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Abuse of Law and Free Movement of Workers
Comments on the paper by Katja Ziegler

The excellent paper by Katja Ziegler examines the relevance of the 'abuse of law' doctrine in the field of the free movement of workers. In this respect, the main claim put forward by Ziegler, a claim that finds me in total agreement, is that the category of abuse of law is factually irrelevant in this field. Thus, despite the fact that the Court has indicated that in theory the provisions on the free movement of workers, and those on the free movement of persons more generally,[2] might not help an abusive claimant,[3] it has never applied this category to a specific case.[4] According to the case law of the Court, the notion of abuse implies an 'improper use' of the Treaty freedoms, to circumvent national law. Thus, the notion of abuse seems to imply the relevance of a psychological element, so that the reason why the right-holder exercises her right becomes relevant to the assessment of whether there is an abuse capable of projecting the factual situation outside the protection afforded by the Treaty. However, in the case of the free movement provisions, the Court has repeatedly, and consistently, declared the irrelevance of the reasons, the psychological element, that might have led the individual to exercise her rights. Thus, for instance the fact that the right to move and work in another Member State is exercised with the sole aim of triggering the Treaty so as to benefit of the rights for family members of Community nationals, which is to say with the intention to circumvent national migration law, is immaterial to the enjoyment of such rights.[5]

In her paper, Ziegler identifies four possible reasons that might explain the irrelevance of the abuse category in the field of free movement of persons. First of all, the non-existence of a principle of abuse of law, which 'could be merely an umbrella term for certain factual scenarios. This might be particularly relevant in relation to corporate tax law, where the concept of abuse might usefully be employed to limit the possibility for corporate entities to exploit gaps in the legislation by simply being always a step ahead than the legislative process[6]. In this respect, abuse of law would

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[1] Durham European Law Institute and Durham Law School. I am grateful to the organisers and participants to the conference for an interesting and lively discussion.

[2] Neither Ziegler nor I are concerned with the free movement of corporate entities; therefore the expression 'free movement of persons' will be used to indicate the free movement of individuals.

[3] E.g.

[4] See e.g. Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925; Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607. The issue of abuse might be relevant in the case of the instrumental use of the free movement provisions with the sole purpose of eluding national tax legislation; on this point see AG Geelhoed's Opinion in Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007] ECR I-2107.

[5] This was to a certain extent established in Case 53/81 *Levin v Staatssecretaris van Justitie*[1982] ECR 1035; and confirmed in Case C-109/01 *Secretary of State for the Home Department Akrich* [2003] ECR I-9607.

[6] For an interesting comment about abuse of law in tax cases, particularly useful for non-tax lawyers, see Confédération Fiscale Européenne *Opinion Statement of the CFE ECJ Task Force on the Concept of Abuse in European Law, based on the Judgments of the European Court of Justice delivered in the files of tax law*, (November 2007), available on http://european-tax-adviser.com/wordpress/wp-content/uploads/2007/11/cfe-opinion-statement-on-abuse-in-european-law_nov-2007.pdf. The paper also points at a possible distinction between abuse of rights (mainly to the detriment of a private party) and abuse of law.

be a useful tool to avoid the age-old problem of passing legislation through a cumbersome and long legislative process only to find that companies having access to good legal advice find a way around it. In this respect, the abuse of law category might well indicate the application of a 'sui generis' mandatory requirement, in that the imposition by the Member State of its rules is a legitimate and proportionate way to protect an aim compatible with Community law (e.g. the need to combat fiscal elusion).

Should one not adhere to the claim that 'abuse of law' is a non-existent legal category, Ziegler puts forward alternative reasons why the abuse of law doctrine has never been applied by the Court in relation to the free movement of workers. Thus, the Court's caselaw in the field of the free movement of persons is driven by a very strong integrationist rationale; in interpreting the rights that individuals derive from the free movement provisions the Court is also driven by a citizenship rationale; and finally, the fact that the case law in this field is driven by fundamental rights consideration.

Some remarks on abuse of individual rights

And yet, as pointed out by Ziegler in the last part of her paper, the real issue revolves around a more fundamental question: is the notion of abuse of workers' rights a legally defined (and legally helpful) category? And in many respects, this is exactly the broader question proposed by Rita de la Feira as the theme of the conference which gave rise to the papers collected in this volume: to what extent can a right really be abused? And what does such an abuse consist of?

Generally, it is not crystal clear that the notion of abuse is legally persuasive: after all, the doctrine of abuse serves the purpose of transforming something that would be otherwise legal into unlawful behaviour. And, as pointed out by ,[7] the transformation from legality to illegality happens via means of judicial interpretation in the case at issue and therefore might raise problems of legal certainty as well as democratic accountability.

In any event, the reasons which might justify this metamorphosis are also not well defined. In this respect, the Court refers to the possibility for a Member State to 'prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, *improperly* to circumvent their national legislation or to prevent individuals from *improperly* or *fraudulently* taking advantage of provisions of Community law'.[8] Thus, it is unclear whether the category of abuse of law would ever be relevant, at least in relation to non-corporate entities, beyond the instances of fraud, which maybe would be best kept distinct in order to avoid confusion.

Fraudulent behaviour might well exclude the individual from the scope ratione personae or ratione materiae of the Treaty. For instance, marriages of convenience are excluded, and were excluded before Directive 2004/38,[9] from the scope of the Treaty

[7] Cross reference needed.
[8] Joined Cases C-151 and 152/04 *Claude Nadin, Nadin Lux-SA and Jean Pascal Durré* [2005] ECR I-11203, para 45, emphasis added..
[9] Article 35 Directive 2004/38 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,

simply because, even though they might be otherwise valid, those are not relevant marriages for Community law purposes. Similarly, the principle according to which individuals cannot exploit the Treaty so as to benefit twice from welfare provisions simply translates in the fact that there is *no right* in Community law to double an entirely overlapping welfare provision.[10] For this reason, there is no possibility to raise a Community law defence in relation to fraudulent behaviour. In this respect, the fact that Article 35 of Directive 2004/38 mentions both abuse and fraud is not in my opinion a sufficient reason to hold that the two are conceptually distinct.

More fundamentally, it should be queried whether the concept of abuse of law can ever be relevant in relation to the exercise of individual rights. Thus, for instance, consider the situation at issue in *Akrich*.[11] Mr and Mrs Akrich moved from the UK to Ireland, and then back to the United Kingdom, with the sole purpose of triggering the Treaty so that Mr Akrich would gain a residence permit pursuant to the *Singh* case law.[12] Leaving aside the fact that since Mr Akrich was unlawfully resident in the UK the Court excluded the applicability of Article 10 of Regulation 1612/68,[13] it was made clear in that case that the motives that led Mrs Akrich to Ireland and back were irrelevant in assessing the legal situation of the couple.[14] Indeed, it would have been untenable to hold that since Mrs Akrich *wanted* to take advantage of one of the ancillary rights expressly conferred by Community law, and used the primary rights to achieve that end, then she should be excluded from the scope of Community law. In other words, it is unlikely that the fact that an individual exercises her rights *in order* to be able to enjoy rights conferred upon her by Community law should matter in defining the scope of such rights. Or else, it would mean that *intention* to enjoy rights might disqualify the claimant from enjoyment of such rights.

Furthermore, it would be illogical to take motivation into account: there are endless variables that can influence individual choices, from mere economic ones to more individual ones such as personal preferences, the location of family and friends, etc. It would be impossible to find a common rationale capable of determining how and when those personal preferences are relevant in defining the legitimate or abusive exercise of the rights at issue; and when such personal motivations are irrelevant. And in any event, it would be difficult to reconcile the notion of abuse with the hermeneutic principles established by the Court. Thus, the free movement provisions have always been given a teleological interpretation, which is aimed not only at *facilitating* movement, but also at *not deterring* the use of both primary Treaty rights and rights contained in secondary legislation (which in any event usually derive

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90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 229/35; see Case C-109/01 *Akrich* [2003] ECR I-9607.

[10] E.g. see Article 12 Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons ad to members of their families moving within the Community, as amended. Consolidated version [1997] OJ L28/1, and http://www.europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf.

[11] Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607.

[12] In Case C-370/90 *Singh* [1992] ECR I-4265 the Court held that a British national returning from Germany to the UK after having worked there was protected by the Treaty and the relevant secondary legislation so that her husband gained residency rights in the UK.

[13] Regulation 1612/68 on freedom of movement for workers within the Community OJ Sp. Ed. 1968 L257/2, p.475. This case law has now been reversed, see Case C-127/08 *Metock*, judgment of 25 July 2008, nyr.

[14] Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607, paras 55 and 56.

directly from Treaty rights).[15] It would be therefore difficult to justify the imposition of limits, which might well appear arbitrary, to the use of those rights by focusing on a pre-defined (by whom?) notion of the manner in which those rights should be used.

This is all the more the case given that the interpretation of the free movement provisions espoused by the Court has gone much beyond the (supposed) intention of the Treaty drafters. Thus, in a dynamic and evolving system like the Community one, it would be very difficult to limit the rights granted by the Treaty by relying on the fact that the claimant is not exercising the right in a manner which is compatible with the reasons for which the right was originally granted. After all, the Court's interpretation has been developing according to an ever changing *telos* (market integration first, constitutional citizenship now) which in some instances openly disregarded the political will expressed in primary and secondary legislation. Thus for instance, consider not only the move from discrimination to barrier to movement,[16] with all that that implies in terms of repartition of regulatory competences,[17] but also those cases in which the Court pushed the scope of Community law beyond its letter. One could usefully recall the health care case law, [18] where the Court accepted that Article 49 EC could be interpreted so as to confer a right to seek health care abroad (subject to limits imposed by he Court itself) beyond what allowed by Regulation 1408/71; or the citizenship case law on welfare benefits for non-economic migrants.[19] It is difficult to maintain that the limitations in Regulation 1408/71, the limitation of the scope of the Treaty to cover only services provided for remuneration in Article 50 EC, or the limitations to the principle of equal treatment provided for in Article 24(2) of Directive 2004/38, were not intended to curtail the possibility to use the Treaty freedoms to gain access to health care and benefits respectively.

Given the ever evolving scope of the free movement provisions, it would be near impossible to draw a line between abusive use of the free movement provisions and non-abusive use. And if such a line were to be drawn it might appear rather arbitrary. Thus, the fact that we find references to the concept of abuse both in the case law and in Directive 2004/38, might indicate simply the fact that, as said above, in instances in

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[15] See the case law on barriers that make movement less attractive and the general definition of barrier given in Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165, para 37.

[16] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165; Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921; Case C-60/00 *M Carpenter v Secretary of State for the Home department* [2002] ECR I-6279.

[17] See generally N Bernard *Multilevel Governance in the European Union* (Kluwer Law International, 2002), esp. ch. 2; and more specifically E Spaventa 'From *Gebhard* to *Carpenter:* Towards a (Non-Economic) European Constitution' (2004) CMLRev 743-773.

[18] Cf Article 22 Council Regulation (EEC) 1408/71. with the health care cases, e.g. C-157/99 *B S M Geraets-Smits v Stichting Ziekenfonds VGZ* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, and *van Riet v Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen* [2003] ECR I-4509; Case C-372/04 *Watts* [2006] ECR I-4325.

[19] E.g. Case C-224/98 *M N D'Hoop v Office national d'emploi* [2002] ECR I-6191; Case C-138/02 *Collins* [2004] ECR I-2703; Case C-209/03 *Bidar* [2005] ECR I-2119. The ruling in *Bdar* might have been partially overruled by the ruling in Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep,* judgment of 18th November 2008, nyr.

which the individual is trying to rely on Community law to shield herself from the consequences of fraudulent, and therefore either illegal or borderline illegal, behaviour Community law cannot be used as a defence.

Abuse of law in horizontal situations

A more interesting question might arise in relation to the possibility of invoking the abuse of law doctrine in relation to horizontal situations. As pointed out by Ziegler, it is not unusual for fundamental rights documents to contain an 'anti-abuse' clause according to which the exercise of fundamental rights cannot be aimed at the destruction of the rights recognised in those documents.[20] Again, it is a matter of debate whether the 'anti-abuse' provisions delimit the scope of the rights granted by such documents, or rather imply a self-standing legal category.[21] Usually the doctrine, or inherent limitation as the case might be, applies both to vertical and horizontal situations. In particular, it might be used to prevent a party from using a right, for instance freedom of expression, in ways which go against the very purpose of the rights granted; or in order to allow a State to regulate such rights to avoid 'abuses'. For instance, the European Court of Human Rights has accepted that Member States might legitimately prevent the expression of ideas, such as racist or fascist ideas, that would undermine the very values which the Convention seeks to protect.[22]

In relation to the free movement of workers provisions it is not clear whether the doctrine of abuse might be relevant in relation to horizontal situations. This question seems particularly relevant following the horizontal effect of the free movement of persons provisions. In *Angonese*,[23] the Court clarified that the prohibition of non-discrimination on grounds of nationality is a mandatory principle of Community law which binds also private parties. In the more recent cases of *Viking* and *Laval*,[24] the Court accepted that the Treaty free movement provisions might impose a positive duty on trade Unions to refrain from taking collective action against trans-frontier employers; or action with the aim of preventing an employer from exercising its Treaty free movement rights.

The horizontal boundaries of the free movement provisions have yet to be properly defined: however, it is not impossible to foresee situations in which claimants might attempt to artificially bring themselves within the scope of the Treaty in order to gain an undue advantage against a private party.[25] Take for instance the case of *Evans*: that case concerned litigation between ex-husband and wife as to the use of fertilised eggs,

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[20] E.g. Article 54 of the EU Charter of Fundamental Rights states 'Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein'. Similar provisions are found in Article 17 of the European Convention for the protection of Human Rights and Fundamental Freedoms; and in Article 18 of the Universal Declaration of Human Rights.

[21] For a comparative discussion see E. Reid 'The Doctrine of Abuse of Rights: Perspectives from a mixed jurisdiction' EJCL (October 2004) http://www.ejcl.org/83/art83-2.html.

[22] E.g. *Garaudy v France* (Decision of 24 June 2003, Appl. No. 65831/01, ECHR 2003-IX (extracts).

[23] C-281/98 *Angonese* [2000] ECR I-4139.

[24] Case C-438/05, *The International Workers' Federation and the Finnish Seamen's Union v Viking Line* [2007] ECR I-10779; Case C-341/05, *Laval un Partneri* [2007] ECR I-11767.

[25] This is common in competition law as well as in vertical cases in relation to free movement of persons; see e.g. the rather artificial intra-Community link in Case C-60/00 *M Carpenter v Secretary of State for the Home department* [2002] ECR I-6279.

when the ex-husband withdrew consent for insemination. In that case, Community law had not been triggered and therefore the balancing act as to the mutual rights and obligations of the two parties rested with national law, and with the European Court of Human Rights.[26] However, one could ask oneself whether if Ms Evans had sought implantation of the fertilised eggs in France, with the sole purpose of triggering the intra-Community element and the jurisdiction of the Court, that would qualify as an abusive use of the free movement provisions.

In the present writer's opinion, even in such an extreme case, it would not be a matter of abusive exercise but rather of defining in more precise way the extent to which individuals can rely on their right to move during the course of proceedings against another person, when their right to move is only tangentially relevant. Thus, in the hypothetical case of a Ms Evans in France, the real issue is not that of an abuse of rights but rather it is a constitutional issue as to the respective scope of application of Community and national law. In other words, the right to have IVF treatment in France would not be abusively exercised, but rather the ECJ would have to decide whether to impose its own fundamental rights standards or rather leave it to national law to balance the conflicting fundamental rights.[27]

Concluding remarks

As argued by Ziegler, it seems doubtful that the doctrine of abuse of law is a legally useful concept in relation to the free movement of workers. Rather, the cases in which abuse of law might be invoked can be grouped in to two categories: first, those cases in which the claimant has engaged in fraudulent behaviour which excludes the application of the Treaty ratione personae (e.g. marriages of convenience, where the spouse is not a spouse for Community law purposes), or ratione materiae (e.g. cases involving double benefits claims). Secondly, the expression 'abuse of law' might serve as an all encompassing safety net that can be relied upon in exceptional circumstances to justify a limitation of the Treaty rights. Thus, it could be seen as a 'sui generis' mandatory requirement, that indicate nothing more than the legitimate and proportionate application of a rule which is itself compatible with Community law. Overall then, at least in relation to the free movement of workers and physical persons more generally, the concept of abuse far from being a self-standing legal category seems to be a tool which might be used to delimit the rights at issue.

[26] *Evans v UK* (Application No 6339/05; judgment of 10 April 2007).
[27] On this point see E Spaventa 'Federalization versus Centralization: Tensions in *Fundamental Rights Discourse in the European Union*' in Dougan and Currie (eds) *50 Years of the European Treaties* (Oxford, Hart Publishing, 2009), p. 343.