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PROHIBITION OF ABUSE OF RIGHTS IN THE EU

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1. INTRODUCTION

The internal market is an arena with more than 500 million players. Economic operators move freely throughout the European Union and exchange goods, provide services, acquire capital and establish themselves in various Member States. However, not all economic operators thrive towards the same end. Some of them simply abuse the rights conferred upon them by European Union law to achieve benefits solely for themselves, to the detriment of their home Member States. It is established jurisprudence of the European Court of Justice (hereinafter: the Court) that: “*Union law cannot be relied on for abusive or fraudulent ends.*”¹ Still, where is the line between use and abuse? There are in particular two main problems related to that issue which will be discussed in this work.

The first is related to the establishment of the objective and the subjective criteria in order to determine abusive conduct. The two criteria were introduced by the Court in *Emsland-Stärke*.² According to the first one, the conduct in question must not go against the purpose of the rules used. The subjective element entails an intention on behalf of the individual to obtain advantage from the Union rules used. The problem is most evident when it comes to broadcasters. The possibility that many Member States have used to introduce more detailed or stricter rules for broadcasters under their jurisdiction, envisaged in the Audiovisual Media Services Directive³ (hereinafter: the AVMS Directive)⁴ resulted in often attempts of broadcasters to avoid those rules. At a first glance, the AVMS Directive prescribes the same criteria for ascertaining abuse as the early case law of the Court, and falls behind the new developments. However, it will be shown that these criteria can be identified with the objective and the subjective element from the more recent case law of the Court. Special attention will be given to the application of the subjective element to broadcasters.

¹ Case C-367/96 *Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, (1998) ECR I-02843, §20. See also: regarding freedom to supply services, Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* (1974) ECR 1299, § 13, and Case C-23/93 *TV 10 v Commissariaat voor de Media* (1994) ECR I-4795, § 21; regarding the free movement of goods, Case 229/83 *Leclerc and Others v 'Au Blé Vert' and Others* (1985) ECR 1, § 27; regarding freedom of movement for workers, Case 39/86 *Lair v Universität Hannover* (1988) ECR 3161, § 43; regarding the common agricultural policy, Case C-8/92 *General Milk Products v Hauptzollamt Hamburg-Jonas* (1993) ECR I-779, § 21; and regarding social security, Case C-206/94 *Brennet v Paletta* (1996) ECR I-2357, § 24.

² Case C-110/99, *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, (2000) ECR I-1569.

³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1–24.

⁴ *Mediawet*, the Dutch law on broadcasting, has been dealt with in numerous cases before the Court, repetitively confirming the consistency with Union law of the aims pursued therein. See in particular: Case C-288/89 *Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, § 22 and § 23; Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, § 3, § 29 and § 30; Case C-148/91 *Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, § 9; Case C-23/93 *TV 10* (n. 1), § 18.

The analysis will answer the question whether the refined subjective element can ever be determined when it comes to broadcasters. The Court has, in the judgements *Halifax*⁵ and *Cadbury Schweppes*,⁶ somewhat amended the subjective element. It added the need to prove that the transaction, proven by objective evidence discernible by third parties, represents a “genuine economic activity”.⁷ This work seeks to demonstrate that, given the nature of the broadcasting services, there will always be a genuine economic purpose in the conduct which is allegedly representing abuse.

The second problem which is up to now unsettled is arising from the fact that abuse of rights is a general principle of European Union law. What is left unclear is whether the principle is of an absolute nature, or simply of an interpretative nature. In simple terms, the question is can it be applied without any national anti-abuse measures?

For the purpose of clarity and introduction to the main problems, the general notion of abuse will be portrayed in the beginning. Behaviour constituting abuse may take various forms. According to the Court, U-turn transactions,⁸ misuse⁹ and fraud¹⁰ fall in the scope of abuse of rights.

Furthermore, the case law of the Court regarding abuse of rights will be presented. The initial and very broad scope in the early case law has been narrowed in subsequent case law. In its landmark judgement *Emsland-Stärke*,¹¹ the Court has developed a test with two conditions which must be fulfilled for the national court to establish abuse.

⁵ Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, (2006) ECR I-01609.

⁶ Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, (2006) ECR I-07995.

⁷ Case C-196/04, *Cadbury Schweppes* (n. 6), § 68.

⁸ Case 33/74 *Van Binsbergen* (n. 1) § 13.

⁹ Case 39/86 *Lair* (n. 1), § 43.

¹⁰ Case 130/88, *Van de Bijl v. Staatssecretaris van Economische Zaken*, (1989) ECR 3039, § 25.

¹¹ Case C-110/99, *Emsland-Stärke* (n. 2).

2. THE NOTION OF ABUSE

Albeit the prohibition of the use of Union law for abusive or fraudulent ends is well established in the case law of the Court, “[i]t is however by no means easy to define the precise scope of that principle.”¹² The Court itself was not always very coherent towards the notion of abuse, sometimes naming it “avoidance”,¹³ “evasion”,¹⁴ “circumvention”,¹⁵ “fraud”,¹⁶ and sometimes simply “abuse”.¹⁷ “Abuse” has become the only term used since the judgement of *Emsland-Stärke*.¹⁸ It can be regarded as a common denominator of all the aforementioned terms. As a consequence, various names are simply different faces of the same concept. The variety of conducts so far encountered by the Court may be divided in three main forms: U-turn constructions, fraud and misuse. The difference in form has no practical difference in the application of abuse of rights doctrine to a particular case, however, as will be shown, it is sometimes quite dubious whether there is consistent criteria to characterise certain conduct as “abusive”.

2.1. U-turn transactions

Since the rules on free movement in the Treaty on the Functioning of the European Union¹⁹ (hereinafter: TFEU) and numerous provisions of secondary Union legislation do not entirely harmonise the areas concerned, it is perfectly normal that the Member States reserve the possibility to maintain or introduce more rigorous rules for the domestic population. Some provisions of secondary law explicitly allow such legislation,²⁰ while it can be concluded

¹² Opinion of Advocate General La Pergola in Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, (1999) ECR I-01459, §20.

¹³ Case C-23/93, *TV10* (n. 1), §21.

¹⁴ Case 115/78, *J. Knoors v. Staatssecretaris van Economische Zaken*, (1979) ECR 399, §50.

¹⁵ Case 229/83, *Leclerc "Au blé vert"* (n. 1), §27.

¹⁶ Case C-367/96, *Kefalas* (n. 1), §20.

¹⁷ Case C-441/93, *Panagis Pafitis and others v. Trapeza Kentrikis Ellados A.E. and others*, (1996) ECR I-1363, §68.

¹⁸ Case C-110/99, *Emsland-Stärke* (n. 11).

¹⁹ Treaty on the Functioning of the European Union, 30.3.2010., OJ C83, p.47-199.

²⁰ For example, Article 3 (1) of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24.; Article 31(2) of the Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, OJ L 207, 6.8.2010, p. 14–29.; Recital 13 of the Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods OJ L 260, 30.9.2008, p. 13–59.

implicitly that Member States are free to legislate outside the harmonised areas.²¹ As a result, persons or goods belonging to a Member State with more rigorous rules can trigger the application of Union law simply by crossing the border and then returning to the home State. Although the persons or goods move from one Member State to another, the final destination of the transaction is the original Member State.²² Higher standards enacted in the home State would be rendered superfluous if such conduct would fall outside the scope of abuse of rights.

The Court has accepted that such behaviour was regarded as falling in the scope of abuse of rights for the first time in the area of services, in the case of *Van Binsbergen*.²³ Van Binsbergen's lawyer had established himself in Belgium in order to avoid the stricter rules in the Netherlands. By doing so, under the Dutch law, he lost the right to represent Mr. Van Binsbergen. The case is a simple illustration of a U-turn transaction. A person establishes himself in another Member State (A) in order to avoid the legislation of the Member State in which he was previously established (B).²⁴ The term is often referred to as circumvention.²⁵

Along with services, the U-turn construction was used in the area of freedom of establishment. The famous case of *Centros*²⁶ is a classic example. A married couple moved from Denmark to United Kingdom to set up a company in order to benefit from the less stringent rules regulating minimum share capital. The company performed no economic activity in the UK, and wished to set up a branch in Denmark, where it did perform economic activity. The Court underlines that “[...] 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 of fraudulently taking advantage of provisions of Community law.”²⁷

²¹ In the area of broadcasting see: Opinion of Advocate General Kokott in Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado*, (2008) ECR I-01407, §32.

²² R. de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law Through Tax*, Common Market Law Review 45-2008 [395-441], p. 399.

²³ Case 33/74 *Van Binsbergen* (n. 1).

²⁴ L. Hell Hansen, *The Development of the Circumvention Principle in the Area of Broadcasting*, Legal Issues of European Integration 25-1998[111-138], p.111.

²⁵ A. Kjellgren, *On the Border of Abuse – The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law*, European Business Law Review 11-2000 [179-194], p. 179.

²⁶ Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, (1999) ECR I-1459.

²⁷ *Ibid.*, § 24. The Court continues to add that choosing the most favourable legislation among different Member States is inherent to the exercise of the freedom of establishment in the single market. It does not in itself prove the existence of an intention to circumvent the national stricter rules (§ 27 of the Judgement). However, along with proving the intention to circumvent, national anti-abuse measures are nevertheless allowed.

It can be concluded that in the Court's case law up to now, in all areas of the Union legal system, U-turn transactions have been the most often form of alleged abuse of rights.²⁸

2.2. Fraudulent behaviour

Fraud can be perceived as a special form of abuse, although the claim to rights invoked here generally is based on objective false premises.²⁹

In order to benefit from countless provisions of Union law, certain conditions must be fulfilled. For example, in order to gain the right to move and reside freely in the European Union as a worker's family member, one must be a family member. A person abusing that right in a fraudulent manner, will, for instance, provide false statements regarding the existence of a marriage. As a consequence, the rights are obtained in a fraudulent manner and cannot be relied upon.

One of the first cases of fraud before the Court is the *Van de Bijl*³⁰ case. A Dutch painter Van de Bijl issued a certificate confirming he has been active in trade abroad, in order to be eligible for the rights to perform professionally in another Member State in accordance with the Directive 64/427/EEC. However, the Dutch authorities questioned the validity of the certificate. Van de Bijl was working in the Netherlands for the time period the certificate was stating that he was working in the United Kingdom. The Court stated that “[...] *the host Member State cannot be obliged to overlook matters which occurred within its own territory and which are of direct relevance to the real and genuine character of the period of professional activity completed in the Member State from which the beneficiary comes.*”³¹

There are commentators claiming that fraud is not a form of abuse, but a different situation, which should also be prohibited.³² They base their claim on the fact that the Court always refers to the prohibition reliance on Community law for “*abusive or fraudulent purposes.*” Moreover, while in the abuse context the key aspect is the correct application of the specific statute, no matter the object of abuse, in fraud case law the Court has to take into account whether the taxpayer is acting in good faith.³³ Contrary to those assertions, it is

²⁸ While the early case law considered each U-turn construction to represent an abuse, the change introduced in the *Centros* judgement changed that presumption. See below 3.3.

²⁹ A. Kjellgren, *On the Border of Abuse...* (n. 25), p. 180.

³⁰ Case 130/88, *Van de Bijl* (n. 10).

³¹ *Ibid.*, §26.

³² P. Pistone nad N. Reich. in: P. Pantavigna, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, 3-4 October 2008, Oxford; Intertax 37 (3) – 2009, [166-176], p. 170.

³³ P. Pistone in: P. Pantavigna, *Prohibition of Abuse of Law...* (n. 32), p. 170.

common to abuse and fraud that the person in question should act in good faith, causing the “correct application of the specific statute”. Moreover, this is confirmed by the case law in the Greek challenge cases³⁴ apply the principle of good faith in cases of abuse.

2.3. Misuse

The broad concept of misuse encompasses a wide range of activities by economic operators, which are in their result, contrary to principles such as good faith, morality, the purpose of the right in question etc.

However, these principles are a part of national law, and are not always common to more than one Member State. In such a situation, the underlying problem is whether the national court is allowed to disregard a provision of Union law to the benefit of a principle of national law. The Court has consistently held that this “[...] *would be contrary to the division of authority between Member States and the Community if a national court would be entitled not to apply a provision of Community law because of a national principle of objective unfairness.*”³⁵ Nevertheless, in *Lair*,³⁶ the Court stated that when Member States wish to: “[...] *prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a 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, it should be observed that such abuses are not covered by the Community provisions in question.*”³⁷

As a result, national courts are free to apply measures up to the point where they are not jeopardizing the supremacy and the uniform application of Union law.

2.4. Demarcation between the three

The central difference between circumvention and misuse is that in the case of circumvention, individuals are using Union law as a tool to escape the application of national legislation of one Member State, and to cause the application of national legislation of some other Member State. When it comes to misuse, individuals are using rights conferred upon

³⁴ See below 3.2.

³⁵ Case 299/84, *Neumann v. BALM* (1985) ECR 3663, § 25. See also: Case 118/76, *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof* (1977), ECR 1177, § 5-6.

³⁶ Case 39/86, *Lair* (n. 1).

³⁷ *Ibid*, § 43.

them by Union law contrary to its purpose by acting in contrary to good faith. The Greek challenge cases³⁸ best depict the distinction, where the managers of companies were not aiming at avoiding national law, but were relying on Union law contrary to its purpose.

The same line of case law will be used to differentiate among misuse and fraud. Both have in common the improper use of Union law. However, while the concept of fraud requires certain “illegal” activity, such as forgery, misuse represents reliance on Union law without acting in good faith. The managers in the Greek challenge cases did not forge any documents or represented false facts in order to trigger the application of Union law. They simply omitted to take action in order to prevent their companies from winding up, relying on the rights conferred by Union law.

The final difference is the one between circumvention and fraud. The difference here is the most obvious, and results from two circumstances. The first being that when it comes to circumvention, an individual is using Union law to avoid the national legislation, whereas when it comes to fraud, an individual is invoking the rights conferred upon him by Union law. The second reason for distinguishing fraud from circumvention is the same as the one distinguishing it from misuse. Fraud necessarily contains an illegal element in the behaviour of the individual, whereas no such conduct takes place with circumvention.

³⁸ See below 3.2.

3. THE DEVELOPMENT OF THE COURT'S CASE LAW ON ABUSE OF RIGHTS

The Court first addressed this issue in 1974.³⁹ However, much has changed in more than thirty years of development. Initially, the Court has had a very broad concept of situations covered by the prohibition of abuse of Community law. In the 90s, things began to change. In a series of cases, together called “the Greek challenge”,⁴⁰ the Court limited the application of the prohibition. Surprisingly, the judgements were not noticed in the public.⁴¹

What was started in the Greek challenge was finished in 1999 in the famous, for some controversial,⁴² *Centros* ruling.⁴³ The Court has narrowed down considerably the scope of the prohibition of abuse of Community law. What was once considered “*using Community law for fraudulent ends*”⁴⁴ is now regarded as the use of market freedoms in a single market. This actually means that whenever free movement is involved, no abuse can occur.

Much was already said by the Court about the prohibition of abuse, but what was lacking was whether this was now a Union law notion, and if it was, what were the criteria for establishing abuse? Up to that date, it was on the national courts to establish abuse following their national law on the matter.⁴⁵ Only a year after *Centros*, a new landmark decision has been delivered. The judgement in *Emsland-Stärke*⁴⁶ introduced a twofold test for establishing abuse.⁴⁷ It also implicitly recognised that the prohibition of abuse of Community law is a general principle.

There was only one question left. Is the prohibition of abuse and the twofold test applicable also in other areas of Union law? The Court has answered that question in the judgement *Halifax*,⁴⁸ following the Opinion of Advocate General Maduro.⁴⁹ It has confirmed that the test established in *Emsland-Stärke* is applicable also in the area of value added tax (hereinafter: VAT). The prohibition of abuse has so far been applied to common agricultural policy (*Emsland-Stärke*) and to VAT (*Halifax*), and many claimed that they represent

³⁹ Case 33/74, *Van Binsbergen* (n. 1).

⁴⁰ Case C-441/93, *Pafitis* (n. 17); Case C-367/96, *Kefalas* (n. 1); Case C-373/97, *Dionysios Diamantis v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, (2000) ECR I-1705.

⁴¹ R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 405.

⁴² *Ibid.*, p. 404.

⁴³ Case C-212/97, *Centros* (n. 26).

⁴⁴ See n. 1.

⁴⁵ See for example: Case C-367/96, *Kefalas* (n. 1), § 21, § 22.

⁴⁶ Case C-110/99, *Emsland-Stärke* (n. 11).

⁴⁷ See below 3.4.

⁴⁸ Case C-255/02, *Halifax* (n. 5)

⁴⁹ Opinion of Advocate General Miguel Poiares Maduro in Case C-255/02, *Halifax*, § 83.

harmonised areas and make the European Union's own resources.⁵⁰ Conversely, the Court has applied the test also in *Cadbury Schweppes*,⁵¹ in the area of direct taxation. It can therefore be concluded that the prohibition of abuse of rights is of a general nature, applicable to all areas of Union law, and can therefore be regarded as a general principle of Union law.

3.1. The starting point – *Van Binsbergen*

Apart from introducing direct effect of the Treaty provision on the freedom to provide services,⁵² the judgement is important as being the first one concerning an alleged abuse of rights. The case was dealing with a classic U-turn transaction. Van Binsbergen's lawyer, a Dutch national, moved to Belgium while the case was pending before the Dutch court. This caused the loss of the right to representation under Dutch law. The Court stated that such a regulation constituted a restriction on the freedom to provide services. Still, what was of fundamental importance in the judgement was that the Court has left certain space for Member States in cases of alleged circumvention: “[I]ikewise, 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 59 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.”⁵³

What was groundbreaking in the judgement was a wide range of situations falling in the notion of abuse and a great space for Member States to limit such behaviour. According to the Court each U-turn transaction is considered to be an abuse. The term “*wholly or principally directed towards its territory...for the purpose of avoiding*” seems to be the only requirement to establish the existence of an abuse. The decision as to whether there is an abuse was left for the national court.

⁵⁰ R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 410-411. See also: A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law*, *European Review of Private Law* 6-2010 [1121-1154], p. 1137.

⁵¹ Case C-196/04, *Cadbury Schweppes* (n. 6).

⁵² Case 33/74, *Van Binsbergen* (n. 1), § 27.

⁵³ Case 33/74, *Van Binsbergen* (n. 1), § 13.

The same reasoning⁵⁴ was applied to the free movement of goods,⁵⁵ workers⁵⁶ and establishment.⁵⁷

3.2. The Greek challenge

Contrary to the early case law, the Court has, in the course of the development of the doctrine of abuse of rights, narrowed down the scope of the notion of abuse, and has limited the national autonomy in applying anti-abuse measures.⁵⁸

A number of cases⁵⁹ referred to the Court by the Greek courts, concerned the interpretation of the Second Company Directive.⁶⁰ Contrary to that Directive, the capital of certain public limited companies was increased by administrative act, instead of a decision of a general meeting of shareholders. The administrative act was in fact an anti-abuse measure. The question was can national rules go against Union law in order to prevent abuse?

The Court stated firstly in *Pafitis*, regarding the application of national anti-abuse measures, that “[...] *the application of such a rule must not detract from the full effect and uniform application of Community law in the Member States.*”⁶¹ If national measures derogating from Union law were allowed, this would undermine the supremacy of Union law.⁶² The same was repeated in the judgements *Kefalas*⁶³ and *Diamantis*.⁶⁴

Furthermore, the Court set further limits to the application of national anti-abuse measures. It stated that such measures, in relation to the Union law provisions must not “*alter the scope of that provision or to compromise the objectives pursued by it.*”⁶⁵

⁵⁴ Albeit not always with the same wording. In *Leclerc* (n. 55) and *Lair* (n. 56) the Court uses the term „*for the sole purpose...in order to circumvent*“. In *Knoors* (n. 57) the Court refers to „*wrongly to evade the national law*“.

⁵⁵ Case 229/83 *Leclerc 'Au Blé Vert'* (n. 1), § 27.

⁵⁶ Case 39/86 *Lair* (n. 1), § 43.

⁵⁷ Case 115/78, *Knoors* (n. 14), § 25.

⁵⁸ As A. Lenaerts puts it: „...[t]he Court was more cautious towards national provisions preventing an abuse of rights conferred by Union law. “ in *The General Principle of the Prohibition of Abuse of Rights...* (n. 50), p. 1130.

⁵⁹ The cases are examples of misuse as a form of abuse of rights.

⁶⁰ Second Council Directive 77/91/EEC of 13 December 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 paragraph 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, OJ L 26, 31.1.1977, p. 1–13.

⁶¹ Case C-441/93, *Pafitis* (n. 17), § 68.

⁶² Opinion of Advocate General Tesouro in Case C-441/93, *Pafitis* (n. 17), § 28.

⁶³ Case C-367/96, *Kefalas* (n. 1), § 22.

⁶⁴ Case C-373/97, *Diamantis* (n. 40), § 34.

⁶⁵ Case C-367/96, *Kefalas* (n. 1), § 23; Case C-373/97, *Diamantis* (n. 40), § 34.

In contrast to the wide scope of the notion of abuse in *Van Binsbergen*, the constraints in the Greek challenge cases are merely the beginning of a very limited approach about to come.

3.3. Narrowing the scope – *Centros*

Somewhat similar to the case law of the Court concerning the scope of restrictions on the free movement of goods, the case law on the scope of the prohibition of abuse of rights is in the start very broad. However, in its progress, it seems to continuously limit the application of the prohibition of abuse of rights. The peak of this tendency is the *Centros*⁶⁶ ruling.

The case was dealing with Danish nationals who set up a company incorporated in the United Kingdom in order to avoid stricter Danish rules on minimum share capital. The company did not carry out any business in the United Kingdom. Moreover, it intended to set up a branch in Denmark. The registration was refused on the basis of alleged circumvention.

The Court first reiterated the well known wording from *Van Binsbergen* and subsequent case law⁶⁷ stating that “*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.*”⁶⁸

In addition, it repeated the wording from the Greek challenge cases that Member States when applying anti-abuse measures in order to “*deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.*”⁶⁹

What is, however, the most important novelty in the judgement, which caused so much reaction,⁷⁰ is the reduction of the scope of prohibition of abuse of rights. The wording reads, as follows: “[...] *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*

⁶⁶ Case C-212/97, *Centros* (n. 26).

⁶⁷ See case law cited in n. 1.

⁶⁸ Case C-212/97, *Centros* (n. 26), § 24.

⁶⁹ Case C-212/97, *Centros* (n. 26), § 25.

⁷⁰ The attention given to the case was enormous. “*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.*” in R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 405, note 53.

*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.*⁷¹

What was once considered an abuse is now referred to as a simple use of a market freedom. Moreover, it is referred to as being inherent to the internal market. The Court switched the extensive definition of abuse with an internal market-friendly approach.

The consequence of the ruling was the Court's introduction of a new concept of the prohibition of abuse of rights, a Union law concept. As long as no harmonisation rules apply within the internal market, persons and businesses alike are entitled to choose the most beneficial regulatory regime.⁷²

The ruling has the effect of Member States' legislation competing in a single market. The regulatory competition⁷³ forces Member States to offer the most favourable conditions in the internal market. This has two possible consequences. The first is the so-called "race to the bottom", where the Member States will reduce the stringency of their rules in order to attract economic activity and gain economic benefits. The second possible outcome is increasing harmonisation on the Union level, if there is a consensus among Member States to raise the level of regulation of a certain area.⁷⁴

There was still a missing link in the abuse of rights puzzle. Since the prohibition of abuse of rights has now become a Union law notion, for reasons of legal certainty, criteria were needed in order to assess in future cases, whether certain conduct would amount to abuse. Fortunately, the wait was not long.

3.4. Introducing the criteria – *Emsland-Stärke*

A year and a half after the *Centros* ruling, the Court released the long expected judgement of *Emsland-Stärke*.

The case was placed in the area of common agricultural policy. *Emsland-Stärke* exported potato starch and wheat starch to Switzerland, and received export refund for it.

⁷¹ Case C-212/97, *Centros* (n. 26), § 27.

⁷² R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 407.

⁷³ K. Engsis Sørensen, *Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?*, *Common Market Law Review* 43-2006 [423-459], p. 424. See also: R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 408.

⁷⁴ For a further discussion, see: R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 408, note 62.

Immediately after, the products were transported by the same means back to Germany unaltered and released for use there. The German authorities reclaimed the unduly granted refund back from Emsland-Stärke.

The Commission claimed that the prohibition of abuse of Community law is a general principle, existing in almost all Member States, and constantly applied in the previous case law of the Court.⁷⁵ The Court agreed with the Commission, albeit leaving out the express reference to abuse of rights as a general principle.⁷⁶

It continued by setting up a twofold test for determining abuse:

“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.”⁷⁷

What is new in contrast to the previous case law, is taking into consideration of the subjective intention of an interested party into consideration.⁷⁸ If we contrast the *Van Binsbergen* case law to the case law of *Centros*, the approach taken in *Emsland-Stärke* seems to be in the middle. It is narrowing down the wide scope the prohibition of abuse had in *Van Binsbergen*, while situations which were considered exercising fundamental freedoms in *Centros* can now constitute abuse if the two elements are cumulatively met.

3.4.1. Establishing the objective element

The first, objective, element has been set out in a quite clear manner. It reflects what was more or less implicitly stated in the previous case law. The person claiming to have the right is barred from invoking it only to the extent to which the Community law provision

⁷⁵ Case C-110/99, *Emsland-Stärke* (n. 11), § 38.

⁷⁶ Case C-110/99, *Emsland-Stärke* (n. 11), § 51.

⁷⁷ Case C-110/99, *Emsland-Stärke* (n. 11), § 52 - §53.

⁷⁸ D. Weber, *Abuse of Law*, *European Court of Justice*, 14 December 2000, *Case 110/99, Emsland-Stärke*, *Legal Issues of Economic Intergration* 31 (1) – 2004 [43-55], p. 51.

formally conferring that right is relied upon for the achievement of “*an improper advantage, manifestly contrary to the objective of that provision.*”⁷⁹

Advocate General Alber stated in his opinion *Emsland-Stärke* that: “*The yardstick for judging the lawfulness of individual import and export transactions is therefore the purpose of the rules in question. In a previous judgement, the Court withheld payment of compensatory amounts from a trader because the objective of offsetting prices had not been attained in the transactions in question and an essential condition for the application of compensatory amounts had not therefore been fulfilled.*”⁸⁰

Advocate General Tizzano depicts in simple terms this issue in his opinion in *Zhu and Chen*⁸¹: “*The test is therefore, essentially, whether or not there has been a distortion of the purposes and objectives of the Community provision which grants the right in question.*”⁸²

On the contrary, when the exercise of the right takes place within the limits imposed by the aims and results pursued by the Community law provision at issue, there is no abuse. There is merely a legitimate exercise of the right.⁸³

3.4.2. Establishing the subjective element

The subjective element from the test is somewhat more controversial.⁸⁴ What is problematic is how the “intention to obtain advantage” from Union law is to be ascertained. The judgement itself gives examples as to indicators of intention. These are “*evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.*”⁸⁵ The use of the word “evidence” could lead to the conclusion that the intention, a subjective element, is to be proven by objective circumstances. This has been the general viewpoint all the way back from the Opinion of Advocate General Lenz in *TV10*,⁸⁶ where he proposed the use of objective criteria for determining intention when it comes to legal persons.⁸⁷

⁷⁹ Case C-373/97, *Diamantis* (n. 40) § 33; Case C-441/93, *Pafitis* (n. 17), § 68; Case C-367/96, *Kefalas* (n. 1), § 22.

⁸⁰ Opinion of Advocate General Alber in Case C-110/99, *Emsland-Stärke* (n. 11), § 69.

⁸¹ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* (2004), ECR I-09925.

⁸² Opinion of Advocate General Tizzano in *Zhu and Chen* (n. 81), § 115.

⁸³ Opinion of Advocate General Maduro in *Halifax* (n. 49), § 68.

⁸⁴ R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 410.

⁸⁵ Case C-110/99 *Emsland-Stärke* (n. 11), § 53.

⁸⁶ Opinion of Advocate General Lenz in Case C-23/93, *TV10* (n. 1).

⁸⁷ Opinion of Advocate General Lenz in Case C-23/93, *TV10* (n. 1), § 61, § 65 - § 66. See also: A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights...* (n. 50), p. 1134; K. Engsis Sørensen, *Abuse of Rights*

When determining the existence of the subjective element, it is not a search for motives, since they do not exist when it comes to legal persons. It must be determined, by objective evidence and objective circumstances, whether the transactions in question are created artificially in order to obtain advantage from Union law provisions.

New developments in establishing the subjective element have taken place in the case law of the Court. They will be discussed below, in the chapter 4.4.concerning abuse of rights in the area of broadcasting.

in Community Law...(n. 73), p. 451, 455; R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 410.

4. PECULIARITIES OF ABUSE OF RIGHTS IN BROADCASTING

A number of cases that came before the Court were dealing with the service of broadcasting. The enactment of the Television without Frontiers Directive⁸⁸ amended and replaced with a new codified AVMS Directive, has been one of the important reasons. This is the consequence of the possibility envisaged therein for Member States to enact more detailed or stricter rules for broadcasters under their jurisdiction.⁸⁹ Member States have used this opportunity, which caused a great number of cases of alleged circumvention.

Another particularity of this area is that the AVMS Directive itself prescribes the conditions for establishing circumvention of more detailed or stricter rules.⁹⁰ This might lead to the conclusion that situations of circumvention are fully harmonised by the AVMS Directive, and there is no need to look at the case law of the Court.

Nevertheless, there are two reasons why the case law from other areas of Union law is still applicable in this area.

First, the criteria in the AVMS Directive need to be interpreted in order to determine the existence of circumvention. The best example is the wording of Article 4 (3) (b) stating that it must be determined that the broadcaster has established itself in another Member States *in order to circumvent* the stricter rules. The wording clearly represents the need to ascertain the rationale behind the change of establishment. It is impossible to do so without applying the case law of the Court regarding the subjective element.

The second reason is resolving situations which represent abuse, but not in the form of circumvention of stricter rules. They would cover situations of fraud or misuse. In those situations, the mentioned Article of the AVMS Directive would not be applicable. Such situations would have to be resolved following the case law of the Court on abuse of rights.

The final peculiarity is the nature of the broadcasting service itself. Broadcasters are relatively free to establish themselves where they prefer, regardless of the place where the customer of his product is situated, as long as he has an access to a satellite.⁹¹ This is also one of the reasons why in the view of the present author a broadcaster will always be able to prove the existence of a “genuine economic activity”.

⁸⁸ Council Directive 89/552/EEC of 3 October 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, OJ L 298, 17.10.1989, p. 23–30.

⁸⁹ Article 4 (1) of the AVMS Directive.

⁹⁰ Article 4 (2) – (5) of the AVMS Directive.

⁹¹ L. Hell Hansen, *The Development of the Circumvention Principle in the Area of Broadcasting...*(n. 24), p. 113.

4.1. The early cases

The Netherlands, with its restrictive broadcasting laws,⁹² has been particularly affected by attempts to avoid its rules, with Dutch companies setting up commercial stations in Luxembourg and, relying on the services provisions, using the Luxembourg station to broadcast programmes back to the Netherlands.⁹³

The case of *Veronica*⁹⁴ and *TV10*⁹⁵ were cases dealing with the interpretation of the Treaty provisions on freedom to provide services and alleged circumvention by legal persons.

In *Veronica*, the Dutch media regulator cancelled the broadcasting licence to a Dutch broadcasting company Veronica, following its decision to set up a commercial transmitter in Luxembourg.

In *TV10*, a broadcasting company established in Luxembourg, had been denied the access to the Netherlands cable network. The Dutch media regulator argued that TV10 established itself in Luxembourg in order to escape the Netherlands legislation applicable to domestic broadcasters.

Both cases dealt with an alleged circumvention of the Dutch stricter rules. Albeit reaching the same conclusion, the two rulings have some differences. In the case of *Veronica*, the Court stated that the Dutch measures in question do not fall in the scope of the Treaty provisions on the freedom to provide services.⁹⁶ However, in both judgements, the Court subjects the Dutch legislation to the justification test to ascertain whether the obstacles to the freedom to provide services are nonetheless allowed. The difference is that, in *TV10*, the Court used the principle of abuse as a justification of restriction of the freedom to provide services.⁹⁷

The area of broadcasting is so far, not much different from the case law regarding abuse in other areas of Union law.

A further proof of this coherence is the judgement in *VT4*⁹⁸, where the Court ignored to refer to *Veronica* and *TV10*, and stated that the Treaties did not “*prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member*

⁹² See n. 4.

⁹³ C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, Third Edition, 2010, p. 391.

⁹⁴ Case 148/91, *Veronica* (n. 4).

⁹⁵ Case C-23/93, *TV10* (n. 1).

⁹⁶ Case 148/91, *Veronica* (n. 4), § 15.

⁹⁷ Case C-23/93, *TV10* (n. 1), § 20 - § 21.

⁹⁸ Case C-56/96, *VT4 Ltd v Vlaamse Gemeenschap* (1997), ECR I-3143.

State in which it is established.”⁹⁹ Analogous to this, the Court will ignore *Van Binsbergen* in the judgement *Centros* some two years later, to confirm the general notion that there is nothing abusive in simply taking advantage of the Treaty provisions on free movement.¹⁰⁰

4.2. Reading Article 4 of the AVMS Directive – The *Van Binsbergen* criteria

Article 4 (2) of the AVMS Directive reads, as follows:

“*In cases where a Member State:*

(a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and

(b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory...”

And continues in paragraph 3:

“*(b) the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the first Member State.*”

It can be read from the cited paragraphs that there are two conditions for establishing circumvention of national stricter rules. Firstly, the broadcast must be wholly or mostly directed towards the first Member State. This inevitably resembles to the *Van Binsbergen* criteria of “*entirely or principally directed*”. Secondly, the change of establishment must be caused by an intention to circumvent. This is what the Court in *Van Binsbergen* calls: “*with the purpose to avoid*”.

The question resulting from this analysis is why would the Union legislator place thirty year-old criteria in this Directive, when the case law has evolved so much since then?

4.3. Re-reading Article 4 of the AVMS Directive – The *Emsland-Stärke* criteria

Regardless of the incredible similarity between the wording of the Article and the wording of the Court in *Van Binsbergen*, it will be shown that these criteria can be identified with the objective and the subjective element from the test in *Emsland-Stärke*.

The first part of the test is, according to the Court, determining that the objectives of the Community rules used have not been achieved. Translated into the wording of the

⁹⁹ Case C-56/96, *VT4* (n. 98), § 22.

¹⁰⁰ C. Barnard, *The Substantive Law of the EU...* (n. 93), p. 392.

Directive, if a broadcaster establishes itself in another Member State and broadcasts solely or mainly to the first Member State, he is neither attaining the objective of the Treaty provision on the freedom to provide services, nor the objective of the AVMS Directive. Those objectives are, namely, the provision of (broadcasting) services in a single market, i.e., in more than one Member State.¹⁰¹ Therefore, despite the formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.¹⁰²

The second part of the test is to some extent more complicated. According to the Court in *Emsland-Stärke*, a subjective element must be fulfilled, comprising the intention to obtain advantage from the Community rules by creating artificially the conditions laid down for obtaining it.¹⁰³ On the other hand, the Directive states that the broadcaster changed its establishment to another Member State *in order to circumvent* the national stricter rules. What is clear from both wordings is the need to determine intention. What remains unclear from the Directive is how this intention is to be established.

Although neither the judgement in *Emsland-Stärke*, nor the Directive clearly resolved that issue, subsequent case law did give some further guidance as to how intention is to be established.

4.4. Refining the subjective element

It was stated above¹⁰⁴ that Advocate General Lenz argued in his opinion in *TV10* that the intention is to be determined in accordance with objective criteria. The Court in *Emsland-Stärke* implicitly accepted that the actual intention could be established on the basis of objective circumstances.¹⁰⁵ In order to reconcile the “subjectiveness” of the intention in the judgement and the “objectiveness” necessary in the area of broadcasting, it is necessary to take into account the new case law where the Court interprets the term.

The Court addressed this matter in the area of VAT. This was significant for two reasons: first, it answered the question whether the twofold abuse test is to be applied also to other areas of Union law; and second, it dealt again with legal persons, and provided for a more detailed analysis of the subjective element of the test.

¹⁰¹ Recital 2 and 104 of the AVMS Directive.

¹⁰² Case C-110/99, *Emsland-Stärke* (n. 11), § 52.

¹⁰³ Case C-110/99, *Emsland-Stärke* (n. 11), § 53.

¹⁰⁴ See 3.4.2.

¹⁰⁵ A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights...* (n. 50), p. 1134.

4.4.1. *Halifax*

The case of crucial importance was a VAT case *Halifax*.¹⁰⁶ The case was concerning a banking company who decided to establish new “call centres” for the purposes of its business. Instead of recovering only 5 % of the VAT paid on any construction works, Halifax set up a scheme according to which it was able to recover the full amount of the VAT incurred through a series of transactions involving different companies in the Halifax group. The national court posed two questions, of which the second is relevant for this issue: *Has the person performing a transaction constituting supply¹⁰⁷ the right to deduct the input VAT, where such a transaction on which that right is based has been concluded with the sole purpose of tax avoidance?*

The Court followed almost completely the Opinion of Advocate General Maduro, who presented the case law up to the relevant moment, and discussed the changes which needed to be made in the twofold test.

According to Advocate General Maduro, the finding of the “artificial” in the transactions in question should not be based on an assessment of the subjective intentions of those claiming the Community right.¹⁰⁸ In his view, it is the finding that the activity at issue cannot possibly have any other purpose than to trigger the application of the Community law provisions in a manner contrary to their purpose, which is tantamount to accepting an objective criterion for the assessment of the abuse.¹⁰⁹

What the Court did not accept, more precisely, what it referred to in an ambiguous manner, was the extent to which the transactions in question are aimed at gaining advantages from Union law. In the view of Advocate General Maduro, an economic activity should be deemed abusive only if there is “*no other economic justification for the activity than that of creating a tax advantage.*”¹¹⁰ It is actually a call for the application of the “sole purpose” criterion.

What the Court affirmed was a less stringent approach towards determining abuse. It stated that “*it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.*”¹¹¹ This might lead to the

¹⁰⁶ Case C-255/02, *Halifax* (n. 5).

¹⁰⁷ Supply is a term from the VAT Directive in question, and a matter for interpretation in the first question posed by the national court.

¹⁰⁸ Opinion of Advocate General Maduro in *Halifax* (n. 49), § 70.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, § 87.

¹¹¹ Case C-255/02, *Halifax* (n. 5), § 75.

impression that albeit there may be some other economic justification, if the main purpose is to gain advantage, there is abuse. What is even more unclear is referring to the Opinion of Advocate General in the same paragraph: “*As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.*”¹¹² At another place,¹¹³ the Court lists several criteria of economic, legal or personal nature to assess the substance of the transaction, which points to the essential purpose, and implies the balancing of several purposes against one another.¹¹⁴

The lacks of this judgement were visible after a very short period of time, when an Italian court submitted a preliminary reference asking: “*Does the concept of abuse of rights defined in the judgment of the Court of Justice in [Halifax and Others] as transactions, the essential aim of which is to obtain a tax advantage , correspond to the definition transactions carried out for no commercial reasons other than a tax advantage, or is it broader or more restrictive than that definition?*”¹¹⁵

The Court’s answer did not change much, stating that: “[...] *uniform basis of assessment, must be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue.*”¹¹⁶

The wait for a clarification remained. However, the answer came only seven months later.

4.4.2. Cadbury Schweppes

A judgement concerning both the freedom of establishment and tax law was delivered by the end of 2006. In the case, a United Kingdom company had set up a subsidiary in Ireland for the purpose of having the subsidiary’s profits taxed at the Irish corporate tax rate, which was substantially lower than the applicable UK corporate tax rate. The United Kingdom applied its tax charge upon profits made by an Irish subsidiary.

¹¹² Case C-255/02, *Halifax* (n. 5), § 75.

¹¹³ Case C-255/02, *Halifax* (n. 5), § 81.

¹¹⁴ F. Vanistendael, *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?*, EC Tax Review 4-2006 [192-195], p. 193. See also: A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights...* (n. 50), p. 1136, note 85; L. Cerioni, *The “abuse of right” in EU company law and EU tax law: A re-reading of the ECJ case-law and the quest for a unitary notion*, Brunel Law School research papers (<http://bura.brunel.ac.uk/handle/2438/4141>), p. 15.

¹¹⁵ Case C-425/06, *Ministero dell’Economia e delle Finanze v Part Service Srl* (2008), ECR I-897, § 32.

¹¹⁶ Case C-425/06, *Part Service* (n. 115), § 45.

The Court dealt with the question whether the UK legislation is contrary to the freedom of establishment, and if so, whether it can be justified for prevention of wholly artificial arrangements intended to escape the national tax normally payable.¹¹⁷

In its answer, the Court explained that the UK anti-abuse legislation must not be applied where, on the basis of objective factors which the interested company must be allowed to demonstrate, and which must be ascertainable by third parties, it is proven that, despite tax motives, the subsidiary is actually established in the host State and carries out *genuine economic activity* (emphasis added).¹¹⁸

What is new and revolutionary in the judgement, is that it explains the relation between the terms “*circumvention*” and “*abuse*” in a way that it clarifies what was started and has been revolutionary in *Centros*: circumvention is not a synonym to abuse. Contrary to the *Van Binsbergen* case law, which identified circumvention with abuse, *Cadbury Schweppes* distinguishes legitimate circumvention and wholly artificial arrangements. If an economic operator performs a genuine economic activity, the fact that he chose a Member State with more favourable legislation is of no relevance.¹¹⁹

The judgement represents a complete and a coherent approach to the principle of prohibition of abuse in Union law. It has been applied to a variety of areas of Union law, and has given a unique method for determining abuse. It has been repeated in numerous judgements and has become settled case law.¹²⁰

4.5. Is there such broadcaster not performing a “*genuine economic activity*”?

The settlement of the subjective criterion in the case law of the Court brings us back to the problem of broadcasters. This work aims to prove that such subjective criterion, comprising genuine economic activity, cannot be applied to broadcasters. In simple terms, broadcasters will always be able to prove genuine economic activity. As a consequence, their conduct will never be regarded as abusive.

¹¹⁷ Case C-196/04, *Cadbury Schweppes* (n. 6), §29, § 34.

¹¹⁸ Case C-196/04, *Cadbury Schweppes* (n. 6), § 65 - § 66.

¹¹⁹ Case C-196/04, *Cadbury Schweppes* (n. 6), § 75.

¹²⁰ See for example: Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* (2007), ECR I-2107, § 74; Case C-105/07, *Lammers & Van Cleeff NV v Belgische Staat* (2008), ECR I-173, § 26; Case C-311/08, *Société de Gestion Industrielle (SGI) v Belgian State* (2010), ECR 0000, § 65; Case C-72/09, *Établissements Rimbaud SA v Directeur général des impôts and Directeur des services fiscaux d’Aix-en-Provence* (2010), ECR 0000, § 34.

There are two main reasons to support this claim, both resulting from the nature of the broadcasting services. The first reason is the fact that when it comes to broadcasting, it is the service which travels. The second reason is the lack of additional costs for expanding the provision of services to more than one Member State.

Firstly, the special nature of the broadcasting service is that neither the provider nor the recipient travels.¹²¹ To a broadcaster, from the point of view of accessing consumers, it is completely irrelevant whether it is established in one or the other Member State. Any broadcaster can choose any Member State as the state of establishment, regardless of the aimed audience. All that is necessary is having the access to a satellite. Connecting to a satellite from whatever place in the European Union bears no additional expenses. Consequently, a broadcaster is free to choose the Member State with the most convenient legislation and simply establish himself there.

The second reason is the fact that providing services in more than one Member State is free of additional costs. Unlike, for example, an exporter of certain goods, who will have additional costs for the export of certain product to more than one Member State, a broadcaster will suffer no such economic loss. There will be no extra burdens for providing services in more than one national market.¹²²

The only situation which could fall in the scope of abuse is a broadcaster established in one Member State, who is directing his entire broadcasting activity to another Member State, without any programmes being transmitted to the Member State of establishment. In such a situation, benefiting from the more favourable legislation in the Member State of establishment would be the sole purpose of the broadcaster's establishment in that Member State. The establishment could be regarded as a wholly artificial arrangement, thus constituting abuse.

However, given the initial costs of setting up a broadcasting company and the size of the internal market with almost endless economic opportunities, it is highly unlikely that any broadcaster with rational economic aims would direct its services only to one Member State.

¹²¹ See for example, Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* (1980), ECR 881; Joined Cases C-34-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* (1997), ECR I-3843.

¹²² The factual barriers might be the language barriers. However, it is enough to imagine two Member States with the audience of the same language, which is possible in the European Union. In such circumstances, the broadcaster will genuinely provide services in more than one Member State, therefore, performing a genuine economic activity.

5. ABUSE OF RIGHTS AS A GENERAL PRINCIPLE OF EU LAW

This chapter aims to answer three questions:

If the prohibition of abuse of rights a general principle of Union law, is it applicable to the same extent in all areas of Union law?

What is the difference between a general principle and an interpretative one?

Is there any help in answering these questions coming from the Court?

5.1. Preliminary remarks

The most appropriate way of beginning this complex issue is first of all defining what a general principle of EU law is. General principles of Union law constitute a genuine, autonomous source of Union law.¹²³ They have a constitutional status and are equal, in terms of hierarchy, to the Treaties.¹²⁴ They are binding on the Union institutions and on the Member States.¹²⁵ They are regarded as an increasingly fundamental¹²⁶ “gapfilling” mechanism in face of the incomplete character of the EU legal order.¹²⁷ Still, what makes a general principle “general”?

A principle common to constitutional traditions of Member States can amount to a general principle when it is recognised by the Court. In doing so, the Court does not choose a common denominator, but the best solution.¹²⁸

A common concept of abuse of rights exists in the legal tradition of the Member States.¹²⁹ So far so good. What is left to be determined is whether the Court has recognised it as a general principle of law. And this is where things get complicated.

5.2. Establishing a (general) principle

The first time the Court was close to defining the prohibition of abuse of rights as a general principle of Union law was in *Emsland-Stärke*, where the Commission asserted that:

¹²³ A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights...* (n. 50), p. 1124.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ T. Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford University Press, 2006, p. 10.

¹²⁷ *Ibid.*, at note 12.

¹²⁸ A. Arnulf in: P. Pantavigna, *Prohibition of Abuse of Law...* (n. 32), p. 168.

¹²⁹ A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights...* (n. 50), p. 1121. See p. 1125 and further for an analysis of the legislation of the Member States concerning the prohibition of abuse of rights.

“[...] *this general legal principle of abuse of rights exists in almost all the Member States and has already been applied in the case-law of the Court of Justice, although the Court has not expressly recognised it as a general principle of Community law.*”¹³⁰ The Court has again failed to reflect upon the Commission’s assertions.

In the meantime, the discussion moved to the Opinions of various Advocates General. The landmark opinion is the already mentioned Opinion of Advocate General Maduro in *Halifax*.¹³¹ Advocate General Maduro firstly presented the case law regarding abuse of rights and continues: “*To my mind, a general principle of Community law can certainly be considered to derive from this line of case law.*”¹³² He then carried on referring to the prohibition as a “*principle governing the interpretation of Community law*”¹³³ As a consequence, in his view, the general principle of abuse of rights should also be extended to the area of VAT. The principle serves as an “*indispensable safety-valve*”¹³⁴ with the purpose to protect the aims of all provisions of Union law.

The Opinion was largely accepted by the Court,¹³⁵ the reference was still scarcely, but innovative. The Court stated that: “*That principle of prohibiting abusive practices also applies to the sphere of VAT.*”¹³⁶

Advocate General Maduro argued again in his Opinion in *Firma ING. AUER*,¹³⁷ for the prohibition of abuse of rights to be regarded as a general principle of law, but received no response on that matter from the Court.

The next call for the recognition of abuse of rights as a general principle came in the Opinion of Advocate General Kokott in *Kofoed*.¹³⁸ She interprets an anti-abuse provision of the Directive 90/434¹³⁹ as representing “*an expression of the principle which is recognised also in the consistent case law*”.¹⁴⁰

And the answer finally came. The Court accepted the Opinion of Advocate General Kokott, and in the interpretation of the anti-abuse provision in the aforementioned Directive

¹³⁰ Case C-110/99 *Emsland-Stärke* (n. 11), § 38.

¹³¹ Opinion of Advocate General Maduro in *Halifax* (n. 49).

¹³² *Ibid.*, § 64.

¹³³ *Ibid.*, § 69.

¹³⁴ *Ibid.*, § 74.

¹³⁵ See 4.4.1.

¹³⁶ Case C-255/02 *Halifax* (n. 5), § 70.

¹³⁷ Opinion of Mr Advocate General Poiares Maduro in Case C-251/06, *Firma ING. AUER - Die Bausoftware GmbH v Finanzamt Freistadt Rohrbach Urfaehr* (2007), ECR I-09689, § 17.

¹³⁸ Opinion of Advocate General Kokott in Case C-321/05, *Hans Markus Kofoed v Skatteministeriet* (2007), ECR I-05795.

¹³⁹ 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, OJ L 225, 20.8.1990, p. 1–5.

¹⁴⁰ Opinion of Advocate General Kokott in *Kofoed* (n. 138), § 57.

stated: “Thus, Article 11(1)(a) of Directive 90/434 reflects the general Community law principle that abuse of rights is prohibited.”¹⁴¹

5.3. The scope of the principle – directly applicable or only a means of interpretation?

What is at the basis of this problem is the differentiation between circumvention and misuse, as explained above.¹⁴² On the one hand, there is circumvention of national law, and on the other there is abuse of Union law. When a circumvention of a national law occurs, the situation is more or less clear. The Member State concerned will have the interest of imposing anti-abuse national measures in order to prevent the individual in using free movement rules to escape national legislation. In such a situation, the question will be whether the national anti-abuse measures are justified by the overriding requirements in the general interest, according to the case law of the Court regarding fundamental freedoms.¹⁴³ Things get complicated when an abuse of Union law occurs. It is unclear whether there is a need for national anti-abuse measures.

This causes two opposite conclusions as to the nature of the principle of prohibition of abuse of rights. Some¹⁴⁴ argue that this is a directly applicable general principle, while the majority¹⁴⁵ argues that this is merely a principle of an interpretative nature, which cannot be applied without national anti-abuse measures.

The latter view was best described by Advocate General Kokott in *Kofoed*: “The competent authorities would also be precluded from relying directly, against an individual, on any existing general principle of Community law prohibiting misuse of law. [...] Moreover, such an approach would undermine the prohibition, already mentioned, on directly applying untransposed provisions of directives to the detriment of individuals.”¹⁴⁶ The Court confirmed that without national implementing measures, the general principle can be applied only if it is contained in national legislation.¹⁴⁷

¹⁴¹ C-321/05, *Hans Markus Kofoed v Skatteministeriet* (2007), ECR I-05795, § 38.

¹⁴² See 2.4.

¹⁴³ See Case 33/74 *Van Binsbergen* (n. 1), § 14; Case C-23/93 *TV 10* (n. 1), § 18 - § 22; Case C-148/91 *Veronica* (n. 4), § 9 - § 11.

¹⁴⁴ R. de la Feria, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 438-439; K. Engsig Sørensen, *Abuse of Rights in Community Law...*(n. 73), p. 430.

¹⁴⁵ A. Kjellgren, *On the Border of Abuse...* (n. 25), p. 192; Opinion of Advocate General Maduro in *Halifax* (n. 49), § 72; Opinion of Advocate General Kokott in *Kofoed*, (n. 138), § 67; L. Cerioni, *The “abuse of right” in EU company law and EU tax law...*(n.114), p. 23.

¹⁴⁶ Opinion of Advocate General Kokott in *Kofoed*, (n. 138), § 67.

¹⁴⁷ C-321/05, *Kofoed* (n. 141), § 37, § 39, § 46, § 48, operative part.

However, it is not without foundation to assume that the general principle prohibiting abuse of rights can be applied directly, without national anti-abuse measures. In the cases of *Halifax* and *Part Service*, the Court has held that the right sought, on the basis of abusive conduct, cannot be granted.¹⁴⁸ There was no need for national measures prohibiting abuse of rights. It is necessary to add that these cases were concerning the area of VAT. The same was applied in *Emsland-Stärke* when the Court stated that: “[...] a Community exporter can forfeit his right to payment of a non-differentiated export refund.”¹⁴⁹

One explanation of this inconsistency was offered by Cerioni.¹⁵⁰ He argues that in the area of common agricultural policy and VAT, the financial interests of the EU are directly affected.¹⁵¹

What is the core issue here is will the Court expand the approach from the VAT and common agricultural policy cases to all areas of Union law? The same question was posed regarding the twofold test applied for the first time in *Emsland-Stärke*. And the Court did apply the test to other areas of Union law, regardless of its financial interests. There is therefore no reason that the future case law would develop in a parallel way.

What is at stake here is the too extensive application of the prohibition of abuse of rights. Advocate General Maduro argued in his Opinion in *CARTESIO Oktató*¹⁵² that the Court should use the notion of abuse with considerable restraint.¹⁵³ The same conclusion was offered by De la FERIA, claiming that “[t]he 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.”¹⁵⁴

It can be concluded from the foregoing that the Court has had an inconsistent approach towards the nature of the prohibition of abuse of rights as a general principle. It was more often applied as an interpretative principle, than as a self-standing general principle. What is however concerning is that there are nevertheless cases when Court applies the prohibition as a directly applicable general principle, causing discrepancies in approach and giving rise to opposite conclusions. It seems that by applying one general principle, it is gravely encroaching upon another – legal certainty. The future case law should be confined to

¹⁴⁸ Case C-255/02 *Halifax* (n. 5), § 93; Case C-425/06, *Part Service* (n. 115), operative part.

¹⁴⁹ Case C-110/99, *Emsland-Stärke* (n. 11), § 59.

¹⁵⁰ L. Cerioni, *The “abuse of right” in EU company law and EU tax law...* (n.114).

¹⁵¹ *Ibid*, p. 23.

¹⁵² Opinion of Advocate General Poiares Maduro in case C-210/06, *CARTESIO Oktató és Szolgáltató bt* (2008), ECR I-09641.

¹⁵³ Opinion of Advocate General Poiares Maduro in *CARTESIO Oktató*, (n. 152), § 29. He quotes Gutteridge (*Abuse of rights*, 5 Cambridge Law Journal, 22, 44, 1933-1935) in note 55 who describes abuse of rights as a “drug which first appears to be innocuous, but may be followed by very disagreeable after effects”.

¹⁵⁴ R. de la FERIA, *Prohibition of Abuse of (Community) Law...* (n. 22), p. 441.

applying the principle as a means of interpretation, save where the Member States are jeopardising the *effet utile* and the uniform application of Union law provisions by non-implementation.

5.4. Concluding remarks

What distinguishes a general principle from an interpretative one is the fact that the former can be directly applied without national anti-abuse measures, unlike the latter.

When analysing the prohibition of abuse of rights, it is not easy to find an unequivocal answer. Calling this a “*general principle with a sui generis aspect*”¹⁵⁵ seems as an expected and a too easy answer.

The prohibition of abuse of rights does amount to a general principle of Union law, albeit with a limited scope. It has been shown that in most areas, it is applied solely as an interpretative principle, not directly applicable without national anti-abuse measures. However, indications exist that the application of the prohibition as a directly applicable principle might have a broader scope than expected. Although sometimes applied as a directly applicable general principle, such application should be performed with great caution, always bearing in mind the general principle of legal certainty.

¹⁵⁵ L. Cerioni, *The “abuse of right” in EU company law and EU tax law...* (n. 114), p. 24.

6. CONCLUSION

The study of the Court's case law regarding the prohibition of abuse of rights leaves us with one clear answer: it is ambiguous. Very much has been said, many problems resolved, and yet, new problems arose.

One sentence in the *Van Binsbergen* judgement started an avalanche of new cases, raising hope for Member States to put an end to evasion of the national stricter rules. In the further development, the Court has been slowly, but constantly closing the doors for the Member States to combat abuse, and has been opening the doors for an even greater use of market freedoms. In this development, it introduced criteria for establishing abuse, and has retained control over national courts when establishing abuse. In some areas, the Union legislator envisaged procedures at the Union level for combating abuse.

One such area has been broadcasting. After the analysis, it can be concluded that the broadcasting industry did very well. The AVMS Directive prescribes a procedure for Member States to undertake in situations of an alleged abuse of rights. Since it has been shown that the procedure entails elements from the case law of the Court, namely the twofold test from *Emsland-Stärke*, subsequent case law refining the subjective element from that test should also be applied. The judgements of the Court, namely *Halifax* and *Cadbury Schweppes*, call for an interpretation of the subjective element in light of objective circumstances, and in light of a genuine economic activity. If the movement is caused by a legitimate business purpose, in search for better economic opportunities, no abuse can take place. As has been shown, broadcasters, due to the nature of the service they provide, will always perform a genuine economic activity and will always escape from the ambit of abuse of rights.

What is however more problematic in the area of abuse of rights is how should this prohibition be regarded. For a long time, Advocates General and academics have been in favour of declaring this prohibition a general principle.¹⁵⁶ When the answer from the Court finally came, it seems that no one was satisfied. The Advocates General called for a more narrow application of the principle, solely as an interpretative principle, whereas academics were divided on the issue.¹⁵⁷

In certain cases the Court applied the prohibition as a directly applicable general principle, where in other cases it has used it only as an interpretative principle. This work has shown that for the sake of legal certainty, the prohibition should be applied as an

¹⁵⁶ See above 5.2.

¹⁵⁷ See above 5.3.

interpretative principle, leaving the Member States to employ anti-abuse measures. Where the Member States fail to do so, the prohibition of abuse of rights may be used, but only to the extent necessary and without jeopardising legal certainty.

As can be seen, we are very far from a clear and unambiguous answer, and it is highly unlikely that such answer will ever be given by the Court in the future. It is possible to imagine this inconsistency being applied in new cases to come, leaving academics in debate. What is most important from a practical point of view is that economic operators, the participants of this enormous market, learn how to play by the incoherent and confusing rules imposed by the Court, because the game goes on.

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