BRINGING CLARITY TO THE PURELY INTERNAL SITUATIONS RULE?

CASE COMMENTARY ON THE JUDGMENT C-268/15 ULLENS DE SCHOOTEN

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ABSTRACT

This case commentary examines the judgment of the Court of Justice of the European Union in the case C-268/15 *Ullens de Schooten* and its effect on the case law regarding the purely internal situation, i.e. a situation in which there is no interstate element. The purely internal situations rule requires a case to have an interstate element in order for the free movement provisions to apply. Developed by the Court in attempt to determine the proper scope of the internal market provisions and protection of the autonomy of the Member States, its application has proved difficult and received considerable criticism. *Ullens de Schooten* is a response to these issues, confirming the conditions under which the free movement provisions may be applied regardless of the circumstances being purely internal. Although the judgment is a step in the right direction, the Court does not fully use the opportunity to explain its reasoning and clarify the doctrine.

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TABLE OF CONTENTS

1. INTRODUCTION

Since its inception, one of the EU's main goals has been to promote economic growth and trade between its Member States by creating a single market. Restrictions on trade and free competition between Member States have gradually been eliminated, and the Court of Justice of the European Union (CJEU, the Court) has played a central role in defining the meaning and scope of the union's free movement rules. *Ullens de Schooten*[2] adds to the case law on Article 49 TFEU prohibiting restrictions to the freedom of establishment in another Member State.

The CJEU has actively protected and promoted the freedom of establishment, recognizing that the concept of establishment itself is very broad.[3] The case law regarding the market freedoms can be divided into three elements which are required for the provisions on the market freedoms to apply: the existence of a cross-border element, the economic aim of exercising a free movement right, and the existence of a specific hindrance to the pursuit of such economic activity.[4]

However, the Court has gradually broadened the scope of situations to which the free movement provisions apply, and in some circumstances the cross-border element is no longer required. *Ullens de Schooten* continues the line of case law of the CJEU on the applicability of the free movement provisions to the so-called purely internal situation, i.e. a situation in which there is no interstate element.[5] This commentary examines the CJEU's application of the purely internal situations rule in *Ullens de Schooten* and the decision's effect on the established doctrine and the role of the CJEU in internal affairs of the Member States.

In order to gain a better understanding of the case, the first section briefly describes the events leading to the preliminary reference. The second section discusses the freedom of establishment and the Court's approach to determining whether a situation is purely internal to a Member State. The article then proceeds to examine the case at hand, taking into consideration the Opinion of the Advocate General and the criticism toward the internal situations doctrine. It concludes with an assessment of the decision's impact on the established doctrine.

2 Judgment of 15 November 2016, *Ullens de Schooten* C-268/15, EU:C:2016:874.
3 Judgment of 30 November 1995, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* C-55/94, EU:C:1995:411, para 25.
4 Caro de Sousa 2011, p. 154. The early case law regarding national regulations that hinder the freedom of establishment concerned in particular the adequate qualifications for pursuing a profession, see e.g. judgment of 28 April 1977, *Thieffry* C-71/76, EU:C:1977:65 and judgment of 7 May 1991, *Vlassopoulou* C-340/89, EU:C:1991:193.
5 Barnard – Peers 2014, p. 365.

2. BACKGROUND AND MAIN ISSUES

Fernand Ullens de Schooten, a Belgian national, operated a clinical biology laboratory in Belgium. Under Belgian legislation, such laboratories must be operated by persons authorized to provide clinical biology services, in other words doctors, pharmacists or chemical science graduates, in order to receive reimbursement under the Belgian social security system. Ullens de Schooten considered this to be a restriction on the freedom of establishment, constituting a breach of Article 52 of the EC Treaty (later Article 43 EC and now Article 49 TFEU). Therefore, he filed a complaint to the European Commission.

Following the complaint, the Commission brought an action before the CJEU in February 1987 seeking a declaration that Belgium had failed to fulfill its obligation under Article 52 of the EC Treaty. The Court dismissed the action, concluding that the national legislation applied without distinction to Belgian nationals and those of other Member States, and that its provisions and objectives did not permit the conclusion that it had been adopted for discriminatory purposes or that it produced discriminatory effects.[6]

In 1989, the laboratory operated by Ullens de Schooten was subjected to a criminal investigation based on suspicion of tax evasion. Ullens de Schooten himself was prosecuted for concealment of operating the laboratory contrary to the required qualifications set in the national law, and was convicted in 1998 by a judgment of the Court of First Instance in Brussels. This was followed by a lengthy appeal process in which Ullens de Schooten again argued that the national provision on qualifications for laboratory operators was not compatible with EU law.

When this argument was dismissed, Ullens de Schooten brought proceedings against the Belgian State, seeking indemnity for the financial consequences of the orders made against him in the previous judgments. Finally, in 2015, the Brussels Court of Appeal decided to make a preliminary reference to the CJEU. The Court of Appeal sought essentially to know whether the non-contractual liability of the State for damage allegedly caused to individuals as a result of a breach of EU law may be pleaded in a case which is confined within a single Member State.

The preliminary reference contained four questions of which the second was the only one answered by the CJEU. As the applicant sought damages on the grounds that the State had breached the provision on freedom of establishment and therefore wrongly convicted him, the CJEU assessed by using the purely internal situations rule whether EU law was applicable, i.e. whether the claims of the applicant had an interstate element. Since the Court found no such element, it followed the purely internal rule and did not apply EU law.[7]

6 Judgment of 12 February 1987, *Commission v Belgium* C-221/85, EU:C:1987:81, para 11.
7 The three additional questions were conditional to the applicability of union law in a purely internal situation. For the complete questions, see *Ullens de Schooten*, para 37.

3. FREEDOM OF ESTABLISHMENT AND THE EVOLUTION OF THE PURELY INTERNAL SITUATIONS RULE

Article 49 TFEU, on which Ullens de Schooten based his claims, prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for the State's own nationals by the law of the country where such establishment is effected. The wording of the Article implies that the provision cannot be invoked by nationals against their own Member State since reference is made to the nationals of a Member State in *another* Member State.[8] The cross-border element is also included in the wording of the provisions on the other fundamental freedoms, leaving it to the Member States to decide how they wish to regulate their internal matters.

The Treaties endeavor to divide competences between the EU and the Member States and to protect the States' autonomy from the Union's regulatory overreach. However, a definite line between national and supranational levels of governance has not been drawn in the Treaties, leaving the issue of defining the boundaries of the scope of each level of governance to the CJEU.[9] The purely internal situations rule has been developed by the Court in an attempt to determine the proper scope of the internal market provisions and to strike a balance between the unity and effectiveness of the internal market and the autonomy of the Member States.[10] Through a line of cases applying the internal situations rule, the Court has outlined the boundaries regarding the scope of the fundamental freedoms. This rule was the deciding factor also in *Ullens de Schooten*.

The purely internal situations rule was first enunciated by the CJEU in *Knoors*[11], a case of a Dutch national seeking to rely, against his Member State of origin, on an EU Directive regulating self-employed activities. The principle was then applied in *Saunders*[12], a case concerning the free movement of workers. In the judgment, the Court held that Article 39 EC (Article 45 TFEU) was inapplicable since the Treaty provisions on freedom of movement for workers could not be applied to "situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law".[13]

8 Craig – de Búrca 2011, p. 771, emphasis added.
9 Tryfonidou 2009a, p. 198.
10 Mataija 2009, p. 35.
11 Judgment of 7 February 1979, *Knoors* C-115/78, EU:C:1979:31, para 24.
12 Judgment of 28 March 1979, R v *Saunders* C-175/78, EU:C:1979:88.
13 ibid para 11.

The basic idea of the rule is relatively simple. If a dispute does not involve the cross-border exercise of market freedoms, it is held to be an internal situation to which EU law does not apply.[14] The Court has subsequently applied the same principle in cases regarding the other fundamental freedoms. It has thus established the purely internal situations doctrine as a general guideline for defining the limits of applying the provisions on the market freedoms.[15]

Since *Saunders*, however, the Court has moved away from the original, rather straightforward approach. In *Pistre*[16], the Court modified its approach to the purely internal rule when it did not dismiss the case as soon as it discovered that the specific facts were confined within a single Member State. The facts of the case did not involve goods that had moved between Member States. On the contrary, the preliminary question concerned French legislation allowing the description "mountain" to be used only in relation to French products after authorization by the French authorities. The Court held that in such a situation, a national measure facilitated the marketing of domestic goods to the detriment of imported goods. This resulted in a difference of treatment between the two categories and thus potentially hindered trade in the internal market.[17]

Under this new approach, the deciding factor in assessing the applicability of the Treaty provisions became the question of whether the contested national measure was potentially capable of affecting trade between Member States.[18] During the decades of its application, the Court has made several other additions to the internal situations rule and also received criticism for these decisions. In *Ullens de Schooten*, the Court apparently saw an opportunity to clarify its current stance as it took time to go over these developments in its judgment.

4. THE PURELY INTERNAL SITUATIONS RULE IN ULLENS DE SCHOOTEN

In *Ullens de Schooten*, the Court considered the evolution of the purely internal rule that had taken place since the early cases. Based on its case law, the Court categorized four different scenarios in which the provisions on fundamental freedoms had been applied even when there had been no transnational elements to be found in the case at hand.[19]

14 Mataija 2009, p. 34.
15 For some of the early cases, see for example for goods, judgment of 19 March 1992, *Morais* C-60/91, EU:C:1992:140; for services, judgment of 8 December 1987, *Gauchard* C-20/87, EU:C:1987:532; and for establishment, judgment of 26 February 1991, *Tourist Guides Greece* C-198/89, EU:C:1991:79.
16 Judgment of 7 May 1997, *Pistre* C-321/94, C-322/94, C-323/94 and C-324/94, EU:C:1997:229.
17 ibid para 45. This new approach was confirmed in judgment of 13 March 2001, *PreussenElektra* C-379/98, EU:C:2001:160.
18 Tryfonidou 2009a, p. 210.
19 *Ullens de Schooten*, paras 50–53.

In the first scenario cited in the judgment, the Court has applied EU legislation when it has not been inconceivable that nationals in other Member States had been or were interested in making use of the fundamental freedoms for carrying on activities in the Member State that had enacted the national legislation in question.[20] The reasoning behind the exception is that the national law is in these circumstances capable of producing effects which are not confined to one Member State.

Secondly, the Court has given an answer to a preliminary reference despite the internal situations rule when the request has been made in proceedings for the annulment of national provisions which apply to both the State's own nationals and those of other Member States. The decision of the referring court would in this situation affect the nationals of other Member States, which justifies the CJEU giving an answer to the preliminary reference. The Court has followed this reasoning in *Libert and Others*[21].

Thirdly, the Court has held in *Dzodzi*[22] that EU law is applicable and the Court may answer preliminary questions in internal situations if the relevant national legislation refers to EU law e.g. by stating that it is implementing an EU directive.[23] Finally, the fourth internal situation in which the free movement rules are applicable, was established in Guimont[24]. The Court held that when national law requires the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law, the free movement provisions may be relevant even in a purely internal situation.[25] This acknowledged the problem of reverse discrimination that will be discussed below.

In *Ullens de Schooten*, it was indisputable that the applicant in the main proceedings was a Belgian citizen contesting the sanctions imposed by the Belgian State for breaching Belgian law, thus constituting a purely internal situation. Therefore, the Court had to consider whether any of the above exceptions to the purely internal rule could be applied. However, without assessing the facts of the case any further the Court stated:

> *"[T]he Court, on a question being referred by a national court in connection with a situation confined in all respects within a single Member State, cannot, where the referring court does not indicate something other than that the national legislation in question applies without distinction to nationals of the Member State concerned and those of other Member States, consider that the request for a preliminary ruling on the interpretation of the provisions of the TFEU Treaty on the fundamental freedoms is necessary to enable that court to give judgment in the case pending before it. The specific factors that allow a link to be established between the subject or circumstances of a dispute, confined in all respects within a single Member State, and Article 49, 56 or 63 TFEU must be apparent from the order for reference."*[26]

Even though the Court confirms the possibility of giving a preliminary ruling in a purely internal situation, it also sets a requirement for the referring court to establish the link between the facts of the case and the Treaty provisions on the fundamental freedoms. The Court also refers to Article 94 of the Rules of Procedure of the Court which lists the information that must be included in an order for reference pursuant to Article 267 TFEU. This very specific reference seems to emphasize that the Court is willing to apply the exceptions to the purely internal situations rule but only if the referring court has indicated in the preliminary reference that the case at hand falls under one of the above exceptions.[27]

If in the future a referring court overlooks this prerequisite, the Court will likely repeat what it did in *Ullens de Schooten* and declare that in the absence of an interstate element EU law cannot be applied. In other words, the Court will not apply the exceptions to the purely internal situations rule unless the referring court makes an effort to explain why EU law should be applied. It is left unspecified how explicitly the connection should be made, but the requirement that it must be "apparent" and the reference to Article 94 of the Rules of Procedure seem to suggest that it should be clearly included in the statement of reasons which prompted the preliminary reference (Article 49(c) of the Rules of Procedure).

Before evaluating the judgment in a broader context, it is important to note that Advocate General Yves Bot had a different take on the applicability of the purely internal situations rule.[28] Unlike the Court, he would have applied Union law despite the facts being confined to one State. His reasoning is briefly examined in the following.

5. OPINION OF THE ADVOCATE GENERAL

In his Opinion, Advocate General Bot acknowledged the Court's previous case law on purely internal situations but reached a different conclusion than the Court. He stated that in the circumstances of the case, it would be neither appropriate nor suitable to strictly apply the purely internal situations rule as it would prevent the applicant in the main proceedings from resorting to EU law when seeking compensation from the Belgian State.[29] His reasoning is twofold.

20 Here the Court referred to inter alia judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* C-570/07, EU:C:2010:300.
21 Judgment of 8 May 2013, *Libert and Others* C-197/11 and C-203/11, EU:C:2013:288
22 Judgment of of 18 October 1990, *Dzodzi v Belgian State* C-297/88 and C-197/89, EU:C:1990:360.
23 ibid paras 36, 37 and 40.
24 Judgment of 5 December 2000, Guimont C-448/98, EU:C:2000:663.
25 ibid para 23.
26 *Ullens de Schooten*, para 54.
27 Sarmiento 2016.
28 *Ullens de Schooten*, Opinion of AG Bot.
29 Opinion of AG Bot, para 48. Even though the Advocate General deemed EU law applicable, he concluded that the national measure was not in breach of the free movement provisions. The objective of protecting public health was a justifiable reason for the restriction. See paras 93–113.

First, he was of the opinion that it would be paradoxical if the applicant could not rely on the argument that a national provision was in breach of EU law in support of his action that was based on the allegation that Belgium had breached EU law.[30] Secondly, the Advocate General argued that the national provision setting professional requirements for laboratories to receive social security payments had cross-border effects as it may discourage nationals of other Member States from establishing a business in Belgium.[31] He refers to previous cases on freedom of establishment, such as *Blanco Pérez and Chao Gómez* and *Venturini*[32], in which the Court has applied EU law in an internal situation since the national legislation could have effects outside the State in question. The deciding factor leading to the Court's different conclusion in *Ullens de Schooten* seems to have been that since the referring court did not explain the relevance of the Treaty rules in the internal situation, the case was deemed hypothetical.[33]

The Advocate General's arguments and the differing conclusions reached by him and the Court draw attention to the difficulties related to the application of the purely internal situations rule. The following section examines the critique that the Court has received for its rulings and how it responds to it in *Ullens de Schooten*.

6. CRITICISM TOWARD THE APPLICATION OF THE PURELY INTERNAL SITUATIONS RULE

Over the course of its application, the purely internal situations rule has received a fair amount of criticism for various reasons of which a few will be discussed here to illustrate the Court's need to make clarifications in *Ullens de Schooten*. First, the strict requirement of interstate movement as a prerequisite for applying the free movement provisions may not always reflect the economic realities of the case. The rule's ability to distinguish between cases where there is an adverse effect on trade which EU law should prohibit and cases where there is no need for such measures has been questioned.[34] Even if the facts of the case are confined in one

30 ibid para 52.
31 ibid para 90–91 in which the Advocate General refers to judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* C-171/07 and C-172/07, EU:C:2009:316, para 23. The Advocate General has only assessed the case based on Article 49 TFEU since Articles 56 and 63 TFEU were, in his opinion, invoked merely formally (para 38). It could be asked whether he had come to the same conclusions had the preliminary reference relied primarily on Article 56 since its wording does not require the service provider to be located in a Member State other than his or her nationality. Article 56 TFEU only requires the service provider and the recipient to be established in different Member States. The Court does not differentiate between the three Articles in its assessment, only stating that there is no link between the subject or circumstances of the dispute in the main proceedings and those provisions.
32 Judgment of 5 December 2013, *Venturini* C-159/12 to C-161/12, EU:C:2013:791.
33 The importance of the detailed explanations provided by the referring court in internal situations was also emphasized by Advocate General Wahl in his Opinion on the abovementioned *Venturini* case, see *Venturini*, Opinion of AG Wahl, para 38.
34 Mataija 2009, p. 43.

Member State, the national measures subject to the preliminary reference may in reality impede the functioning of the internal market.[35] To address these issues, the Court has gradually adopted a more refined approach to the purely internal rule by considering, inter alia, whether the contested measure is capable of having effects on interstate trade or if the national measure in question has a connection to EU law.

Although these developments can be seen as improvements to the sometimes overly simplified rule, the new criteria make it more complicated to assess the applicability of the EU provisions, and the inconsistencies in case law have persisted. Part of the problem is that the function of the purely internal situations rule has been to act as a gatekeeper to the preliminary reference mechanism since the Court will not pursue an assessment in cases confined to one State. However, as the Court has increased the number of situations which are held to have a potential cross-border element, the line between internal and cross-border situations has become increasingly blurred.[36]

The situation has not been improved by the inconsistences in determining how strong the link to interstate movement should be.[37] As a result, the rule is neither effectively promoting a functional internal market nor clearly distinguishing an internal sphere that Member States could regulate independently. A perceived lack of coherence can, however, be better understood by viewing the Court's judgments in the context of the evolving objectives of the EU. As the EU's goals have expanded from purely economic issues to other fields such as social rights and rights of citizens, so has the scope of application of EU law as defined by the Court.[38]

The other main problem is reverse discrimination, a harmful side effect of the purely internal rule. Since EU legislation may not be evoked in situations confined within a single Member State, nationals cannot rely on the free movement provisions against their own State if the case does not have a transnational element. Nationals of another Member State may therefore enjoy more favorable treatment in the host state since they get the benefits of EU law in addition to national legislation.[39] As happened in *Ullens de Schooten*, if the Court does not find any connection with another state, it considers the case to be a purely internal situation for which no European remedies are available.[40] The different treatment based on whether there is a cross-border element or not has led to the somewhat confusing result that the same national

35 Tryfonidou 2009a, p. 201.
36 Caro de Sousa 2011, p. 161–162.
37 See for example judgment of 11 July 2002, *Carpenter* C-60/00, EU:C:2002:434, in which the deportation of the spouse of a Member State national was held by the Court to impede said national's right to provide services, thus creating a link to Union law. If this criterion had been followed by the Court in all cases, almost anyone could have fulfilled the requirements and challenged national practices as a matter of Union law.
38 O'Leary, 2009, p. 15–16 and 37.
39 Barnard 2013, p. 236.
40 Poiares Maduro 2000, p. 128.

measure is sometimes legal, sometimes illegal. The potential arbitrariness of attaching so much importance to crossing a national border has been seen incompatible with union citizenship and the requirement of equal treatment.[41]

To some extent, the Court has responded to this issue in *Guimont,* making it possible to give a preliminary ruling in an internal situation if it might be useful to the national court in case that court were to prohibit reverse discrimination.[42] The Court's reasoning implies that it is willing to give a preliminary ruling without assessing too closely the actual relevance of the question.[43] It has received criticism for this approach since the stricter traditional doctrine has better supported the Member States' autonomy in internal matters.[44] At the same time, however, it has been argued that the Court should no longer leave the task of solving the problem of reverse discrimination to the Member States.[45] The divided opinions on how to deal with this problem demonstrate the difficulty of finding balance between an efficient internal market and preserving the allocation of competences between the EU and the Member States.

7. CONCLUSIONS: BRINGING CLARITY TO THE CASE LAW?

The challenges described above and the Court's attempts at overcoming them have contributed to the formation of an area of case law described as "traditionally chaotic and obscure".[46] It seems from the judgment in *Ullens de Schooten* that the Court has seen this case as an opportunity to bring order and clarity to its previous case law on the purely internal rule and to explicitly confirm the conditions under which an exception can be made to the traditional requirement of a cross-border element.

The effect of this case on the internal situations doctrine is not dramatic. The judgment does not in itself change the Court's approach to the purely internal situations. What it does, however, is bring together and summarize the different situations in which an exception to the main rule can be made. It clarifies to the national courts how the purely internal situations doctrine should be applied and what is expected of the national courts in this regard. Its nature as an assertion of general guidelines is further emphasized by the fact that the case was heard by the Grand Chamber instead of a Chamber of three or five judges.

41 For criticism of the Court's case law, see judgment of 1 April 2008, *Gouvernement de la Communauté française and Gouvernement wallon* C-212/06, EU:C:2008:178, Opinion of AG Sharpston paras 133–157.
42 *Guimont*, para 23.
43 Ritter 2006, p. 701.
44 ibid p. 702; Caro de Sousa 2011, p. 163. On the other hand, the Court's approach in *Guimont* has also received approval, see Tryfonidou 2009a, p. 215
45 Tryfonidou 2009b, p. 29.
46 Sarmiento 2016.

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As the exceptions to the requirement of an interstate element operate in the sensitive area of division of competences, the decision can also be perceived as a deliberate demonstration of the Court's efforts to respect the Member States' autonomy in their internal affairs. The judgment can be seen as an indication that the traditional approach to purely internal situations is still in use and the Court does not intend to broaden the scope of exceptions to it or base its judgments on hypothetical scenarios. Even so, the main problems regarding the internal situations rule remain largely unsolved.

It is notable that the Court decided to strictly apply the internal situations rule contrary to the Opinion of the Advocate General. The Advocate General's assessment was that the facts constituted one of the exceptions to the purely internal rule, but the judgment does not reveal why the Court took the opposite view. It is only stated that the Treaty provisions are intended to "protect persons making actual use of the fundamental freedoms".[47] It is not clarified whether the deciding factor in the judgment was the referring court's failure to explain why any of the exceptions should apply, or that none of the exceptions would have applied in the first place. It would have better served the Court's purpose of clarifying the doctrine if it had given reasons for rejecting the Advocate General's arguments.

Although the standards for applying the internal situations doctrine have now been defined, *Ullens de Schooten* does not solve the complicated issue of applying them. Nevertheless, the case offers a more coherent view of the doctrine and is a step in the right direction in clarifying the internal market legislation.

47 *Ullens de Schooten*, para 57.

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