefore my view that Directive 2019/2121 supports the argument that the correct application of Community law and the principle of abuse in freedom of establishment obliges a Member State to deny the right if it is based on a wholly artificial arrangement. The application of general principles should be bound by the same factors as fundamental rights, as such the correct application of them must conform with the objectives and structure of the EU. Failure to act by Member States in cases of abuse would therefore lead to the improper application of EU law in freedom of establishment.

[234] COM/2018/241 – 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 p.2.
[235] Ibid. p. 3.
[236] Ibid.
[237] Ibid.
[238] Sørensen (2019) p. 282.
[239] Ibid. p. 283.
[240] Directive 2019/2121 Article 86m(8).

3.2.4 The Danish cases – confirmation of an obligation in tax law?

Lastly, the Court's judgment in the *Danish cases*[241] warrants a mention, due to its confirmation of the existence of a general obligation to act for Member States in abuse cases, at least in tax law.

In the first case, Joined cases C-115/16, C-118/16 and C-119/16, one of the questions which the referring court sought clarity on was:

> [W]hether, in order to combat an abuse of rights in the context of applying Directive 2003/49,[242] a Member State must have adopted a specific domestic provision transposing that Directive or whether it may refer to domestic or agreement-based anti-abuse principles or provisions?[243]

We have seen above that the Court in *Kofoed* considered the provision on abuse in the Merger Directive[244] to reflect the general principle that abuse is prohibited. However, it required that reliance on the principle of abuse must be derived from a transposition of the Directive into national legislation that is sufficiently precise and clear, or from the domestic general legal context.[245] This was also the view held by Advocate General Kokott in her opinion in the *Danish cases* where she held that Member States cannot apply Article 5 (the article on abuse) of the Directive to the detriment of the claimant, for the reason of legal certainty, if it has not transposed it.[246] Furthermore, a Member State cannot rely on the general principle of abuse in cases falling under the scope of the Directive, due to the risk of undermining the harmonization of the Directive and the prohibition of applying non-transposed provisions of directives to the detriment of individuals.[247]

The Court took a different stance, overruling its judgment in *Kofoed*. It held that:

> in the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights provided for by Directive 2003/49 where they

[241] Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16 N Luxembourg 1 and Others, and Joined Cases C-116/16 and C-117/16 T Danmark and Y Danmark.
[242] Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.
[243] Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16 N Luxembourg 1 and Others, and Joined Cases C-116/16 and C-117/16 T Danmark and Y Danmark para. 95.
[244] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.
[245] C-321/05 Kofoed paras. 38, 42 & 44.
[246] Opinion of Advocate General Kokott delivered on 1 March 2018 Case C-115/16 para. 103.
[247] Ibid. para. 104.

> are invoked for fraudulent or abusive ends.[248]

Furthermore, in relation to the judgment in *Kofoed* the Court stated that:

> even if it were to transpire [...] that national law does not contain rules which may be interpreted in compliance with Article 5 of Directive 2003/49, this — notwithstanding what the Court held in the judgment of 5 July 2007, Kofoed [...] — could not be taken to mean that the national authorities and courts would be prevented from refusing to grant the advantage [...] in Article 1(1) of the directive in the event of fraud or abuse of rights.[249]

This is clearly a new stance taken by the Court on the principle of abuse in tax law compared to *Kofoed* and opens the door on applying the principle to conduct within the scope of a directive which contains an anti-avoidance provision, without national implementation of said directive. It is also important to note that this is an obligation on Member States, it must refuse the grant of an advantage resulting from the directive if there is a finding of abuse in accordance with the general principle (which requires the application of the test established in *Emsland-Stärke*).[250]

However, one should be wary when applying this precedent, as it only applies to rights derived from EU legislation and not rights rooted in national- or tax treaty law.[251] Furthermore, one should not presume that this judgment has general application to other fields of EU law, rather, it is most probably limited to the area of tax law. This is also in line with scholars believing that the principle has greater use in the field of tax law compared to e.g., company law.[252]

In the second case, Joined Cases C-116/16 and C-117/16, the Court further clarified what it means by an *artificial arrangement* specifically regarding letterbox companies in tax law. It stated that:

> A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia where, on account of a conduit entity interposed in the structure of the group between the company that pays dividends and the company in the group which is their beneficial owner, payment of tax on the dividends is

[248] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 para. 111.
[249] Ibid. para. 117.
[250] Ibid. para. 120.
[251] Danon et. al. (2021) p. 484.
[252] See e.g. Sørensen (2019) p. 281.

avoided.[253]

This statement raises the question of whether the objective element of the test in *Emsland-Stärke* is still relevant. An interpretation held by commentators has been that the focus following this judgment is now on the motivation of the taxpayer.[254] Whether the statement from the Court means that when the sole purpose of the taxpayer is to obtain a tax advantage, the objective of the applicable provision is irrelevant, which would undermine the test established in *Emsland-Stärke*, may be discussed.[255] Danon et. al. argue that this is not the case.[256] It is instead their view that the Court relies on both the objective- and subjective element of the test, with reference to the Court explicitly stating that there must be both a subjective- and objective element present,[257] and I am inclined to agree. However, it must be borne in mind that an argument can be made that wholly artificial arrangements, i.e., letterbox companies, always defeats the objective of direct tax provisions, and as such, the relevant part of the *Emsland-Stärke* test in this area is the subjective element.[258]

In conclusion, the importance of the *Danish cases* should not be understated, because they overruled the judgment in *Kofoed.* They also further cemented the principle's role as a general principle of EU law, due to the consequence being that application of the principle to conduct which falls within the scope of a tax directive, which has a codified anti-avoidance rule, to the detriment of an individual resident in a state which has not transposed the directive, is in compliance with the principle of legal certainty. Therefore, it must be considered that the principle of abuse can be applied directly to create obligations to the detriment of individuals, even if it has been given specific effect and expressed in a concrete manner already in the directive concerned which has not been implemented in national law.

This conclusion may be justified, as regards to the principle of legal certainty, by the view that the application of the precedent does not entail the removal of a right, rather, that no right existed in the first place. As such, when the principle of abuse is applied, it is not to the detriment of any individual.

In any case, the application of the principle of abuse in freedom of establishment remains unclear for Member States. However, while its application as an interpretative principle is limited through *Centros* and *Polbud* (among others), the Court has left the door

[253] Joined Cases C-116/16 and C-117/16 T Danmark and Y Danmark para. 100.
[254] Danon et. al. (2021) p. 492.
[255] Ibid. & Joined Cases C-116/16 and C-117/16 T Danmark and Y Danmark para. 64.
[256] Danon et. al. (2021) p. 492.
[257] Ibid.
[258] Ibid.

open to applying it as an exception on a case-by-case basis when there exists a wholly artificial arrangement.

4. Abuse of rights and free movement of persons

In the area of free movement of persons, a divide between two main themes can be seen in the Court's case law: abuse of rights in the context of workers' benefits and derived residence rights for family members. This chapter will therefore deal with these topics separately, but first, some initial observations can be made as to the relevancy of the principle in free movement of persons in general.

The right to free movement of workers is guaranteed through Article 45 TFEU and entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Additionally, free movement of citizens is guaranteed through Article 21 TFEU. These freedoms are further developed in secondary law, mainly through Directive 2004/38[259] and Regulation 492/2011[260].

Article 35 of Directive 2004/38 explicitly recognizes the principle of abuse of rights in free movement of citizens and their family members. It states that:

> Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

This is a codification of the Court's case law on the principle of abuse of rights in free movement of workers and citizens.[261]

According to Ziegler, two conclusions can be drawn from this codification: that the principle is officially recognized in this area of EU law and that the principle in this context, dogmatically, is equated to a justification which provides Member States with the ability to except or derogate from the freedom under specific circumstances.[262] Ziegler goes on to state six observations that can be made.

[259] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
[260] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.
[261] This is explicitly stated in recital 3 of the directive.
[262] Ziegler in de la Feria and Vogenauer (2011) p. 295.

Firstly, in this context, abuse of rights is not inherent to the definition of the right, nor does it affect the scope of the Treaty.[263] Therefore, Member States can only refuse, terminate, or withdraw a right, i.e., restrict conduct which, while being within the scope of a right, is to be considered abusive.[264]

Secondly, as a consequence of this, abuse of rights does not rule out the existence of a right.[265]

Thirdly, abuse of rights and lack of rights are not synonymous in this context.[266]

Fourthly, it can be said that while the provision dogmatically equates abuse of rights to the ordinary derogation clauses (public policy, public security, and public health), the relationship between them is uncertain.[267] This is two-faced. It is both unclear how the inter-relationship between abuse of rights and the general derogation clauses is to be viewed, and how the limitation of proportionality and the safeguards in Articles 30 and 31 of the Directive affect the principles application.

Fifthly, both abuse of rights and fraud are mentioned in the Article, but the relationship between the two concepts in the context of the Directive is not clear.[268] Ziegler's conclusion is that the concept of *fraud* refers to deception about a condition being met where it is not formally fulfilled, e.g. through forgery of a marriage certificate.[269] Therefore fraud would only be relevant in situations which require certificates or documents in order for the conditions of application of the right to be fulfilled.[270] On the other hand, abuse presupposes that the formal requirements of the right are fulfilled, but the motive or purpose behind it is improper, e.g. marriages of convenience.[271]

Lastly, the application of abuse of rights is vertical in nature, between individuals, the EU, and the Member States.

Furthermore, some scholars are skeptical of the principle's relevance in the context of free movement of persons. Kroeze claims that there exists two schools of thought, either the "full rejection of the impact of the concept of abuse of law within the field [...] or its reduction

[263] Ibid. p. 296.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid.
[271] Ibid.

to a merely verbal acceptance as a legal principle"[272] and Ziegler asks "why the Court of Justice refers to the abuse of rights at all in the context of free movement of persons, and whether appeasing Member States might be the only reason."[273] While these arguments can be made, it is important to analyze the case law of the Court in order to understand why these conclusions may be reached and the role of the principle in this area of free movement law.

With reference to the case law of the Court of Justice, I therefore aim to investigate the relevancy of the principle of abuse in the context of free movement of persons, and how this may be seen in light of its application in freedom of establishment.

Furthermore, it is important to acknowledge that in free movement of persons, the formal doctrine of abuse established in *Emsland-Stärke* is not always applied. Rather, there can be said to exist a separate, informal, doctrine of abuse which is used primarily in this area of EU law.[274] Such a doctrine, instead of applying the formal doctrine, addresses artificial practices through other legal grounds which have no relation to the formal doctrine of abuse, e.g., the definition of worker or the codification of an informal doctrine in Article 35 of Directive 2004/38.[275]

4.1 Case law on abuse of rights in the context of workers' benefits

The relevancy of the status of being a *worker* in the EU today may be called into question, especially as regards to abuse of rights, due to the introduction of Directive 2004/38 which meant that residence rights of family members were no longer dependent on the status of being a worker, but rather the status of being an EU citizen.[276]

Before the introduction of the Union citizenship in the Maastricht Treaty in 1992, the status of worker was of major importance, due to several rights being derived from it. However, throughout the years following the implementation of Union citizenship, the status of worker became less relevant, for example, in *Grzelczyk*[277] the Court stated that citizenship was "destined to be the fundamental status of nationals of the Member States"[278] and that "those who find themselves in the same situation [...] enjoy the same treatment in law irrespective of

[272] Kroeze in Cambien et. al. (2020) p. 245.
[273] Ziegler in de la Feria and Vogenauer (2011) p. 313.
[274] Saydé (2014) p. 102.
[275] Ibid.
[276] Ziegler in de la Feria and Vogenauer (2011) p. 298.
[277] C-184/99 Grzelczyk.
[278] Ibid. para. 31.

their nationality"[279]. In the case, the Court relied on the right of non-discrimination[280] to provide, under certain circumstances, non-workers certain social benefits.[281] However, this was made conditional on the refusal to grant being a disproportionate restriction, the application of this precedent is therefore highly unforeseeable, mainly due to it being an individualized assessment in the specific case.[282] As such, the status of worker is still relevant due to its automatic nature in granting equal treatment, notably in the area of social and tax advantages under Regulation 492/2011.[283]

Levin is the case that set the framework for the principle of abuse in the context of free movement of workers, due to the Court defining the scope of *worker*. While the Court in *Lawrie-Blum*[284] had stated that a worker is a person who "for a certain period of time [...] performs services for and under the direction of another person in return for which he receives remuneration"[285], the scope of this definition was unknown. In *Levin*, while the Court did not refer to the doctrine of abuse, the Court stated that for an activity to be regarded as *work*, it must be effective and genuine and not purely marginal and ancillary.[286]

In *Lair*[287] the questions raised by the national court concerned a claim of social benefits after short-term employment. On the possibility of a finding of abuse limiting the free movement of workers by reference to the facts of the case the Court stated that:

> where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, [...] such abuses are not covered by the Community provisions in question.[288]

I'd like to raise two observations here. Firstly, the Court in *Lair* makes reference to the *sole purpose doctrine* a decade before it was developed in the area of establishment in *Centros*, during a time when the *essential purpose doctrine* was applied.[289] According to de la Feria, this dichotomy between the freedoms can be attributed to the fact that human beings should be

[279] Ibid.
[280] Article 18 TFEU.
[281] Ziegler in de la Feria and Vogenauer (2011) p. 299.
[282] Ibid.
[283] Ibid.
[284] Case 66/85 Lawrie-Blum.
[285] Ibid. para. 17.
[286] Case 53/81 Levin para. 17.
[287] Case 39/86 Lair.
[288] Ibid. para. 43.
[289] Kroeze in Cambien et. al. (2020) p. 245.

treated differently to legal persons and hold a greater moral value.[290] Furthermore, this difference is not surprising, as the Court, according to de la Feria, has a tradition of different approaches to the concept of abuse in the field of workers and citizenship compared to establishment for these reasons.[291]

Secondly, the focus on the *purpose* of entering a Member State seems to be at odds with the judgment in *Levin*, where the motive was of no relevance.[292] Ziegler solves this by stating that it may be observed that there exists two types of motives, with reference to Advocate General Slynn's opinion in *Lair*.[293] In his opinion he states that in order to be classified as a worker, a person must not have a motive which rules out the genuineness of the work:

> If he is there [in the capacity of a worker as well as doing a genuine and effective job] […] the collateral intentions behind his going [...] are irrelevant. But if he goes there not genuinely in the capacity of a worker but, e.g., in order to become a student or to gain a short, useful experience before his studies begin, then it does not seem to me that he is to be regarded as a worker for the purposes of Article 7 (2) and (3) of the regulation, even if during that period he is doing genuine and effective work[294]

In short, the motive can either be *collateral* – which are the motives behind a genuine and effective job – or motives which rule out the genuineness of the work.[295] This second motive must be established on objective evidence, and if so, entails that it is to be considered an abuse which is not covered by Community law.

Lair is important due to two factors. First, it establishes the doctrine of abuse of rights in free movement of workers. Secondly, it defines this concept within the framework of the concept of *worker*. When the sole purpose of exercising a right is to obtain, after a very short period of occupational activity, a social benefit, it is to be considered abusive, thus the worker is not genuinely there in the capacity of a worker. The consequence of this is that, as of *Lair*, there was no separate concept of abuse in free movement of workers, rather, it was a part of a very broad definition of *worker*.[296]

[290] de la Feria in de la Feria & Vogenauer (2011) p. xix.
[291] Ibid.
[292] Ziegler in de la Feria and Vogenauer (2011) p. 302.
[293] Ibid.
[294] Opinion of Advocate General Sir Gordon Slynn delivered on 17 September 1987, 3182.
[295] Ziegler in de la Feria and Vogenauer (2011) p. 302.
[296] Ibid.

The scope of the term *objective evidence* was developed in the cases *Paletta I*[297] *& II*[298]. In short, the cases concerned the interpretation of Article 18 of Regulation 574/72[299] and more specifically paid sick leave.[300] Vittorio Paletta, his wife Raffaela, and their two children (the employees) were Italian nationals employed by the company Brennet AG, which was established in Germany.[301] The employees had reported themselves as sick, but Brennet AG had refused to pay them their wages even though, in accordance with the Lohnfortzahlungsgesetz, they were entitled to a maximum of six weeks' pay.[302] Brennet AG's refusal was based on the grounds that they doubted the authenticity of medical findings made abroad, and they did not consider themselves bound by these findings.[303]

In *Paletta I* the Court stated that the competent institution is bound in fact and in law by medical findings found by an institution in the country of residence or temporary residence as regards to the commencement and duration of the employee's incapacity of work.[304]

This raised the question in *Paletta II* of whether the Court's interpretation of Article 18 of Regulation 574/72 in *Paletta I* "mean that an employer is barred from adducing evidence of abuse which shows conclusively or with a sufficient degree of probability that incapacity for work did not exist?"[305]

The Court, with reference to *Van Binsbergen* and *Lair* (among others), restated that Community law cannot be relied upon for abusive or fraudulent purposes, and that national courts, where it can be established based on objective evidence that the conduct was abusive, may deny the worker benefits provided for in Community law.[306] The conduct must nonetheless be assessed in light of the objectives of the provision.[307]

Advocate General Cosmas considered that there exists a presumption of validity of medical certificates in accordance with Article 18, however, this does not preclude adducing evidence which conclusively proves that the certificate is to be considered invalid.[308] He states

[297] C-45/90 Paletta I.
[298] C-206/94 Paletta II.
[299] Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.
[300] C-45/90 Paletta I para. 2.
[301] Ibid.
[302] Ibid. paras. 2 & 3.
[303] Ibid. para. 4.
[304] Ibid. para. 28.
[305] C-206/94 Paletta II para. 14(2).
[306] Ibid. para. 24 & 25.
[307] Ibid. para. 25.
[308] Opinion of Advocate General Cosmas delivered on 30 January 1996 para. 47 & 48.

that if the medical certificate lacks certain essential characteristics relating to form, meaning that it is evidently tainted, e.g. it contains the wrong name or date, it cannot be considered genuinely related to the worker and thus he cannot rely on it.[309] The employer can also provide evidence that the certificate does not correspond with reality due to irrefutable evidence relating to an act of a public body in the issuing Member State, e.g. cases where the certificate was fraudulently obtained.[310] This evidence must be conclusive, it is not sufficient that it gives rise to strong suspicions.[311]

The Court concluded, in line with Advocate General Cosmas' conclusion, that the provision does not:

> preclude employers from adducing evidence to support, where appropriate, a finding by the national court of abuse or fraudulent conduct on the part of the worker concerned, in that, although he may claim to have become incapacitated for work, such incapacity having been certified in accordance with Article 18 of Regulation No 574/72, he was not sick at all.[312]

As such, the bar for finding abuse in the context of free movement of workers is set very high. It must be based on objective evidence, which conclusively provides abusive conduct on the part of the worker. Such evidence may e.g., be either relating to the form of issued certificates or that the certificate was fraudulently obtained. Therefore, it must be irrefutably proven that the grounds cited for the Community provision do not reflect reality.

Ninni-Orasche[313] is a continuation of the argumentation found in *Lair* relating to abuse and obtaining social benefits after a short time of being employed. With reference to the judgment in *Lair,* the Austrian court considered whether Ninni-Orasche, who was an Italian national, could be considered to fulfill the test for finding abuse established in *Lair*, due to applying for a benefit after an employment period of two-and-a-half months.[314]

The Court stated that Ninni-Orasche was a worker with reference to the employment's effective and genuine nature, and that "factors relating to the conduct of the person concerned before and after the period of employment are not relevant for establishing the status of worker"[315]. Most notably in this case, the Court expanded the scope of relevant motives to be

[309] Ibid. para. 49.
[310] Ibid. para. 50 & 51.
[311] Ibid. para. 60.
[312] C-206/94 Paletta II para. 27.
[313] C-413/01 Ninni-Orasche.
[314] Ziegler in de la Feria and Vogenauer (2011) p. 303.
[315] C-413/01 Ninni-Orasche para. 28.

considered in finding abuse from the *motive for taking up employment* to the *motive for entering the country*.[316]

Lastly, I would like to shortly consider Advocate General Mazák's opinion in *Förster*[317]. Jacqueline Förster, a German national, had moved to the Netherlands to study and while studying she worked for a period longer than three years.[318] After ending her employment, she applied for a student benefit which was refused by the Dutch authority on the basis of not being a worker and not fulfilling a residence requirement found in national law.[319]

Mazák initially refers to the case law in *Lair* and *Ninni-Orasche* (among others) that it is settled that a national studying abroad, and engaging in occupational activity in the host state, retains their status as worker after the cessation of employment as long as there is a *continuity* between the occupational activity and their studies.[320]

This continuity should not be interpreted strictly, and even if the motive for entering the Member State was principally to study, that does not as such preclude the person from being considered a worker.[321] Mazák considers that, due to there being a substantial employment relationship and a personal relationship with a Dutch citizen, Förster's sole purpose for entering the Member State was not to enjoy the benefit.[322] The Court agreed with Mazák's finding relating to Förster´s motive and by extension the dismissal of a finding of abuse.[323]

To summarize, in free movement of workers, it was established in *Lair* that when a national enters another Member State with the sole purpose of, after a short period of employment, enjoying benefits in the host state on grounds of current regulation in the area, he is not within the scope of Community law. This is to be established based on objective evidence which conclusively proves that the national is not genuinely there in the capacity of a worker.

In the context of free movement of workers, the Court has not applied the formal test established in *Emsland-Stärke* even though, e.g., *Förster* was decided after. The Court instead applies an informal sole purpose doctrine, where the purpose of the movement must be to partake in genuine economic activity.

The reasoning behind this disparity in application of the principle of abuse is unclear, likewise the consequences of it. It may be discussed whether the application of a formal- or

[316] Ziegler in de la Feria and Vogenauer (2011) p. 303.
[317] C-158/07 Förster.
[318] Ziegler in de la Feria and Vogenauer (2011) p. 303.
[319] Ibid. p. 304.
[320] Opinion of Advocate General Mazák delivered on 10 July 2008 para. 76.
[321] Ibid. para. 80.
[322] Ibid. paras. 86 & 87.
[323] Ziegler in de la Feria and Vogenauer (2011) p. 304.

informal doctrine of abuse amounts to different conclusion. They both share the same objective: to deter artificial arrangements by private individuals which lead to improper usage of Community law.[324] They are also both autonomous legal grounds on which institutions may base their decisions.[325] As such, all cases concerning abuse of EU law concern artificial practices, however, depending on the factual setting, the technique for addressing this may differ from the definition of artificial practice seen in *Emsland-Stärke*, and often its objective element.[326] This is exemplified through the doctrine in *Lair*, which is an example of an informal doctrine of abuse and does not apply the formal test. Instead of a teleological assessment akin to the objective element in *Emsland-Stärke*, the test in *Lair* focuses on the purpose for taking up an occupational activity.

It is nevertheless clear that the standard for denying a benefit in free movement of workers with reference to the principle of abuse is very high.

4.2 Case law on abuse of rights in the context of derived resident rights for family members

In the area of free movement of citizens' family members' resident rights, it is my knowledge that the Court has so far not found abuse of rights to be present in a case. Therefore, as stated above, the relevancy of the principle has been questioned, and the variation of application of the principle depending on the field of EU law has also been acknowledged in doctrine.[327] Szabados therefore states that it could be argued that it is more difficult to establish abuse in the area of free movement of persons than in other freedoms, yet, it must be borne in mind that the Court consistently acknowledges the existence of the principle in the area derived resident rights for family members with reference to Article 35 of Directive 2004/38.[328]

This thesis will therefore examine how the Court has applied Article 35 and the principle of abuse in the context of family members of Union citizens below.

[324] Saydé (2014) p. 104.
[325] Ibid.
[326] Ibid. p. 103-104.
[327] Szabados (2017) p.4.
[328] Ibid.

4.2.1 Case law of the Court of Justice before Directive 2004/38

The first case in which the Court acknowledged the possibility of abuse in the context of family members was *Singh*[329]. The case concerned whether a third country national, who was a family member of a Union worker and legal resident of a Member State, could be considered to have a residence right in the worker's state of nationality upon the worker's return.[330] The Court implied that this was the case, but the UK had raised the argument that granting such a right would increase the risk of marriages of convenience.[331] However, with reference to its case law, the Court held that "the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse."[332]

The Court did not further specify what may constitute abuse, instead, it considered that once a family member acquires a residence right in one Member State, which is also the state where the Union citizen works, they are able to retain this right when entering the home state of the Union citizen.[333] This raised questions on how this applies to U-turn situations in the area of free movement of citizens and their family members, and how it relates to the general principle of abuse.[334]

Akrich[335] concerned such a U-turn situation in which questions of abuse were raised. The circumstances of the case were that a British-Moroccan couple had taken up work in Ireland with the express purpose of triggering immigration rights under EU law on their return to the UK.[336] Mr. Akrich had previously been illegally residing in the UK and during this illegal stay married a British citizen.[337] He was subsequently deported to Ireland, where he and his wife stayed for a couple of years before wishing to return to the UK.[338] Upon trying to re-enter the UK, the Secretary of State denied Mr. Akrich this right on the grounds that they were evading national immigration legislation, which stated that residents rights for family members could be denied when the UK national had left the UK in order to acquire rights under those

[329] C-370/90 Singh.
[330] Ziegler in de la Feria and Vogenauer (2011) p. 304.
[331] Ibid. & C-370/90 Singh para. 14.
[332] C-370/90 Singh para. 24.
[333] Kroeze in Cambien et. al. (2020) p. 247.
[334] Ibid.
[335] C-109/01 Akrich.
[336] Ziegler in de la Feria and Vogenauer (2011) p. 305.
[337] Szabados (2017) p. 4.
[338] Ibid.

regulations and thereby to evade the application of UK immigration law.[339] With reference to *Lair*, it could be said that the couple entered Ireland with the sole purpose of obtaining resident rights in the UK after a very short period of occupational activity.[340]

While the Court had decided in *Singh* that such conduct could in principle give rise to benefits, the relevance of the motive behind the conduct had to be decided upon.[341] The Court held that:

> the motives which may have prompted a worker [...] to seek employment in another Member State are of no account as regards his right to enter and reside in the territory [...] provided that he there pursues or wishes to pursue an effective and genuine activity [...].
>
> [...]
>
> Conversely, there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.[342]

The Court concluded that the resident right was dependent on the third country national being the lawful resident of a Member State in order to follow the EU citizen to another Member State.[343] As such, the couple could be denied re-entry to the UK due to Mr. Akrich lack of prior lawful residence there.[344]

While *Akrich* was decided soon after *Emsland-Stärke*, the Court makes no reference to the dual test for finding abuse. Instead, the Court states that the motive for the exercise of the right is irrelevant but mentions that marriages of convenience are an exemption to the irrelevance of motive.[345] Interestingly, the Court therefore seems to disregard the *Emsland-Stärke* test in free movement of persons in this case.

Kroeze considers that the judgment in *Akrich* can be seen in two ways: either the Court departed from its own case law on abuse in free movement law, and therefore the requirement of an objective- and subjective element, or it is an indication of the Court's general development of the principle where the subjective element's relevance was diminishing.[346]

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[339] Ibid. & Ziegler in de la Feria and Vogenauer (2011) p. 305.
[340] Ziegler in de la Feria and Vogenauer (2011) p. 305.
[341] Ibid.
[342] C-109/01 Akrich paras. 55 & 57.
[343] Ibid. para. 50.
[344] Szabados (2017) p. 4.
[345] Ziegler in de la Feria and Vogenauer (2011) p. 305.
[346] Kroeze in Cambien et. al. (2020) p. 248, see also e.g. C-255/02 Halifax & C-196/04 Cadbury Schweppes.

One should further acknowledge that the irrelevance of the motive of the worker as regards to residence rights could be interpreted as not being in line with the Court's judgment in *Lair*, where it seemed that the purpose of the exercise was the deciding factor in workers' benefits. However, *Lair* should in my view be interpreted in such a way that it is not necessarily the motive itself, which is the relevant factor, rather that it is such that it rules out the genuineness of the work – see above with reference to Ziegler. *Lair* is a continuation of the definition of *worker* in *Levin* and its precedent, in my view, is that there are some motives which rule out the effectiveness and genuineness of work.[347]

In relation to *Akrich*, this conclusion means that, while the initial motive for taking up employment is irrelevant for a citizen's right of entry, if it can be established, based on objective evidence, which conclusively proves that the national has entered the Member State with the sole purpose of, after a short period of employment, enjoying resident rights for their spouse in the home Member State, he or she is not there genuinely in the capacity of worker.

What may be concluded from *Akrich* is that when the exercise of the free movement right is effective and genuine, it cannot be considered abuse of EU law.[348] In relation to developments in the area of abuse of EU law which came later, this is perhaps not a surprising statement. If we recall *Cadbury Schweppes*, the Court stated that Article 49 TFEU presupposes "actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there."[349] An increased focus on *genuine* use can therefore be seen in the historical context of the principle. Kroeze argues that this is a reasonable development with reference to the principle of effectiveness.[350] The Court has consistently limited the scope of abuse of EU law, and therefore the Member States' margin of discretion and ability to rely on the principle, which could potentially undermine EU law.[351] A narrow principle of abuse ensures the effectiveness of fundamental rights of citizens.[352]

4.2.2 Case law of the Court of Justice after the implementation of Directive 2004/38

Article 35 of the Directive gives Member States the discretion to adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of

[347] See Opinion of Advocate General Sir Gordon Slynn delivered on 17 September 1987, 3182.
[348] Kroeze in Cambien et. al. (2020) p. 248.
[349] C-196/04 Cadbury Schweppes para. 54.
[350] Kroeze in Cambien et. al. (2020) p. 249.
[351] Ibid.
[352] Ibid.

rights. The Commission has defined, in its guidance, the concept of *abuse* in the context of the Directive as:

> an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules.[353]

First, Article 35 of the Directive explicitly mentions *marriages of convenience* as an example of abuse in the context of free movement of citizens within the scope of the Directive. In recital 28 the concept is defined as a marriage contracted for the sole purpose of enjoying the right of free movement and residence under the Directive. The Commission lists certain indicative criteria which may suggest intention to abuse in its guidance.[354] This conduct most closely resembles the artificial nature of companies. Both companies and marriage are creatures of national law – marriage is a civil state, merely a registration of a relationship – whose criteria for existence are determined by legislation. Therefore, one would more readily imagine companies and marriages being considered *wholly artificial* than e.g., cases of family reunification which presupposes physical movement. It should therefore not come as a surprise that marriage of convenience is mentioned specifically in the Directive – abuse of rights is at its core a principle to counteract artificial arrangements.

The Commission also devotes attention to *other forms of abuse*, where it can be said to codify the case law of the Court not only in the field of family members' resident rights, but also the principle of abuse in general. One such case, which the Commission describes as a form of abuse, could occur:

> when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under Community law.[355]

This is the situation *Akrich* described above, and the Commission seems to acknowledge the findings in that case by stating that the line between use and abuse of EU law is whether the

[353] COM/2009/313 – COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States p. 15 with reference to C-110/99/Emsland-Stärke & C-212/97 Centros.
[354] Ibid. p. 16.
[355] Ibid. p. 17.

exercise of the right was *genuine and effective*.[356] While the Commission refrained from mentioning the *Emsland-Stärke* test explicitly in this context, it is my view, due to the Commission's definition of *abuse* above reflecting the dual test, that whether an exercise of a Community right is genuine and effective is to be judged on the basis of the test in *Emsland-Stärke*. This conclusion is supported below.

The first case relating to Article 35 of Directive 2004/38 was *Metock*[357] which concerned a case where the Irish Minister of justice had refused to grant the right of residence to four third country nationals which were all spouses of nationals of other Member States all residing in Ireland.[358]

While the Court did not discuss the subject of abuse more than a brief mention that Member State may rely on Article 35 to prohibit family members of union citizens from entering and residing there, Advocate General Poiares Maduro discussed the subject to a greater extent.[359]

In *Akrich*, the Court had made the third country nationals right of residence subject to prior lawful residence in another Member State. It was later held in *Jia*[360] that this condition was specific to the factual circumstances of *Akrich*, not an approach which has general application.[361] Poiares Maduro also considers how the circumstances of *Akrich* relate to the implementation of Directive 2004/38, stating that even if one would consider that its approach reflected the principle of abuse of rights rather than being limited to the specific circumstances of the case, it was adopted before the implementation of Directive 2004/38 which sought to review existing legislation which the judgment was based on.[362]

He therefore concludes that the Directive does not entail that right of residence can be made conditional on prior lawful residence in a Member State. However, the concept of abuse in Article 35 can potentially cover situations akin to *Akrich* where a third country national seeks to evade national immigration legislation illicitly.[363] The Court agreed with this conclusion, stating that Article 35 can be relied upon by Member States to prohibit family members of Union citizens the right of entry and residence in cases of abuse of rights.[364]

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[356] Ibid. p. 18.
[357] C-127/08 Metock.
[358] Szabados (2017) p. 5.
[359] Ibid.
[360] C-1/05 Jia.
[361] View of Advocate General Poiares Maduro of 11 June 2008 1(1) Case C-127/08 paras. 11 & 12.
[362] Ibid. para. 13.
[363] Ibid. paras. 14 & 15.
[364] C-127/08 Metock para. 75.

As we have seen previously, the concept of abuse has also over time been made dependent on whether the exercise of a right is *genuine and effective*, both in the context of establishment and persons.[365] It must therefore be discussed what is considered genuine and effective exercise of a right within the framework of the Directive.

Firstly, in its guidance, the Commission lists a set of indicative criteria to assess whether residence in the host Member State was genuine and effective:

> the circumstances under which the EU citizen concerned moved to the host Member State [...], degree of effectiveness and genuineness of residence in the host Member State [and] circumstances under which the EU citizen concerned moved back home.[366]

Secondly, in *O and B*[367] the Court discussed the significance of *genuine residency* in the context of the right of residence for family members, however, it did not mention Article 35 explicitly.

The case concerned two third country nationals, Mr. O and Mr. B, who had married Dutch citizens.[368] The Union citizens had exercised their right to move in the Union and subsequently returned, but they had not spent a very long time abroad.[369] Mr. O's wife had stayed in Spain for two months without finding work there, and after returning regularly visited during the holidays.[370] Mr. B's wife had, on the other hand, spent the weekends in Belgium during her husband's stay there.[371]

As for the rejection of Mr. O and Mr. B's right of residence, the Court stated that rejection of a derived right of residence for family members upon return to the home Member State may only be considered an obstacle to leaving a Member State if the residence in the host state has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State.[372] An exercise of the rights granted under Article 6(1) of the Directive (right of residence for up to three months) does not indicate an intent to settle and create or strengthen family life in the host Member State and therefore a refusal to confer right of residence on family members upon return will not deter Union citizens from exercising their rights under Article 6.[373] Furthermore, the addition of shorter periods of residence, e.g.

[365] See Case 53/81 Levin, Case 39/86 Lair, C-109/01 Akrich, C-196/04 Cadbury Schweppes & COM/2009/313 final p. 18.
[366] COM/2009/313 final p. 18.
[367] C-456/12 O. and B.
[368] Szabados (2017) p. 5.
[369] Ibid.
[370] Ibid.
[371] Ibid.
[372] C-456/12 O. and B. paras. 47 & 51.
[373] Ibid. para. 52.

residence during several weekends does not give rise to such a derived right, it is rather to be considered within the scope of Article 6.[374]

It may therefore be concluded that the decisive criteria for determining whether the exercise is genuine and effective is the existence of family life that was created or strengthened in the host Member State and continued upon arrival in the home Member State.[375]

Additionally, the Court recognizes that the *Emsland-Stärke* test is applicable in the area of derived resident rights. The Court mentions that Union law does not cover abuse, where it can be established based on the objective- and subjective elements in *Emsland-Stärke*.[376] In my view, this is a strong indicator that, even though the Court in *O and B* does not mention Article 35 of the Directive, due to the context of abuse of law and Directive 2004/38, the correct application of the concept of *abuse* in Article 35 entails proof of such abuse on a combination of the objective- and subjective element in *Emsland-Stärke*.

Lastly, the only case to my knowledge where the Court has expressly discussed the question of abuse in the context of Article 35 of Directive 2004/38 is *McCarthy*[377]. The facts of the case were that the Columbian wife of a British and Irish national living in Spain was not permitted to board flights to the UK and was as such denied entry to the territory of the Member State with a residence card issued by Spanish authorities, due to her not possessing an entry visa.[378]

The main question posed to the Court was whether a Member State, with reference to Article 35 of the Directive, may generally require possession of an entry visa in order for third country nationals to enter the state as a family member, even if they have a valid residence card issued by another Member State.[379] In reference to abuse, Advocate General Szpunar reformulates this into a question of whether Member States which are faced with systematic abuse of rights can adopt a measure of general application, which is precautionary and does not require a finding of abuse in the specific case.[380]

Szpunar's account of the principle is very pedagogical and may serve as a guidance on the application of the principle and Article 35. First, he defines *abuse of rights* as a EU law principle of national law "where a legal person relies on EU law 'with the sole aim of avoiding

[374] Ibid. para. 59.
[375] Kroeze in Cambien et. al. (2020) p. 258.
[376] Ibid. para. 58.
[377] C-202/13 McCarthy.
[378] Szabados (2017) p. 5-6.
[379] C-202/13 McCarthy para. 29.
[380] Opinion of Advocate General Szpunar delivered on 20 May 2014 Case C-202/13 para. 106.

the application of national law',"[381] secondly, as a principle of EU law "where a legal person 'makes fraudulent or improper use of a right conferred on him by EU law'."[382] Furthermore, it is an autonomous concept which is to be examined through an objective- and subjective element.

Szpunar goes on to apply the *Emsland-Stärke* test to the facts of the *McCarthy* case and concludes that neither the objective- nor the subjective element were present in the case, with reference to the evidence put forth by the UK.[383] The claimants' exercise had not been merely formal and artificial, rather, the trips corresponded to lawful use of the freedom.[384] Furthermore, the UK had not based its rejection on any subjective element, they had not questioned the genuineness of the marriage or that they had genuine family life in Spain.[385] As such, the UK could not rely on Article 35 of the Directive.

The Court, as in *Metock*, did not discuss the subject of abuse at length, it did however refer, although indirectly, once more to the fact that proof of abuse requires that the objective- and subjective elements in *Emsland-Stärke* are fulfilled.[386] As for the application of Article 35 to measures of general application, the Court considered that when denial is automatic and lack specific assessment of the claimant's conduct, it would:

> disregard the very substance of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens' family members who are not nationals of a Member State.[387]

Article 35 of the Directive therefore does not permit Member States to require prior issuance of an entry visa for family members of Union citizens, when they already possess a valid residence card, to enter its territory.[388] Such measures of general application are prohibited.

To summarize, the Commission guidance establishes a clear definition of *abuse* within the context of Article 35 of Directive 2004/38 and lists some indicators of such abuse. It is, in my view, clear that the correct application of this definition entails the dual test established in *Emsland-Stärke* due to the Commission describing an objective- and a subjective element. Furthermore, it is evident that the Court recognizes the test in the area of residence rights of

[381] Ibid. para. 111.
[382] Ibid.
[383] Ibid. paras. 122 & 123.
[384] Ibid. para. 122.
[385] Ibid. para. 124.
[386] C-202/13 McCarthy para. 54.
[387] Ibid. para. 57.
[388] Ibid. para. 58.

family members, however, it is yet to apply it in this context. Only Advocate General Szpunar in his opinion in *McCarthy* has done so. To establish abuse, it is essential to determine whether the exercise of the movement is effective and genuine, which is to be established based on the objective- and subjective element in *Emsland-Stärke*. The decisive criteria for this, in line with the judgment in *O and B*, is the existence of family life that was created or strengthened in the host Member State and continued upon arrival in the home Member State.

5. Analysis and conclusions

5.1 Summary of findings

The definition of *abuse of rights* within the context of the EU has been subject to several major developments. It was initially considered in *Van Binsbergen* that Member States may take suitable measures to ensure that the person does not circumvent nation rules of that Member State.[389] This was later developed into a more general doctrine which afforded Member States the discretion to take measures to prevent persons and companies from "improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation."[390]

This wide discretionary competence was subsequently limited in the Court's case law, most notably in *Centros* where conduct that many scholars and Member States at the time considered to be abusive was deemed to be at the very core of the freedom of establishment.[391] The consequences of this judgment created plenty of legal discourse regarding the subject of abuse, especially after the Court's decision in *Cadbury Schweppes* which was seen by some as a limitation of the findings in *Centros*. This was due to the introduction of the deciding factor of whether it was an actual establishment in the host state which performed a *genuine economic activity* and which was not a *wholly artificial arrangement*. This raised the question of whether the facts of *Centros* – or more generally, letterbox companies at large – would be considered wholly artificial arrangements.

Controversially, the Court answered this question in *Polbud* which similarly to *Centros* concerned a letterbox company. However, while *Centros* concerned the setting up of a branch, *Polbud* regarded a cross-border conversion.

The Court upheld its precedent in *Centros*, stating that conversions into a company governed by the law of another Member State, while still conducting most or all its business in the departure Member State, is to be considered actual establishment in the host Member State and the pursuit of genuine economic activity there. This is not only a confirmation of the doctrine in *Centros*, but also an extension of its scope. The decision could be interpreted as meaning that freedom of establishment required either the pursuit of genuine economic activity,

[389] Case 33/74 Van Binsbergen para. 13.
[390] C-200/02 Zhu and Chen para. 34.
[391] Kroeze in Cambien et. al. (2020) p. 242. and Ringe in de la Feria & Vogenauer (2011) p. 109.

or the transfer of a registered office, which is a significant extension of the scope of the *Centros* doctrine and opened for conversions that only involved the transfer of registered office.

Perhaps as a direct response to the judgment in *Polbud*, Directive 2019/2121 was amended to cover cross-border conversions, and a requirement that the departure Member State conduct an in-depth examination of whether the conversion is an artificial arrangement was introduced. As such, a general obligation on Member States to conduct an examination of abuse was present and may be argued to exist in some areas of freedom of establishment, especially as regards to tax law, to ensure the correct application of EU law.[392]

As such, in freedom of establishment the scope of the freedom is wide, and one may conclude that the possibility of applying the principle of abuse is very limited. Nevertheless, it can be argued that there exists a general obligation for Member States to deny the right if a wholly artificial arrangement exists. This may especially be the case in tax law with reference to *the Danish cases*.

Furthermore, it is important to acknowledge that in the context of freedom of establishment, a formal test which was established in *Emsland-Stärke* is applied. That is to say, the finding of a wholly artificial arrangement requires an objective- and a subjective element. In short, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved and the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it, must be present.

In the area of free movement of persons, the Court has not as readily adopted a formal test for findings of abuse, rather, it has relied on an informal approach to the principle. The historical development of the principle in this field can be divided into two subsections and two periods in time: free movement of workers benefits and derived resident rights of family members, and before and after the implementation of Directive 2004/38.

In relation to workers' benefits, the Court has applied an informal doctrine based on the purpose for taking up occupation in a host Member State where the purpose of the movement must be to partake in genuine economic activity (the so-called *sole purpose doctrine* established in the field of free movement of persons in *Lair*). Be that as it may, the concept of workers' rights has lost relevancy during the 21st century with the introduction of citizenship

[392] See Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16 N Luxembourg 1 and Others, and Joined Cases C-116/16 and C-117/16 T Danmark and Y Danmark above under 3.2.4.

as the fundamental status of nationals. Therefore, as regards to persons, the case law relating to citizens' rights is of major importance.

The principle of abuse has been most relevant in the area of derived resident rights of citizens' family members, where the Court in several cases have had to decide upon the existence of abuse, both before and after the implementation of Directive 2004/38.

Before the implementation the Court applied an informal doctrine of abuse, as in the area of workers' benefits, and most notably, in my view, in *Akrich* concluded that the initial motive for taking up employment is irrelevant for a citizen's right of entry. However, if it can be established, based on objective evidence, which conclusively proves that the national has entered the Member State with the sole purpose of, after a short period of employment, enjoy resident rights for their spouse in the home Member State, he or she is not there genuinely in the capacity of worker and the exercise is not effective and genuine. This is a similar approach to abuse as seen in e.g., *Lair*.

The implementation of Directive 2004/38 meant the introduction of abuse of rights in secondary law relating to citizens' rights through Article 35 which gives Member States the discretion to adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights.

As an initial finding, the Commission guidance on the Directive establishes a definition of abuse: an artificial conduct entered solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing the conditions laid down by Community rules, does not comply with the purpose of those rules.

The Court has in its case law[393] considered that a finding of abuse requires the application of the *Emsland-Stärke* test and the presence of an objective- and subjective element. With the introduction of Directive 2004/38 it may therefore be said that the Court shifted its approach from an informal- to a formal test for finding abuse as regards to free movement of persons. However, the Court has not, to my knowledge, applied the formal test to a specific case, rather relying on the definition of worker or mutual recognition.

Nonetheless, my conclusion is that the correct application of the definition in the guidance entails the dual test established in *Emsland-Stärke* due to the Commission describing an objective- and a subjective element. Furthermore, it is evident that the Court recognizes the test in the area of residence rights of family members. Therefore, to establish abuse, it is essential to determine whether the exercise of the movement is *effective* and *genuine*, and not

[393] See C-456/12 O. and B & C-202/13 McCarthy.

wholly artificial, which is to be established based on the objective- and subjective element in *Emsland-Stärke*. The decisive criteria for this, in line with the judgment in *O and B*, is the existence of family life that was created or strengthened in the host Member State and continued upon arrival in the home Member State.

What is then the general definition of *abuse of rights* within the context of Community law after this account of the Court's case law on the subject? Vogenauer summarizes it in one sentence, it means that:

> a given rule of law will not be applied where (1) a particular set of facts is clearly and unambiguously covered by the wording of the rule but (2) the result of applying the rule would be contrary to the purpose of that rule and (3) the person's reliance on the rule is abusive.[394]

This thesis has given an account to the requirements and application of the principle and to summarize, the principle of abuse, both in freedom of establishment and free movement of persons, is dependent on whether there is a genuine and effective, and not wholly artificial, exercise of the right to free movement. This is to be determined through the application of the dual test established in *Emsland-Stärke* and requires an objective- and subjective element. While the Court has applied the test in several cases regarding freedom of establishment, it has refrained from both applying it, and finding abuse to be present, in the context of free movement of persons. I will now, as a last chapter, discuss why this may be.

5.2 The nature of legal personhood and its impact on the application of the principle of abuse

A starting point for this thesis was the scholarly debate on the relevancy of the principle of abuse in the context of free movement of persons illustrated by Kroeze's mention that its impact in the field is either rejected or reduced to merely verbal acceptance.[395] We have seen above that the principle has been subject to major development throughout its existence, however, they have mostly come in the field of freedom of establishment.[396] Why is that?

[394] Vogenauer in de la Feria & Vogenauer (2011) p. 571.
[395] Kroeze in Cambien et. al. (2020) p. 245.
[396] However, see *Van Binsbergen* (free movement of services) and *Emsland-Stärke* (common agricultural policy).

The nature of legal personality is, in my view, central to this discussion. The legal personality is at its very core distinct from a physical personality in the fact that it is by nature a legal notion; it is what the law decides it is.

Specifically in the context of a comparison between abuse of rights in freedom of establishment and free movement of persons, the artificial nature of legal personhood must be borne in mind. In *Cadbury Schweppes*, the Court focused on whether it was an actual establishment in the host state which performed a *genuine economic activity* and which was not a *wholly artificial arrangement*,[397] and we have seen that the focus on *genuine exercise* also occurs in the field of free movement of persons.

Would it not then be reasonable to assume that by their very nature, companies can more readily create wholly artificial arrangements than a physical person? As stated above, a company is a creature of law and artificial by nature. A person on the other hand is a physical entity which exists in and of itself and has a presence. Therefore, imagining a scenario where a person exists artificially in another Member State seems challenging and may be why the Court has not considered abuse at length within this context. A reasonable conclusion would thus be that individuals are inherently less able to move around and reinvent themselves compared to companies and therefore require less scrutiny as regards to abuse than the actions of corporations and should be protected in their exercise of said movement due to the fundamental nature of EU citizenship, which is the basis for their right.[398]

Furthermore, we have seen above that reliance on EU law for reasons other than its intended purpose is at the heart of the principle of abuse. Because of the fundamental nature of citizenship, which grants an autonomous right of free movement to all Union nationals, economic rationale is no longer connected to the right.[399] While not all Union nationals will benefit fully from the right, due to qualifying conditions such as residency time, economic contribution or sufficient financial resources, free movement is related to Union citizenship per se.[400] As such, citizens may exercise free movement without regard to their motivation for doing so.

Therefore, it is difficult to argue that the objective element of the *Emsland-Stärke* test can ever be present. How can you argue that the exercise of a right related to citizenship must

[397] C-196/04 Cadbury Schweppes para. 51.
[398] Simpson in de la Feria & Vogenauer (2011) p. 492.
[399] Dougan in de la Feria & Vogenauer (2011) p. 362.
[400] Ibid.

serve a given purpose to not be considered abusive, when the right is inherent to the concept of Union citizenship and autonomous?

On the other hand, the Court has been clear in *Cadbury Schweppes* that the objective of freedom of establishment is to allow a Community national to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin and to profit therefrom. Therefore, one would find it easier to imagine a scenario where there exists a wholly artificial arrangement contrary to this objective than even begin to define an underlying objective to free movement of citizens.

Nevertheless, it must be borne in mind that the Court has been adamant in continuously stating that a right granted under Directive 2004/38 may be denied if the exercise is not genuine and effective and there exists one case which is mentioned as an example where the principle could be considered: marriages of convenience. Marriage contracted for the sole purpose of enjoying the right of free movement and residence under the Directive is prohibited. A marriage, similarly to a company, is artificial in nature and a creature of national law. Therefore, one can more readily imagine companies and marriages being considered *wholly artificial* than e.g., cases of family reunification which presupposes physical movement. It should therefore not come as a surprise that marriage of convenience is mentioned specifically in the Directive.

However, outside of marriages of conveniences, it is my conclusion that the principle of abuse of rights, as of right now, serves limited practical use in free movement of persons. When posed with the question of abuse, as regards to free movement of persons, in the future, the Court must then answer the question Dougan raises in his paper: "how can a Union citizen possibly 'abuse' a right which serves no legally defined (or definable) purpose?"[401]

[401] Ibid.

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