

PROHIBITION OF ABUSE OF (COMMUNITY) LAW: THE CREATION OF A NEW GENERAL PRINCIPLE OF EC LAW THROUGH TAX

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1. Introduction: Thirty years of abuse

The Court of Justice has been alluding to abuse and abusive practices in its rulings for more than thirty years.¹ For a long time, however, the significance of these references was unclear. Several factors might have contributed to this lack of clarity. First, it is certainly significant that abuse of rights is not a concept familiar to the legal systems of all Member States. Some domestic legal systems include the principle, others do not; amongst those that do, some give the principle a broad scope of application, others a more restrictive one. Overall, it can be said that civil law systems generally accept the principle of abuse of rights to some degree. In France, where the principle is believed to have been developed, the principle has very wide application,² whilst in other civil law countries, such as Germany, the application of the principle is more limited. Conversely, common law systems, namely those of the United Kingdom and Ireland, do not recognize the principle; the same applies to Denmark and other Nordic systems, which follow the common law approach.³

Second, the Court has not always adopted a coherent approach regarding the terminology used to describe abusive practices. In fact, for many years the

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1. The first ruling where the Court refers to abusive practices appears to have been Case 33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR 1299, (*Van Binsbergen*), concerning free movement of services. For an analysis of this case, see below section 2.1.

2. See Bell et al., *Principles of French law* (OUP, 1998), at pp. 364–366.

3. For a more detailed analysis of Member States' approach to the principle of abuse of rights, see Brown, "Is there a general principle of abuse of rights in European Community Law?", in Heukel and Curtin (Eds.), *Institutional Dynamics of European Integration*, Vol. II, (Martinus Nijhoff Publishers, 1994), pp. 511–525, at 513–515. Also, for a comprehensive overview of the French notion of abuse of rights, albeit from a tax perspective, see Harris, "Abus de droit in the field of Value Added Taxation", (2003) *British Tax Review* ("BTR"), 131–152, at 132–136.

Court used words such as “avoidance”,⁴ “evasion”,⁵ “circumvention”,⁶ “fraud”⁷ and “abuse”,⁸ in an apparently interchangeable fashion.⁹ Moreover, two of those words were sometimes used in the same sentence, separated solely by the conjunction “or”, and thus implicitly indicating that the Court considered these terms to be synonymous.¹⁰ This terminological confusion was also reflected in the literature, with a prime example being the reference by some commentators to the “circumvention principle”,¹¹ others to the “*Van Binsbergen* principle”,¹² and yet others to the “evasion principle”,¹³ instead of the principle of abuse or abusive practices. Only in the late 1990s, and in particular since the judgment in *Emsland-Stärke*, has the Court consistently referred to “abuse” within its rulings.¹⁴

Finally, and partly as a direct consequence of these terminological discrepancies, until recently the scope and practical applicability of the doctrine of abuse and abusive practices were somewhat unclear. On the one hand, there was significant scepticism as to whether the references by the Court to abuse

4. E.g. *Van Binsbergen*, note 1 *supra*, at para 13 and Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [1994] ECR I-4795, para 21.

5. E.g. Case 115/78, *J. Knoors v. Staatssecretaris van Economische Zaken*, [1979] ECR 399, para 50.

6. E.g. Case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v. SARL “Au blé vert” and others*, [1985] ECR I, para 27.

7. E.g. Case C-367/96, *Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, [1998] ECR I-2843, para 20.

8. E.g. Case C-441/93, *Panagis Pafitis and others v. Trapeza Kentrikis Ellados A.E. and others*, [1996] ECR I-1363, para 68.

9. Although, the potential role played by divergent standards of legal translation at the Court should also be acknowledged here. The impact of translation matters upon law making at EU level, and in particular upon the case law of the Court, has been subject to increased scrutiny in recent years, see amongst others, Glezl, “Lost in Translation; EU Law and the Official Languages – Problem of the Authentic Text”, Paper presented at a conference organized by the University of Cambridge’s Centre for European Legal Studies, entitled *The Treaty of Rome – 50 Years On!*, Warsaw, 9–10 March 2007, available at <www.cels.law.cam.ac.uk/events/warsaw_conference.php>; and McAuliffe, “Translation at the Court of Justice of the European Communities” in Olsen and Stein (Eds.), *Forensic Translation*, (Palgrave MacMillan, 2007).

10. The expression “abuse or fraudulent conduct” was used for example in the *Paletta II* ruling, Case C-206/94, *Brennet AG v. Vittorio Paletta*, [1996] ECR I-2382, para 26.

11. See Hansen, “The development of the circumvention principle in the area of broadcasting”, (1998) LIEI, 111–138.

12. See Ris and Pullen, “Advocate General reinforces the principle of country of origin control under the Television without Frontiers Directive”, (1996) ECLR, 453–461, at 456–457.

13. See Hörnle, “Country of origin regulation in cross-border media: One step beyond the freedom to provide services?”, (2005) ICLQ, 89–126, at 115 et seq.

14. Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, [2000] ECR I-1569.

did indeed amount to the development of a general principle of abuse of Community law.¹⁵ On the other, there were also important questions regarding the absence of criteria for determining the applicability of the doctrine, i.e. where a particular situation should be deemed to be abusive.¹⁶

This state of affairs has changed radically within the last few years, with abuse of law gaining significant prominence. This marked change has been attributed to various factors, including the increase in the volume of free movement within the internal market and also the 2004 enlargement.¹⁷ However, it seems undeniable that two successive events have played a major role: first, the development by the ECJ of an abuse test in *Emsland-Stärke* in 2000;¹⁸ and second, the subsequent emergence of an intense debate as to whether the Court would apply this new test to the field of taxation.¹⁹ The rulings in *Halifax* and *Cadbury Schweppes*, the first applying the abuse test to VAT, the second to corporate taxation,²⁰ represented a definite turning point in terms of the attention dedicated by commentators and practitioners alike, to the newly designated “principle of prohibition of abuse of law”.²¹ And justifiably so: these two cases highlighted the broad scope of application of the Community’s abuse of law doctrine; confirmed the criteria for determining the existence of abuse (a slight alteration to the initial abuse test, as set out in *Emsland-Stärke*); and all of this whilst furthering the Court’s intervention in what is generally regarded as an extremely sensitive area for Member States, taxation.

These latest developments, however, give rise to significant questions, not only from a taxation perspective, but more generally from the perspective of the development of the EU legal system as a whole. In particular, it is unclear at present whether the case law of the Court in this area amounts to a fully fledged principle; and if so, what is the scope of that principle of prohibition

15. See Kjellgren, “On the Border of Abuse – The Jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of Community Law”, (2000) EBLR, 179–194; and Brown, op. cit. note 3 *supra*. For a discussion of this issue, see *infra* section 4.

16. The absence of criteria led some to undertake the difficult task of attempting to discern an objective pattern through in-depth analysis of the Court’s cases on abuse and abusive situations, see most notably Kjellgren, op. cit. note 15 *supra*.

17. See Engsig Sørensen, “Abuse of rights in Community law: A principle of substance or merely rhetoric?”, (2006) CML Rev., 423–459, at 423–424.

18. See note 14 *supra*.

19. See e.g. Harris, op. cit. *supra* note 3; and Farmer, “VAT Planning: Assessing the ‘Abuse of Rights’ Risk”, (27 May 2002) *The Tax Journal*, 15–17.

20. Cases C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise*, [2006] ECR I-1609; and C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, [2006] ECR I-7995, respectively.

21. There is already a significant amount of literature on the topic post *Halifax* and *Cadbury Schweppes*, see *infra* section 3.

of abuse, is it a principle of prohibition of *abuse of Community law*, or more broadly a Community principle of prohibition of *abuse of law*? Equally, can this principle of prohibition of abuse be characterized as a general principle of Community law? It has been said that no other issue in European law is today more important or better suited for intensified and thorough research than the development of common European legal principles.²² Yet, insofar as abuse of law is concerned, it is clear that discussion has been lacking.

This paper attempts to provide an answer to those questions through a comprehensive analysis of the Court's case law to date on abuse and abusive practices in the context of the internal market.²³ It starts by analysing the evolution of the Court's approach to abuse until the recent tax rulings. It then looks at the recent tax judgments, questioning whether these represented the final confirmation of the existence of the abuse of law principle within the EU legal system. It concludes with an analysis of the scope and characteristics of the principle, inquiring in particular as to whether it constitutes a new general principle of Community law.

2. Evolution of the Court's approach to abuse and abusive practices

The first reference by the ECJ to abuse and abusive practices appears to have been within the area of free movement of services, with the judgment in *Van Binsbergen*.²⁴ Subsequently, over the last thirty years, the Court's application of the concept has spread to various areas of the EU legal system, and significantly to all fundamental freedoms.²⁵ Arguably, however, the approach adopted by the Court has neither been the same for all areas of the EU legal system, nor the same over time. In fact, an analysis of the relevant case law provides a sense of an evolving approach to abuse and abusive practices, progressively

22. President of the Court of Justice, Rodríguez Iglesias, at the speech before the Danish Parliament, on 26 April 1999, cited in Nergelius, "General Principles of Community Law in the Future: Some Remarks on their Scope, Applicability and Legitimacy", in Bernitz and Nergelius (Eds.), *General Principles of European Community Law* (Kluwer Law International, 2000), pp. 223–234, at 223.

23. Due to length considerations, the discussion is broadly limited to internal market issues, although reference is made to areas of law which strictly speaking do not fall under the internal market banner, such as citizenship or the common agricultural policy. It will not include, however, examination of the use of the concept of "abuse of rights" in other areas of European law, such as human rights, contract law, international civil procedure or competition law.

24. See note 1 *supra*.

25. As the Court itself acknowledged in numerous cases, see e.g. the list of cases on abusive practices, by area, provided in *Kefalas*, note 7 *supra*, at para 20.

developing a principle whose application appears to be heavily dependent on the subject matter at issue.

2.1. *Free movement of services: the origins*

Van Binsbergen is regarded as a landmark case within free movement of services, not only because it introduced the doctrine of abuse of rights within the Community sphere, but equally, because it established the direct effect of Article 49 EC. The case concerned a Dutch lawyer chosen by Van Binsbergen to act as his legal representative in a case before a Dutch court. Although he was a Dutch national, while the case was still pending, Mr Van Binsbergen's lawyer moved to Belgium. Thus, as legal representation before Dutch courts was reserved to residents under Dutch law, Van Binsbergen's lawyer lost his right to act as his representative. The Court considered that Dutch law restricting legal representation to residents constituted, in principle, a restriction on free movement of services. However, it added that such restrictions could be justified – given the particular nature of the service provided – and could thus be regarded as compatible with Article 49 EC.²⁶ Then, in a statement, which has been consistently cited by the Court in later rulings on abuse and abusive practices, it concluded:

“Likewise, 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 [49] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.”²⁷

Although the statement in itself has been considered to have “relatively limited applicability”,²⁸ in practice it constituted the basis for the Court's initial approach to the so-called “u-turn”, or “circumvention” transactions. Broadly speaking, these are situations where either persons or goods move from one Member State to another, although the final destination of the transaction is the original Member State; the central focus is the exercise of a right conferred by Community law, the right to free movement, in order to circumvent the national law of a Member State. The Court's initial approach to these, as reflected in *Van Binsbergen*, as well as in later cases, was to deem it legitimate

26. *Van Binsbergen*, note 1 *supra*, at para 12.

27. *Id.*, at para 13.

28. See Kjellgren, note 15 *supra*, at 180.

for Member States to apply legislation aimed at preventing this type of transaction. This statement implied that the Court regarded u-turn transactions, or circumvention cases, as falling within the scope of abuse of Community law, and in particular of the right to free movement.

Although this approach was applied to other areas of EU law, and in particular to other fundamental freedoms,²⁹ special attention was given to the matter within the so-called broadcasting cases.

2.1.1. *Broadcasting cases*

In the early 1990s a number of cases were referred to the Court concerning circumvention transactions within the field of broadcasting,³⁰ most notably *Commission v. Belgium, Veronica* and *TV10*.³¹ The cases focused on the interpretation not only of the EC Treaty provisions on free movement of services, but also of the provisions of the Television Without Frontiers Directive, which establishes the legal framework for television broadcasting within the internal market.³² In all cases, the ECJ was essentially asked whether restrictions imposed by Member States on free movement of broadcasting services could be justified in light of the Court's approach to abuse and abusive practices, as set out in *Van Binsbergen*. In all but one of these cases, the Court considered that the abuse doctrine, as set out in *Van Binsbergen*, did indeed apply. The significance of these rulings, and in particular of the application of the abuse doctrine to broadcasting, is considerable, and is highlighted by the fact that in 1997 an anti-abuse clause was included within the Television Without Frontiers Directive, with the specifically stated aim of reflecting the Court's case law on the matter.³³

29. See Case 205/84, *Commission v. Germany*, [1986] ECR 3755; Case 39/86, *Sylvie Lair v. Universität Hannover*, [1988] ECR 3161; and Case C-61/89, *Criminal proceedings against Marc Gaston Bouchoucha*, [1990] ECR I-3551.

30. Hansen explains the rationale behind these cases: "In the area of broadcasting, circumvention of national rules is a well known phenomenon, not only because the national legislation, especially in regard to advertising, differs from Member State to Member State, but also because a broadcaster as opposed to other service providers is relatively free to establish himself where he prefers", see note 11 *supra*, at 113.

31. See Case C-211/91, *Commission v. Belgium*, [1992] ECR I-6773; Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR I-487; and *TV10*, note 4 *supra* respectively.

32. Council Directive 89/552/EEC of 3 Oct. 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, O.J. 1989, L 298/23, as last amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 Dec. 2007, O.J. 2007, L 332/27.

33. See Art. 2a and Recital 14 to the Preamble of Council Directive 89/552/EEC, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, O.J. 1997, L 202/60.

In *Commission v. Belgium* the Belgian Government tried to invoke the abuse doctrine, as set out in *Van Binsbergen*, in order to justify national legislation limiting access to the domestic cable TV network. Under Belgian law, broadcasters situated in other Member States were barred from access to that network, where the programmes were not broadcasted in one of the languages of the Member State in which the broadcaster was established. The Court reiterated its ruling in *Van Binsbergen* adding, however, that “it does not follow that it is permissible for a Member State to prohibit altogether the provision of certain services by operators established in other Member States, as that would be tantamount to abolishing the freedom to provide services.”³⁴ The rationale for the decision in this case appears to have been that the Belgian “anti-abuse” legislation was in fact too broad, potentially applying to situations, which, in the view of the Court, might not amount to abuse. The same, however, did not apply, in its opinion, to the subsequent broadcasting cases.

In *Veronica*, a Dutch broadcasting company saw its broadcasting licence cancelled by the Dutch media regulator, following its decision to set up a commercial transmitter in Luxembourg. The ECJ, again reiterating its ruling in *Van Binsbergen*, stated:

“By prohibiting national broadcasting organizations from helping to set up commercial radio and television companies abroad for the purpose of providing services there directed towards the Netherlands, the Netherlands legislation at issue has the specific effect, with a view to safeguarding the exercise of the freedoms guaranteed by the Treaty, of ensuring that those organizations cannot improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes.”³⁵

A similar approach was adopted by the Court, one year later, in *TV10*, a case which also involved Luxembourg and the Netherlands. TV10, a broadcasting company established in Luxembourg, had been denied access to the Netherlands cable network. The Dutch media regulator invoked, as reason for the refusal, the fact that TV10 had established itself in Luxembourg in order to “escape the Netherlands legislation” applicable to domestic broadcasters.³⁶ The Court ruled that:

“The Treaty provisions on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly

34. *Commission v. Belgium*, note 31 *supra*, at para 12.

35. *Veronica*, note 31 *supra*, at para 13.

36. *TV10*, note 4 *supra*, at para 7.

or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.”³⁷

What is particularly interesting about this case, is not so much the ruling itself, as this essentially reiterates the judgment in *Veronica*, but rather the Opinion of the Advocate General. In his Opinion, Advocate General Lenz provides a lengthy and detailed analysis on the issue of abuse, its scope and applicability, in particular in light of the *Van Binsbergen* line of case law. He essentially concludes that, although the statement in *Van Binsbergen* “raises doubts as to what legal consequences are to be linked with the avoidance of applicable rules”,³⁸ in his view, the activity, even if abusive, should be regarded as falling within the scope of the free movement provisions. “[Thus] it is only within the framework of the freedom to provide services that the law of the country in which the services are provided can be applied under certain circumstances as a limitation of or an exception to the freedom as if the provider of services were established in that country.”³⁹ Moreover, and as regards the criteria for the determination of existence of abuse, he states:

“In the first place, it should be considered on the basis of what facts a circumvention can be found to have taken place. Circumvention of a law or an abuse of law is regularly characterized by an intention to circumvent or abuse, which is undoubtedly a subjective factor. Consequently, the interpretation of the *Van Binsbergen* case law put forward by the Commission to the effect that there is an objective and a subjective test suggests itself. ...

[However] I regard the employment of subjective criteria for assessing the legally relevant conduct of a legal person as problematic. Consequently, I consider that the avoidance of legal provisions by a legal person should be able to be determined using objective criteria.”⁴⁰

Two aspects of the Opinion can potentially be regarded as constituting a precursor of, or a basis for, the development by the Court of the abuse doctrine in later rulings. First, the view that an activity, even if abusive, should be regarded as falling within the scope of the free movement provisions, with the abuse principle seen as “an exception” to those provisions, could arguably be regarded as the theoretical framework behind the *Centros* line of case law.⁴¹ As

37. *Id.*, at para 23.

38. Opinion of A.G. Lenz in *TV10*, *ibid.*, at para 25.

39. *Id.*, at para 33.

40. *Id.*, at paras. 59 and 61.

41. See *infra* section 2.2.

discussed below, the idea that circumvention of national rules can be legitimate, and not abusive, rests on the assumption that, even when there is circumvention, the free movement provisions should still apply. The assessment as to whether there is abuse or not, should only be done *a posteriori*. Equally significant is the reference in the Opinion to the need for the establishment of criteria for the determination of the existence of abuse, and in particular to the possible use of objective and/or subjective criteria. This could arguably be regarded as the origin of the so-called abuse test, set out by the ECJ some years later, in *Emsland-Stärke*.⁴²

Thus, from the initial statement in *Van Binsbergen*, to the establishment of some of its theoretical foundations in the broadcasting cases, the free movement of services' jurisprudence can broadly be regarded as having initiated the process of creating a Community law principle of abuse, a process which was to be continued further within the context of other freedoms.

2.2. Freedom of establishment and company law: The development

Although references to abuse and abusive practices in the context of the freedom of establishment can be found within the Court's rulings since the late 1970s,⁴³ only from the late 1990s onwards did these cases start to gain considerable pre-eminence. This increased attention coincided with – and was probably partially caused by – the development of a different approach by the ECJ to national measures intended to ensure that freedom of establishment was not abused, particularly in the field of company law.

Initially the Court's approach to freedom of establishment appeared to mimic that adopted in the field of free movement of services. In *Daily Mail*, a company incorporated in the United Kingdom applied for transfer its central management and control to the Netherlands, with the accepted principal aim of avoiding paying United Kingdom's capital gains tax.⁴⁴ Upon the Treasury's refusal, *Daily Mail* initiated proceedings against it, claiming that the obligation under United Kingdom law to request an authorization for transfer of residence was contrary to Articles 43 and 48 EC. Without ever addressing directly the potential issue of abuse, or the fact that the purpose of the transfer was to avoid paying tax,⁴⁵ the Court ruled:

42. See *infra* section 2.4 for an analysis of the abuse test, as set out by the Court in *Emsland-Stärke*.

43. See *Knoors*, note 5 *supra*.

44. Case 81/87, *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] ECR 5483.

45. A fact that has been classified as "curious" by Cunha and Cabral, see "'Presumed innocent': Companies and the exercise of the right of establishment under Community law", (2000) EL Rev., 157–164, at 160.

“It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.

Under those circumstances, [Articles 43 and 48] of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.”⁴⁶

Thus, the case was perceived by some Member States as giving *carte blanche* to the practice of using anti-abuse measures within the field of company law, which would otherwise have been regarded as restrictions on freedom of establishment.⁴⁷ In that context, it is unsurprising that when, in 1999, the *Centros* ruling was delivered,⁴⁸ it gave rise to significant controversy.⁴⁹ Yet, the Court’s change of approach in *Centros* was not totally unpredictable.

For a few years, the Court had been signalling a different approach in lower profile rulings within the field of company law, most notably in the so-called “Greek challenge” cases, a series of cases referred by the Greek courts concerning alleged abuse of Second Company Law Directive’s provisions.⁵⁰ In these cases the Court expressly accepted the right of national courts to apply domestic anti-abuse of rights provisions and/or principles, even where those rights were granted by Community law. However, when read in conjunction, it is

46. See note 44 *supra*, at paras. 23 and 24.

47. Although in *Segers* the Court had seemed to signal a different approach; in that case, it ruled that the refusal to accord a sickness benefit to a director of a company formed in accordance with the law of another Member State could not be regarded as an appropriate measure to combat abusive practices within the field of company law, see Case 79/85, *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beropen*, [1986] ECR 2375, at para 17.

48. Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459.

49. Craig and de Burca that the outcome of this case caused “considerable surprise”, see *EU Law – Texts, Case and Materials*, 4th ed. (OUP, 2007), at p. 809.

50. Second Council Directive 77/91/EEC of 13 Dec. 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 para 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, O.J. 1977, L 26/1. See *Pafitis*, note 8 *supra*; *Kefalas* note 7 *supra*; and Case C-373/97, *Dionysios Diamantis v. Elliniko Dimosio (Greek State) and Organismos Ikonimikis Anasygkrotisis Epicheiriseon AE (OAE)*, [2000] ECR I-1705.

clear from the various rulings that, this right was deemed to be subject to certain conditions, namely: that the anti-abuse provisions do not detract from the full effect and uniform application of Community law;⁵¹ and that national anti-abuse provisions do not alter the scope of the Community law provision in question, nor compromise the objectives pursued by it.⁵² Although Member States should perhaps have taken notice of the implicit limits imposed by the Court in those cases on the application of domestic anti-abuse rules and/or principles, in practice those judgments either failed to be noticed, or merely added to the general perception that restrictions on freedom of establishment were justified insofar as anti-abuse measures were concerned.

2.2.1. *Centros and legitimate circumvention*

From a purely company law perspective, *Centros* was regarded as a landmark decision from the outset.⁵³ The case was widely perceived as an endorsement of the incorporation principle as a criterion for establishment of companies' legal residence, signalling the beginning of the end for the application of the real seat principle within the EU.⁵⁴ Nevertheless, from the perspective of the development of a Community principle of abuse by the ECJ, the case was no less significant, having helped delineate the concept of abuse for EU purposes.

Broadly speaking, *Centros* was a circumvention case, i.e. it concerned a company, owned by Danish citizens, but incorporated in the United Kingdom, allegedly with the sole aim of avoiding the application of Danish rules on minimum capital. The company set up a branch in Denmark, but was refused registration with the local Chamber of Commerce on the basis that the branch would in reality be its primary establishment; as the company had never traded in the United Kingdom, this allegedly constituted an abuse of the freedom of establishment. Following proceedings at the Danish courts, the case was re-

51. See *Pafitis*, note 8 *supra*, at para 68.

52. *Kefalas*, note 7 *supra*, at para 23; and *Diamantis*, note 50 *supra*, at para 34.

53. This is reflected in the attention given to the case by legal commentators. The Court's own documents show over 130 notes and commentaries to the case, with a vast majority – over 100 – written in the first two years, after the release of the ruling. See the following, at 546 to 551: <curia.europa.eu/fr/coopju/apercu_reflets/common/recdoc/notes/Notes_89-04.pdf>.

54. Within the EU, the majority of Member States applied the real seat principle, including Germany, France and Austria; whilst a minority, including the UK and Ireland, applied the incorporation principle. For a discussion on the impact of the *Centros* ruling upon these principles see amongst others: Omar, “*Centros*, *Überseering* and beyond: a European recipe for corporate migration: Part 1”, (2004) *International Company and Commercial Law Review*, 398–407; Lowry, “Eliminating obstacles to freedom of establishment: The competitive edge of UK Company Law”, (2004) *CLJ*, 331–345; and Xanthaki, “*Centros*: is this really the end for the theory of the siège réel?”, (2001) *Company Lawyer*, 2–8.

ferred to the ECJ, which was asked whether it was contrary to Articles 43 and 48 EC for a Member State to refuse to register a branch under those circumstances.

The case law on circumvention situations within the field of services – such as the broadcasting cases, and *Van Binsbergen* itself – as well as previous cases within the field of establishment – such as *Daily Mail* – would seem to point in the direction that the Court would have regarded the situation in *Centros* as abusive and, consequently, the refusal of the Danish authorities as a justifiable restriction on the freedom of establishment.⁵⁵ However, as mentioned above, the Court had already been signalling – in particular in the “Greek challenge” cases – a more cautious attitude towards domestic provisions aimed at curtailing abuse of right conferred by Community law. In *Centros* it took this new approach one step further:

“It is true that according to the case law of the Court a Member State is entitled to take measures designed 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...

...
[However] 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 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.”⁵⁶

Thus, the Court concluded that it was contrary to Articles 43 and 48 EC

“for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State, in which it has its registered office but in which it conducts no business, where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital.”⁵⁷

55. This much was invoked by the Danish Government, see note 48 *supra*, at para 23.

56. *Id.*, at paras. 24 and 27.

57. *Id.*, at para 39.

It has been pointed out that the circumstances in *Centros* were inherently different from those in other circumvention cases mentioned above, and that this might explain the different outcomes.⁵⁸ Indeed, this could constitute a valid explanation, were it not for the post-*Centros* cases on freedom of establishment,⁵⁹ as well as those on free movement of workers, and even on citizenship issues.⁶⁰ In light of those, it seems much more reasonable to assume that, more than factual differences, what determined the different outcome in *Centros* was a fundamental shift in the Court's legal approach to abuse. Under this new approach, the previous broad (and perhaps simplistic) conceptualization of abuse, under which all circumvention situations were regarded as abusive, was substituted for a narrower (and perhaps more sophisticated) conception of it, under which not all circumvention situations would be tantamount to an abuse of Community law. It is true that in *Centros*, the Court failed to establish definite criteria for determining which situations were abusive, and which were not. However, it initiated the process of doing so, by re-conceptualizing abuse for EU purposes, and thus setting out the basis which would lead a year later to the establishment of the abuse test in *Emsland-Stärke*, and later on to its application in tax cases, such as *Halifax* and *Cadbury Schweppes*.

The obvious question that follows the above is *why*. Why was there such a shift in the case law? What prompted the ECJ to streamline its concept of abuse? Here one can only speculate. It is possible that the new approach merely reflected a better understanding of the abuse phenomenon and of different Member States' approaches to the abuse of rights concept. In this case, the rationale for the shift would have had a purely legal nature. There might however be another explanation, which would suggest a much more policy-driven motivation. That is that the Court's re-conceptualization of abuse is part of a wider interventionist approach as regards internal market issues, which could arguably constitute a further push towards European integration.

The logic of this argument works as follows: under *Centros*, so long as no harmonization rules apply within the internal market, persons and businesses alike are entitled to choose the most beneficial regulatory regime; thus, if reg-

58. See Engsig Sørensen, op. cit. note 17 *supra*, at 444–447.

59. See namely Cases C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, [2002] ECR I-9919; and Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, [2003] ECR I-10155. In both rulings the Court reiterated its *Centros* approach to company law matters, thus increasing the disquiet amongst some Member States' governments and company lawyers alike, over the end of the real seat principle. See in particular the comments of Omar, "Centros, Überseering and Beyond: a European Recipe for Corporate Migration: Part 2", (2005) *International Company and Commercial Law Review*, 18–27; and Roth, "From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law", (2003) *ICLQ*, 177–208.

60. See *infra* section 2.4.

ulatory discrepancy continues to be the norm across the EU, regulatory competition would increase, with potential economic benefits for EU competitiveness as a whole;⁶¹ if, on the other hand, Member States are dissatisfied with the regulatory *status quo*, then further harmonization of company law constitutes the only alternative which is compatible with the internal market principles. Either way – increased competition or further harmonization – there are potential gains for the European integration cause.⁶² Seen in this context, the Court's new approach to abuse adopted in *Centros* was probably, not only a calculated policy choice, but equally, a rational one.

2.3. *Free movement of goods, Common Agricultural Policy and agricultural levies: abuse test*

Cases regarding abuse and abusive practices in the context of the Common Agricultural Policy date back to the late 1970s.⁶³ However, it was the ruling in *Emsland-Stärke* which had the most significant impact on the development of the Community law doctrine of abuse.⁶⁴ The case concerned the interpretation of Regulation 2730/79.⁶⁵ The factual circumstances of the case were relatively

61. Recent empirical evidence suggests that the ruling in *Centros* has already been having the effect of increasing jurisdictional competition in EU company law: apparently not only have the number of start-ups from other Member States which are incorporated in the UK increased sharply since the 2000s; but equally, the minimum capital requirements have watered down in several other EU Member States, see Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, Centre for Business Research, University of Cambridge, Working Paper No. 323, March 2006, at 11. Whether regulatory competition in company law is the right way forward is debatable however. For a more detailed discussion of the so-called "Delaware effect", also known as "race to the bottom", whereby companies choose to register in a jurisdiction with a light regime, see also e.g. Deakin, "Two types of regulatory competition: Competitive federalism versus reflexive harmonisation. A law and economics perspective on *Centros*", (1999) CYELS, 231–260; and Barnard and Deakin, "Market access and regulatory competition", in Barnard and Scott (Eds.) *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing, 2002), pp. 197–224, in particular at 198–204.

62. Thus, the classic debate over whether to harmonize or increase regulatory competition within the EU, see e.g. Póitres Maduro, *We the Court – The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1997), in particular at pp. 103–149; Reich, "Competition Between Legal Orders", (1992) CML Rev., 861; Ehlermann, "Harmonisation versus Competition Between Rules", (1995) EL Rev., 333; and Weatherill, "Why Harmonise?", in Tridimas and Nebbia (Eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Vol. 2, (Hart Publishing, 2004), pp. 11–32, in particular 11–19.

63. See Case 125/76, *Peter Cremer v. Bundesanstalt für landwirtschaftliche Marktordnung*, [1977] ECR 1593, at para 21; and Case C-8/92, *General Milk Products GmbH v. Hauptzollamt Hamburg-Jonas*, [1993] ECR I-779, at para 21.

64. *Emsland-Stärke*, note 14 *supra*.

65. Commission Regulation (EEC) No 2730/79 of 29 Nov. 1979 on the application of the system of export refunds on agricultural products, O.J. 1979, L 317/1.

straightforward: during 1987 Emsland-Stärke exported a potato-based product to Switzerland, for which it received export refund; however, subsequent inquiries conducted by the German customs authorities revealed that, immediately after their release for use in Switzerland, the products were transported back to Germany unaltered and by the same means of transport and released for use there; in light of this, in 1992 the German authorities reclaimed from Emsland-Stärke what they perceived as unduly granted refund. The question for the Court was essentially whether in these circumstances the Regulation should be interpreted as precluding Emsland-Stärke's right to export refund.

At the hearing, Emsland-Stärke argued that a general principle of abuse of rights did not constitute a clear and unambiguous legal basis for the claim of repayment of the export refund.⁶⁶ The Commission argued, however, that whilst Regulation 2730/79 did not constitute a legal basis for demanding repayment of export refunds, consideration should be given to Article 4(3) of Regulation 2988/95 on the protection of the European Communities' financial interests, according to which "[a]cts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal."⁶⁷

This provision was, according to the Commission, simply the expression of a general principle of law in force within the Community legal order. Although, it acknowledged that the Court had not expressly recognized it as a general principle of Community law, the Commission argued that a general legal principle of abuse of rights existed in almost all the Member States and had, in practice, already been applied in the case law of the ECJ.⁶⁸

The Court agreed with the Commission, albeit without making reference to abuse as a "general principle of Community law". It started by pointing out that it was clear from its previous jurisprudence, and in particular *Cremer* and *General Milk Products*, not only that the scope of Community Regulations could not be extended to cover abuses on the part of a trader, but equally that, where importation and re-exportation operations were not realized as *bona fide* commercial transactions, the granting of monetary compensatory amounts might be precluded.⁶⁹ It then went on to set out an abuse test:

66. *Emsland-Stärke*, note 14 *supra*, at para 24.

67. Council Regulation (EC, Euratom) No. 2988/95 of 18 Dec. 1995 on the protection of the European Communities financial interests, O.J. 1995, L 312/1.

68. See note 14 *supra*, at paras. 36–38.

69. *Id.* at para 51.

“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.

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. The existence of that subjective element can be established, *inter alia*, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.

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.”⁷⁰

As already noted above, the significance of the ruling in *Emsland-Stärke* lies in the fact that, for the first time, the Court provided criteria for determining the existence of abuse for the purposes of Community law.⁷¹ It is true that there had already been implicit references to an abuse test in previous case law of the Court;⁷² however, never until *Emsland-Stärke* had the Court expressly endorsed such test. For this reason, and despite its relatively obscure subject matter, the case gave rise to significant debate.

Two aspects of the ruling were particularly controversial: first the inclusion of a subjective element within the abuse test; second, the implications of this novel abuse test for other areas of Community law. The controversy surrounding the inclusion of the subjective element was connected to the fact that prior to *Emsland-Stärke* some, including advocates general, had expressed reservations about the usefulness of that element.⁷³ The debate over the implications of the new abuse test for other areas of Community law, on the other hand, was an issue which was directly associated with the Court’s rationale in *Emsland-Stärke*, i.e. whether the abuse test could be extended to other areas of Community law, depended on the reason behind the establishment of the test by the ECJ in the first place. Although the ruling provides no express help in this regard, it was assumed by many immediately after the judgment that the fact that agricultural levies constituted a Community’s own resource had played a ma-

70. Id. at paras. 52 to 54.

71. See along the same lines Weber, “Abuse of Law – European Court of Justice, 14 December 2000 – Case C-110/99, *Emsland-Stärke*”, (2004) LIEI, 43–55, at 51.

72. See in particular Opinion of A.G. Lenz in *TV10*, note 4 *supra*.

73. See review provided by Weber, note 71 *supra*, at 51–52. It is interesting to note that in *Halifax* the Court has introduced amendments to the test, precisely in relation to its subjective element, see *infra* section 3.1.

role.⁷⁴ On this basis it was argued by some Member States' tax authorities that, as VAT was also part of the Community's own resources,⁷⁵ the abuse test should apply within the field of that tax.⁷⁶

Thus, it was in this manner that the existence, or not, of an EC principle of abuse, became firmly a tax matter. One that has been much debated over the last seven years, and which shows no signs of relenting.⁷⁷

2.4. *Free movement of workers and citizenship: The Exception?*

At the same time that the debate surrounding the application of the new abuse test to tax law matters was beginning to emerge, questions were being raised as regards the Court's reluctance to apply the case law on the doctrine of abuse to other areas of Community law, namely free movement of workers and citizenship. As with the Common Agricultural Policy, the Court had already ruled on abuse and abusive practices in the context of free movement of workers before.⁷⁸ However, it was only more recently, and namely since the ruling in *Centros*, that its approach became clearer and thus more questionable, in particular in light of the ruling in *Emsland-Stärke*.

In 2003 the Court issued two rulings which clearly hinted at a strict approach to the concept of abuse in the context of free movement of workers: *Ninni-Orasche* and *Akrich*. In *Ninni-Orasche*, an Italian citizen contested the refusal by the Austrian authorities to grant her funding for studying at an Aus-

74. Harris, for example, argued that "the Commission intervened in this reference to the ECJ specifically to protect the Communities' own resources", op. cit. *supra* note 3, at 141.

75. The principal piece of legislation in this regard is Council Decision 2000/597/EC, Euratom of 29 Sept. 2000 on the system of the European Communities' own resources, O.J. 2000, L 253/42. There is, however, a substantial amount of legislation in this area, see list provided in de la Feria, *A Handbook of EU VAT Legislation*, Vol. II, (Kluwer Law International, 2004), at table V.A.1.

76. In 2003, Harris commented that "in recent cases before United Kingdom VAT tribunals, Customs and Excise have made some reliance on the case of *Emsland-Stärke* in support of an assertion that *abus de droit* is a general principle of Community law, and can therefore be applied universally in matters of VAT avoidance within the Member States", op. cit. *supra* note 3 at 137. See also Ladds and Chowdry, "Debenhams Retail Plc v. Commissioners of Customs and Excise", (2004) BTR, 26–36, at 32.

77. As Terra and Kajus commented in 2004, specifically as regards VAT, "it seems that the discussion regarding legal principles (and VAT) in the near future will focus on the applicability of the abuse of rights doctrine", in *A Guide to the European VAT Directives*, Volume I, (IBFD, 2004), at p. 42. See *infra* section 3 for an analysis of the abuse debate in the context of taxation.

78. See Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie* [1982] ECR 1035, at para 21; *Lair*, note 29 *supra*, at para 43; Case C-370/90, *The Queen v. Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department*, [1992] ECR I-4265, at para 24; and C-206/94, *Brennet AG v. Vittorio Paletta*, [1996] ECR I-2357, at paras. 24 and 25.

trian university.⁷⁹ At issue was the interpretation of the free movement of workers' provisions, as Ms. Ninni-Orasche had worked part-time in Austria for a short period, before embarking on her undergraduate studies. Amongst other aspects, the national court asked the ECJ whether the student's application for funding, should be regarded as abusive. The Court started by emphasizing that according to *Lair* "migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship"; however, this "cannot give rise to a situation whereby a national of a Member State may enter another 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 an abuse, the Court states, is not covered by the Community provisions in question.⁸⁰ Ultimately, the ECJ considered that it was for the national court to determine whether the conditions established in *Lair* were met, and namely whether Ms. Ninni-Orasche's request was abusive. Notwithstanding this, the Court did emphasize that, as long as the employment activity performed was not "purely marginal and ancillary", a national of a Member State working as a temporary worker in another Member State was entitled to the protection granted by the free movement of workers' provisions. Implicit in the Court's ruling therefore is a narrowed view of what falls within the concept of abuse. This approach was made even clearer in *Akrich*.

The case in *Akrich* concerned the right of a Moroccan national to enter and remain in the United Kingdom.⁸¹ After many years of attempting to reside there, Mr Akrich married a British citizen in 1996. As soon as the couple had lived in Ireland for six months, Mr Akrich applied for residence in the United Kingdom. The application was refused however on the basis that Mr and Mrs Akrich had moved to Ireland for the express purpose of subsequently exercising Community rights in order to be able to lawfully return to the United Kingdom. The case was referred to the ECJ, which was essentially asked whether in these circumstances, the couple was entitled to reside in the United Kingdom under the free movement of workers provisions, and in particular in light of the Court's previous case law.

In his Opinion, Advocate General Geelhoed argued for the application of the abuse test, as set out in *Emsland-Stärke*.⁸² After highlighting the difficulties

79. Case C-413/01, *Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst*, [2003] ECR I-13187.

80. *Id.*, at paras. 34 and 36.

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

82. *Id.*, Opinion of the A.G., at para 96.

of applying this test to a particular case, the Advocate General, went on to conclude:

“The installation of a worker in another Member State in order to benefit from a more favourable legal system is by its nature not a misuse of Community law.

That being said, the question arises as to whether the same is true of the return of a Community worker to his own Member State ...

In my view it is established that return to one’s own Member State under the conditions laid down in Community law is inherent in the freedom of movement of persons. By its very nature there is no abuse of Community law where the persons concerned on such return rely on the rights conferred on them by Community law.

I conclude that in the situation arising in the main proceedings there can be no question of a misuse of Community law.”⁸³

Albeit essentially arriving at the same conclusion, the ECJ did not follow the Advocate General’s line of argument.⁸⁴ In particular, it is interesting to note the Court’s choice not to apply the abuse test. In fact, on the issue of whether the conduct in question could be regarded as abusive, the Court merely stated the following:⁸⁵

“It should be mentioned that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity ...

Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse ... even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.

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.”⁸⁶

83. *Id.*, at paras. 181–184.

84. For a critical analysis of the differences between the Opinion of the A.G. and the Court’s judgment, see annotation by Spaventa, (2005) CML Rev., 225–239.

85. It has been suggested that the brevity of the Court’s ruling indicates that the Court found this a difficult case, see White, “Conflicting competences: free movement rules and immigration laws”, (2004) EL Rev., 385–396, at 389.

86. *Akrich*, *supra* note 81, at paras. 55 to 57. The Court concluded that Mr Akrich could not rely on EC law for protection, on the basis that he had not been a lawful resident of a Member

It has been argued that “the dismissal of allegations of abuse of rights” in both *Ninni-Orasche* and *Akrich*, highlights the Court’s view that there is no such thing as “abusively creating” the situation whereby someone becomes a worker for the purposes of EU law.⁸⁷ In fact, it did not exclude the possible existence of abuse in the context of free movement of workers, in practice the Court significantly narrowed the doctrine’s scope of application. Yet, the most controversial rulings arose within the field of citizenship.

2.4.1. *Citizenship cases*

The development of case law within the area of EU citizenship by the Court of Justice is a relatively recent phenomenon. It is true that even prior to the introduction of the citizenship provisions by the Maastricht Treaty, there were a few rulings which are said that have had a “citizenship component”;⁸⁸ however, those provisions were only given a full central role by the Court after its ruling in *Grzelczyk*, in 2001.⁸⁹ Yet, despite the infancy of the case law in this area, there have been already three citizenship cases in recent years, where the issue of abuse played – or perhaps, should have played – a significant part.

The first of these cases was *Chen*, which concerned the refusal by the United Kingdom authorities to grant Mrs Chen, a Chinese citizen, and her daughter Catherine, an Irish citizen, a permanent residence permit.⁹⁰ The factual circumstances of the case were relatively straightforward. Mr and Mrs Chen were Chinese citizens, who, for business reasons, travelled frequently to the United Kingdom. The couple had a child, born in China in 1998, and wished to have a second, but they had come across difficulties due to the birth control policy in that country. In that context, Mrs Chen, who was six months pregnant, decided to travel to the United Kingdom and temporarily establish herself in Northern Ireland. The child, Catherine, was born in Belfast in 2000, and pur-

State, see para 58. The so-called “lawful residence” criterion has again been applied by the Court in the recent *Jia* ruling, Case C-1/05, *Yunying Jia v. Migrationsverket*, [2007] ECR I-1; although, according to some commentators, not with great clarity, see annotation by Elsmore and Starup, (2007) CML Rev., 787–801. As opposed to *Akrich*, however, in *Jia* “it is not alleged that the family member in question was ... seeking to evade national immigration legislation illicitly”, see judgment at para 31.

87. See Craig and de Burca, op. cit. note 49 *supra*, at 779.

88. See Barnard, *The Substantive Law of the EU – The Four Freedoms*, 2nd ed. (OUP, 2007), at p. 415.

89. Case C-184/99, *Rudy Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, at para 31. As Arnall comments, initially the Court’s approach to the effect of the citizenship provisions was “rather cautious”, see *The European Union and its Court of Justice*, 2nd ed. (OUP, 2006), at p. 511.

90. Case C-200/02, *Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department*, [2004] ECR I-9925.

suant to Irish nationality legislation, was issued with an Irish passport. It was accepted from the outset that Mrs Chen had taken up residence on the island of Ireland in order to enable the child she was expecting to acquire Irish nationality and, consequently, to allow herself and her daughter to acquire the right to reside in the United Kingdom. Having applied for residence permission in the United Kingdom, Catherine and her mother saw this application declined on the basis that the situation, whereby Catherine obtained Irish citizenship, was abusive.

The Court, following the Opinion of the Advocate General,⁹¹ briefly dismissed the existence of abuse, stating:

“It is true that Mrs Chen admits that the purpose of her stay in the United Kingdom was to create a situation in which the child she was expecting would be able to acquire the nationality of another Member State in order thereafter to secure for her child and for herself a long-term right to reside in the United Kingdom.

Nevertheless, under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality ...

None of the parties that submitted observations to the Court has questioned either the legality, or the fact, of Catherine’s acquisition of Irish nationality.

Moreover, it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty

However, that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country.”⁹²

In *Collins* the possibility of abuse was not even discussed by the Court.⁹³ The case concerned the refusal by the United Kingdom authorities to grant Mr Collins, a citizen with dual nationality, American and Irish, the right to obtain a job seeker’s allowance. Mr Collins was an American citizen, who on various occasions from 1979 to 1981 had resided in the United Kingdom. During one of his stays there he had applied and obtained Irish nationality. During the fol-

91. See in particular paras. 108–129 of the Opinion in *Chen*.

92. *Id.*, at paras 36–40.

93. Case C-138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions*, [2004] ECR I-2703.

lowing years he lived mostly in the United States of America, but also in African countries. In 1998, Mr Collins arrived in the United Kingdom with the intention of finding work. A few days after his arrival he applied for a job seeker's allowance, which was refused by the competent authorities on the basis that he was not habitually resident in the United Kingdom.

At the hearing it was established that Mr Collins had never "lived nor worked in Ireland", and that he only had visited Ireland "on three occasions for periods of, at most, 10 days". Yet, Advocate General Colomer regarded these circumstances as "irrelevant",⁹⁴ with the ECJ making no reference to them. That the conduct could be regarded as abusive did not even seem to constitute a consideration for either the Court, or the Advocate General.⁹⁵

The latest development within the field of EU citizenship, which gave rise to abuse considerations, was *Commission v. Austria*.⁹⁶ In this case, the Commission was seeking a declaration from the ECJ that Austria was in breach its obligations under Articles 17 and 18 of the EC Treaty, by failing to take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organized by it under the same conditions as holders of secondary education diplomas awarded in that country. In its submissions to the Court, Austria argued that its legislation was justifiable on the basis that it constituted a measure intended on preventing abuse of Community law.⁹⁷ The Court disagreed.

Although implicitly acknowledging that prevention of abuse of Community law can indeed constitute an acceptable justification for certain measures restricting EC law provisions, the Court considered that: "In this case, it need merely be observed that the possibility for a student from the European Union, who has obtained his secondary education diploma in a Member State other than Austria, to gain access to Austrian higher or university education under the same conditions as holders of diplomas awarded in Austria constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty, and cannot therefore of itself constitute an abuse of that right."⁹⁸

94. *Id.*, Opinion of the A.G., at para 23 and footnote 16.

95. The same is true of commentators, see annotation by Oosterom-Staples, (2005) CML Rev., 205–223; and Meulman and de Waele, "Funding the Life of Brian: Jobseekers, Welfare Shopping and the Frontiers of European Citizenship", (2004) LIEI, 275–288. However, Meulman and de Waele do highlight the fact that at the centre of the ruling is an issue of welfare shopping and benefit tourism, see in particular 287–288.

96. Case C-147/03, *Commission v. Republic of Austria*, [2005] ECR I-5969.

97. *Id.*, at paras 54 and 55.

98. *Id.*, at para 70. See Annotation by Rieder, (2006) CML Rev., 1711–1726, at 1715.

The Court's dismissal of existence of abuse in the context of all the above citizenship cases, as well as in the most recent workers cases, can be seen as a mere consolidation of previous jurisprudence, namely on freedom of establishment. However, it can also be said that it goes further than any previous case law by ruling out the existence of abuse in cases, such as the ones on citizenship, which could have reasonably been argued to reflect more extreme situations of abuse. In fact, if the circumstances in *Commission v. Austria* – as well as the Court's response in that case – mirror to a large extent those in *Centros*, the same could not be said of the circumstances in *Collins*, and even less so, of those in *Chen*. Indeed, there seems to be an artificial element in both these latter cases, which arguably merited, at the very least, a closer examination by the Court.⁹⁹ In particular, application of the abuse test, as set out by the Court in *Emsland-Stärke*, to both cases, could have resulted in a different outcome.

Once again we must pose the question, *why*? Namely, why did the Court refrain from applying the *Emsland-Stärke* test to these cases, and why has it consistently dismissed the existence of abuse in cases concerning free movement of persons, often without providing a full explanation of its reasoning?¹⁰⁰ Indeed, the case law appears to suggest a divergence of approach by the ECJ to abuse in cases concerning purely commercial situations, namely those involving legal persons, from those involving natural persons.¹⁰¹ It is, of course, impossible to ascertain with certainty what is the rationale for this distinct approach. However, at least part of the answer might reside in the relatively low profile that persons have enjoyed within the case law of the Court for many years. There is undoubtedly a sense that the ECJ is attempting to strike a balance between its wish to push for integration, by giving EU citizens more extensive rights¹⁰² – such as in *Ninni-Orasche*, *Akrich* and *Collins* – and the need to take into account the politically sensitive nature of free movement of per-

99. The Court's refusal in *Chen* to consider the abuse argument in more detail has been criticized by Carlier, who comments: "In *Chen*, the question of abuse of law was maybe more important than that of the purely internal situation. Was there not a kind of fraudulent use of European law which, *fraus omnia corrumpit*, would lead to dismissing its effects?", in annotation, (2005) CML Rev. 1121–1131, at 1127–1128.

100. This has led Hofstotter to assert, in the wake of the *Chen* ruling, that "clearly, the frequently tested but ineffective argument of an abuse of rights cannot bite", in (2005) EL Rev., 548–558, at 558.

101. See Snell, who comments more generally that "a common theme is emerging from the case law. The Court has consistently favoured the movement of Union citizens over other forms of free movement", in "And then there were two: Products and citizens in Community law", in Tridimas and Nebbia, op. cit. note 62 *supra*, pp. 49–72, at 62.

102. See Hofstotter, op. cit. note 100 *supra*, at 548.

sons – as in *Chen*.¹⁰³ One might have thought that the same balance was required as regards some commercial law areas, namely taxation. Yet, insofar as taxation is concerned, the Court has not shied away from adopting a more interventionist approach, applying the EC law concept of abuse to a growing range of circumstances.

3. Taxation: The confirmation of a new general principle of Community law?

Before *Emsland-Stärke*, it would have been almost impossible to foresee the impact that a decision on agricultural levies would have on EU tax law and policy. This it is not to say that the application of the Court of Justice's case law on abuse to tax law matters had not been the focus of debate beforehand; it had, in particular in the wake of the *Centros* ruling.¹⁰⁴ However, it is undeniable that the decision in *Emsland-Stärke* represented a turning point in this regard. The discussion was initially centred on VAT,¹⁰⁵ and only later did it move to direct taxation.

3.1. Indirect taxation and *Halifax*

Soon after the ruling in *Emsland-Stärke*, the first references concerning the applicability of the new abuse test to VAT cases started arriving to the ECJ.¹⁰⁶ Amongst the first of these cases was *Halifax*, a case referred in 2002 by the United Kingdom courts, which would become a landmark ruling, not only from a tax perspective, but arguably for the development of a general Community principle of prohibition of abuse.¹⁰⁷ However, largely due to its controversial nature, and potential implications, the case was not decided until

103. See Kunoy, "A Union of National Citizens: The origins of the Court's lack of *Avant-Gardisme* in the *Chen* case", (2006) CML Rev., 179–190.

104. See Saldanha Sanches, "Normas Anti-Abuso, Jurisprudência Comunitária e Direito Português: As Provisões no Balanço Fiscal", *Conferência sobre Fiscalidade Internacional*, Universidade Nova de Lisboa, 12–13 March 2002; Werlauff, "The consequences of the *Centros* decision: Ends and means in the protection of public interests", (2000) *European Taxation*, 542–545; and Eicker, "In the *Centros* Case the ECJ delivered a decision with far-reaching implications for company law and tax law", (1999) *Intertax*, 391–392.

105. For the reasons explained *supra*, see section 2.3.

106. See Ridsdale, "Abuse of rights, fiscal neutrality and VAT", (2005) *EC Tax Review*, 82–94.

107. See note 20 *supra*. For an analysis of the proceedings in the United Kingdom courts, which preceded the reference to the Court of Justice, see Pincher, "What is avoidance", (2002) BTR, 9–20.

2006.¹⁰⁸ In the intervening period, the Court decided on various other VAT cases, where the issue of abuse arose.¹⁰⁹

3.1.1. *The road to Halifax*

RAL was the first in a series of cases regarding the use of so-called aggressive VAT planning schemes decided in 2005.¹¹⁰ The case concerned the determination of the place of supply of services, where the supplier, the RAL Group, had – through a restructuring scheme – located its place of business outside the Community for the sole or main purpose of avoiding liability to VAT. The United Kingdom tax authorities challenged the scheme on two bases: the interpretation of Articles 43 to 59 of the Common VAT System Directive (hereafter: “CVSD”),¹¹¹ and alternatively the fact that the structure set up by the RAL Group amounted to an abuse of rights.

Following proceedings in the UK courts, the case was referred to the ECJ, which was essentially asked: first, to interpret the rules regarding place of supply of services, in Articles 43 to 59 of the CVSD; and secondly, whether there was a principle of abuse of rights in Community law applicable in the field of VAT. The Court, following the Opinion of its Advocate General, skilfully avoided answering the second question by adopting a controversial interpretation of the VAT place of supply of services rules.¹¹²

Some months later, the Court issued its decision in Joined Cases *Gemeente Leusden and Holin Groep*.¹¹³ The cases concerned the introduction of anti-avoidance law in the Netherlands, which included a rule abolishing the right to opt for taxation of lettings of immovable property where certain conditions were met. Both *Gemeente Leusden* and *Holin Groep* had entered into leasing

108. In fact, several procedural facts seemed to point towards a certain hesitation by the Court as regards this case: first, the delivery of the A.G.’s Opinion was delayed by two months (initially due in February 2005, it was in fact only released in April 2005); second, *Halifax* and *BUPA* were the last VAT-related cases (by several months) entering the Court’s register in 2002 to be ruled upon; and, third, the case was heard at the Court’s Grand Chamber, a rarity in itself.

109. For a joint analysis of all these rulings, see de la Feria, “The European Court of Justice’s solution to aggressive VAT planning – further towards legal uncertainty?” (2006) *EC Tax Review*, 27–35.

110. Case C-452/03, *Chancery Division RAL (Channel Islands) Ltd and Others v. Commissioners of Customs and Excise*, [2005] ECR I-3947.

111. Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax, O.J. 2006, L 347/1.

112. The ruling came as a surprise, mostly in light of the Court’s previous case law on place of supply of services’ provisions, see for a comprehensive analysis of the decision and its implications, de la Feria, “‘Game Over’ for aggressive VAT planning?: *RAL v. Commissioners of Customs & Excise*”, (2005) *BTR*, 394–401.

113. Joined Cases C-487/01 & C-7/02, *Gemeente Leusden v. Staatssecretaris van Financiën and Holin Groep BV cs v. Staatssecretaris van Financiën*, [2005] ECR I-5337.

agreements prior to the new legislation, and had opted to waive the exemption applicable to those services. Following the entry into force of the new law, the Dutch tax authorities took the view that an adjustment to the VAT deducted was required on the basis that Gemeente Leusden and Holin Groep were no longer entitled to waive the exemption in respect of those lettings. The Court of Justice was asked whether the CVSD provisions, or the principles of legitimate expectations and legal certainty, precluded such an adjustment.

Although the case did not directly involve abuse issues, the ruling does provide an interesting insight into the Court's approach to abusive practices in the context of tax law. The Court began by emphasizing that "preventing possible tax avoidance and abuse is an objective recognized and encouraged by the Sixth Directive".¹¹⁴ It then goes on to state: "As regards tax avoidance, although, under the law of a Member State, a taxpayer cannot be censured for taking advantage of a provision or a *lacuna* in the legislation which, without constituting abuse, has allowed him to pay less tax, the repeal of legislation from which a person liable to VAT has derived an advantage cannot, as such, breach a legitimate expectation based on Community law".¹¹⁵

In December 2005, it was the turn of *Centralan*.¹¹⁶ The case concerned a series of transactions entered into by the University of Central Lancashire allegedly with the exclusive, or main, purpose of maximizing the recovery of input VAT incurred on the construction costs of one of its buildings. Following proceedings in the United Kingdom courts between Centralan, one of the University-owned companies involved in the transactions, and the United Kingdom tax authorities, the case was referred to the Court of Justice. The questions referred solely concerned the interpretation of CVSD provisions; however, in its written observations, the Commission suggested that, in light of pending proceedings, including *Halifax*, the applicability of the principle of abuse of rights to this case should be considered.

Once again, as it had done in *RAL*, the Court avoided answering the question on the applicability of the abuse principle, by adopting a teleological interpretation of the CVSD provisions: "Finally, given that, in circumstances such as those of the main proceedings, in the event that the national court comes to the conclusion mentioned in paragraph 64 above, ... it is not appro-

114. *Id.* at para 76. The Court adds: "it would be contrary to that objective to prohibit a Member State to require immediate application of its law withdrawing the right to opt for taxation of certain lettings of immovable property entailing an obligation to adjust deductions made, where the State has become aware that the right to option was being used as part of tax avoidance schemes", at para 77.

115. *Id.* at para 79.

116. Case C-63/04, *Centralan Property Ltd v. Commissioners of Customs & Excise*, [2005] ECR I-11087.

priate to consider the possible application of the principle of abuse of rights in such circumstances.”¹¹⁷

Although arriving at the same conclusion, Advocate General Kokott did provide further guidance on the applicability of the concept of abuse in the context of VAT. While acknowledging the existence of artificial transactions, she ultimately deemed it superfluous to analyse whether the principle of abuse of rights applied. This is because, in her view, to adopt a purposive interpretation of CVSD provisions would “preclude these artificial transactions from giving rise to a tax exemption which would run counter to the objectives of the directive and would have to be remedied by course to unwritten principles such as the prohibition on the abuse of rights”.¹¹⁸ The most interesting aspect of the Advocate General’s Opinion in *Centralan* was, therefore, not so much the solution advocated, but rather the rationale behind it. In fact several significant points emerge from the Opinion, namely: an acknowledgment of the existence of “artificial transactions”, i.e. aggressive tax planning, as a distinct phenomenon; an acceptance of the need and desirability of combating this phenomenon, i.e. the assumption of applicability of the principle of abuse of rights to the VAT area; and finally, recognition of the principle of abuse of rights as a potential method to combat this phenomenon.

It is interesting to note that although the Court’s policy in relation to the applicability of the previous case law on abuse to the VAT field would only become clearer with *Halifax*, the main elements of that policy were already present in *Gemeente Leusden* and *Holin Groep* and in *Centralan*. First, it is clear that the Court considers that there is a distinction between taking advantage of a provision or *lacuna* in legislation in order to pay less tax, i.e. VAT planning, and the creation of artificial transactions entered into for the purpose of gaining a tax advantage, i.e. VAT avoidance; the first constitutes a legitimate practice, the second is perceived as an undesirable activity. Second, it also establishes an unambiguous correlation between VAT avoidance and abuse of Community law.

3.1.2. *Halifax and the new principle of prohibition of abuse*

On February 2006 the Court of Justice finally delivered its eagerly awaited ruling in *Halifax*.¹¹⁹ The factual circumstances of the case were somewhat complex but can be summarized as follows: Halifax was a banking company and as such the vast majority of its supplies are tax -exempt financial services; in 1999, it took the decision to establish new “call centres” for the purposes of

117. Id. at para 81.

118. Id. A.G.’s Opinion, at para 61.

119. *Halifax*, note 20 *supra*.

its business; by virtue of the apportionment of tax rule in Article 174 of the CVSD, Halifax could have recovered only 5 percent of the VAT paid on any construction works; however, following advice from their tax advisers, Halifax set up a scheme whereby it was able to recover effectively the full amount of input VAT incurred on the building works through a series of transactions involving different companies in the Halifax group. Following proceedings before the United Kingdom courts, the case was referred to the ECJ, which, amongst other issues, was asked whether the doctrine of abuse of rights, as developed in its case law, precluded a taxable person from exercising the right to deduct input VAT, where the transactions, on which that right was based, were effected for that exclusive purpose.

The Court confirmed that the principle of prohibiting of abuse also applied to the sphere of VAT, and therefore the CVSD should be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derived constituted an abusive practice. The Court was keen to emphasize however that this principle did not preclude tax planning – “taxpayers may choose to structure their business so as to limit their tax liability”; only abusive practices were forbidden.¹²⁰ In order to determine whether an abusive practice has taken place, the Court then set out a two-part test. An abusive practice will be found to exist where:

- the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, resulted in the accrual of a tax advantage, the grant of which would be contrary to the purpose of those provisions; and
- it is 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, that the essential aim of those transactions concerned was to obtain a tax advantage.¹²¹

According to the ECJ, it is for the national courts to verify in each specific case, and in light of the evidence presented, whether these conditions are fulfilled and consequently, whether an abusive practice has taken place. Once such practice has been established, the transactions involved “must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.”¹²²

120. *Id.* at para 73.

121. *Id.* at paras. 74, 75 and 81.

122. *Id.* at para 94.

The ruling largely followed the Opinion of the Advocate General.¹²³ In this Opinion, Advocate General Poiares Maduro had also adopted the view that the principle of prohibition of abuse of Community law, as he prefers to refer to it,¹²⁴ did indeed apply to the field of VAT.¹²⁵ Moreover, it had also set up a two-part test in order to establish the existence of abusive practices. There was however, an important difference in this regard between the Opinion of the Advocate General and the ultimate ruling of the Court: the expression used by the Advocate General in the second part of the test, was “activities for which there is objectively no other explanation”; whilst the Court opted for the formula “the essential aim” of the transactions, thus significantly widening the scope of the concept of abuse.

The decision in *Halifax* was therefore hardly surprising in light of both the Advocate General’s Opinion, and also earlier case law.¹²⁶ Not only had the Court’s rulings on VAT cases delivered during the previous year paved the way for *Halifax*, but, equally, looking at the Court’s previous case law on abuse, *Halifax* arguably represented merely the culmination of years of developing an EC law concept of abuse. Particularly noteworthy are the clear influences of *Emsland-Stärke* and the *Centros* line of case law. As regards *Emsland-Stärke* the influence is obvious: the test proposed by the Court in *Halifax* is virtually identical to the one proposed in that decision, with a few minor amendments, namely to its previously called “subjective element”.¹²⁷ As far as the *Centros* line of case law is concerned, the influence, albeit less evident, is of no less significance: the notion expressed both in *Halifax*, and in the immediately preceding rulings, such as *Gemeente Leusden* and *Holin Groep*, that “planning without abuse” is a legitimate activity, is reminiscent of the idea of

123. Despite the intense controversy it had caused, the Opinion was generally seen as a pre-emption of the Court’s ruling, see e.g. Brennan, “Why the ECJ should not follow Advocate-General Poiares Maduro’s Opinion in *Halifax*”, (2005) *International VAT Monitor* July/August, 247–254; and Cordara, “*Halifax*: a conservative opinion”, (2005) BTR, 267–270.

124. According to the A.G., “the use of the term ‘abuse of rights’ ... may actually be misleading”, in Opinion of the A.G. in *Halifax*, *BUPA*, and *University of Huddersfield*, at para 71. The three cases were initially joined, however, the Court, ultimately, decided to issue separate rulings on each, see *Halifax*, note 20 *supra*; Case C-419/02, *BUPA Hospitals Ltd, Goldsborough Developments Ltd v. Commissioners of Customs & Excise*, [2006] ECR I-1685; Case C-223/03, *University of Huddersfield Higher Education Corporation v. Commissioners of Customs & Excise*, [2006] ECR I-1751.

125. *Id.* at paras. 70, 73 and 76.

126. See de la Feria, “Giving themselves extra (VAT)? The ECJ ruling in *Halifax*”, (2006) BTR, 119–123.

127. Probably in light of previous criticisms on the use of a subjective element in the test, see *supra* section 2.3.

“legitimate circumvention” expressed both in *Centros*, and in the post-*Centros* decisions on establishment.¹²⁸

Yet, despite its predictability, the ruling in *Halifax* gave rise to intense controversy.¹²⁹ Not least due to its implications for legal principles, such as fiscal neutrality and legal certainty,¹³⁰ which are of particular concern when considering taxation matters. From the outset, it was clear that further guidance would be required on the application of the abuse principle to VAT, and thus, that new cases were likely to arise in this area.¹³¹ However, no one seemed to doubt the landmark status of the *Halifax* decision for tax law.¹³² Unfortunately, the same could not be said of its significance for the development of a Community principle of prohibition of abuse of law, which seems to have passed virtually unnoticed. In the tax world, meanwhile, the attention turned to direct taxation, and to the question of whether the Court of Justice would also apply the newly designated principle to corporate tax law.

3.2. *Direct taxation*

The discussion around the applicability of the new principle of abuse to corporate tax matters started immediately after the decision in *Halifax* had been delivered.¹³³ It is true that, even prior to *Halifax*, there had already been some

128. Although, the criteria for establishing this “legitimacy” are not necessarily the same in both cases; indeed it is unclear whether the situation in *Centros* would have met the criteria for “legitimacy” established by the Court in *Halifax*, i.e. the abuse test. It certainly was an artificial transaction, it might, however, have passed the test on the basis of its first element: the formal application of the freedom of establishment provisions to the circumstances of the case did not give rise to a result contrary to the purpose of those provisions, as interpreted by the Court.

129. For a comprehensive list of all the alleged “weaknesses” of the ruling, see Victoria Sanches, “El Concepto de Abuso de Derecho en el Ambito del IVA: El ‘Caso *Halifax*’”, (2006) *Fiscal*, 40–49.

130. See for the principle of fiscal neutrality, Ridsdale, note 106 *supra*; for the principle of legal certainty, de la Feria, note 109 *supra*; and for an overall commentary on the consequences of the decision McCarthy, “Abuse of rights: The effect of the doctrine on VAT planning”, (2007) *BTR*, 160–174.

131. As the Court of Justice itself acknowledged, see *Halifax*, note 20 *supra*, at para 77. See also comments in de la Feria, note 109 *supra*, at 32. Events since seem to be proving predictions right, with the first case on the application of the abuse principle to VAT post-*Halifax*, already having been decided by the ECJ, see Case C-425/06, *Ministero dell'Economia e delle Finanze v. Part Service Srl*, judgment of 21 Feb. 2008, nyr. Unfortunately, the Court failed to provide extra guidance in that case, preferring to refer the case back to the Italian courts for application of the new abuse test.

132. It has even been argued, with some success, that 21 Feb. 2006, now nicknamed “Halifax Day”, marked the beginning of a new stage of evolution for the EU VAT system, see Swinkels, “Halifax Day: Abuse of Law in European VAT”, (2006) *International VAT Monitor*, May/June, 173–181.

133. See Douma and Engelen, “Halifax plc v. Customs and Excise Commissioners: The ECJ

discussion of the potential effect of the Court's jurisprudence on abuse of law matters on tax law,¹³⁴ but *Halifax* gave it a new impetus. The focus of the discussion was around the different legal status of VAT and corporate tax, at EU level. VAT is a (broadly) harmonized tax, which forms part of the Community's own resources;¹³⁵ thus, when applying the principle of prohibition of abuse of law to the VAT area, the Court of Justice had done so in the context of the CVSD provisions, i.e. at issue was *abuse of Community law*. On the contrary, corporate taxes have only been marginally harmonized,¹³⁶ and do not form part of the Community's own resources; thus if the Court was to apply the principle to corporate taxation, the issue would be primarily one of *abuse of law*, rather than abuse of Community law, as in most cases, there would be no Community law to abuse in the first place.¹³⁷ The Court first dealt with the more difficult matter of the applicability of the principle to non-harmonized direct tax law; only some months later did it deal with its applicability to harmonized direct tax law.

3.2.1. *Cadbury Schweppes and non-harmonized direct tax law*

Fortunately, there was not long to wait. Pending at the Court of Justice at the time of the *Halifax* ruling were already several cases, which would test the Court's willingness to extend the application of the principle to corporate taxation. In particular, there were some references concerning the use of so-called Controlled Foreign Companies (CFC) rules,¹³⁸ whose compatibility with EC law had been questioned for some years.¹³⁹ The first of these cases to be de-

applies the abuse of rights doctrine in VAT cases", (2006) BTR, 429–440; and Rousselle and Liebman, "The doctrine of the abuse of Community law: The Sword of Damocles hanging over the head of EC corporate tax law?", (2006) *European Taxation*, 559–564.

134. In addition to references included *supra*, see for a throughout commentary on the implications for tax law of the *Centros* line of case law, Schön, "Playing different games? Regulatory competition in tax and company law compared", (2005) CML Rev., 331–365.

135. For explanation of the significance of being part of the Community's own resources for the abuse debate, see *supra* section 2.3.

136. As Wattel and Terra comment: "Positive harmonisation measures in the field of direct taxation currently in force amount to three directives on specific tax problems of international groups of companies ... and one directive on savings interest taxation", see *European Tax Law*, 4th ed. (Kluwer Law International, 2005), at p. 248.

137. Reflecting this reality, see discussion on the application of the principle only to potential cases of abuse of the existing Corporate Tax Directives, Rousselle and Liebman, op. cit. note 133 *supra*, at 561–564. The argument is developed further below.

138. Broadly speaking, CFC rules are anti-avoidance measures aimed at preventing the diversion of capital to low-tax jurisdictions, see for a more detailed explanation of how these rules usually work, Weber, *Tax Avoidance and the EC Treaty Freedoms – A Study of the Limitations under European Law to the Prevention of Tax Avoidance* (Eucotax Series, Kluwer Law International, 2005) at pp. 121–122.

139. As far back as 2001, Schön questioned the compatibility of these rules, in light of,

cided by the Court (and thus, its critical test in the post-*Halifax* era) was *Cadbury Schweppes*.¹⁴⁰

Cadbury Schweppes concerned the compatibility of United Kingdom CFC rules – which in this case had the effect of imposing a tax charge upon a United Kingdom parent company, on the profits made by an Irish subsidiary – with the EC Treaty provisions on freedom of establishment.¹⁴¹ Before answering this question, however, the ECJ considered that it was relevant to first consider the issue of “whether the fact that a company established in a Member State establishes and capitalizes companies in another Member State solely because of the more favourable tax regime applicable in that Member State constitutes an abuse of freedom of establishment.”¹⁴² It therefore started by acknowledging that “[a] national of a Member State cannot attempt, under the cover of the rights created by the Treaty, improperly to circumvent national legislation” or “improperly or fraudulently take advantage of provisions of Community law.”¹⁴³ Yet, it added that it followed from the decisions in *Centros* and *Inspire Art* that the establishment of subsidiaries in another Member State, such as Ireland, “for the purpose of benefiting from the favourable tax regime which that establishment enjoys does not in itself constitute abuse” (para 38).

The Court then proceeded to consider the compatibility of the United Kingdom CFC rules with freedom of establishment provisions. In this regard, it stated:

“The separate tax treatment under the legislation on CFCs and the resulting disadvantage for resident companies which have a subsidiary subject, in another Member State, to a lower level of taxation are such as to hinder the exercise of freedom of establishment by such companies, dissuading them from establishing, acquiring or maintaining a subsidiary in a Member State in which the latter is subject to such a level of taxation. They therefore constitute a restriction on freedom of establishment within the meaning of Articles 43 and 48 EC.

Such a restriction is permissible only if it is justified by overriding reasons of public interest. It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it.” (paras. 46 and 47)

amongst others, the Court’s case law on what he designated as “abusive behaviour”, see “CFC Legislation and European Community Law”, (2001) BTR, 250–260, at 256. See also Lang, “CFC Legislation and Community Law”, (2002) *European Taxation*, 374–379.

140. Case C-196/04, [2006] ECR I-7995.

141. For a more detailed explanation of the United Kingdom CFC legislation and the factual circumstances of the case, see *Cadbury Schweppes* ruling, *ibid.*, at paras. 3 to 28.

142. *Id.*, at para 34.

143. *Id.*, at para 35.

The United Kingdom, supported by Denmark, Germany, France, Portugal, Finland and Sweden, had submitted that the CFC legislation was intended to counter tax avoidance, and was thus justified. The Court however considered that “it must be determined whether the restriction on freedom of establishment arising from the legislation on CFCs may be justified on the ground of prevention of wholly artificial arrangements and, if so, whether it is proportionate in relation to that objective” (para 57). In this regard, invoking *Emsland-Stärke* and *Halifax*, the Court pointed out that, in order to establish the existence of a “wholly artificial arrangement”, there must be:

“In addition to a subjective element consisting of the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment ... has not been achieved.

In those circumstances, in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality.” (paras. 64 and 65)

Where this test is not satisfied and thus, according to the Court, the transactions are deemed to be genuine, and not wholly artificial, application of CFC rules is not justified. The ECJ therefore held: “Articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a CFC in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable” (para 75).

The significance of the ruling does not rest in the statement that establishing subsidiaries in another Member State, such as Ireland, for the purpose of benefiting from the favourable tax regime which that establishment enjoys, does not in itself constitute abuse. The legitimacy of so-called “tax location shopping” could have already been inferred from the *Centros*’ line of case law.¹⁴⁴ Nor in the Court’s reference to “wholly artificial arrangements”. In *ICI* the Court had already held that national legislation, which restricts the exercise of the freedom of establishment, could only be justified where it had “the spe-

144. See Panayi, *Double Taxation, Tax Treaties, Treaty Shopping and the European Community* (Eucofax Series, Kluwer Law International, 2007) at pp. 179–193; also O’Shea, “The UK’s CFC rules and the freedom of establishment: Cadbury Schweppes plc and its IFSC subsidiaries – tax avoidance or tax mitigation?”, (2007) *EC Tax Review*, 13–33, at 21 and 29.

cific purpose of preventing wholly artificial arrangements.”¹⁴⁵ Rather, the novelty of *Cadbury Schweppes* rests in the definition of “wholly artificial arrangement” employed by the Court. Indeed, the use by the Court, as well as the Advocate General Léger,¹⁴⁶ of the abuse test, as set out in *Halifax*, in order to define wholly artificial transactions, has significant implications for both the Community concept of abuse of law, and the scope of its application.

First, and perhaps more obviously, it is interesting to note that the two concepts – “wholly artificial transactions” and “abuse of law” – are equated in the ruling.¹⁴⁷ This is a slightly different approach from that adopted in *Halifax*, where the Court (but not the Advocate General) considered that the concept of abuse of law would cover situations where “the essential aim of the transactions was to obtain a tax advantage”.¹⁴⁸ This raises the obvious question of whether in future cases, the abuse test could be extended to “mainly artificial transactions”, in other areas beyond VAT.¹⁴⁹ Second, the ruling in *Cadbury Schweppes* seems to narrow down the scope of “legitimate circumvention”, as set out in *Centros*, *Überseering* and *Inspire Art* and later imported into the case law on movement of workers and citizenship; at the same time, the concept of abuse seems to have been enlarged. In those cases the artificiality of the arrangements was not deemed relevant for establishing the existence of abuse, but in *Cadbury Schweppes* abuse and artificiality were regarded as closely related concepts.¹⁵⁰ This also raises the question of whether the Court will now reassess its approach to abuse in the context of company law, free movement of workers, and EU citizenship areas. Thus, it follows from the two points above that the concept of abuse of law applied by the Court in *Cadbury Schweppes* appears to be narrower than that applied in some other areas of EU law, namely VAT; but broader than that applied in other areas of EU law, such

145. Case C-264/96, *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, [1998] ECR I-4695, para 26. This approach was confirmed in later cases, see Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, [2002] ECR I-11779, para 37; Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, [2004] ECR I-2409, para 50; and Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, [2005] ECR I-10837, para 57.

146. See Opinion of the A.G. in *Cadbury Schweppes*, note 140 *supra*, at paras. 117 to 122.

147. See Edwards and Farmer, “The concept of abuse in the freedom of establishment of companies: A case of double standards?”, (forthcoming).

148. See *supra* section 3.1.

149. The “mainly for tax purposes” approach has also been suggested by Pistone, “The need for tax clarity and the application of the *Acte Clair* doctrine to direct taxes”, (2007) *Intertax*, 534–536, at 535. See for a different approach, Meussen, “Cadbury Schweppes: The ECJ significantly limits the application of CFC rules in the Member States”, (2007) *European Taxation*, 13–17, at 16.

150. For a comprehensive analysis of the conceptual differences between *Centros* and *Cadbury Schweppes*, see Edwards and Farmer, note 147 *supra*.

as company law, workers and citizens. In this regard, the concept of artificiality is central, as follows:

- no abuse, regardless of artificial nature of the transactions (*Centros*, *Akrich*, *Chen*);
- abuse is established, only where existence of wholly artificial arrangements is determined (*Cadbury Schweppes*);
- abuse is established, even where the arrangements are not wholly artificial, but only mainly artificial (*Halifax*).

Finally, from the perspective of the scope of application of the Community's concept of abuse of law, the *Cadbury Schweppes* ruling is also significant. What the Court seems to have done in that judgment was to broaden the scope of application of the EC concept of abuse of law, rather than broaden the concept of abuse of law itself. In *Halifax*, Advocate General Poiares Maduro spoke of prohibition of abuse of Community law, and it was clear to everyone which Community law was potentially being abused in that case: the CVSD. Although not using the same terminology, the same could be said of most, if not all, cases involving abuse of law claims, where the Community law allegedly abused was always identifiable. Arguably, this was not the case in *Cadbury Schweppes*. Of course, it could be said that the Court's analysis was undertaken on the basis of freedom of establishment, and that in *Cadbury Schweppes*, what the Court did was merely to define what constitutes abuse of that freedom. However, abuse of a freedom presupposes the formal exercise of a right granted by that same freedom. Is this the case as regards the setting up of subsidiaries? Is the possibility of establishing a subsidiary in another Member State a right which is conferred merely by the freedom of establishment provisions in the EC Treaty? Moreover, are CFC rules meant to counteract situations of abuse of freedom of establishment? The answer to all these questions is, possibly, no.

As the Court explained in *Cadbury Schweppes*, CFC rules can indeed restrict freedom of establishment, but that is not their principal aim. Their principal aim is to prevent an international form of tax avoidance, the so-called profit shifting to low tax jurisdictions, which, although it can take place between companies established within the EU, more often than not, will involve companies established outside EU territory.¹⁵¹ The international nature of the phenomenon challenges the presumption that it constitutes the exercise of a

151. The international nature of the phenomenon is highlighted by the fact that the idea for CFC rules was initially developed in the United States, and that the OECD itself has recommended their introduction to its members, see Lang, op. cit. note 139 *supra*, at 374.

right granted by the EC Treaty. Thus, the fact that CFC rules can hinder freedom of establishment, as the Court successfully argues, does not imply necessarily that they are designed to counteract abuse of that freedom. Inclusion within the scope of the freedom of establishment should not be equated to the exercise of rights granted by that same freedom. It follows that the application in *Cadbury Schweppes* of the EC concept of abuse as a potential justification for application of CFC rules does not fall within the scope of “prohibition of abuse of Community law”, but rather more generally within “prohibition of abuse of law”. What the Court appears to have done in *Cadbury Schweppes* therefore was to initiate the process of harmonizing the concept of abuse of law, i.e. using the same concept of abuse of law for all cross-border transactions within the internal market, even if the right being exercised is not granted by Community law.¹⁵²

This process has continued in *Thin Cap Group Litigation*.¹⁵³ The case concerned the compatibility of the United Kingdom anti-tax avoidance legislation, known as thin capitalization rules, with Community law, and in particular the freedom of establishment provisions.¹⁵⁴ Considering that the rules were in principle a restriction on freedom of establishment, the Court then went on to consider the “fight against abuse practices” as a potential justification for that restriction.¹⁵⁵ In this regard, it reiterated its ruling in *Cadbury Schweppes*, stating:

“According to established case law, a national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned...

The mere fact that a resident company is granted a loan by a related company which is established in another Member State cannot be the basis

152. A process which has been designated as “Europeanization” of the concept of abuse, see Vanistendael, “*Halifax and Cadbury Schweppes*: one single European theory of abuse of tax law”, (2006) *EC Tax Review*, 192–195, at 194. See also Fontana, “The Uncertain Future of CFC Regimes in the Member States of the European Union – Part 2”, (2006) *European Taxation*, 317–334, at 327–328. The influence of the EU concept of abuse of law is even being felt in the country widely credited with formulating the original *abus de droit* doctrine, France, see Leclercq, “Interacting principles: The French abuse of law concept and the EU notion of abusive practices”, (2007) *Bulletin for International Taxation*, 235–244.

153. Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, [2007] ECR I-2107.

154. Broadly speaking, under thin capitalization rules, loan interest paid by resident subsidiary to a non-resident parent (which is deductible by the subsidiary as business expenses) may under certain conditions be re-qualified as dividend payments (which are taxable as subsidiary’s profits). Most, but not all, Member States apply some form of thin capitalization rules, see *European Tax Surveys (Including Tax Treaties)*, IBFD Database.

155. *Thin Capitalization Group Litigation*, note 153 *supra*, at paras. 71 *et seq.*

of a general presumption of abusive practices and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty...

In order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory..."¹⁵⁶

Ultimately, the Court considered that the United Kingdom legislation would not respect proportionality, and thus could be regarded as incompatible with the EC Treaty provisions on freedom of establishment unless "that legislation provides for a consideration of objective and verifiable elements which make it possible to identify the existence of a purely artificial arrangement, entered into for tax reasons alone, and allows taxpayers to produce, if appropriate and without being subject to undue administrative constraints, evidence as to the commercial justification for the transaction in question."¹⁵⁷

Although the Court does not refer specifically to *Halifax* in the ruling, the elements of the abuse test set out in that ruling are still present here, and it is clear that the concept of abuse used in this ruling is identical to that used in *Cadbury Schweppes*. What is more, the comments made above as regards the international nature of the profit shifting phenomenon, which CFC rules aimed at combating, apply, *mutatis mutandis*, to thin capitalization.

The most recent development as regards the application of the EC concept of abuse of law to direct taxation cases has been *Columbus Container Services*, a case again concerning the application of CFC rules, this time in Germany.¹⁵⁸ Surprisingly, the Court in that case considered that the German CFC rules did not in fact constitute a restriction of the freedom of establishment (nor of free movement of capital).¹⁵⁹ Advocate General Mengozzi however held a different view.¹⁶⁰ In his Opinion, he discusses thoroughly the possible justification of the German CFC rules as a measure aimed at "fighting wholly artificial arrangements". Replying to the argument, put forward by the German

156. *Id.*, at paras. 72 to 74.

157. *Id.*, at para 92.

158. For an explanation of the background to this case and the German CFC legislation, see Schnitger, "German CFC legislation pending before the European Court of Justice – abuse of law and revival of the most-favoured-nation-clause", (2006) *EC Tax Review*, 151–160, at 155–160.

159. Case C-298/05, Judgment of 6 Dec. 2007, nyr.

160. *Id.*, Opinion of 27 March 2007, nyr, and, at the time of writing, only available in the following languages: Spanish, Czech, Danish, German, French, Italian, Latvian, Maltese, Portuguese, Slovene, Finnish and Swedish.

Government, that the Court's interpretation of what constitutes wholly artificial arrangements was too restrictive, the Advocate General stated that he saw no reason why the Court should depart from its ruling in *Cadbury Schweppes*.¹⁶¹ Unfortunately, the ECJ did not consider these issues in its ruling, as the conclusion that the German CFC legislation did not constitute a restriction made unnecessary any discussion over potential justifications. The matter has therefore been left open to debate: will the Court in forthcoming cases follow the same approach as in *Cadbury Schweppes* as regards wholly artificial arrangements, or will it be willing to revisit the abuse of law test, bringing it even closer to the one used in *Halifax*? Hopefully, further guidance will soon be available, as opportunities for further guidance on the application of the EC concept of abuse of law to direct taxation cases, in areas where no harmonization has taken place, are certainly likely to materialize in the near future.¹⁶²

3.2.2. *Merger Directive and abuse of law in harmonized direct tax law*

The influence of *Halifax* has also extended to the Corporate Tax Directives. Soon after *Cadbury Schweppes* and *Thin Capitalization Group Litigation*, the Court issued its ruling in *Kofoed*.¹⁶³ The case concerned the charging of income tax in respect of an exchange of shares undertaken by Mr Kofoed. Amongst other aspects, the case focused on the interpretation of an anti-abuse clause set out in Article 11(1)(a) of the Merger Directive.¹⁶⁴ This clause provides that a Member State may refuse to apply or withdraw the benefit of all or any part of the provisions set out in the Directive, where it appears that the exchange of shares has tax evasion or tax avoidance as its principal or as one of its principal objectives.¹⁶⁵ Invoking the decisions in both *Halifax* and *Cad-*

161. *Id.* at paras. 169 and 176, translated from the Portuguese version.

162. In 2005 another case concerning United Kingdom CFC rules and their compatibility with Community law was also referred to the ECJ, Case C-203/05, *Vodafone 2*, O.J. 2005, C 182/29. The case was said to "raise new issues regarding the justification based on the risk of tax avoidance and the controversial EC law concept of abuse in respect of direct taxation", see Fontana, *op. cit.* note 152 *supra*, at 318–319. The referral was, however, withdrawn by the UK Special Commissioners, following the ruling in *Cadbury Schweppes* on the basis of the "clear guidance" provided by the Court in that case. This view has nevertheless been challenged by Vodafone, which is said to be considering appeal of the decision not to refer the case, see Ayoyo, "UK Special Commissioners Withdraw ECJ Referral of CFC Case", (2007) *Tax Notes International*, 662.

163. Case C-321/05, *Kofoed*, judgment of 5 July 2007, *nyr.*

164. 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, O.J. 1990, L 225/1.

165. It is interesting to note that this provision has been designated as "redundant" in light of the Court of Justice's previous case law, see Terra and Wattel, *op. cit.* note 136 *supra*, at 571.

bury Schweppes, the Court, following the Opinion of Advocate General Kokott almost to the letter, stated:

“Article 11(1)(a) of Directive 90/434 reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law.”¹⁶⁶

Although the ruling was not the first concerning the interpretation of the Merger Directive’s anti-abuse clause,¹⁶⁷ its relevance should be read in the context of the previous tax cases on abuse and abusive practices. In this regard, three aspects are worthy of emphasis: first, the Court’s specific reference to *Halifax* and *Cadbury Schweppes*, indicating that this ruling is part of a new approach to abuse of law within the tax field; second, the fact that the Court uses a slightly different language from that used in those cases raises the question of whether this is yet another abuse criterion;¹⁶⁸ finally, and most importantly, the Court’s reference to prohibition of abuse of law as a “general Community law principle”.

4. Assessment of the Court’s case law: Is the prohibition of abuse of law a new general principle of Community law?

The significance of the extension of the Court of Justice’s jurisprudence on abuse and abusive practices to taxation matters is evident, primarily from a tax law perspective.¹⁶⁹ The Commission itself has acknowledged this fact in a re-

166. *Kofoed*, note 163 *supra*, at para 38; and Opinion of the A.G., at para 58.

167. See Case C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, [1997] ECR I-4161; and comments of Zalasinski, “Proportionality of anti-avoidance and anti-abuse measures in the ECJ’s Direct Tax Case Law”, (2007) *Intertax*, 310–321, at 316. See also Zalasinski “Case-law-based anti-avoidance measures in conflict with proportionality test: Comment on the ECJ Decision in *Kofoed*”, (2007) ET, 571–576.

168. As Pistone comments “Reference to normal commercial operations could significantly broaden the scope of justifications based on anti-abuse grounds. After the *Kofoed* decision one could even conclude that not only may there be one notion of abuse for secondary law in the field of VAT and a different one for direct taxes, but also that the latter notion may differ according to whether we are dealing with fundamental freedoms (as in *Cadbury Schweppes*), or with a harmonized domain (as in *Kofoed*)”, in *op. cit.* note 149 *supra*, at 535.

169. Following the decision in *Cadbury Schweppes*, several Member States are reassessing their CFC legislation; see Taylor and Sykes, “Controlled Foreign Companies and Foreign Profits”, (2007) BTR, 609–647. For an exclusively UK perspective see also Whitehead, “Practical

cent communication, where it expresses its willingness to “support and assist Member States” in conducting a review of their anti-avoidance rules, in order to bring them in line with the ECJ case law in this area.¹⁷⁰ Perhaps less evident, however, and certainly much less debated, is the impact of these rulings upon the EU legal system, namely whether they amount to the creation of prohibition of abuse of law as a new general principle of Community law. The Court seems to be indicating that it favours this approach;¹⁷¹ and so do some former and current advocates general,¹⁷² the Commission,¹⁷³ and various tax law commentators.¹⁷⁴ Yet, looking at the last thirty years, since the ruling in *Van Binsbergen*, it is clear that there has been no consensus on this matter, even amongst those groups mentioned above, and that a thorough debate has yet to take place.

4.1. *Concept of general principle of Community law*

It is a well-known fact that the only provision in the EC Treaty that refers to general principles is Article 288, which in its second paragraph refers to “the general principles common to the laws of the Member States”, in the context of non-contractual liability.¹⁷⁵ Yet, the key nature of their role within the EU legal system is undeniable. Created by the Court of Justice, through a process, which has been designated as “legitimate judicial activism”,¹⁷⁶ general principles of Community law are regarded as an increasingly fundamental¹⁷⁷ “gap

implications arising from the European Court’s recent decisions concerning CFC legislation and dividend taxation”, (2007) *EC Tax Review*, 176–183; and Baker, “Are the 2006 Amendments to the CFC legislation compatible with Community law”, (2007) *BTR*, 1–6.

170. See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, COM(2007)785 final, 10 Dec. 2007.

171. See *Halifax*, note 20 *supra*, at para 70; and *Kofoed*, note 163 *supra*, at para 58.

172. A.G. Kokott in *Centralan*, note 116 *supra*, at para 81, and in *Kofoed*, note 163 *supra*, at para 49. For views expressed beyond the tax cases, see also references below.

173. Opinion of the A.G. Poiares Maduro in *Halifax*, note 20 *supra*, at para 69.

174. Although it is clear that here the statement is often based on a presumption for the existence of the principle, rather than on actual arguments, see Pistone, *op. cit.* note 149 *supra*, at 535; Zalasinski, *op. cit.* note 167 *supra*, at 314; and Douma and Engelen, *op. cit.* note 133 *supra*, at 436.

175. Although Art. 6(2) TEU also includes a reference to “general principles of Community law”, in the context of human rights protection.

176. See Groussot, *General Principles of Community Law* (Europa Law Publishing, 2006) at p. 9. Arnall points to the creation of general principles as “one of the Court’s most remarkable and inspired initiatives”, *op. cit.* note 89 *supra*, at p. 335.

177. See Nergelius, *op. cit.* note 22 *supra*; and Tridimas, *The General Principles of EU Law*, 2nd ed.. (OUP, 2006), at p. 10.

filling” mechanism in face of the incomplete character of the EU legal order.¹⁷⁸

Although what is exactly a general principle of Community law is difficult to define and there is no apparent full doctrinal agreement,¹⁷⁹ three main characteristics have been proposed as essential:

– *Generality* – a principle should have, not only a level of abstraction which distinguishes it from a specific rule, but equally, a degree of recognition by a relevant constituency, such as the courts.¹⁸⁰

– *Weight* – a principle must express a core value of an area of law or the legal system as a whole; although the degree of importance of that value might diverge from principle to principle.¹⁸¹

– *Non-conclusiveness* – a principle does not necessitate a decision, but rather point towards a decision, i.e. it is “orientative”, rather than conclusive.¹⁸²

In formulating these general principles, the Court draws inspiration from different sources, the most important of which are the laws of the Member States. This process, which has been designated as “re-transplantation”,¹⁸³ means in practice that principles which are common to most of the Member States’ legal systems, but not necessarily all, will become principles of Community law.¹⁸⁴

In light of the above, the question which should be asked is whether the case law of the Court of Justice on abuse of law and abusive practices displays the characteristics inherent to the development of a general principle of Community law.

178. Tridimas, *ibid.*, at note 12; and Groussot, “The General Principles of Community Law in the creation and development of due process principles in competition law proceedings: From Transocean Marine Paint (1974) to Montecatini (1999)”, in Bernitz and Nergelius, *op. cit.* note 22 *supra*, pp. 185–204, at 187.

179. See Groussot, *op. cit.* note 176 *supra*, at pp. 129–130.

180. *Ibid.*, note 181, at pp. 127–130; and Tridimas, *op. cit.* note 177 *supra*, at p. 1.

181. Tridimas, *ibid.*

182. Groussot, *op. cit.* note 176 *supra*, at p. 128.

183. De Búrca, “Proportionality and subsidiarity as general principles of law”, in Bernitz and Nergelius, *op. cit.* note 22 *supra*, pp. 95–112.

184. As Hartley points out “whatever the factual origin of the principle, it is applied by the European Court as a principle of Community law, not national law”, see *The Foundations of European Community Law*, 5th ed. (OUP, 2003), at p. 134. The legitimacy of this interpretation appears to have its origins in the Court of Justice’s ruling in *Werhahn and Others*, Cases 63–69/72, [1973] ECR 1229; see Usher, “The Reception of General Principles of Community Law in the United Kingdom”, (2005) EBLR, 489–510, at 490–491.

4.2. *Does the case law on prohibition of abuse of law amount to a general principle of Community law?*

Until the 1990s, scant attention seems to have been paid to the Court of Justice's consistent allusions within its jurisprudence to abuse and abusive practices. From then onwards, however, sporadic examination of the meaning of those references, and on whether they amounted to a general principle of Community law, started appearing, first within the Opinions of advocates general, then slowly spreading to the literature. Before the tax rulings, there were three main strands of opinion: those few who considered that the references within the case law amounted to the development of a general principle of Community law;¹⁸⁵ those who did not;¹⁸⁶ and those who showed some scepticism, albeit without reaching a definite conclusion.¹⁸⁷ After the latest tax rulings, there is yet a fourth strand: those who believe that the references in the ECJ jurisprudence do amount to a principle of Community law, but not a general one, and rather an interpretative one, or a "principle of construction".¹⁸⁸

Four main arguments have been presented by those who doubted the existence of a general Community principle of abuse of law: firstly, the fact that the existence of such a principle had never been recognized by the Court;¹⁸⁹ secondly, that abuse of rights is a principle that not all Member States apply in their own domestic systems;¹⁹⁰ thirdly, that there is no precise Community meaning for abuse of law, or specific criteria in this regard;¹⁹¹ and finally that

185. See Opinion of A.G. Jacobs in Cases C-34–36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, [1997] ECR I-3843, para 45; Opinion of A.G. La Pergola in *Centros*, note 48 *supra*, at para 20; arguments of the Commission in *Emsland-Stärke*, note 14 *supra*, at para 38; Weber, *op. cit.* note 71 *supra*, at 54; Engsig Sørensen, *op. cit.* note 17 *supra*.

186. See Opinion of A.G. Tesauero in *Pafitis*, note 8 *supra*, at para 28, and in *Kefalas*, note 7 *supra*, at paras. 18–27; Triantafyllou, annotation of *Kefalas*, "Abuse of rights versus primacy", (1999) CML Rev., 157–164, at 161–162; and Kjellgren, note 15 *supra*, at 190. See also Brown, who although considering that the case law of the Court at the time did not amount to a general principle, suggested that abuse of law should be developed as such by the Court in future, note 3 *supra*, at 511.

187. See Opinion of A.G. Lenz in *TV10*, note 4 *supra*, at para 25; Opinion of A.G. Geelhoed in *Akrich*, note 81 *supra*, at para 173; and Opinion of A.G. Tizzano in *Chen*, note 90 *supra*, at para 111.

188. See Opinion of A.G. Poirares Maduro in *Halifax*, note 20 *supra*, at para 69; Edwards and Farmer, note 147 *supra*; and Rousselle and Liebman, note 133 *supra*, at 562.

189. As recently as 2000, Kjellgren noted that the Court had never, until then, recognized the existence of the principle, "on the contrary, especially in the earlier cases, such an existence has been expressly denied", in note 15 *supra*, at 190.

190. A.G. Tesauero in *Kefalas*, note 7 *supra*, paras 18–27; A.G. Tizzano in *Chen*, note 90 *supra*, at para 111.

191. A.G. Geelhoed in *Akrich*, note 81 *supra*, at para 173.

the references by the Court to abuse are inchoate and inconsistently applied.¹⁹² Arguably most of these arguments were convincing prior to the tax rulings. It is, however, increasingly hard to see them as compelling in light of the most recent developments. In *Halifax* and *Kofoed* the Court expressly referred to the “principle of prohibiting abusive practices” and the “general Community law principle that abuse of rights is prohibited”, respectively.¹⁹³ Whilst it is true that not all Member States apply a principle of abuse of law, or abuse of rights, in their own domestic systems, it is also true that the majority do apply it; furthermore, it has long been accepted that in order for a general principle of Community law to be created it is not necessary that the principle applies in all Member States, but merely in most.¹⁹⁴ As already discussed, it is true that the Community concept of abuse of law has neither been developed by the Court in a fully coherent manner, nor consistently applied across the different areas of Community law.¹⁹⁵ However, the Court’s most recent case law, in particular since *Emsland-Stärke* and *Halifax*, has identified core elements of a Community concept of abuse of law through the development of the “abuse test”, which have been applied across different (albeit admittedly not all) areas of Community law. To the potential counter-argument that core conceptual elements and partial applicability are not sufficient in order to establish the existence of a general principle of Community law, it should be answered that the general assumption is that general principles are “open principles”, their development being part of a dynamic process, generated and led by the Court of Justice,¹⁹⁶ and thus they do not spring into existence in their final, fully fledged, form.¹⁹⁷

Should the prohibition of abuse of law be regarded merely as a principle of construction, rather than a general principle of Community law? In most cases

192. Brown, *op. cit.* note 3 *supra*, at p. 511.

193. In this regard, the influencing role of the Advocates General in these cases, and in particular that of A.G. Poiras Maduro in *Halifax*, should not be underestimated. Although, as it has been pointed out that there are “difficulties inherent in assessing the contribution of the Advocate General to the work of the Court or to the development of principles of Community law”, it is also acknowledged that one of their most significant roles has been that of “extrapolation from the laws of the Member States of unwritten general principles of law as sources of Community rights and obligations”, see Burrows and Greaves, *The Advocate General and EC Law* (OUP, 2007), at p. 7 and Tridimas, “The role of the Advocate General in the development of Community Law: Some reflections”, (1997) CML Rev., 1349–1387, at 1386.

194. See Lorenz, “General Principles of Law: Their Elaboration in the Court of Justice of the European Communities”, (1964) *American Journal of Comparative Law*, 1–29, at 7–9.

195. See *supra* section 3.2.

196. See Groussot, *op. cit.* note 89 *supra*.

197. Another general principle of EU law, proportionality, for example, although enshrined in the EC Treaty, still required further years of ECJ jurisprudential development before it could be said to constitute a fully-fledged general legal principle.

the answer to this question will be irrelevant from a practical perspective, as general principles of Community law also operate in practice as interpretative aids for Community legal measures.¹⁹⁸ There are, however, situations where the distinction can be practically relevant: beyond their role as interpretative aids and “gap fillers”, general principles can also act as overriding rules of law.¹⁹⁹ Arguably, it was in this second capacity that the Community principle of prohibition of abuse of law was applied, in *Cadbury Schweppes*, by the Court of Justice: used to strike down a domestic legal provision on the basis that it did not comply with the Community abuse of law concept, as developed by the Court in previous case law. It follows that *Cadbury Schweppes* could be regarded as the final confirmation of prohibition of abuse of law, not only as a Community interpretative principle, but as a general principle of Community law, capable of being used as an instrument of judicial review where national legislation falls within the scope of Community law. The fact that the ECJ has not applied the principle for the purposes of judicial review uniformly, across all areas of EC law, should not be regarded as an obstacle to this conclusion. The intensity of judicial review exercised by the Court on the basis of the application of general principles of EC law can, and often does, vary depending on the subject matter – a phenomenon which has been designated within constitutional law literature as the “sliding scale of judicial review”.²⁰⁰

Overall, the contributions of Court of the Justice decisions within the field of tax law, towards the creation of a general principle of prohibition of abuse of law, are clear and can be summarized as follows:

198. As Farmer points out, *op. cit.* note 19 *supra*, at 16; see also A.G. Poiares Maduro’s comments in *Halifax*, note 20 *supra*, at footnote 62.

199. See Nergelius, *op. cit.* note 22 *supra*, at 227.

200. See Gerards, “Intensity of judicial review in equal treatment cases”, (2004) *Netherlands International Law Review*, 135–183; Lavrijssen and de Visser, “Independent administrative authorities and the standard of judicial review”, (2006) *Utrecht Law Review*, 111–135; and Doukas, *Werbefreiheit und Werbebeschränkungen: Eine europa- und grundrechtliche Untersuchung der Kontrollmaßstäbe für Beschränkungen der kommerziellen Kommunikation, dargestellt am EG-Recht, an der EMRK, am deutschen Grundgesetz und an der griechischen Verfassung*, Materialien zur interdisziplinären Medienforschung, No. 49 (Baden-Baden, Nomos, 2005). Once again using the principle of proportionality as an example, the extent of the judicial review on the basis of this principle has ranged from strict, in areas such as fundamental rights, to less intensive in areas such as social policy. For an example of the first type, see Case C-353/99 P, *Council v. Hautala*, [2001] ECR I-9565, where the Court annulled a Council decision denying a MEP access to a Council document on the basis that the aim pursued (public interest in international relations) could be achieved through measures which would be less restrictive of the right to information; for an example of the second type, see Case C-84/94, *United Kingdom v. Council (Working Time Directive)*, [1996] ECR I-5755, where the Court held that the Working Time Directive did not breach proportionality as the Council must be allowed a wide discretion in social policy areas.

- streamlining of the Community concept of abuse of law, in particular through the development of an “abuse test” (*Halifax*);
- recognition by the Court of Justice and other EU institutions, such as the Commission, of the existence of the principle of abuse of law (*Halifax*, *Kofoed*);
- extension of the field of application of this principle, through its use as an instrument of judicial review of national legal measures falling within the scope of EC law (*Cadbury Schweppes*).

Following these contributions, the characteristics usually attributed to general principles of Community law, i.e. generality, weight and non-conclusiveness, are arguably all present in the Court’s jurisprudence on prohibition of abuse of law.

The diagram on the next page is an attempt at summarizing the field of application of the new Community general principle of prohibition of abuse of law.

5. Conclusion

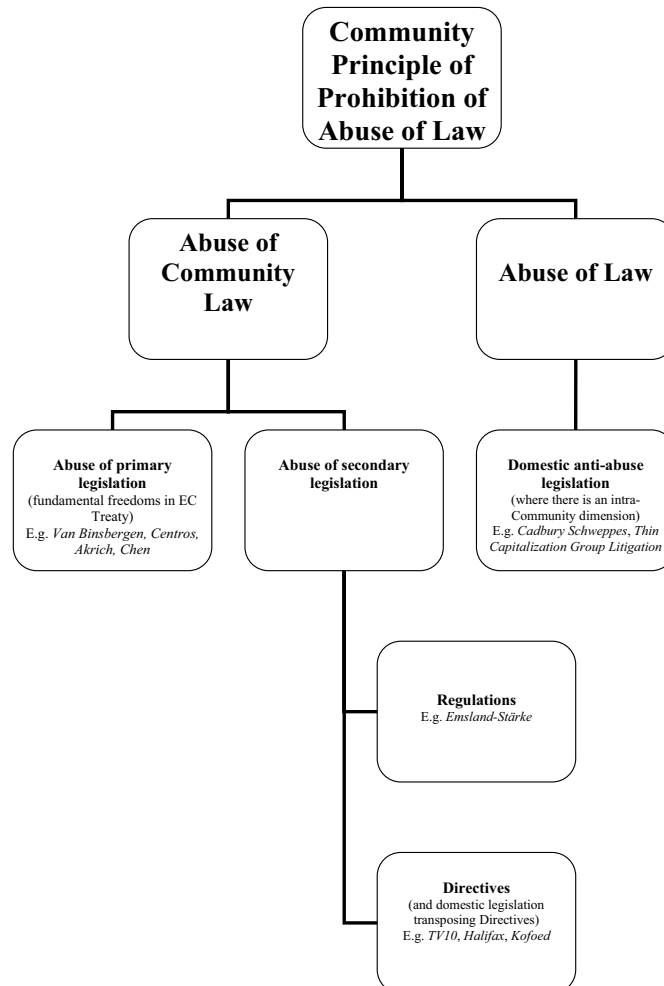
It has recently been said that, although tax law tends to be portrayed as a discrete, dry and somewhat dull area of law, the recent Court of Justice jurisprudence in this field does not fit the bill.²⁰¹ These are indeed changing, and challenging, times: who would have guessed that from such a sensitive field of law,²⁰² where at EU level unanimity voting rules run supreme and harmonization is limited to specific areas, would emerge a new general principle of Community law – a principle whose effects will be firmly felt beyond tax law.²⁰³

Paradoxically, whilst the more recent Court’s rulings within the field of tax law are the culmination of a process leading to the creation of a general principle of prohibition of abuse of law, they also constitute the initial stages of that other dynamic process, which governs the development of all general principles of Community law. Further clarification is likely to be requested from the ECJ, not only as regards the more theoretical aspects of the principle, such as the Community’s concept of abuse of law, but also its more practical consequences and/or implications, such as the principle’s scope of application,

201. See Kingston, “A light in the darkness: Recent developments in the ECJ’s direct tax jurisprudence”, (2007) CML Rev., 1321–1359, at 1321.

202. See Snell, “Non-discriminatory tax obstacles in Community law”, (2007) ICLQ, 339–370, esp. 356 et seq.

203. For an interesting analysis of the creeping influence of general principles of Community law upon national legal systems, see Usher, note 184 *supra*; and also Boyron, “General principles of law and national courts: applying a *jus commune*?”, 23 EL Rev. (1998), 171–178.



onus of proof, available remedies, etc. Particularly interesting, in light of the case law to date, are the questions of whether (or rather when) the application of the principle will spread to the other areas of EU law – such as free movement of persons and citizenship, where the Court has so far consistently dismissed allegations of abuse of law – and if so, what will be the scope of the judicial review in light of that principle.

By recognizing prohibition of abuse of law as a general principle of Community law, the Court has essentially entered *terra incognita*. The process is now likely to create a momentum of its own, leading to the loss of the control which the Court has so far been able to exercise. While the case law on abuse and abusive practices remained patchy and vague, it was potentially easier for the Court to dismiss its application whenever policy considerations dictated a different result. Such an approach will be much harder to sustain when applying a general principle of Community law. Ultimately, however, all this dynamic process is heavily dependent on one single factor, which is yet to emerge: an increased awareness by the wider legal community of the significance of the recent events within the field of tax law.