

measures such as those in *Graf* or *Kranemann*. The effect of such measures is not to prevent access to the market, but to deter an individual from taking up activities in another Member State because of the economic costs such activity would entail. In the latter case, *Graf* creates a *de minimis* rule, but *Kranemann* suggests that this will not be applied, or will be less rigorously applied, where the measure specifically targets movement between Member States.

(iii) Restrictions on secondary establishment

The taking up of business activity in another Member State can occur either through primary or secondary establishment. The former is where a trader relocates her central place of business to another Member State. By contrast, with secondary establishment, the trader remains in her home state, but sets up branches, agencies or subsidiaries in other Member States. Restrictions on secondary establishment inevitably prevent traders from other Member States setting up a business in the host state, as to do so would involve their having to abandon their place of business in their home state. This question was raised in *Klopp*, concerning a German lawyer practising law in Dusseldorf. He applied to register with the Paris Bar Council in order to practise in Paris, but was refused because of a general prohibition on anyone practising at the Paris Bar unless their principal office was in Paris and the other offices they worked from were in the environs of Paris.

Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971

17. ... under [the second paragraph of Article 49 TFEU] freedom of establishment includes access to and the pursuit of the activities of self-employed persons 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. It follows from that provision and its context that in the absence of specific Community rules in the matter each Member State is free to regulate the exercise of the legal profession in its territory.
18. Nevertheless that rule does not mean that the legislation of a Member State may require a lawyer to have only one establishment throughout the Community territory. Such a restrictive interpretation would mean that a lawyer once established in a particular Member State would be able to enjoy the freedom of the Treaty to establish himself in another Member State only at the price of abandoning the establishment he already had.
19. That freedom of establishment is not confined to the right to create a single establishment within the Community is confirmed by the very words of Article [49 TFEU], according to which the progressive abolition of the restrictions on freedom of establishment applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State. That rule must be regarded as a specific statement of a general principle, applicable equally to the liberal professions, according to which the right of establishment includes freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community.
20. In view of the special nature of the legal profession, however, the second Member State must have the right, in the interests of the due administration of justice, to require that lawyers enrolled at a bar in its territory should practise in such a way as to maintain sufficient contact with their clients and the judicial authorities and abide by the rules of the profession. Nevertheless such requirements must

not prevent the nationals of other Member States from exercising properly the right of establishment guaranteed them by the Treaty.

21. In that respect it must be pointed out that modern methods of transport and telecommunications facilitate proper contact with clients and the judicial authorities. Similarly, the existence of a second set of chambers in another Member State does not prevent the application of the rules of ethics in the host Member State.

The judgment suggests that it is unlikely that restrictions on secondary establishment can be justified. This position is supported by *Commission v France*,⁴⁹ where the French government attempted to justify a similar prohibition on secondary establishment for doctors and dentists, on the grounds that patients will often wish to have access to the same doctor. The Court was equally dismissive, stating that even in general practices, recent developments resulted in practitioners belonging to group practices with the consequence that a patient could never ensure access to a particular practitioner. The argument in *Klopp* that effective supervision does not in fact require physical presence has been reinforced in the context of taxation in *Commission v Denmark*, where the Court pointed out that a Directive existed specifically to regulate mutual assistance between national tax authorities.⁵⁰ Denmark made certain tax breaks conditional upon incorporation in Denmark, saying this was necessary to prevent fraud, because the authorities could not verify tax claims made by companies based abroad. In a judgment entirely consistent with its information-based approach to the internal market, and with the philosophy of the Services Directive, the Court found this to be disproportionate.⁵¹ If checking of claims was necessary, Denmark should seek to find ways to do this abroad, with the help of local authorities, rather than washing its hands of the matter. The case shows that states should not regard foreign establishments as beyond the supervisory pale, but rather should engage with authorities in other states to obtain the information that they need.

Most cases have concerned more hidden restrictions on secondary establishment. In *Stanton*,⁵² a challenge was made to a Belgian requirement for the self-employed to pay social security contributions unless they were also employed in Belgium. The Court considered that such an exemption penalised those who extended their business activities across more than one Member State and whilst it was not discriminatory, as more Belgians were affected by it than any other nationality, it was nevertheless illegal as it restricted free movement. More recently, in *Commission v Portugal*,⁵³ a Portuguese requirement that private security firms be legally incorporated in Portugal was held to be an illegal restriction on secondary establishment as it prevented natural persons from other Member States setting up in Portugal.

⁴⁹ Case 96/85 *Commission v France* [1986] ECR 1475. See also Case C-351/90 *Commission v Luxembourg* [1992] ECR I-3945.

⁵⁰ Case C-150/04 *Commission v Denmark* [2007] ECR I-1163.

⁵¹ See p. 827.

⁵² Case 143/87 *Stanton v INASTI* [1988] ECR 3877. See also Joined Cases 154/87 and 155/87 *Rijksinstituut voor de sociale verzekering des zelfstandigen v Wolf* [1998] ECR 3897; Case C-53/95 *INASTI v Kammler* [1996] ECR I-703.

⁵³ Case C-171/02 *Commission v Portugal* [2004] ECR I-5645.