EUROPEAN COMPANY LAW - OSLO PhD-SEMINAR 2021

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FOCUS

- Judgments from the CJEU relevant to company law
- UK-EU Agreement and free movement of companies

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JUDGMENTS RELEVANT FOR COMPANY LAW

- Cases concerning company law harmonisation (directives and regulations)
- Cases on free movements of companies (and directors)
- Cases on Service Directive 2006/123
- Aspects of general EU law
- Cases on EU competition law
- Cases on EU trade agreements?

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GENERAL PRINCIPLE OF ABUSE

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A GENERAL PRINCIPLE

- Finally accepted as a general principle of EU law in C-251/16, *Cussens*, para. 31:
  - "The principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in Halifax, thus displays the general, comprehensive character which is naturally inherent in general principles of EU law…"
- Affirmed by the Grand Chamber in C-359/16, *Altun*:
  - Para. 48: "According to the Court's settled case-law…"
  - Para. 49: "The principle of prohibition of fraud and abuse of rights, expressed by that case-law, is a general principle of EU law which individuals must comply with. The application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law…"

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THE APPLICATION OF THE PRINCIPLE

- As a general principle it applies to all types of (binding) EU law
- What test to use?
  - The test developed in C-110/99, *Emsland-Stärke*, is still often repeated
    - Objective element
    - Subjective element
    - Proportionality
  - What about fraud cases?
  - What about cases where restriction on free movement is justified in reasons relating to abuse?

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THE APPLICATION 2

- The principle may be applied against private parties, Member States and even the Union when they rely on EU law
- May be invoked by private parties, Member States or Union (consequently, it can be applied in cases between private parties, see C-423/15, *Kratzer)*
- Member States have a duty to apply the principle if they find abuse/fraud, see the Danish Beneficial Ownership cases, C-115/16 and others, paras 97-98, and C-116/16 and others, paras 71-72
- The principle applies even when national law does not allow for exception in the case of abuse/fraud
  - A reversal of C-321/05, *Kofoed*
  - Do we need abuse clauses in secondary EU law?

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HOW TO USE THE PRINCIPLE

- Some recent examples show that the principle has "teeth"
  - Danish Beneficial Ownership cases from 26 February 2019 (Joint cases C-115/16 and others, *N Luxembourg I* and Joint Cases C-116/16 and others, *T Danmark*)
  - C-664/17, *Ellinika N*
  - C-359/16, *Altun* and C-370/17, *CRPNPAC*

- How may the principle of abuse be used in company law -related cases?

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THE PRINCIPLE AND COMPANY LAW

- We may prevent company stakeholders to rely on 'rights' conferred by company law directives/regulation
  - For instance C-367/96, *Kefalas*
  - Could supplement the Nordic general clause – remember we can rely directly on EU law
- Restricting access to rely on free movement rights
  - The reservation for abuse (= principle?) has been repeated in all cases
  - However, not abuse to incorporate in the most attractive jurisdiction or even convert an existing company to such a jurisdiction
  - Something more specific (abuse or fraud) is needed.

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NATIONALITY AND RESIDENCE REQUIREMENTS FOR DIRECTORS

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HOW TO BENEFIT FROM THE RIGHT OF FRE MOVEMENT

- Directors or board members (managers) may themselves invoke either Art. 45, 49, or 56
  - C-107/94, *Asscher*, director who was the sole owner of a company was self-employed
  - C-350/96, *Clean Car,* day-to-day manager was a worker
  - C-270/13, *Iraklis*, President of Port Authority was a worker, para. 41:
    - "Moreover, the Court has previously held, in the context of an examination of the link between a member of the board of directors of a capital company and that company, that board members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties, satisfy the criteria for being treated as workers within the meaning of the case-law of the Court (judgment in Danosa, C-232/09…."

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HOW TO BENEFIT (CONTINUED)

- Their employer may invoke Art. 45 on their behalf, see C-350/96, *Clean Car*
- Companies may invoke Art. 49 or 56 because they are discriminated or restricted in doing business
- Investors may invoke Art. 63

- Does it matter?

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DIFFERENT TYPES OF RULES RESTRICTING FREE MOVEMENT

- Company law measures applicable to all companies incorporated in a state (IncRules)
- Measures applicable to branches of companies from other Member States – company law rules (BranchRules)
- Measures applicable to companies conducting certain types of trade (TradeRules)
- Most cases concern TradeRules, but these may easily be applied by analogy to Branch Rules, whereas it may be more doubtful if they apply to IncRules.

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PROTECTION AGAINST DISCRIMINATION

- Requirements of nationality of the Member State
  - C-211/89, *Factortame II,* TradeRule (registration of fishing vessel), Art. 49 infringed
  - C-474/12, *Scheibel Aircraft*, TradeRule (arms trading), Arts. 45 and 49 infringed
  - Can easily be applied to BranchRules and IncRules
- Requirement of residence in the Member State
  - C-350/96, *Clean Car*, TradeRule (but applicable to all trades), Art. 49 infringed
  - C-114/97, *Comm. v. Spain*, TradeRule (private security firm), Arts. 49 and 56 infringed
  - Can easily be applied to BranchRules and IncRules
- Language requirements
  - C-206/19, *KOB*, TradeRule (agricultural land acquisition), SD Art. 14(1) infringed

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RESTRICTIONS TO FREE MOVEMENT

- Requirement of EU/EEA residence and nationality
  - C-299/02, *Comm. v. NL*, TradeRule
    - Companies wanting to register a ship in NL need to have directors and day-to-day manager of EU/EEA nationality
      - Restriction
      - Cannot be justified in the need to ensure effective control over ship
    - Also requirement for companies operating ships that they have director who is a EU/EEA national and resident in that region
      - Restriction and not justified
  - Applicable to BranchRules, but IncRules?.

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E-9/20, *ESA V. NORWAY*

- Norwegian law requires that director and half the board in private limited companies should reside in Norway. Does not apply to EEA nationals as long as they reside in the EEA (similar requirement for half the board members of public limited companies and financial undertakings)
- For financial undertakings not formed as private or public limited companies more than half the founders must be EEA residents residing in an EEA state
- ESA started infringement proceedings as they argued that Norway had failed to fulfil its obligations under Article 31 and 28 of the EEA Agreement
- No infringement of the free movement of workers provisions as these only protect free movement between EEA states (or where there is a sufficiently close link to EEA), and does not protect a person residing outside EEA and there is no evidence of discrimination of EEA national residing in other EEA states.

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E-9/20 CONTINUED

- Was the freedom of establishment infringed?
  - **ESA** argued that the requirements made it difficult to set up a secondary establishment in Norway as they had to redeploy or recruit personnel that complies with the requirement (relies on C-299/02, Comm. v. Netherlands). The possibility to obtain an exception does not diminish the restriction, and restriction not justified in need to establish jurisdiction over these persons
  - **Norway** argues there is no restriction, as EEA companies are free to set up branches (whereby C-299/02, is not relevant), and furthermore any restriction is justified to ensure civil and criminal liability
  - **Icelandic government** argued that the provision does not interfere with the management of companies formed in other EEA states, and only affected situations where a subsidiary is set up in Norway – and here they must expect to comply with Norwegian law
  - **Commission** supports ESA.

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E-9/20 CONTINUED

- **EFTA Court** found that there was an infringement of the freedom of establishment
  - The freedom ensures the right to chose the appropriate legal form to pursue a secondary establishment (para. 75)
  - The freedom prohibits all restrictions as there is no form of de minimis rule (para. 77) – does not discuss market access
  - There is a restriction since an EEA national wishing to set up a company in Norway needs to select the management according to the Norwegian requirements (refers to C-299/02) (para. 80)
  - Also the requirements may restrict the possibility of EEA national resident in a non-EEA state from forming a Norwegian financial undertaking, and the freedom of establishment does not require EEA residence (para. 82).

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E-9/20 CONTINUED

- EFTA Court
  - The possibility of making discretionary exemption does not remove the restriction (para. 83)
  - Does not accept the argument that foreign companies could just form branch in Norway instead of a subsidiary, as this restricts the choice between the appropriate legal form (para. 86)
  - Restriction not justified in the need to ensure jurisdiction over managers
    - Inconsistent as only half the board should fulfil requirement
    - Why does Norway make it possible to make exemption from requirement?
    - EEA nationality not required of persons residing in Norway
    - No argument why founders of financial institutions should fulfil requirements.

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THE CONCEPT OF AN UNDERTAKING IN COMPETITION LAW

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THE IMPORTANCE OF THE CONCEPT

- Agreement within one undertaking not subject to Article 101 TFEU
- When deciding on whether a firm is dominant under Article 102 it is the position of the undertaking that is relevant
- If a company infringes EU competition law, other companies forming part of the same undertaking may also be responsible for any fine or damages that has to be paid as a consequence
  - Even though EU law does not regulate damages for such infringement, Member State must make it possible to claim such damages (principle of effectiveness) and EU law does determine that the undertaking is responsible for such damages (C-723/17, *Skanska*)
  - Directive 2019/1 also requires that fines imposed by Member States for infringement of EU competition law are based on the concept of undertaking, see art. 13(5)
  - Spill-over in national competition law.

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COMPANY LAW CONSEQUENCES

- Corporate structure does not define the concept of the undertaking
- Parent companies and subsidiaries
  - Must show that control is exercised
  - Assumption that (almost) wholly owned subsidiary is controlled (how can you prove this is not the case?)
  - For not wholly owned subsidiary indication of control necessary
    - Same persons in management
    - Group compliance rules
  - Amounts to piercing the corporate veil
  - Consequences for company law?

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CONSEQUENCES 2

- Are subsidiaries liable for their parents' infringements (and are sibling companies liable for each other)?
  - Some cases focus on the ability to control, whereas others focus on the fact that a group is one enterprise
  - C-882/19, *Sumal*
  - Consequences for other stakeholders in subsidiary (sibling)?
- Joint ventures – the exercise of veto rights may be sufficient to trigger concept of undertaking
  - E.g. one or more joint venture partner may be liable for infringements of the joint venture.

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C-66/18, COMMISSION V HUNGARY

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BACKDROP OF THE CASE

- Grand chamber case from 6 October 2020
- Hungarian law on higher education allows foreign institutions to carry out activities in Hungary if there is a treaty between Hungary and the state where the institution has its seat (not applicable to EU/EEA states) and if the foreign institution is genuinely offering higher education in the state where it has its seat
- A case about CEU/rule of law/letterbox companies
- Court would not censor why the Commission had initiated the case
- Commission argued that both EU law and GATS infringed.

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THE JUDGMENT

- Requirement of activity at seat infringed Article 49, see *Polbud* and *Centros*
- Requirement also infringed Article 16 of the Service Directive 2006/123 as it restricted the provision of services and could not be justified
- Did it infringe GATS?
  - Hungary argued that any infringement of WTO law should be handled by the DSB of the WTO
  - Argument dismissed by the CJEU, as WTO law is part of EU law and therefore something the CJEU can decide on and something the Commission can take action to enforce
  - GATS mode of supply 3 (establishment) accepted for higher education activities and since an agreement was required establishment was not possible (Article XVII Infringed)
  - Requirement of activities in seat state discriminatory and therefore infringing the national treatment requirement in GATS Article XVII
- Additionally several provisions in the Charter infringed.

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UK-EU TRADE AND COOPERATION AGREEMENT

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BACKDROP OF THE AGREEMENT

- Culmination of several years of negations and it supplements the Withdrawal Agreement
- Clear that UK would not accept free movement of persons and therefore could not be allowed to be part of the internal market
- Free movement of goods favoured over free movement of capital and establishment
- Only vague reference to harmonisation efforts (level playing field)
- The UK have made it clear that the agreement is not based on EU law and that they will not be bound by the case law of the CJEU
- The agreement does not have direct effect and can only be enforced via a dispute settlement mechanism open to the UK and the EU (but not others) – and as we now know the Commission may enforce the agreement against Member States.

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IMPLICATIONS FOR COMPANIES

- SE, SCE and EEIG can no longer be registered in the UK and either had to transfer their seat out of the UK or convert to UK corporate form
- Investment liberalisation (Part Two, Heading One, Title II, Chapter 2)
  - Who benefits?
    - National and legal persons of a Party
    - Legal persons are formed in either the EU or the UK and have "substantial business operation" in the territories of that party
      - For the EU "substantial business operation" should be interpreted as "effective and continuous link" (does not really make it clearer)
      - Thus a company must have some activities in that party where it is incorporated
    - Consequences?

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IMPLICATIONS 2

- What is an investment?
  - Any rules that affect the establishment of an enterprise and the operation of such an enterprise
  - Could be the formation of a company or the acquisition of a company (10 % of capital may be enough) and setting up a branch
  - Requirement of an economic activity in the establishment
  - Cross-border mergers and conversions and transfer of real seat?
- How are investments protected
  - National treatment and most favoured nation treatment
  - Some (limited) specific rights.

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QUESTIONS AND COMMENTS

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