The line between use and abuse: overview of the introduction of the principle in VAT and Customs

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List of abbreviations

ECJ	Court of Justice of the European Union
The Treaty	Treaty establishing the European Economic Community concerning freedom to provide services within the Community
EC	European Commission
Sixth VAT Directive	Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment
Union Customs Code	Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code
Delegated Act	Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code
Implementing Act	Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code
Community Customs Code	Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code
Regulation (EC) No 341/2007	Commission Regulation (EC) No 341/2007 of 29 March 2007 opening and providing for the administration of tariff quotas and introducing a system of import licences and certificates of origin for garlic and certain other agricultural products imported from third countries

1. Introduction

The European Single Market[1] is an arena that accounts for 500 million consumers and 21 million small and medium-sized enterprises[2]. Economic operators move freely throughout the European Union ("EU") 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 EU law to achieve benefits solely for themselves, to the detriment of their home Member States and the own resources of the EU.

It is established case law of the Court of Justice of the European Union ("ECJ") that *"Union law cannot be relied on for abusive or fraudulent ends."*[3]

However, the more important question is: where is the line between use and abuse?

The ECJ has played a fundamental role in determining the legal framework within which Member States may or have to contrast fraudulent and abusive behaviours.

Nowadays the ECJ has recognised the principle of abuse as a general principle in law in both VAT and Customs matters. However, the contours of the principle have taken shape through the case law of the ECJ in all matters the ECJ is competent to provide a decision on. The first time the ECJ touched upon the notion of abuse was in the *Van Binsbergen*[4] case in 1974 on the free movement of services. The ECJ has ultimately recognised the principle in the *Halifax*[5] in 2006 case on the chargeability of VAT. The road to it was long and not without any obstacles.

First, the terminology used by the ECJ was not consistent. Next to that, it took a long time for the ECJ determine the applicable criteria to define abuse.

The decision in *Halifax* represented the beginning of a new disclosure of the newly designed principle. As the decision in *Halifax* was in the field of VAT, the question arose whether the principle of prohibition of abuse of law was also applicable to other areas of tax (such as customs). Other questions arose on how to apply the criteria for application of the principle and what the exact implication was of the principle.

Over the years, the ECJ has further defined the principle of prohibition of abuse of law through mostly VAT case law.

In this contribution, I will give an overview of the development of the principle through the case law of the ECJ and examine whether the principle is also applicable in customs matters.

[1] https://europa.eu/european-union/topics/single-market_en
[2] https://ec.europa.eu/growth/single-market_en
[3] ECJ, C-367/96, Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE), 12 May 1998, ECLI:EU:C:1998:222
[4] ECJ, C-33/74, Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131
[5] ECJ, C-244/04, Halifax and Others, 21 February 2006, ECLI:EU:C:2006:121

2. Introducing the notion of abuse: different bumps in the road

2.1. The linguistic bump: the many faces of abuse

Albeit the ECJ had been alluding to abuse and abusive practices for more than thirty years, since its decision in the case *Van Binsbergen*[6], the significance of these references was for a long time unclear.

The terminology used by the ECJ was not very coherent. Throughout the years the ECJ referred to abuse and abusive practices in more than 5 manners[7]: "avoidance"[8], "evasion"[9], "circumvention"[10], "fraud"[11] or simply "abuse"[12]. "Abuse" has become the only term used since the judgement in the *Emsland-Stärke*[13] case in the year 2000.

By looking at this terminology, the first question that pops up is whether the ECJ refers to a different type of abuse or considers the existence of only one type of intolerable behaviour.

The confusion arises from the concept of 'fraud'. Fraud, of which the original meaning was 'damage', became synonymous of 'avoidance', 'deception', and 'malice'. It indicates the illegal behaviour of the taxpayer with the intent to benefit from Community rights.[14]

As mentioned during the years, the concept of abuse has become clearer.

The decision in the *Direct Cosmetics Limited*[15] case in 1988 marks an important first step. This decision contained two elements giving useful hints about what is to be understood under the concept of abuse. While in this decision the ECJ uses the wording "avoidance", it is important to take this decision into consideration.

First with the reference to avoidance of VAT, the ECJ implies a circumvention of taxable rules that would otherwise apply in respect of a specific transaction.

Next to that, the ECJ explicitly draws a distinction from tax evasion which requires an intentional element.

In other words, after *Direct Cosmetics Limited* it was clear that tax avoidance and tax evasion were two different phenomena. The limited use of this decision had as result that it took another twelve years until there was more clarity about the concept.

With the *Emsland-Stärke* decision in the year 2000 decision the ECJ began to refer to the concept of abuse in an appropriate way. Before exploring this case in more detail (cf. infra), it must be acknowledged that in this decision the EC and the ECJ have framed the concept of abuse.

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[6] ECJ, C-33/74, Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 17.
[7] Paolo Piantavigna, Tax Abuse in European Union Law: A Theory, EC Tax Review, 2011-3, p. 3.
[8] ECJ, C-33/74, Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131. See also: ECJ, C-23/93, TV10 v Commissariaat voor de Media, 5 October 1994, ECLI:EU:C:1994:362.
[9] ECJ, C-115/78, Knoors v Staatssecretaris van Economische Zaken, 7 February 1979, ECLI:EU:C:1979:31.
[10] ECJ, C-229/83, Leclerc v Au blé vert, 10 January 1985, ECLI:EU:C:1985:1.
[11] ECJ, C-367/96, Kefalas and Others v Elliniko Dimosio and Organismos Oikonomikis Anasygkrotisis Epicheiriseon, 12 May 1998, ECLI:EU:C:1998:222.
[12] ECJ, C-441/93, Pafitis and Others, 12 March 1996 , ECLI:EU:C:1996:92.
[13] ECJ, C-110/99, Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695.
[14] Paolo Piantavigna, Tax Abuse in European Union Law: A Theory, EC Tax Review, 2011-3, p. 3.
[15] ECJ, C-138/86, Direct Cosmetics Ltd v Commissioners of Customs and Excise, 12 July 1988, ECLI:EU:C:1988:383.

2.2. The criteria bump

Not only the linguistics were an issue in giving the principle more weight, there were also important outstanding questions regarding the applicable criteria.

This state of affairs radically changed in the last decade. Whilst this marked change has been attributed to a variety of factors, two successive events undoubtedly played major roles.

The first event is the development of an abuse test by the ECJ in the *Emsland-Stärke*[16] case (cf. infra).

The second event is the subsequent emerge of an intense debate as to whether the ECJ would apply this new test within the different fields of taxation (VAT, direct tax and customs).

These events intensified the process, which had already been initiated, ultimately culminating with the decision of the ECJ in *Halifax*.

2.2.1. The starting point of the principle: Van Binsbergen[17]

The prejudicial questions in this case related to the interpretation of Articles 59[18] and 60[19] of the Treaty establishing the European Economic Community concerning freedom to provide services within the Community ("the Treaty").

Facts

Mr. Van Binsbergen had entrusted the defence of his interests before the Centrale Raad van Beroep to a legal representative of Dutch nationality entitled to act for parties before courts and tribunals where representation by an attorney (in Dutch "advocaat") is not obligatory.[20]

This legal representative had, during the course of the proceedings, transferred his residence from the Netherlands to Belgium. As a result the capacity of the legal representative to represent Mr. Van Binsbergen before the Centrale Raad van Beroep was contested on the basis of a provision of Dutch law under which only persons established in the Netherlands may act as legal representatives before that court.[21]

In support of his claim Mr. Van Binsbergen invoked the provisions of the Treaty relating to freedom to provide services within the Community. The Centrale Raad van Beroep decided to refer the case to the ECJ and to ask two prejudicial questions relating to the interpretation of Articles 59 and 60 of the Treaty.

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[16] ECJ, C-110/99 Emsland-Stärke, (2000) ECR I-11569.
[17] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131.
[18] Article 59: Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The Council may, acting unanimously on a proposal from the Commission, extend the provisions of this Chapter to nationals of a third country who provide services and who are established within the Community.
[19] Article 60: Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. "Services" shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.
[20] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 3.
[21] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 4.

Reasoning and judgement of the Court

The question referred by the Centrale Raad van Beroep seeks to determine whether the requirement that legal representatives be permanently established within the territory of the State where the service is to be provided can be reconciled with the prohibition, under Articles 59 and 60, on all restrictions on freedom to provide services within the Community.[22]

The ECJ considered that a requirement that the legal representative providing the service must be habitually resident within the territory of the State where the service is to be provided may, according to the circumstances, have the result of depriving Article 59 of all useful effect. This is contrary to the purposes of Article 59 which is to abolish restrictions on freedom to provide services imposed on persons who are not established in the State where the service is to be provided.[23]

The ECJ continues that Member States may, taking into account the particular nature of the services to be provided, impose specific requirements and that such requirements cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good.[24]

Furthermore the ECJ left certain space for Member States to impose requirements in cases of alleged circumvention: *"[l]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."*[25]

Importance of the case

Apart from introducing the principle of direct effect of the Treaty provisions on the freedom to provide services, it is also the first time the ECJ touched upon the concept of abuse of rights.[26]

The broad way in which the ECJ formulated the concept of abuse was ground-breaking. The term "*entirely or principally directed towards ...for the purpose of avoiding*"[27] seems to be the only requirement to establish the existence of an abuse.

As such, a wide range of situations could be falling in the notion of abuse and the Members States were given considerable power to limit such behaviour.

[22] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 1.
[23] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 11.
[24] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 12.
[25] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 13.
26 R. de la Feria and S. Vogenauer, Prohibition of Abuse of Law: a new general principle of EU law?, Studies of the Oxford Institute of European and Comparative Law, p. xv.
[27] ECJ, C-33/74 Van Binsbergen, 3 December 1974, ECLI:EU:C:1974:131, para. 13.

2.2.1. The true starting point in Customs: Cremer[28]

Facts

In order to facilitate the export to third countries of cereals or processed products based on cereals at the prices prevailing on the world market it was possible for the Member States to grant an export refund in the form of import licenses for the import free from levy to compensate for the difference between such prices and the prices of the exporting Member State.[29] A refund of the same nature was provided for milk, milk products and preparations based on milk powder used in the feeding of animals.[30]

In the period between December 1964 and March 1965, 'Nordkraft' Kraftfutterwerk C.F. Günther & Co. mbH (hereafter referred to as “Günther & Co”), whose registered office is in Hamburg, exported 2 928 935 kg of a product described as 'animal feed treated with molasses or sweetened and other 'Nordkraft' prepared animal feed, a feeding-stuff for swine’ from the Germany to Denmark, at that time a non-Member country.[31]

This product consisted of 73 % tapioca chips, 2 % tapioca flour, 22 % soya oil-cake and 3 % mineral matter; it contained more than 50 % starch.

Günther & Co received export refunds of a quantity of cereal corresponding to the quantity of processed product exported.

Gunther & Co transferred these import licences to the Peter Cremer (hereafter referred to as “Cremer”) undertaking, of which Gunther & Co is a subsidiary and the registered office of which is also in Hamburg.

An investigation carried out by the German customs authorities revealed that a large part of the tapioca chips had been sifted out of the product in Denmark and thereupon sold and delivered to an undertaking in the Netherlands legally associated with Cremer.

The German authorities took the view that the removal of the tapioca chips by sifting did not amount to 'use or consumption or treatment or processing' of the goods in the country of destination within the meaning of the German provisions relating to refunds. These provisions laid down those requirements as a pre-condition for a finding that export to a third country had taken place. Furthermore, the starch content was reduced below 50 % through the sifting so that the remaining product no longer fulfilled the conditions for the grant of a refund.

Consequently it revoked the licences granted to Cremer to import the goods free from levy. Cremer brought an action against this decision before the ECJ.

[28] ECJ, C-125/76 Firma Peter Cremer, 11 October 1977, ECLI:EU:C:1988:383, para. 21 and 22.
[29] Article 20 of Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the markets in cereals (Journal Officiel, p. 933).
[30] Article 14 (2) of Regulation No 13/64 of the Council of 5 February 1964 on the progressive establishment of a common organization of the markets in milk and milk products (Journal Officiel, p. 549).
[31] ECJ, C-125/76 Firma Peter Cremer, 11 October 1977, ECLI:EU:C:1988:383.

Reasoning and judgement of the Court

The ECJ ruled that the scope of the applicable regulations in the case at hand could in no case be extended to cover abusive practices of an exporter in taking advantage of the flat-rate assessment in calculating the refunds.[32]

The ECJ left it for the competent national authorities to judge the facts with a view to preventing undue payment of refunds as a result of manipulation by the producers of the proportion of the ingredients of compound animal feeding-stuffs. The ECJ further considered that it in his view was clear that a compound feeding-stuff which contains only one product and that in insignificant proportions cannot give rise to a claim for a refund.[33]

Importance of the case

This case was one of the first occasions that the ECJ used the wording “abuse” in its case law and was confronted with abuse in customs cases.

The ECJ ruled in particular that Community Regulations could not be extended to cover abuses on the part of 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.

Later on, in the *General Milk Products GmbH*[34] case (“General Milk”) the ECJ ruled in the same way. In this case, concerning the re-exportation of New Zealand cheddar cheese from Germany, the company General Milk Products qualified for monetary compensatory amounts.[35]

After the amendments to the Joint Discipline Arrangement between New Zealand and the Community concerning cheese and the consequent amendments to the Community regulations concerning the calculation and fixing of monetary compensatory amounts on milk and milk products came into force, General Milk did not longer qualify for compensatory amounts for re-exportation.[36]

The ECJ held that the EEC regulations in question had to be interpreted in such a way that positive monetary compensatory amounts may be applied to exports of New Zealand cheddar cheese when no negative compensatory amounts or minimum prices rules were applied to the product at the same time of its importation, unless it could be shown that the import and export transactions were effected for the sole purpose of wrongfully securing an advantage under the regulations.[37]

[32] ECJ, C-125/76 Firma Peter Cremer, 11 October 1977, ECLI:EU:C:1988:383, para. 21.
[33] ECJ, C-125/76 Firma Peter Cremer, 11 October 1977, ECLI:EU:C:1988:383, para. 14.
[34] ECJ, C-8/92 General Milk Products, 3 March 1993, ECLI:EU:C:1993:82.
[35] ECJ, C-8/92 General Milk Products, 3 March 1993, ECLI:EU:C:1993:82, para. 4.
[36] ECJ, C-8/92 General Milk Products, 3 March 1993, ECLI:EU:C:1993:82, para. 5.
[37] ECJ, C-8/92 General Milk Products, 3 March 1993, ECLI:EU:C:1993:82, para. 21.

2.2.2. The true starting point in VAT: Joined cases Direct Cosmetics limited and Laughtons Photographs[38]

Facts

- Direct Cosmetics Limited

Direct Cosmetics Limited ("Direct Cosmetics") is a company specializing in 'direct sales' of cosmetic products which cannot be sold on the ordinary retail market.[39]

The cosmetics consist of surplus stocks, discontinued lines and products which were wrapped or packaged for a particular occasion, such as Christmas, but which could not be sold on the occasion envisaged.

Direct Cosmetics buys those products at low prices and resells them through agents in hospitals, factories and offices under certain conditions.

The turnover of all of the company's agents is below the minimum laid down by United Kingdom legislation in accordance with Article 24[40] of the Sixth VAT Directive[41] above which a person is liable to VAT.[42]

- Laughtons Photographs Limited

Laughtons Photographs Limited ("Laughtons") is a company which specializes in taking photographs of classes and individual children at school.[43]

At the beginning of each year, its representatives visit the schools in order to solicit orders for photographs. During the year bookings are made and one of the company's photographers goes to the school in order to take individual and class photographs. The company sells the photographs to the schools, which then sell them to parents.

The sales method at present employed by Laughtons seems to consist in invoicing the schools for the packages of photographs at an agreed price. In most cases the company is then unaware of the price at which the photographs are sold to parents. No VAT is charged on the turnover generated by the schools.[44]

[38] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383.
[39] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 3.
[40] Article 24 lays down the special scheme of small undertakings and the limits for Member States to exempt small undertakings from VAT.
[41] Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment ("Sixth VAT Directive")
[42] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 3.
[43] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 4.
[44] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 4.

Issues at stake and the prejudicial questions to the Court

The result of the above-mentioned two sales schemes is that the final taxable base for VAT is not the final value of the sale to consumers. Consequently no tax is paid on the difference between the final price and the price previously charged.[45]

In order to deal with such form of tax avoidance, the United Kingdom had implemented a measure derogating the Sixth VAT Directive. The EC was informed about this measure.[46]

Later on, the United Kingdom amended the measure without notifying the EC. It followed from an earlier case brought before the ECJ, that the EC should have been notified on the amendment of the measure.[47]

Consequently, the United Kingdom notified the EC on the amended measure and asked for a derogation of Article 27 (1) of the Sixth VAT Directive, which was granted by the EC.[48]

According to this Article 27 Member States could be authorised to introduce special measures for derogation from the provisions of the Sixth Directive, in order to simplify the procedure for charging VAT or to prevent certain types of tax evasion or avoidance.

As result of this procedure, both Direct Cosmetics and Laughtons were notified by the United Kingdom that it was decided that the taxable amount for VAT has to be the open-market value on a sale by retail.[49]

Laughtons and Direct Cosmetics appealed that decision. They maintained that the decision was invalid, inasmuch as it was outside the limits of the aims referred to in Article 27 (1) of the Sixth VAT Directive and earlier case law of the ECJ.

The case was brought before the VAT Tribunal in London, which decided to refer the case to the ECJ to get more clarity on the interpretation of article 27 (1) of the Sixth VAT Directive.

Accordingly the referring Court wanted to know:

(a) whether Article 27 (1) of the Sixth VAT Directive permits the adoption of a derogating measure, such as that at issue, where the taxpayer carries on business in a certain manner not with any intention of obtaining a tax advantage but for commercial reasons;
(b) whether Article 27 (1) permits the adoption of a measure such as that at issue which is not applicable to all, but only to some, taxable persons who sell to non-taxable resellers;
(c) whether the Council's authorizing decision is invalid on account of a procedural defect;
(d) whether the Council's authorizing decision is invalid on substantive grounds and, in particular, whether the authorized measure is disproportionate to the objective referred to in Article 27 (1), namely the prevention of certain types of tax evasion or avoidance.

[45] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 5.
[46] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 6.
[47] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 7.
[48] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 9.
[49] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 12.

Reasoning and judgement of the Court

The reasoning and the answer of the ECJ regarding the first questions are the ones to take into account to further define the notion of abuse.

In this respect, the ECJ considers that the concept of tax avoidance as expressed in Article 27 (1) of the Sixth VAT Directive is a concept of Community law. Hence the definition of that concept is not left to the discretion of the Member States.[50]

The wording of Article 27, in all the language versions, draws a distinction between the concept of avoidance, which represents a purely objective phenomenon, and that of evasion, which involves an element of intent.[51]

That distinction is confirmed by the historical background to Article 27. Whilst the Second Council Directive on VAT[52] referred exclusively to the concept of 'fraud', the Sixth VAT Directive mentions in addition the concept of 'tax avoidance'. This means that the legislator intended to introduce a new element in relation to the pre-existing concept of tax evasion, more in particular the objective nature of tax avoidance. The intentional element, which constitutes an essential element of evasion, is not required as a condition for the existence of avoidance.[53]

The ECJ continues that such interpretation in line is with the principle governing the system of VAT, being the elimination of all factors which may lead to distortions of competition at national and Community level and which includes the introduction of a tax which is as neutral as possible and covers all the stages of production and distribution.[54]

Importance of the case

The interpretation of the ECJ in this case focused on article 27 of the Sixth VAT Directive. As mentioned, this article allowed Member States to derogate from the ordinary rules on the determination of the taxable basis for the purpose of countering tax evasion and avoidance.

In this judgement, the ECJ considered three important points on the concept of abuse.[55]

First and as mentioned above, the ECJ for the first time makes a distinction between the concept of tax *avoidance* and tax *evasion*.[56] In the ECJ's view, avoidance differs from evasion because it lacks the intentional element.[57] The ECJ, however, did not use the opportunity of this decision to provide a clear and precise definition of tax avoidance.

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[50] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 20.
[51] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 21.
[52] Second council directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes Structure and procedures for application of the common system of value added tax (67/228/EEC)
[53] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 22.
[54] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 23.
[55] P. Pistone, *Abuse of Law in the Context of Indirect Taxation: From (Before) Emsland-Stärke 1 to Halifax (and Beyond)* in R. de la Feria and S. Vogenauer, *Prohibition of Abuse of Law: a new general principle of EU law?*, Studies of the Oxford Institute of European and Comparative Law, p. xv
[56] P. Pistone, *Abuse of Law in the Context of Indirect Taxation: From (Before) Emsland-Stärke 1 to Halifax (and Beyond)* in R. de la Feria and S. Vogenauer, *Prohibition of Abuse of Law: a new general principle of EU law?*, Studies of the Oxford Institute of European and Comparative Law, p. 384.
[57] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 21 and 22.

Secondly, the ECJ touched upon a terminology issue on the concepts of tax avoidance and tax evasion.[58] Both terms are used to refer to the same concept of tax evasion throughout the different language versions of the Sixth VAT Directive. Where the French version and most of the other language versions refer to tax avoidance, in the English version reference is made to tax evasion. The same applies to the Greek and Dutch version. Unfortunately, the ECJ, does not delve deeper into this subject (cf. supra).

As a third point, the ECJ decision referred to the principle of proportionality to measure the reaction of the Member States to tax avoidance[59]. As such, the ECJ anticipated a juridical trend that would gradually become a milestone in the ECJ's case law on abuse.

While the case law on the prohibition of abuse started very broad[60], after a while the ECJ started to limit the application of the principle[61]. The peak of this tendency was the decision of the ECJ in the *Centros*[62] case in 1999.

This case concerned an issue regarding two Danish nationals who had set up a company incorporated in the United Kingdom in order to avoid stricter Danish rules on minimum share capital. Centros had never traded in the United Kingdom since its formation.[63] Centros tried to set up a branch in Denmark but the registration was refused on the basis of alleged circumvention.[64]

While the ECJ first referred to its decision in the *Van Binsbergen* case, it subsequently narrowed the scope of the prohibition of abuse of rights.[65] What was once considered as an abuse, was now referred to as simple use of a market freedom. The ECJ considered: *"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."* [66]

The decision of the ECJ in *Centros* shows a fundamental shift in the ECJ's legal approach to abuse. Under this new approach, the previous broad concept of abuse, under which all circumvention situations were regarded as abusive, was substituted by a narrower concept, under which not all circumvention situations were to be defined an abuse of Community law.[67] A new concept of the prohibition of abuse of rights, a Union law concept, arose. However, there was still a missing link.

There was still a need for criteria to assess whether a certain conduct could be considered abuse or not. With the *Centros* ruling, the ECJ, however, had set out the basis which would lead to the abuse test in the *Emsland-Stärke* decision one year later.

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[58] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 29-32.
[59] ECJ, Joined cases C-138/86 and C-139/86 Direct Cosmetics Ltd and Laughtons Photograps Ltd v Commissioners of Customs and Excise, 12 January 1988, ECLI:EU:C:1988:383, para. 33.
[60] Reference is to be made to the decision of the ECJ in Van Binsbergen.
[61] ECJ, C-441/93, Pafitis and Others, 12 March 1996 , ECLI:EU:C:1996:92; ECJ, C-367/96, Kefalas and Others v Elliniko Dimosio and Organismos Oikonomikis Anasygkrotisis Epicheiriseon, 12 May 1998, ECLI:EU:C:1998:222.
[62] ECJ, C-212/97, Centros, 9 March 1999, ECLI:EU:C:1999:126.
[63] ECJ, C-212/97, Centros, 9 March 1999, ECLI:EU:C:1999:126, para. 3.
[64] ECJ, C-212/97, Centros, 9 March 1999, ECLI:EU:C:1999:126, para. 6-7.
[65] ECJ, C-212/97, Centros, 9 March 1999, ECLI:EU:C:1999:126, para. 24 and 27.
[66] ECJ, C-212/97, Centros, 9 March 1999, ECLI:EU:C:1999:126, para. 27.
[67] 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, p. 407.

2.2.3. The criteria: Emsland-Stärke[68]

Facts

Emsland-Stärke exported potato starch and wheat starch to Switzerland. The recipient of the goods were the undertakings Fuga AG (hereafter referred to as "Fuga") and Lukowa AG (hereafter referred to as "Lukowa"), both established at the same address in Lucerne (Switzerland) and managed and represented by the same group of persons.

Emsland-Stärke applied for and received an export refund for these exports.

Subsequent investigations 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 were released for use there on payment of the relevant import duties.

The German customs authorities reclaimed from Emsland-Stärke the unduly granted export refund. Emsland-Stärke did not agree and the case was eventually brought before the ECJ.

The question for the ECJ was essentially whether in these circumstances the Regulation[69] should be interpreted as precluding Emsland-Stärke's right to export refund.

Reasoning and judgement of the Court

Emsland-Stärke argued at the hearing that to demand repayment of the export refund or withdraw *ex post facto* the advantage obtained would breach the principle of lawfulness since the general principle of abuse of rights does not constitute a clear and unambiguous legal basis for the adoption of such a measure.[70]

The EC argued 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. The EC thereby referred among others to the cases *Cremer* and *General Milk* as mentioned above.[71]

The ECJ agreed with the EC, albeit leaving out the express reference to abuse of rights as a general principle.

The ECJ ruled, with reference to the Cremer case, that it is clear from the case-law of the Court that the scope of Community regulations must in no case be extended to cover abuses on the part of a trader. The ECJ also held that, with reference to the *General Milk* case, the fact that importation and re-exportation operations were not realised *as bona fide* commercial transactions but only in order wrongfully to benefit from the grant of monetary compensatory amounts, may preclude the application of positive monetary compensatory amounts[72].

[68] ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695.
[69] Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products.
[70] ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695, para. 24.
[71] ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695, para. 38.
72 ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695, para. 51.

It continued by setting up a two-step 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.[73]

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.[74]"

The ECJ leaves it to the national courts 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.[75]

Importance of the case

What is new in contrast to the previous case law, is that the ECJ provided for the first time criteria for determining the existence of abuse for the purposes of Community law. It is true that there had already been implicit references to the criteria in previous case law.[76] However, not until *Emsland-Stärke*, the ECJ actively took the subjective intention of an interested party into consideration.

If we compare the *Van Binsbergen* case to the case law of *Centros*, the approach taken in *Emsland-Stärke* seems to be somewhere in the middle. *Esmland-Stärke* is narrowing down the wide scope the principle of prohibition of abuse as set out in *Van Binsbergen* while situations, which were considered exercising fundamental freedoms in *Centros,* can now constitute abuse if the two elements are cumulatively met.

2.2.4. The anti-abuse test

2.2.4.1. The objective element

The objective element has been set out in a quite clear manner: the conditions for the grant of a benefit were created artificially, meaning that a commercial operation was not carried out with an economic purpose, but solely to obtain a benefit from the Community budget.

This reflects what was more or less implicitly stated in the previous case law[77] where the ECJ stated that the person claiming to have the right is barred from invoking it to the extent to which the Community law provision formally conferring that right, is relied upon for the achievement of *"an improper advantage, manifestly contrary to the objective of that provision."*

Advocate General Alber stated in his opinion *Emsland-Stärke*, with reference to the *Töpfer* case[78] that: "*The yardstick for judging the lawfulness of individual import and export*

[73] ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695, para. 52.
[74] ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695, para. 53.
[75] ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695, para. 54.
[76] Opinion of A.G. Lenz in C-23/93, TV10 v Commissariaat voor de Media, 16 June 1994, ECLI:EU:C:1994:362.
[77] ECJ, C-441/93, Pafitis and Others, 12 March 1996, ECLI:EU:C:1996:92., para. 68; ECJ, C-367/96, Kefalas and Others v Elliniko Dimosio and Organismos Oikonomikis Anasygkrotisis Epicheiriseon, 12 May 1998, ECLI:EU:C:1998:222, para. 22; ECJ, C-373/97, Diamantis, 23 maart 2000, ECLI:EU:C:2000:150, para. 33.
[78] ECJ, C-250/80, Anklagemyndigheden v. Hans Ulrich Schumacher, Peter Hans Gerth, Johannes Heinrich Gothmann and Alfred C. Töpfer. 27 October 1981, ECLI:EU:C:1981:246.

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.[79]*"*

2.2.4.2. The subjective element

The subjective element from the test is, against the objective element, controversial. This controversy surrounding the inclusion of the subjective element was linked to the fact that prior to *Emsland-Stärke* some, including advocates general, had expressed reservations about the usefulness of that element.[80]

The subjective element consists in the intention to obtain a financial advantage, incompatible with the objective of Community law, by creating artificially the conditions laid down for obtaining it.

What is problematic is how the "*intention to obtain advantage*" from Union law is to be ascertained. The decision 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.*"[81]

The use of the word "*evidence*" could lead to the conclusion that the intention, a subjective element, is to by proven by objective circumstances. This has been the general viewpoint all the way back from the Opinion of Advocate General Lenz in *TV10*, where the Advocate General proposed the use of objective criteria for determining intention when it comes to legal persons.[82]

Despite the lack of importance within the first years after the ruling in the *Emsland-Stärke* case, it gained significant importance afterwards. An important reason for this seems to lie within VAT cases.

Three cases[83] potentially involving abusive practices were decided in the period after *Emsland-Stärke* but before *Halifax*.

In the *Gemeente Leusden and Holin Groep* case[84] the ECJ referred to *Emsland-Stärke* but did not apply it.

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[79] Opinion of A.G. Alber in ECJ, C-110/99 Emsland-Stärke, 16 May 2000, ECLI:EU:C:2000:252, para. 69.
[80] 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, p. 407.
[81] ECJ, C-110/99 Emsland-Stärke, 14 December 2000, ECLI:EU:C:2000:695, para. 53.
[82] Opinion of A.G. Lenz in C-23/93, TV10 v Commissariaat voor de Media, 16 June 1994, ECLI:EU:C:1994:362, para. 61, 65 and 66.
[83] ECJ, Joined cases C-487/01 and C-7/02, Gemeente Leusden and Holin Groep BV cs v Staatssecretaris van Financiën, 29 April 2004, ECLI:EU:C:2004:263; ECJ, C-452/03, RAL (Channel Islands) Ltd and Others v Commissioners of Customs & Excise, 12 May 2005, ECLI:EU:C:2005:289 and ECJ, C-63/04, Centralan Property Ltd v Commissioners of Customs & Excise, 15 December 2005, ECLI:EU:C:2005:773.
[84] ECJ, Joined cases C-487/01 and C-7/02, Gemeente Leusden and Holin Groep BV cs v Staatssecretaris van Financiën, 29 April 2004, ECLI:EU:C:2004:263: the cases concerned the introduction of antiavoidance 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.

RAL[85] and *Centralan*[86] concerned two cases about potential tax planning schemes. In RAL the ECJ did not mention *Emsland-Stärke* or the abuse test at all. The ECJ came to the same conclusion by interpreting the provisions under dispute. The same applies for *Centralan*. What is to be noted is that with the decision in *Centralan*, the idea of an 'abuse of rights doctrine' was revealed.

In its observations submitted in the *Centralan* proceedings, the EC considered that it must be examined whether there was a case of abuse of rights. The EC argued that, although the Sixth VAT Directive does not contain a provision concerning abuse of rights, it is a principle of law which is recognised in many areas of Community law.[87] For making this statement, the EC relied on the definition of abuse of rights laid down in the *Emsland-Stärke* case. The EC further stated that, under the principle of prohibition of abuse of law, transactions are to be disregarded which have no business justification but are entered into by a group of taxpayers in order to create an artificial situation whose sole purpose is to create the conditions for the recovery of input tax.[88] Unfortunately at that time, neither the Advocate General Kokott in her opinion, nor the ECJ in its decision attached value to the abuse test. Nonetheless, the idea was already there and eventually found acceptance in *Halifax* (cf. infra).[89]

2.2.5. The milestone case: Joined cases Halifax[90], BUPA[91] and University of Huddersfield[92]

Facts

- Halifax

Halifax is a banking company which mainly performs exempt financial services. Halifax wished to construct four buildings for its business. If the partial exemption rules were applied, Halifax would have been able to recover only some 5% of the VAT on the building works.[93] However, Halifax set up a complex network of transactions in order to recover the whole of input VAT on the building works.

[85] ECJ, C-452/03, RAL (Channel Islands) Ltd and Others v Commissioners of Customs & Excise, 12 May 2005, ECLI:EU:C:2005:289: 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.
[86] ECJ, C-63/04, Centralan Property Ltd v Commissioners of Customs & Excise, 15 December 2005, ECLI:EU:C:2005:773: 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.
[87] See Opinion of the AG Kokott in ECJ, C-63/04, Centralan Property Ltd v Commissioners of Customs & Excise, 17 March 2005, ECLI:EU:C:2005:185, para. 22.
[88] See Opinion of the AG Kokott in ECJ, C-63/04, Centralan Property Ltd v Commissioners of Customs & Excise, 17 March 2005, ECLI:EU:C:2005:185, para. 22.
[89] 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, p. 421.
[90] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121.
[91] ECJ, C-419/02, BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:122.
[92] ECJ, C-223/03, University of Huddersfield Higher Education Corporation v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:124.
[93] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 12.

- BUPA

BUPA runs private hospitals. The UK Government had announced its intention to exclude certain drugs and prostheses from zero-rating, so BUPA set up a structure which would provide them with these goods for a period of between 50 and 100 years. They did so by purchasing in advance an enormous quantity of goods, to be physically supplied at a later date. By making an upfront payment on account, the sale would be zero-rated. Furthermore, different reverse sales agreements between VAT groups and within the same VAT group were set up, in order to avoid pre-financing of VAT.[94]

- University of Huddersfield

The University of Huddersfield makes exempt supplies of education services. It wished to refurbish two buildings. The input VAT on the refurbishment costs would be very limited under the 'normal' VAT deduction rules. However, the University set up a scheme to recover the whole of input VAT on the renovation works.[95]

Questions referred to the ECJ in the Halifax case

In the proceedings in the Halifax case, the referring tribunal considered that it was the intention of Halifax to obtain a tax advantage through the implementation of an artificial tax avoidance scheme. The Tribunal referred in this respect to the case law of the ECJ is *Emsland-Stärke* and decided to refer the following questions to the ECJ[96]:

> *"*
> *(1) (a) In the relevant circumstances, do transactions*
> *(i) effected by each participator with the intention solely of obtaining a tax advantage and*
> *(ii) which have no independent business purpose qualify for VAT purposes as supplies made by or to the participators in the course of their economic activities?*
> *(b) In the relevant circumstances, what factors should be considered in determining the identity of the recipients of the supplies made by the arm's-length builders?*
> *(2) Does the doctrine of abuse of rights as developed by the Court operate to disallow the appellants their claims for recovery of or relief for input tax arising from the implementation of the relevant transactions?"*

The questions referred to the ECJ in *BUPA* and *University of Huddersfield* are similar.

Opinion of the Advocate General in all cases

The Advocate General Poiares Maduro opines on the three cases in one single opinion as he was of the opinion that "*despite the differences in the tax planning schemes adopted, these cases pose identical legal problems*"[97]:

[94] ECJ, C-419/02, BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:122, para. 15-18.
[95] ECJ, C-223/03, University of Huddersfield Higher Education Corporation v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:124, para. 13-21.
[96] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 42-43.
[97] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200.

1. Are transactions made solely for tax avoidance purposes to be considered as an economic activity?

In this respect, the Advocate General stipulates that the terms 'economic activity' and 'supply' made by a 'taxable person acting as such' should be interpreted as meaning that each of the transactions at issue must be considered objectively and per se. In that regard, the fact that a supply is made with the sole intention of obtaining a tax advantage is immaterial.[98]

2. Can VAT deduction be refused on the basis of a principle of abuse of law?

The Advocate General is of the opinion that the principle of abuse of law is an element in the interpretation of Community law and that VAT law is not different in this respect. Community law must be interpreted in such a way that abuse of Community law is prohibited.[99]

"Tax law should not become a sort of legal 'wild-west' in which virtually every sort of opportunistic behaviour has to be tolerated so long as it conforms with a strict formalistic interpretation of the relevant tax provisions and the legislature has not expressly taken measures to prevent such behaviour."[100]

However, deciding when abuse takes place is, according to the Advocate General, far from straightforward:

"Definition of the scope of this Community law principle, as applicable to the common VAT system, is ultimately a problem of determining the limits applicable to the interpretation of the provisions of the VAT directives that confer certain rights on taxable persons. In this regard, the objective analysis of the prohibition of abuse has to be balanced against the principles of legal certainty and protection of legitimate expectations that also 'form part of the Community legal system' and in the light of which the provisions of the Sixth Directive must be interpreted. From those principles it follows that taxpayers must be entitled to know in advance what their tax position will be and, for that purpose, to rely on the plain meaning of the words of the VAT legislation."[101]

"Furthermore, the Court has consistently held, in consonance with the position generally accepted by Member States in the tax domain that taxpayers may choose to structure their business so as to limit their tax liability."[102]

His conclusion is that the principle of abuse of law can only be applied if two conditions are met. First, the aims and results pursued by the legal provisions formally giving rise to the right to deduct, must be frustrated if the rights claimed were actually conferred.[103] Second the operation has no other purpose than the creation of a right to deduct VAT.[104]

If the above conditions are met, an interpretation of the Sixth VAT Directive, taking into account the principle of abuse of law, will lead to the conclusion that the right to deduct VAT is not conferred or conferred only partially.

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[98] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 59.
[99] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 69.
[100] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 77, last sentence.
[101] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 84.
[102] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 85, first sentence.
[103] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 87.
[104] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 88.

If one of the above conditions is not met, Member States must comply with article 27 of the Sixth VAT Directive and request a derogation to fight VAT optimisation structures.

3. What is a payment on account (only relevant in the BUPA case)?

The Advocate General states that there is no payment on account in the sense of art. 10(2) of the Sixth VAT Directive[105] if the goods or services are not defined precisely at the time of payment. Consequently, VAT has, in the BUPA case, not become due at the moment of the payment.[106]

Reasoning and judgement of the Court in the Halifax case

The first question, whether transactions of the kind at issue constitute supplies of goods or supplies of services and an economic activity when they are effected for the sole purpose of obtaining a tax advantage without any economic aim, is answered by the ECJ as follows.

The ECJ considers that under settled case law, the terms "supply of goods"[107], "supply of services"[108], "taxable persons"[109] and "economic activity"[110], which define taxable transactions, are objective in nature and apply regardless of the purpose and results of the transaction concerned.[111] Consequently, whether or not a transaction is carried out for the sole purpose of obtaining a tax advantage is irrelevant in determining if it constitutes a supply of goods or services and an economic activity.[112] As a result, the transactions constituted supplies of goods or services and economic activities subject to VAT, provided that they satisfied the objective criteria on which these concepts were based, even if they had the sole aim of obtaining a tax advantage.[113]

The ECJ follows by answering the second question before question 1 (b) (cf. supra).

More in particular the ECJ replied to the question whether a taxable person has no right to deduct input VAT where the transactions on which that right is based constitute an abusive practice.

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[105] Article 10 (2) of the Sixth VAT Directive: The chargeable event shall occur and the tax shall become chargeable then the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5 (4) (b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire. However, where a payment is to be made on account before the goods are delivered or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.
By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either: - no later than the issue of the invoice or of the document serving as invoice, or - no later than receipt of the price, or - where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.
[106] Opinion of the AG in C-255/02, C-419/02 and C-223/03, 7 April 2005, ECLI:EU:C:2005:200, para. 101.
[107] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 50.
[108] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 52.
[109] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 53.
[110] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 54.
[111] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 56.
[112] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 59.
[113] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 60.

Under settled case law, EC law cannot be relied on for abusive and fraudulent ends[114] and this principle also applies to VAT.[115] The ECJ, however, emphasized that this principle did not preclude tax planning *"taxpayers may choose to structure their business so as to limit their tax liability"*[116]; only abusive practices were forbidden.

In order to determine whether an abusive practice has taken place (reply to question 1 (b)), the ECJ set out a two-part test. The ECJ considers that to constitute an abusive practice, the transactions involved have to (i) result in a tax advantage the granting of which would be contrary to the aim of the provisions of the Sixth VAT Directive, and (ii), it must be apparent from objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.[117]

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."*[118]

Importance of the case

The ECJ largely followed the Opinion of the Advocate General. Therefore, the decision in *Halifax* was not that surprising taking into account both the Opinion of the Advocate General and the ECJ's earlier case law.

As mentioned above, the ECJ's rulings on VAT cases delivered during the previous year paved the way for *Halifax*. When looking at the ECJ's previous case law on abuse, *Halifax* represents a mere culmination of years of developing a Community law concept of abuse. What is remarkable are the clear influences of *Emsland-Stärke* and the *Centros* line of case law.[119]

The *Emsland-Stärke* influence is obvious: the two-part test proposed by the ECJ in *Halifax* is virtually identical to the one proposed in *Emsland-Stärke* with some minor changes to the subjective element.

The Centros influence is less obvious but not less important: the notion expressed both in *Halifax*, and the preceding rulings in G*emeente Leusden* and *Holin Groep*, that "planning without abuse" is a legitimate activity, reminds of the idea of "legitimate circumvention" expressed in *Centros.*

[114] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 68-69.
[115] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 70.
[116] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 73.
[117] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 74, 75 and 81.
[118] ECJ, C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21 February 2006, ECLI:EU:C:2006:121, para. 94.
[119] 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, p. 423.

3. Interim conclusion: abuse as a general principle of Community law

Through *Halifax*, the ECJ explicitly extended the approach taken in the early *Van Binsbergen* and *Emsland-Stärke* decisions to the field of VAT, and introduced the abuse of rights theory to EU VAT.

The ECJ gave a definition of abuse in the field of VAT, as circumvention of tax rules through transactions essentially driven by tax reasons.

The artificiality, which was the second (subjective) element in *Emsland-Stärke*, has through *Halifax* become a mere tool to the interpretation of the facts whether essentially a tax advantage is pursued.[120] Thereby, the ECJ went back to the *Direct Cosmetics* case, by relying on the objective factors for detecting abusive practices and assessing the measures of the Member States against the light of proportionality.[121]

The Halifax case has been of importance in the development of the abuse of rights doctrine in general, but also for acceptance of the prohibition of abuse of Community law as a general principle of Union law.[122]

The discussion around the applicability of the new principle of abuse to other fields of taxation (such as direct tax) started immediately after the decision in Halifax had been delivered.

The focus of the discussion was around the legal status of the principle at EU level. As VAT law is a harmonized tax and forms part of the Community own resources, the application in the field of VAT is more evident than in the field of direct taxation.

In the years after Halifax, the ECJ dealt with several cases on the applicability of the principle to direct taxation.[123]

At the same time, the ECJ further developed the principle through various VAT cases.[124] Also, several Member States implemented anti-abuse provisions in their VAT law.[125]

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[120] Peter Slegtenhorst, *Abuse of rights in EU VAT - The Court's tool to introduce a new general principle of EU Law*, Master Thesis, Faculty of law, Lund University, 2015, p. 27.

[121] P. Pistone, A*buse of Law in the Context of Indirect Taxation: From (Before) Emsland-Stärke 1 to Halifax (and Beyond)* in R. de la Feria and S. Vogenauer, Prohibition of Abuse of Law: a new general principle of EU law?, Studies of the Oxford Institute of European and Comparative Law, p. 385.

[122] 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, p. 423 as referred to in Peter Slegtenhorst, Abuse of rights in EU VAT - The Court's tool to introduce a new general principle of EU Law, Master Thesis, Faculty of law, Lund University, 2015, p. 27.

[123] In this respect reference is to be made to ECJ, C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, 12 September 2006, ECLI:EU:C:2006:544; ECJ, C-524/04, Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, 13 March 2007, ECLI:EU:C:2007:161; ECJ, C-298/05, Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt, 6 December 2007, ECLI:EU:C:2007:754.

[124] In this respect, reference is to be made to the following cases: ECJ, C-425/06, Ministero dell'Economia e delle Finanze v Part Service Srl, 21 February 2008, ECLI:EU:C:2008:108; ECJ, C-277/09, the Commissioners for Her Majesty's Revenue & Customs v RBS Deutschland Holdings GmbH, 22 December 2010, ECLI:EU:C:2010:810; ECJ, C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, 20 June 2013, ECLI:EU:C:2013:409; ECJ, C-589/12, Commissioners for Her Majesty's Revenue & Customs v GMAC UK plc, 3 September 2014, ECLI:EU:C:2014:2131, ECJ, C-419/14, WebMindLicenses kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság, 17 December 2015, ECLI:EU:C:2015:832; ECJ, C-251/16, Edward Cussens and Others v T. G. Brosman, 22 November 2017, ECLI:EU:C:2017:881.

[125] Such as France, Italy, Ireland, the Netherlands, Belgium and the UK. See R. de la Feria and S. Vogenauer, *Prohibition of Abuse of Law: a new general principle of EU law?*, Studies of the Oxford Institute of European and

4. The application of the principle by the ECJ in customs cases

The principle of prohibition of abuse is now a well-known principle in both VAT and direct taxation matters (cf. supra).

What is not so clear is the application of the principle in customs cases.

First of all, there is no general anti-abuse provision customs legislation. Neither the Union Customs Code[126], nor the Delegated Act[127] and the Implementing Act[128] include an anti-abuse provision. Also their predecessors[129] did not contain such a provision.

Only article 4, 3 of the Council Regulation of 18 December 1995 on the protection of the European Communities financial interests[130] - which has a general scope[131] - comprises a provision to prevent abuse:

> *"3. Acts 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.*

Secondly and although the development of the anti-abuse doctrine came to a milestone with the *Emsland-Stärke* case on export refunds, after *Halifax* the ECJ did not often appraise the principle of abuse in customs matters.

Thirdly, also the academic payed less attention to the application of the principle in customs matters in comparison to VAT and direct taxes.[132]

Nevertheless, when analysing the case law of the ECJ, it seems that the ECJ also made application of the principle.

Hereafter an overview will be given of the ECJ's case law where application has been made of the principle in cases on import licenses (see 4.1.1.) and customs valuation (see 4.1.2.).

Comparative Law. For example, in Belgium an anti-abuse provision has been inserted in article 1, 10 of the Belgian VAT Code.

[126] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ("Union Customs Code").

[127] Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code ("Delegated Act").

[128] Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code ("Implementing Act").

[129] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ("Community Customs Code") and Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

[130] Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

[131] ECJ, C-158/08, Agenzia Dogane Ufficio delle Dogane di Trieste v Pometon SpA, 4 June 2009, ECLI:EU:C:2009:349.

[132] During my research I came across a lot of articles discussing the principle in VAT law and direct taxation. The same does not apply for customs matters.

4.1. Abuse regarding the use of import licenses

4.1.1. Sices[133]

Facts

The case concerned imports of garlic of Chinese origin into the EU carried out by certain importers including SICES (hereafter referred to as "the importers"). The importers had the status of new importers[134] and were holders of import licences. In that respect, the imports concerned benefited from the exemption from the specific duty of EUR 1,200 per tonne net.[135]

The Italian customs authorities made critical comments on the commercial transactions that accompanied these imports.[136]

The transactions were as follows: the wholesalers (Duoccio srl "Duoccio" or Tico srl "Tico", hereafter both referred to as "the wholesalers") purchased the garlic from a Chinese supplier. The wholesalers then, before the import into the EU, sold the garlic to the "importers, who could import garlic into the EU at a reduced import duty, since they were holder of an import license.[137]

After the import by the importers using the import licenses and thus applying the reduced import duty, the importers sold the goods back to the wholesalers.

At the time of the facts there was a large demand for garlic of EU consumers. However, Duoccio had already exhausted its own import licenses, so that he was no longer capable of importing garlic at the preferential duty rate. Furthermore, the specific duty was fixed at such a level that imports outside the tariff quota were not profitable.[138]

According to the Italian customs authorities, the two successive sales of garlic (by Duoccio to the importers and then by the importers to Duoccio), were designed to circumvent the prohibition of the transfer of rights arising under import licences. The consequence thereof was that Duoccio agreed to purchase the garlic in free circulation even before the imports had taken place. Therefore Duoccio was to be regarded as the actual importer which benefited from the preferential duty rate without being entitled to do so.[139]

The case came before the Commissione tributaria provinciale di Venezia (hereafter referred to as the "Court of First Instance"). This Court of First Instance stated that, although the various

[133] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145.
[134] Article 4(3) of Commission Regulation (EC) No 341/2007 of 29 March 2007 opening and providing for the administration of tariff quotas and introducing a system of import licences and certificates of origin for garlic and certain other agricultural products imported from third countries ("Regulation (EC) No 341/2007"): 'New importers' shall mean importers other than those referred to in paragraph 2, who have imported into the Community at least 50 tonnes of fruit and vegetables as referred to in Article 1(2) of Regulation (EC) No 2200/96 in each of the previous two completed import tariff quota periods, or in each of the previous two calendar years.
[135] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para.14.
[136] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para.15.
[137] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para.16.
[138] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 17.
[139] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 18.

sales operations were valid, the actual importers were the wholesalers and not the importers who hold import licences. The Court continued that there were serious, precise and consistent indications that the legal instruments had a fictitious character which were only used make the import of garlic at a preferential duty rate possible and to circumvent the prohibition of the transfer of rights arising under the import licences. Consequently, the Court of First Instance ruled that the facts of the case constituted an abuse of rights.[140]

The decision was appealed and the appealing Court decided to refer the following question to the ECJ for a preliminary ruling:

> *"On a proper construction of Article 6 of Regulation (EC) No 341/2007[141], is there an unlawful transfer of licences for the importation at a preferential rate of duty of garlic of Chinese origin under the GATT quota, where the holder of those licences, following payment of the duty due, places the garlic in question on the market by means of a transfer to another trader who holds import licences and from whom it had — prior to the importation — acquired the garlic concerned?"*

Reasoning and judgement of the Court

Where the ECJ in customs matters usually remained at a safe distance from the appraisal of abuse (except for a few cases), it does go into detail in this decision.

After having revised the general principles concerning the prohibition of abuse, it goes on to apply the two-step test to check whether or not there has been abuse.[142] It is noteworthy in this context that the ECJ refers to its decisions in the *Emsland-Stärke* and *Halifax* cases to apply the abuse test.

First and as regarding the objective element, the ECJ considers that in the management of tariff quotas it is necessary to safeguard competition between genuine importers so that no single importer is able to control the market.[143] According to the ECJ this objective is not attained in the case at hand as the traditional importer will have the possibility to import garlic at the preferential duty rate and to expand his influence on the market above the share of the tariff quota that was allocated to him.[144]

In the second place, with regard to the subjective element, the ECJ takes over the wording in the *Halifax* case, more in particular that *"it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage. The*

[140] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 19.
[141] Article 6 of Regulation (EC) No 341/2007:1. By way of derogation from Article 23 of Regulation (EC) No 1291/2000, 'A' licences shall be valid only for the subperiod for which they have been issued. Box 24 thereof shall show one of the entries listed in Annex III. 2. The security referred to in Article 15(2) of Regulation (EC) No 1291/2000 shall amount to EUR 50 per tonne. 3. The country of origin shall be entered in box 8 of 'A' licence applications and of licences and the word 'yes' shall be marked with a cross. The import licence shall be valid only for imports originating in the country indicated. 4. By way of derogation from Article 9(1) of Regulation (EC) No 1291/2000, rights arising under 'A' licences shall not be transferable.
[142] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 29-31.
[143] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 35.
[144] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 36.

prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of an advantage".[145]

There are two requirements for it to be possible to regard the transactions at issue as being designed to confer an undue advantage on the purchaser in the EU: first, it is necessary that the importers intended to confer such an advantage on that purchaser and second, that the transactions be devoid of any economic and commercial justification for those importers.[146]

Regarding the second condition, the ECJ further considers that such economic and commercial justifications are present *"even if such transactions are based on the desire of the purchaser to benefit from the preferential rate of duty and even if the importers concerned are aware of that"*[147], unless *"they are artificially created with the essential aim of benefiting from the preferential rate of duty"*[148].

4.1.2. Cervati et Malvi[149]

Facts

This case concerns again the import of garlic, but this time from Argentina, by the importers Cervati et Malvi. The facts are similar to those of *SICES*. However, in this case it was explicitly stated that the resale after import into the EU shall be *'in exchange for an appropriate remuneration"*[150] but, at a lower cost than the specific charge applied to imports outside the quota system.

Cervati et Malvi appealed against a levy of additional duties imposed by Italian customs authorities. The Italian customs authorities accused Cervati et Malvi of having acquired rights on the issue of import licenses with reduced import duties via fictitious companies. In the appeal procedure the Italian customs authorities moreover argue that there would be an infringement on the Italian customs regime with the purpose of avoiding tax.

Cervati et Malvi states that it is wrong to assume that it is for a traditional importer who does not have the required import licenses would be prohibited to use certificates from another Community economic operator who has the correct documents. Cervati et Malvi refer to their right to structure their activities in such a way it limits their tax debt and denies the alleged abuse of rights.[151]

The referring Italian court refers the case to the ECJ and asks whether the transactions described must be considered as prohibited unlawful practices and abuse of rights to circumvent customs duties should be considered.[152]

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[145] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 33.
[146] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 37.
[147] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 38.
[148] ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145, para. 40.
[149] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255.
[150] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 23.
[151] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 23.
[152] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 25.

Reasoning and judgement of the Court

The ECJ refers to its settled case-law[153] and considers the two-step test.[154]

First an objective element is required, more in particular it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved.[155]

Second a subjective element is required to the effect that it must be apparent from a number of objective circumstances that the essential aim of the transactions concerned is to obtain an undue advantage by the artificial creation of the conditions necessary for its achievement. The prohibition of abusive practices is not relevant where the transactions at issue carried out may have some explanation other than the mere attainment of an advantage.[156]

The ECJ gives some further guidance to the referring court but leaves it for the referring court to establish whether the factors constituting abuse are present in the case at hand. The ECJ thereby draws the attention to the fact that the referring court must take into account all the facts and circumstances of the case, including the commercial transactions preceding and following the import at issue.[157]

The ECJ continues that in certain circumstances, a mechanism such as that at issue could have been established with the essential aim of artificially creating the requisite conditions for the application of the preferential duty rate. Amongst the factors that could allow the artificial nature of such a mechanism to be established are the facts that the importer holding the import licences did not accept any commercial risk or that the importer's profit margin is insignificant or that the price of the garlic sold by the importer to the first buyer in the EU, then by the latter to the second buyer in the EU, is lower than the market price.[158]

[153] ECJ, C-244/04, Halifax and Others, 21 February 2006, ECLI:EU:C:2006:121 and ECJ, C-155/13, Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia, 13 March 2014, ECLI:EU:C:2014:145.
[154] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 32.
[155] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 33.
[156] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 34.
[157] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 35.
[158] ECJ, C-131/14, Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno, 14 April 2016, ECLI:EU:C:2016:255, para. 51.

4.2. Abuse in customs valuation cases

4.2.1. Compaq Computer International Corporation[159]

One of judgments where the ECJ confirmed that a certain amount should be added to the transaction value, was the decision of the ECJ in the Compaq Computer International Corporation ("CCIC") case.

Facts

CCIC, a company established under Netherlands law, was a subsidiary of Compaq Computer Company (CCC), a company established in the United States. CCIC sold Compaq data processing equipment in the EU and had, to that end, a distribution centre in the Netherlands.[160]

Under a contract between CCC and Microsoft Corporation, Compaq computers might be equipped with software consisting of the MS-Dos and MS Windows operating systems and sold with those systems, in return for a payment of USD31 to Microsoft for every computer equipped with those operating systems.[161]

CCC bought laptop computers from two Taiwanese computer manufacturers. As part of this sale, it was agreed that the operating systems would already be installed on the hard drives of the computers when they were delivered. To that end, CCC made these operating systems available free of charge to the manufacturers, who then installed them on those computers.[162]

CCC then sold on to CCIC the laptop computers, which were dispatched free on board from Taiwan to the Netherlands. Upon their arrival, CCIC declared the computers for free circulation. When their customs value was being determined, the selling price between the Taiwanese manufacturers and CCC, which did not include the value of the operating systems, was used.[163]

The Landelijk Waardeteam van de Douane (customs authorities' National Valuation Team) conducted an investigation into CCIC to establish the accuracy of the declared customs value of the computers in question. They took the view that the value of the operating systems installed on these computers should be included in the customs value. Following that investigation, the customs authorities marked up the customs value of every computer by the value of the operating systems installed on those computers and sent two demands for payment to CCIC as additional customs duties on the imports of laptop computers declared for free circulation.[164]

This became the main issue to be solved by the ECJ.

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[159] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716.
[160] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 11.
[161] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 12.
[162] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 13.
[163] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 14.
[164] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 15.

Reasoning and judgement of the Court

According to ECJ in respect of the determination of the customs value, the Community legislation on customs valuation seeks to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values.[165]

The customs value must thus reflect the real economic value of an imported good and, therefore, take into account all of the elements of that good that have economic value. Software constitutes intangible property. The cost of acquiring such property, when incorporated in an item of goods, must be regarded as an integral part of the price paid or payable for the goods, and hence of the transaction value[166].

The operating systems at issue in the main proceedings are software that was made available to the Taiwanese manufacturers free of charge by CCC in order for it to be installed on the hard drives of the computers at the time of their manufacture. Furthermore, it is accepted that that software has a unitary economic value of USD 31 which was not included either in the value of the transaction between the Taiwanese manufacturers and CCC or in that of the transaction between CCC and CCIC.[167]

In order to determine the customs value of imports of computers equipped by the seller with software for one or more operating systems made available by the buyer to the seller free of charge, in accordance with Article 32(1)(b) or (c) of the Community Customs Code[168], the value of the software must be added to the transaction value of the computers if the value of the software has not been included in the price actually paid or payable for those computers.[169]

The same is true when national authorities accept as the transaction value, in accordance with Community law, the price of a sale other than that made by the Community purchaser. In such cases, the term 'buyer' for the purposes of Article 32(1)(b) or (c) of the Community Customs Code must be understood to mean the buyer who concluded that other sale[170]. It is noteworthy that the ECJ did not even refer to the exact legal basis of adding the amount in question to the transaction value. It merely referred to sub-paragraph letters (b) or (c). It must be emphasised that the closed catalogue of amounts that can be added to the transaction value is not an autonomous rule.

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[165] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 30.
[166] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 31.
[167] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 32.
[168] Article 32(1)(b) or (c) of the Community Customs Code : 1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:
(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
(i) materials, components, parts and similar items incorporated in the imported goods,
(ii) tools, dies, moulds and similar items used in the production of the imported goods,
(iii) materials consumed in the production of the imported goods,
(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;
(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;
[169] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 37.
[170] ECJ, C-306/04, Compaq Computer International Corporation v Inspecteur der Belastingdienst - Douanedistrict Arnhem, 16 November 2006, ECLI:EU:C:2006:716, para. 38.

4.2.2. Christodoulou[171]

Facts

Afi N. Christodoulou AE (hereafter referred to as "Christodoulou"), a company whose registered office is in Nafplion (Greece), specialises in the preparation of fruit, mainly oranges, for the production of fruit juice. It has a sales department near Athens (Greece) and a factory in the north of Greece.[172]

In 2006 the Greek customs authorities carried out a post-clearance inspection in order to verify Christodoulou's compliance with the customs regulations on imports of orange juice with added sugar from Bulgaria since January 2002.[173]

That inspection was preceded by another inspection in November 2005 of Elliniki Biomikhania Zakharis AE (hereafter referred to as "Elliniki") – a company registered in Greece – in order to verify that company's compliance with the provisions on export refunds. Elliniki exported sugar to Bulgaria. The exports were intended for Agrima SA (hereafter referred to as "Agrima"), whose registered office is in Sofia (Bulgaria). As the export of white sugar was subsidised, the export price of that sugar was lower than the domestic selling price.[174]

The inspection revealed that Christodoulou also exported its concentrated orange juice to Agrima, using permanent export declarations. Agrima received both products, that is to say, the sugar and the orange juice, through a temporary import declaration and placed them under the inward processing customs procedure with a view to their re-export without payment of any customs duties.[175]

After simply mixing the two products and diluting them with water, the orange juice with added sugar ('the final preparation'), whose declared country of origin was Bulgaria, was re-exported to Greece, destined for Christodoulou.[176] There was no written agreement between Christodoulou and Agrima.[177]

The question arose whether subsidies on exports of sugar had any impact on the customs value of the final preparation imported from Bulgaria into the EU.

Reasoning and judgement of the Court

As regards the customs value of imported goods the ECJ considers that the transaction value, that is to say, the price actually paid or payable for the goods when they are sold for export to the customs territory of the EU, needs to be adjusted, where necessary.[178]

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[171] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825.
[172] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 13.
[173] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 14.
[174] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 15.
[175] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 16-17.
[176] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 17.
[177] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 18.
[178] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 38.

In that regard the ECJ refers to its previous case law where the ECJ considered that, as a general rule, the price actually paid or payable for the goods forms the basis for calculating the customs value, that price is a factor that potentially must be adjusted where necessary in order to avoid the setting of an arbitrary or fictitious customs value.[179]

The ECJ continues, with reference to its ruling in the CCIC case, that the transaction value must reflect the real economic value of imported goods and take into account all the elements of those goods that have economic value.[180]

Furthermore and according to the ECJ, Christodoulou, under cover of a permanent export and allegedly substantial processing, intended to hide the fact that the goods were in fact outwardly processed.[181] By dint of that practice, they circumvented the application of Article 146(1) of the Community Customs Code[182], under which goods giving rise to the granting of export refunds cannot be open to the outward processing procedure[183].

The ECJ continued that the scope of EU regulations must not be extended to cover abuse on the part of a trader.[184] The ECJ again refers to the two-step test as set out in the *Emsland-Stärke* case.

The ECJ considers that the existence of the subjective element can be established by, inter alia, evidence of collusion between the EU exporter receiving the refunds and the importer of the goods in the non-member country.[185] The obligation to give back an advantage improperly received by means of an irregular practice does not constitute a penalty, but is simply the consequence of a finding that the conditions required to obtain the advantage derived from the EU rules were created artificially, thereby rendering the advantage received a payment that was not due and thus justifying the obligation to repay it.[186]

The determination of the transaction value in accordance with the provisions of the Community Customs Code necessarily takes into account the export refund which the exporter wrongfully benefited from by artificially creating the conditions required to obtain that advantage.[187]

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[179] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 39.
[180] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 40.
[181] In the English version of the decision, reference is made to inward processing. This is probably a mistake in translation.
[182] Article 146(1) of the Community Customs Code: The outward processing procedure shall not be open to Community goods: - whose export gives rise to repayment or remission of import duties,- which, prior to export, were released for free circulation with total relief from import duties by virtue of end use, for as long as the conditions for granting such relief continue to apply, - whose export gives rise to the granting of export refunds or in respect of which a financial advantage other than such refunds is granted under the common agricultural policy by virtue of the export of the said goods.
[183] ECJ, C-116/12, Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 62.
[184] ECJ, C-116/12 Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 63.
[185] ECJ, C-116/12 Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 64.
[186] ECJ, C-116/12 Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 66.
[187] ECJ, C-116/12 Ioannis Christoudolou, Nikolaos Christoudolou, Afi N Christodoulou AE v. Elliniko Dimosio, ECLI:EU:C:2013:825, para. 68.

5. Conclusion

Through its case law ECJ introduced the principle of prohibition of abuse. After the decision in *Halifax*, there was an intensification of the application if the principle, especially in the field of VAT.

Several Member States of the EU have amended their national legislation bringing it in line with this case law and national courts start to apply the EU concept. In addition new cases have been referred to the ECJ specifically concerning the application of the principle of prohibition of abuse of law.

Next to that and as from the *Halifax* ruling, the principle of prohibition of abuse of law was no longer expressly reserved for VAT cases. As mentioned, immediately thereafter the ECJ dealt with many cases on the application of the principle in direct taxation.

What is more interesting is that the principle is, although not put in the spotlight, also applicable in customs matters.

It took the ECJ several years to again apply the principle. Between the *Esmland-Stärke* case of the year 2000 and the SICES case in 2014, there are no obvious cases where the ECJ applies the principle. In the SICES case the ECJ only refers, apart from the *Emsland-Stärke* case, to its case law developed in the area of VAT. The ECJ seems to maintain this trend in the *Cervati et Malvi* case.

Where in cases on import licenses, the ECJ explicitly refers to the two-step test of *Emsland-Stärke* as further developed in Halifax, the ECJ also takes into account the principle in customs valuation matters. Although the ECJ did not refer to the circumvention or abuse of customs valuation provisions, the ECJ implicitly attempted to counteract abuse or customs valuation planning.

It will be interesting to see how the ECJ further develops its case law in the future on the application of the anti-abuse doctrine in customs matters and whether the principle will become as important as in VAT.

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