THE "ABUSE OF RIGHT" IN EU COMPANY LAW AND EU TAX LAW: A RE-READING OF THE ECJ CASE-LAW AND THE QUEST FOR A UNITARY NOTION

By **Luca Cerioni**
Law Lecturer, Brunel University

Introduction

The existence of a concept of "abuse of rights" in the case-law of the ECJ concerning different areas – provision of services; common agricultural policy; company law, tax legislation - has been attracting, since the 1990s, much attention and debate in the scholarly literature all over Europe[1].

In effect, the circumstance that the ECJ, in a number of rulings in these different areas, has been using not only the words "abuse" or "abusive purpose" but also the words "fraud" and "circumvention", provides scope for debate about these concepts (e.g., as to whether "circumvention" can arise without "abuse")[2], and as to whether the concept of "abuse" emerging in one area of EU law coincides with or is different from the concept of "abuse" emerging in other areas of EU law[3]. In trying to deal with these two fundamental issues, the academic debate has been focusing on several questions (the responses to which affect the solution to these two fundamental issues): whether it is possible to assert the existence of an anti-abuse principle in EU law; whether such a principle would be a general principle or merely a principle of interpretation; the scope of its application; the consequences of its introduction both in the EU and in Member States' legal systems[4] .

The present paper aims at contributing to the debate on these points and thus at contributing to extrapolate a response to the two ultimate issues highlighted above, by

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[1] Among the numerous contributions: L.Brown, Is there a general principle of abuse of rights in European Community Law? In Heukel and Curtin (Eds.), *Institutional Dynamics of European Integration*, Vol. II (Martinus Nijhoff Publishers, 1994), pp. 511-525, at 513-515; A. Kjllgren, 'On the Border of Abuse-The Jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of Community Law' (2000), *European Business Law Review*, 179-194; K.Sorensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?' (2006) 43 *Common Market Law Review* 423; P. Schammo, 'Arbitrage and Abuse of Rights in EC Legal System', (2008) 14 *European Law Journal 3*, 351-376; R.de la Feria, 'PROHIBITION OF ABUSE OF (COMMUNITY) LAW: THE CREATION OF A NEW GENERAL PRINCIPLE OF EC LAW THROUGH TAX', in (2008) 45 *Common Market Law Review* 395

[2] E.g., P. Schammo, 'Arbitrage and Abuse of Rights in EC Legal System', cit., 358-359; R.de la Feria, ''PROHIBITION OF ABUSE OF (COMMUNITY) LAW: THE CREATION OF A NEW GENERAL PRINCIPLE OF EC LAW THROUGH TAX', cit., 458-459.

[3] Although the ECJ, in the rulings analysed in the subsequent parts of this article, made reference to EC law, in the introduction, in the general discussion and in the conclusive reflections reference will be made to "EU law" to reflect the fact that the Lisbon Treaty, which entered into force on 1 December 2009, replaced the name "European Community" with the name "European Union" and changed the name of the EC Treaty into "Treaty on the Functioning of the European Union" (TFEU). In the text, reference will be made to "the Treaty" to indicate the TFEU, and the Treaty Articles' numbers will refer to the Articles as they are numbered in the TFEU with indication, in footnote, of the original number of the same Articles in the EC Treaty (and, where relevant, in the EEC Treaty ante-1992).

[4] P. Piantavigna, 'Conference Report: Prohibition of Abuse of Law: A New General Principle of EU Law?3-4 October 2008, Oxford (UK)', in (2009) *Intertax* 37, 166-175, reporting a debate which took place at a symposium organised in Oxford.

focusing, in particular, on two areas which, in the literature, seems to have provided scope for much controversy: the areas of EU company law and of EU tax law. Through a re-reading of the case-law, it is argued that, ultimately, a conceptual distinction emerges between "abuse" and "circumvention" and that, despite a partially different terminology, it is possible to reconcile the ECJ rulings issued in different areas – and particularly in two areas of company law and tax law - and, at the current stage of EU law, to identify a unitary notion of abuse of rights. It is furthermore argued that the unifying factor lies in the prejudice of the conduct at stake in the concrete cases for the interest of third parties.

For these purposes, par. 1 provides a general overview of the developments of the ECJ case-law concerning the abuse of right, whereas par. 2, 3 and 4 concentrate on ECJ's rulings which have been providing scope for much academic debate as regards their (in)consistency with one another, namely the ECJ's company law rulings concerning the freedom of establishment and on the ECJ's tax law rulings. Par. 5 assesses whether the concept of abuse of rights emerging from these rulings on their whole can be seen as a unitary one, and Par. 6 discusses whether it can be regarded as a general principle. The conclusion follows in Par. 7.

1. The "entry" of the concept of "abuse of rights" in EU law

As it was observed, "the case-law on abuse of rights now cuts across the entire spectrum of EC law"[5]. The developments of the ECJ case-law which eventually resulted in the "entry" of the concept of abuse into EU law started with the 1974 *Van Binsbergen*[6] ruling, concerning the freedom to provide services. In the situation at stake, a Dutch lawyer, after having been entrusted to act as legal representative before Courts in the Netherlands for a local party, had transferred its residence from Netherlands to Belgium during the course of the proceedings, losing its capacity to represent the party in question due to a Dutch requirement that legal representatives be permanently established in the Netherlands. The ECJ thus had to rule on the issue whether this requirement could be reconciled with the prohibition of all restrictions on freedom to provide services within the Community. After recognising in general terms that a requirement, whereby the person providing the service must be habitually resident within the State where the service is to be provided, may - according to the circumstances - deprive Art. 56 of the Treaty[7] of all useful effect[8], the ECJ took into consideration the particular nature of the services. In this respect, it stated that specific requirements imposed on persons providing the services cannot be considered to be incompatible with the Treaty if they aim at applying professional rules of conduct where the person providing the service would escape the application of these rules by establishing himself in another Member State[9]. The rules at stake were justified by the general good (organisations, qualifications, professional ethics, supervision, liability), and were binding on all persons established in the State concerned. Consequently, the ECJ found that a Member State is entitled to take measures to prevent the exercise by a services provider whose activity is entirely or principally directed towards its

5 P. Schammo, 'Arbitrage and Abuse of Rights in EC Legal System', cit., p. 359.
6 Case 33/74, *Van Binsbergen*, ECR 1299
7 Which was numbered Art. 59 of the EEC Treaty at the time of the ECJ's ruling.
8 Ibid, para. 11
9 Ibid, para. 12

territory of the freedom guaranteed by Art. 56 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State[10].

Although the ECJ did not yet expressly use the word "abuse", a first type of conduct was thus at stake: the resort to fundamental freedoms for a purpose – in the concrete case, that of avoiding professional rules of conduct – which is *different from the purpose* pursued by the Treaty articles granting the fundamental freedoms themselves. The specific situation was a kind of "U transaction" – i.e., establishment of its residence in another Member State by a national of a Member State whose activity is directed toward this Member State - which was regarded as aimed at escaping national rules of conduct which would be otherwise applicable. Because the ECJ decision in this case made specific reference to the nature of the service involved and to the rules of conduct concerned, *without statements of general character*, this decision – whilst clarifying that Member States are entitled to take measures to prevent the conduct at stake – raised three interconnected key questions.

First, whether Member States would be entitled to take measures to prevent the circumvention of any type of national rules in whatever area. Second, and in consequence, whether *any* conduct aimed at escaping national rules by using fundamental freedoms could be prevented by Member States. Third, and as an ultimate question, whether the key element in this conduct ought to be identified in the *intention* of escaping national rules or in the *achievement of the concrete result* of doing so with prejudice for third parties.

The *Van Binsbergen* case was followed not only by other rulings in the area of free movement of services, which reiterated its findings[11], but also by a number of rulings in other areas, namely the free movement of goods[12], the free movement of workers[13] and the freedom of establishment[14]. These rulings made it clear that Member States are allowed to take measures to prevent situations of circumvention of national rules similar to that at stake in *Van Binsbergen*[15] or to prevent other situations of use of rights conferred by the Treaty for improperly gaining benefits[16]. In these subsequent rulings the ECJ expressly started using the word "abuse" to indicate these situations[17],

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10 Ibid, paras. 12 – 13.

11 As it occurred in three rulings concerning broadcasting services: Case C- 148/91, *Veronica Omroep Organisatie v. Commissariat voor de Media* [1993] ECR I-487, para. 12-13; Case C-211/91, *Commission v. Belgium,* [1992] ECR I-6773, para. 12; Case C- 23/93, *TV10 v. Commissariat voor de Media* [1994] ECR I-4795, para. 21.

12 Case 229/83, *Leclerc v. Au ble vert* [1985] ECR 1, para. 27

13 E.g. Case 39/86, *Lair v. Universitat Hannover* [1988] ECR 3161, para. 4

14 E.g. Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399, para. 25; Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265, para. 24

15 Case 229/83, *Leclerc v. Au ble vert*, para. 27; Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399, para. 25; Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992], para. 24.

16 Case 39/86, *Lair v. Universitat Hannover* [1988] ECR 3161, para. 43

17 E.g., Case 39/86, *Lair v. Universitat Hannover*, cit. para. 43; Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh*, cit., para. 24: "..the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national law and of prohibiting Member States from taking the measures necessary to prevent such abuse".

thereby implying that Member States are entitled to prevent the circumvention of any area of law *when* the circumvention amounts to abuse. Nonetheless, the key question whether *any* circumvention of national laws via the resort to rights granted by EU law (and in general, whether any improper use of rights granted by EU law) would amount to abuse, did not yet find the response. This response would have requested a test for identifying - in all its constituent elements – the notion of abuse applicable to the instances of avoidance of national law via the recourse to fundamental freedoms and to other situations of improper reliance on rights conferred by the Treaty.

Other rulings which involved not circumvention of national laws, but reliance on rights conferred by EU law provisions, provided the occasion for a further development of the ECJ case-law concerning the abuse of rights. In fact, in part of these cases – which involved preliminary references brought by Greek courts regarding alleged instances of abuse of provisions of Second Company Law Directive[18] – the ECJ, in deciding whether the conduct at stake amounted to abuse, had regard to any inconsistency between the objectives of the Directive's provisions of which the parties involved aimed at benefiting and the conduct of the parties concerned[19]. Interestingly, in these cases the ECJ, whilst accepting the right of national courts to apply domestic anti-abuse rules, even where the rights of which the parties seek to benefit were granted by EU law provisions, made it evident that this right of national courts were subject to specific conditions: the national anti-abuse rules must not detract from the full effect and uniform application of EU law[20], they must not alter the scope of the EU law provisions under consideration[21], and they must not compromise the objective pursued by EU law provisions[22]. Through this insistence on the purpose pursued by the EU provision concerned, the ECJ adopted the teleological reasoning which – eventually – would contribute to its elaboration of overall test for identifying the concept of abuse.

In fact, it was eventually in the 2000 *Emsland-Starke* ruling[23], in the area of common agricultural policy, that the ECJ for the first time laid down a twofold test – a subjective test and an objective test - for identifying the concept of abuse of rights. In the situation concerned, a German company, *Emsland-Starke*, had exported to Switzerland several consignments of potato-based products and had been granted the export refund provided for by Art. 10(1) of the EEC Regulation n. 2730/79[24]. Although the products had been released for home use in Switzerland, enquiries conducted by the German customs investigation services revealed that, immediately

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[18] Case C-441/93, *Panagis Pafitis*, [1996] ECR I-1347, Case C-367/96, *Kefalas and Others v.Greece* [1988] ECR I-2843, and Case C-373/97, *Dionysio Diamantis v.Elliniko Dimosio* [2000] ECR I-01705, concerning the application of the Council Directive 77/91/EEC of 13 December 1976 ("on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second para. of Art. 58 of the Treaty, in respect of the formation of public limited companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent", known as "Second Company Law Directive"), in OJ 1977, L 26/1.

[19] Case C-441/93, *Panagis Pafitis*, cit.,, para. 67 to 70; Case C-367/96, *Kefalas and Others v.Greece* cit., para. 21 to 23; Case C-373/97, *Dionysio Diamantis v.Elliniko Dimosio*, cit., para. 33 and 34.

[20] Case C-441/93, *Panagis Pafitis*, cit.,, para. 68

[21] Case C-367/96, *Kefalas and Others v.Greece* cit., para. 23

[22] Case C-373/97, *Dionysio Diamantis v.Elliniko Dimosio*, cit., para. 34

[23] Case C-110/99, *Emsland-Starke* [2000] ECR I-1569

[24] Commission Regulation (EEC) 2730/79 of 29 November 1979 on the application of the system of export refunds on agricultural products, O.J. 1979, L 317/1.

after the release for home use in Switzerland, the products had been transported back to Germany unaltered and by the same means of transport, which prompted the relevant German authority to revoke the decisions granting the export refund and to demand repayment. The Commission, which had intervened in the proceedings brought by the company against the decisions to revoke the export refund, had submitted that, whilst Regulation 2730/79 does not constitute a legal bases for demanding repayment of export refunds, the abuse of rights aspect had to be examined. In this respect, the Commission cited Council Regulation 2988/95 on the protection of EC financial interests, whereby "acts which are established to have as their purpose to obtaining of an advantage contrary to the objectives of 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 the failure to obtain the advantage or in its withdrawal"[25].

The Commission argued that this Regulation, whilst not applicable at the material time, expresses a general principle of "abuse of rights" already in force in the Community legal order[26]. The ECJ – after referring to previous rulings in the field of common agricultural policy, in which, without thoroughly defining the concept of abuse, it had held that the scope of EC Regulations must in no cases be extended to cover abusive practices[27] - specified the elements that must exist in order for an abuse to be found. The ECJ stated: "A finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.."[28]. In light of these elements, the ECJ clarified, in the case at stake, that the company's obligation to repay the export refund was "not a penalty for which a clear and unambiguous legal basis would be necessary, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the Community rules were created artificially, thereby rendering the refunds granted undue payments and thus justifying the obligation to repay them"[29].

The *Emsland-Starke* ruling marked a decisive step in the development of the ECJ case-law on abuse of rights, from a dual viewpoint. Firstly, it laid down a *complete test* for identifying the concept of abuse with regard to a conduct – namely, the access to rights (in the specific case, financial benefits) granted directly by EU law provisions – which does not involve the exercise of fundamental freedoms within the internal market, and which represents, therefore, a type of conduct additional to the U-transactions in the exercise of fundamental freedoms (at stake in *Van Binsbergern*). In so doing, it went further than previous case-law[30], by highlighting that a key requirement in order for this second type of conduct to amount to abusive practice lies in the *artificial* creation of conditions required to obtain a (financial) benefit granted

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[25] Council Regulation (EC, Euratom) 2988/95 of 18 December 1995, on the protection of the European Communities financial interests, O.J. 1995, L 312/1.

[26] Case C-110/99, *Emsland-Starke*, cit., para. 36 to 38.

[27] Case C-125/76, *Cremer v.BALM* 1977 ECR 1593; Case C-8/92, *General Milk Products v. Hauptzollamt Hamburg-Jonas* [1993] ECR I-779

[28] Case C-110/99, *Emsland-Starke*, cit., para. 52 and 53

[29] Ibid, para. 56

[30] Such as the cases indicated above, in fn 17 and 18.

directly by EU law. Secondly, regarding this type of conduct the *Emsland-Starke* ruling, by clearly showing that the subjective element is necessary but not sufficient, evidenced the importance of the link between the subjective element and the objective result. Specifically it highlighted that this link ultimately creates a dissociation between the *form* of a given behaviour – which form (objectively) fulfils the conditions for obtaining a benefit – and the *substance* of the behaviour itself, which substance (due to the artificiality of the behaviour, and to the underlying intention) does not meet the purpose of the EU provisions granting the benefit. The ruling further emphasized that this dissociation between form and substance would create a prejudice to the financial interests of the Community (as shown by the arguments put forward by the Commission) and of Member States, which prejudice needs to be prevented.

It can well be noted that the ECJ used the adverb "artificially" with reference to this second type of conduct (access to benefits granted directly by EU provisions), whereas, as regards the first type of conduct (i.e., the U-transactions characterised by the resort to a fundamental freedom guaranteed by the Treaty, for the purpose of escaping national rules), it generally used (as in *Van Binsbergern*) the verbs "to avoid", "to escape" or "to evade"[31]. Despite this difference in the language, it could be argued that using the exercise of fundamental freedoms, such as the freedom to provide services or the freedom of establishment, for a purpose (escaping national rules) which is different in substance from the purpose of the Treaty provisions granting the fundamental freedoms themselves, amounts to an "artificial" use of those freedoms. In other words, the "artificiality" can be regarded as a common element of both types of conduct.

However, whilst *Van Binsbergen* showed that the artificial use of these freedoms could be prevented by Member States when the outcome was the circumvention of national rules intended to protect the general interests – and thus, impliedly, indicated that, *in these cases*, "circumvention" could be regarded as synonymous of "abuse" – a fundamental question remains unanswered by the ECJ case-law examined until this point: whether and, if so, in which cases, there can be "circumvention" without "abuse of rights" in the exercise of fundamental freedoms involving U-transactions.

The response – and the possibility of identifying a unitary notion of abuse – can be drawn, in the author's view, from the ECJ rulings in the company law area concerning the freedom of establishment of companies, and from rulings in the tax law area, which latter can also strengthen the relevance of the test laid down in *Emsland Starke*.
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2. "Abuse of rights" in the company law rulings of the ECJ concerning companies' freedom of establishment…

"U-transactions" similar to those at stake in *Van Binsbergern* came to the attention of the ECJ in the company law field too, with regard to the exercise of the freedom of establishment. Four landmark rulings – specifically, the 1987 *Segers* ruling[32], the 1999 *Centros* ruling[33], the 2003 *Inspire Art* ruling[34], the 2006 *Cadbury Schweppes*

[31] E.g., Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken* , cit., para. 25.
[32] Case 79/85, *Segers*, [1986] ECR 2375
[33] Case C-212/97, *Centros* [1999] ECR I-1459
[34] Case C-167/01, *Inspire Art* [2003] ECR I-10195

ruling[35] - give the clear indication that, whilst an "abuse" always presupposes a circumvention of the applicable national provisions, vice-versa a circumvention of the applicable national provisions does not necessarily result in an abuse.

In the situation at stake in the 1987 *Segers* ruling, a Dutch national, Mr. Segers, had set up a private limited company in the UK, of which he was the sole shareholder and director. This company did not carry out any business activity in the UK – where it had its registered office – and all the business activity was carried on by a subsidiary established in the Netherland. The relevant Dutch authority had rejected Mr. *Segers's* application of a sickness insurance scheme which, according to Dutch legislation, was reserved to directors of companies established in the Netherland. Interestingly, against the Dutch authority's arguments according to which Mr. *Segers* intended to circumvent Dutch national rules, the ECJ found that the fact that the company did not carry out any business activity in the Netherland was immaterial on the ground that the company, having its registered office in the UK, met one of the conditions established by Art. 54[36] for enjoying the right of establishment[37]. However, as regards the relevant Dutch authority's arguments, the ECJ - by using both the word "abuse" and the word "fraud", and by concluding that "the need to combat fraud may....justify a difference of treatment in certain circumstances…"[38] but "the refusal to accord a sickness benefit….cannot constitute an appropriate measure in that respect"[39] - indirectly suggested that there could be, in certain circumstances, cases of circumvention amounting to abuse or to fraud and which could be contrasted through appropriate measures.

Whereas the *Segers* ruling did not offer a reply to the question as to what would be the "certain circumstances" and the "appropriate measures", the subsequent *Centros* and *Inspire Arts* rulings showed "U-transactions" which the ECJ regarded as representing circumventions without abuse of rights and offered indications as regards the circumstances when the circumvention would amount to abuse. In *Centros*, Danish nationals had set up again a private company in the UK and this company had opened a branch in Denmark, where all business activity was deemed to be carried out. Although the relevant Danish authority had refused to register the branch on the ground that the Danish founders of the UK company had circumvented provisions of Danish company law requiring a minimum share capital for the purpose of protecting creditors, the ECJ rejected this position. The ECJ found that the refusal to register the branch would prevent the company established in the UK by the Danish nationals from exercising its freedom of establishment guaranteed by the Treaty[40], but – in its reasoning leading to this conclusion – it highlighted two decisive points. First, the ECJ, on the basis of its previous case-law concerning both the exercise of fundamental freedoms and the access to rights granted by EU law, specified that Member States "are entitled to take measures designed to prevent some of their nationals from attempting, under cover of the rights created by the Treaty, *improperly* to circumvent national legislation or to prevent individuals from improperly or

[35] Case C-196/04, *Cadbury Schweppes* [2006] ECR I-7995
[36] Which was numbered Art. 58 (of the EEC Treaty) at the time of the ECJ ruling.
[37] Case 79/85, *Segers*, cit., para 16.
[38] Ibid., para. 17
[39] Ibid.
[40] Case C-212/97, *Centros*, cit. para. 21

fraudulently taking advantage of provisions of Community law"[41]. The wording "*improperly* to circumvent" indirectly suggests that, in addition to cases of *improper* circumvention of national rules – which Member States are entitled to contrast and which, arguably, indicate cases of abuse – there may be cases of "*proper*" (intended as *not abusive)* circumvention of national rules via the fundamental freedoms. As a result, it could also suggest that individual Member States should not contrast these cases without contravening the purpose of the Treaty's provisions granting the fundamental freedoms themselves. In fact, in this respect, the ECJ held that national courts, whilst able to take account of the abuse or fraudulent conduct on the part of the persons concerned to deny them the benefit the EU law provisions on which they seek to relay, must assess such conduct in light of the purpose pursued by the EU law provisions at stake[42]. Second, the ECJ took into consideration the fact that the rules which the parties sough to avoid were rules concerning the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses and had regard to the specific purpose of the Treaty's provisions granting the right of establishment. On these grounds, it held that the fact that a national of a Member State wishing to set up a company chooses to form it in a Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member State cannot, in itself, constitute an abuse of the right of establishment[43]. Moreover, by restating a conclusion of the *Segers* ruling, the ECJ also found that the fact that a company does not conduct any business in the Member State in which it had its registered office but only in the Member State where the branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny the company the benefit of the right of establishment[44]. Lastly, in light of the need to protect creditors which had been invoked by the Danish authorities as justification, the ECJ noted that the Danish measure did not meet the proportionality requirements which are necessary in order for any measure restricting the right of establishment to be legitimate[45]. The ECJ took this position for two reasons. On the one hand, it stressed that the refusal to register a branch was not such as to attain the objective of protecting creditors[46]. It could be noted that, in highlighting this aspect, the ECJ seemed to indicate that, without negative effects for the protection of creditors, there can be no abusive conduct, despite the choice of a less restrictive company law regime for setting up the company that would then carry out all activity through a branch in another Member State. On the other hand, the ECJ pointed out that creditors were able to know that the company was governed by the law of a Member State other than Denmark and were able to refer to certain rules of EU law protecting them[47], such as the Fourth and the Eleventh Company Law Directives[48].

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[41] Ibid, para. 24
[42] Ibid, para. 25.
[43] Ibid, para. 27
[44] Ibid, para. 29
[45] Ibid, para. 34-35
[46] Ibid, para. 35
[47] Ibid, para. 36
[48] Fourth Council Directive 78/660/EEC of 25 July 1978 on annual accounts of certain types of companies, in OJ 1978 L 222, p. 11, and Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State, in OJ 1989 L 395, p. 36

The ECJ concluded by remarking again that the fact that a Member State may not refuse to register a branch of a company established in another Member State does not preclude the first Member States from adopting other measures for combating fraud, either in relation to the company itself or in relation to its members, where it has been established that they are attempting, by establishing a company in another Member States, to evade their obligations towards public or private creditors in the territory of a Member State concerned[49].

If the *Centros* ruling – a case of circumvention (i.e., "U-transaction") - without a finding of abuse - is read together with *Van Binsbergen*[50], it appears that the ECJ has drawn a distinction based on two elements: *a)* the type of national rules that were being circumvented; *b)* the ultimate outcome of the circumvention, i.e. the effect of generating a prejudice for third parties' interests.

Arguably, the ECJ has been ready to state that the circumvention can be prevented by Member States – and seems thus to have impliedly equated circumvention with abuse – where the rules being circumvention were rules assumed to protect the *general public interest* (*Van Binsbergen*) whereas it has not regarded the circumvention as sufficient to prove abuse where the rules being circumvented, via the exercise of the right of establishment, were national rules concerning the formation of a company and assumed to protect the *specific interests* of creditors. By taking *Van Binsbergen* together with *Segers* and *Centros*, it emerges therefore – as regards the ultimate outcome of the circumvention – that in the former case the ECJ impliedly took for granted the prejudice for the general interests, whereas in the two latter cases the ECJ requires that the prejudice for the specific interest of the concerned third party be proved. The *evasion of the obligations* towards public or private creditors – the reason, highlighted by the ECJ, which would allow Member States to adopt measures to combat fraud[51] – would, by definition, *compromise the interests* of creditors. By analysing the ECJ overall reasoning in *Centros*, and in particular by noting that the ECJ referred to "abuse *or* fraudulent conduct"[52], attention can be paid to the fact that the ECJ would seem to have expressly focused on the *attempt to evade* the obligations towards public and private creditors only when referring to fraud[53]. Accordingly, it can be inferred that a subtle distinction can be drawn in the ECJ's reasoning, between "abuse" and "fraud" and that, whereas in cases of "abuse" the prejudice to the interests of creditors is the effect, in cases of "fraud" it is the searched purpose.

It follows that, without a prejudice for third parties' protection (either *supposed to exist* or *to be proved*, according to the kind of rules which are being circumvented), there can be "circumvention" with neither "abuse" nor "fraud", and that an "innocuous" circumvention is the case where preventing the circumvention on its own would imply preventing the resort to the freedom of establishment and thus defeating the very purpose of Arts. 49 and 54 of the Treaty[54].

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[49] Ibid, para. 38
[50] Case 33/74, *Van Binsbergen*, cit., retro part 1.
[51] Case C-212/97, *Centros*, cit. para. 38
[52] Ibid, para. 29
[53] Ibid, para. 38.
[54] Which were numbered as Art. 52 and 58 of the EEC Treaty at the time the case was brought before the ECJ, and which were referred to as such in the ECJ ruling.

Whereas in the subsequent *Inspire Art* ruling the ECJ confirmed and strengthened the findings in *Centros*, in *Cadbury Scwheppes* it took a position which part of the literature found difficult to reconcile with the one in *Centros*.

In *Inspire Art*, the ECJ had to examine again the case of a Dutch national who had set up a company in the UK, which company carried out all its business activity through a branch in the Netherlands. Unlike the Danish authorities in *Centros*, the Dutch authorities in *Inspire Art* did not refuse to register the branch of the UK company, but required it to comply with some substantive measures of Dutch company law, amongst which the minimum capital requirement. The justifications put forward by the Dutch Government were the protection of creditors, the need to combat improper recourse to freedom of establishment, the protection of effective tax inspections and fairness in commercial dealings. The ECJ found again that, as regards the protection of creditors, this purpose could be sufficiently achieved because the company involved held itself out as a company governed by English law, thus giving creditors sufficient notice that it was governed by a legislation other than that of the Netherland and offering them the protection of the Fourth and Eleventh Company Law Directives[55]. As for the improper use of the right of establishment, the ECJ, by recalling its *Centros* findings, regarded the company's incorporation in another Member State offering a less restrictive regulation as inherent in the right of establishment, and thus considered its carrying out of business activity only through a branch in the Member State of "secondary" establishment as insufficient on its own to prove abuse or fraud[56]. In turn, the Dutch justifications based on the fairness of business dealings and efficiency of tax inspections were rejected on the ground that no evidence had been produced to prove that the Dutch provisions met the required criteria of efficacy, proportionality and non discrimination[57]. In conclusion, the ECJ clearly found that abuse must be established on a case-by-case basis and that, where abuse is so established, Member States are free to take measures to prevent it[58].

Overall, the *Inspire Art* ruling thus confirmed that circumvention of national rules via the freedom of establishment does not in itself amount to abuse when the *protection of third parties' interests are not at stake*, and that – only where Member States *prove* that this protection is being compromised – they can take measures to prevent the circumvention/abuse by restricting the freedom of establishment if no other less restrictive measure can be considered.

3….and in a ruling concerning both company law and tax law: the Cadbury Schweppes ruling

The *Cadbury Schweppes* ruling owes its importance, in the context of the development of the concept of abuse of law, on the one hand to the fact that it is at the same time a company law ruling and a tax law ruling, and on the other hand – from the company law viewpoint - to the fact that the ECJ specified the ultimate purpose of the Treaty's provisions on the freedom of establishment. In the situation at stake, a UK company had set up a subsidiary in Ireland for the purpose, *inter alia*, of having the subsidiary's profits taxed at the Irish corporate tax rate, which was substantially

[55] Case C-167/01, *Inspire Art*, cit., para. 135
[56] Ibid, paras 138-139
[57] Ibid, para. 140
[58] Ibid, para. 143

lower than the applicable UK corporate tax rate. Whilst the UK tax authority, according to UK law, had applied its national CFC legislation (by attributing to the UK parent company the profits accrued to the Irish subsidiary), the ECJ – in assessing the incompatibility of UK CFC tax legislation with EU law – stated that Arts. 49 and 54 of the Treaty[59], by granting the right of establishment, have the ultimate purpose of assisting economic and social interpenetration within the internal market through a genuine economic activity in the host State, i.e. in the State of the secondary establishment[60]. This purpose could not be achieved – the ECJ specified - in the case of a "letter-box" or "front" subsidiary, which does not carry out any economic activity in the host State[61]. On these grounds, the ECJ reached the conclusion that the CFC legislation was incompatible with Arts. 49 and 54 of the Treaty and could thus not be applied, unless that application serves only to prevent *wholly artificial arrangements intended to escape the national tax normally payable*[62]. Consistently with its overall reasoning, the ECJ specified that CFC legislation must not be applied where, on the basis of objective factors which the interested company must be allowed to demonstrate, and which must be ascertainable by third parties, it is proven that, *despite tax motives*, the subsidiary is actually established in the host Stage and carries out a *genuine* economic activity[63]. The objective factors which must be demonstrated relate to the existence of the subsidiary in terms of premises, staff and equipment[64].

Whilst the importance of *Cadbury Schweppes* from the company law perspective lies in the fact that the ECJ clearly specified that "letter-box" or "front" subsidiaries are not covered by the Treaty provisions on the right of establishment, its importance from the tax law viewpoint lies in the circumstance that – by making reference to this case of subsidiaries not carrying on genuine economic activities – the ECJ explained the meaning of the expression "wholly artificial arrangements", that it had already used in several previous tax law rulings[65]. By applying the test laid down in *Emsland-Starke*[66], the ECJ stressed in fact that, for a wholly artificial arrangement to exist, "there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by the freedom of establishment …" (i.e., assisting economic and social interpenetration within the EU through a genuine economic activity in the host State) "..has not been achieved"[67].

Cadbury Schweppes thus showed the application of the same test (including the subjective and the objective elements) for identifying the abusive practices from one area of EU law to another, and clarified that, in the field of tax law, wholly artificial arrangements – such as the setting up in other Member States of subsidiaries not carrying on genuine economic activities - are synonymous of abuse. Consequently,

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[59] Which were numbered, respectively, Art. 43 and Art. 48 of the EC Treaty at the time of the ECJ ruling.

[60] Case C-196/04, *Cadbury Schweppes,* cit., para. 53

[61] Ibid, para. 68

[62] Ibid., para. 75

[63] Ibid., para. 65-66

[64] Ibid, para. 67

[65] E.g., Case C-264/96, *ICI* [1998] ECR I-4695, para. 26; Case C-324/00, *Lankhorst-Hohorst* [2002] ECR I-11779, para. 37; Case C-9/02, *De Lasteyrie du Saillant* [2004] ECR I-2409, para. 49; Case C-446/03, *Marks & Spencer* [2005] ECR I-10837, para. 57.

[66] Case C-110/99, *Emsland-Starke,* cit., para. 52 and 53, retro, part 1

[67] Case C-196/04, *Cadbury Schweppes,* cit., para. 64.

from *Cadbury Schweppes* it is also possible to deduce that a "U-transaction" - such as the creation of a subsidiary, by a national of Member State A, in Member State B for tax savings reason, and the fact that the activity of the subsidiary is *mainly* directed towards Member State A - amounts to circumvention which is *not* "wholly artificial", i.e., which is not abuse, if the subsidiary carries on some genuine activity in Member State B.

Nonetheless, the fact that, in *Cadbury Schweppes*, the ECJ considered in principle he case of "letter-box" and "front-subsidiaries" as falling within the "wholly artificial arrangements" that Member States can combat – and thus, impliedly, within the concept of abuse – gives rise to the question whether and how *Cadbury Schweppes* can be reconciled with the *Centros* findings. Taking into consideration the fact that, in *Centros*, the (parent) company in the UK had only the registered office there and was arguably the kind of "letter-box" or "front" company that, according to *Cadbury Schweppes*, a subsidiary could not be, part of the literature has found it difficult to reconcile the two rulings and has thus seen a change in the ECJ-case-law[68]. However, in the author's view, it is possible to reconcile the two rulings by having regard to the consequences of the arrangements at stake in the concrete cases for third parties' interests. This perspective shows, in fact, the similarity of the concept of abuse in the company law field and in the tax law field, despite a different terminology: the choice of a more favourable company law legislation ("forum-shopping"), via an "U-transaction", is not on its own sufficient to prove abuse without a proven prejudice to the protection of specific third parties' interests (such as creditors, in *Centros*) to the same extent as the choice to exercise the freedom of establishment in a Member State with a more favourable tax legislation than the Member State of origin is not sufficient to prove abuse (i.e., to prove a "wholly artificial arrangement"), but can become so if the absence of a genuine economic activity in the host Member State shows that the *only* objective (and outcome) consists of a prejudice to the financial interest of the Member State of origin (*Cadbury Schweppes*). In addition, the two rulings could not be seen as inconsistent with each other if considering that, in *Centros*, the secondary establishment in Denmark used to carry on a genuine economic activity, and would have thus met the requirement of not being a "letter-box" or "front-subsidiary" (branch) which the ECJ set out in *Cadbury Schweppes* to identify the cases when the use of the freedom to set up secondary establishments is protected by the Treaty due to its not being an "abusive practices".

The concept of abuse as wholly artificial arrangement resulting in a prejudice to the financial interest of a Member State was confirmed, and specified in greater detail, in the *Lammers*[69] ruling. Belgian tax authority, by applying a national anti-abuse provision, had reclassified interest paid by a Belgian subsidiary on funds lent by the parent company established in another Member State as taxable dividends as these interest payments exceeded specific limits. The Belgian tax legislation thus introduced a difference in treatment between resident subsidiaries according to whether or not their parent companies has its seat in Belgium, and the ECJ – consistently with its previous case-law – regarded this differential treatment as creating a restriction to the freedom of establishment on the ground that it made less attractive for companies based in other Member States to create a subsidiary in

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[68] R.de la Feria, PROHIBITION OF ABUSE OF (COMMUNITY) LAW: THE CREATION OF A NEW GENERAL PRINCIPLE OF EC LAW THROUGH TAX, cit., p. 428-429

[69] Case C-105/07, *Lammer&Van Cleeffs*, [2008] ECR I-173

Belgium. Although a national measure creating this restriction to the freedom of establishment could be justified – the ECJ explained – when targeting *wholly artificial arrangements* designed to circumvent national legislation of the Member States concerned, "in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, *with a view to escaping the tax normally due on the profits* generated by activities carried out on national territory"[70].

This statement on the one hand confirm that in the ECJ tax case-law *abusive practices* coincide with *wholly artificial arrangements*, on the other hand makes even more explicit than in *Cadbury Schweppes* the outcome of prejudicing the financial interests of Member States which, without a corresponding economic activity, makes an arrangement abusive. Consequently, in the author's view, it is possible to reconcile *Centros* and *Inspire Art* on the one hand with *Cadbury Schweppes* and *Lammers* on the other hand, by noting that the ECJ has simply been expressing the distinction between mere circumvention and abuse with a different approach. On the one hand, in *Centros* and *Inspire Art*[71], it has done so with a "positive" language, by indicating, in essence, *when* a circumvention *is allowed* and by specifying that it is allowed *when* it does not cause a prejudice to third parties' protection. On the other hand, in *Cadbury Schweppes* and *Lammers*, it has done so with a "negative" language by indicating, ultimately, when a circumvention – "wholly artificial arrangement" – is *not allowed* and by clarifying that it is not allowed when it *only* causes *a prejudice* to the financial interests (tax revenues) of the Member State of origin, which is the case in the absence of a genuine economic activity in the host State.

Other ECJ tax law rulings show the concept of abuse which emerges as regards the first typology of conduct too, i.e. as regards the attempt to create artificially the conditions required for obtaining benefits granted directly by EU tax law provisions.

4. Abuse of right in other tax law rulings of the ECJ

The definition of abuse put forward in *Emsland-Starke*[72] was used again by the ECJ in the 2004 *Leusden* ruling[73], concerning a case of interpretation of the Sixth Value Added Tax (VAT) Directive (hereinafter: VAT Directive)[74]. In a situation in which an amendment to the implementing national legislation had withdrawn the right to opt for taxation of lettings of immovable property, which would have allowed him to enjoy a tax advantage due to the deduction of input tax, the concerned taxpayer had argued that the repeal of legislation from which he had derived an advantage in paying less tax constituted a breach of legitimate expectation. The ECJ, in finding that the repeal of this legislation from which a taxpayer had derived this advantage, without there being an abuse, cannot breach a legitimate expectation based on EU

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70 Case C-105/07, *Lammers&Van Cleeff* , cit. para. 28.

71 Retro, part 2.

72 Case C-110/99, *Emsland-Starke,* cit., para. 52 and 53, retro, part 1

73 Case C-487/01 *Leusden* [2004] ECR I-5337

74 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ 1977 L 145 p.1

law, recalled the concept of abuse and, in so doing, it literally repeated the subjective element and the objective element already indicated in *Emsland-Starke*[75]. Moreover, in stating that "as regards tax avoidance… under the law of a Member State, a taxpayer cannot be censured for taxing advantage of a provision or a lacuna in the legislation which, without constituting an abuse, has allowed him to pay less tax…"[76], the ECJ arguably accepted the conceptual difference between abuse and elusion *with regard to cases in which the issue at stake is the access to tax advantages granted directly by the EU or by the national legislator*, without the exercise of fundamental freedoms. *Emsland-Starke* was thus deemed to provide the framework also for all cases in which the conduct under examination is the access to tax advantages granted directly by the legislator.

In fact, in the 2006 *Halifax* ruling, concerning again the VAT Directive[77], the ECJ spelt out for the first time[78] the definition of the concept of abuse in the taxation field. A British banking company, who was able to recover less than 5% of its input VAT, needed to construct call centres in different sites. Following the advice of its tax advisers, the company had entered into an overall set of agreements involving several transactions as between companies belonging to its own group. As a result of these arrangements, it had managed to entirely deduct the VAT paid on invoices received from its suppliers for construction works. The ECJ was essentially asked two questions, closely interconnected with each other: a) whether transactions carried out by each participator with the intention solely of obtaining a tax advantage and which have no independent business purpose qualify for VAT purposes as supplies made by or to the participants in the course of their economic activities; b) whether the doctrine of abuse of rights as developed by the ECJ case-law prevented the company from recovering the input VAT.

The ECJ, in light of the wording of the VAT Directive and of its previous case-law – in which, by analysing the definitions of "taxable person" and "economic activities", it had found that these terms are objective in nature and apply without regard to the purpose or results of the transactions concerned – gave a positive response to the first question. Specifically, it stated that the transactions at issue constituted supplies of goods and an economic activity within the meaning of the VAT Directive, provided they satisfy the objective criteria on which those concepts are based. This applies – the ECJ specified – even if they are carried out with the sole aim of obtaining a tax advantage, without any other economic objective[79].

Nonetheless, the fact that the transactions may constitute supplies under the terms of the VAT Directive even if they are carried out with the sole aim of obtaining a tax advantage does not mean – as the ECJ specified in answering the second question – that EU legislation can cover abusive practices. In particular, the ECJ, after recalling its settled case-law whereby the application of EU legislation cannot be extended to cover abusive practices, i.e. to transactions carried out not in the context of normal

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75 Ibid, para. 78

76 Ibid, para. 79

77 Case C-255/02 *Halifax* [2006] ECR I-1609,

78 As this ruling preceded *Cadbury Schweppes* (retro, part 3) and was referred to by the ECJ in *Cadbury Schweppes*, together with *Emsland-Starke,* when specifying the subjective and objective elements that must exist for a wholly artificial arrangement to be found: Case C-196/04, *Cadbury Schweppes,* cit., para. 64.

79 Case C-255/02 *Halifax*, cit.., para. 60

commercial transactions but only for the purpose of wrongfully obtaining advantages provided for by EU law[80], found that the principle of prohibiting abusive practices also applies to the sphere of VAT[81].

With this premise, the ECJ moved from its previous case-law in the VAT area, according to which a traders' choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations, to agree with the A.G. that taxpayers may choose to structure their business so as to limit their tax liability[82]. However, the ECJ followed this line of reasoning for highlighting the difference between an acceptable limitation of tax liabilities and an abusive practice, and for identifying, on the basis of *Emsland-Starke*, the concept of abuse applicable in the VAT field too. In this respect, the ECJ specified that two conditions must exist for the abuse to be found: *a)* first, the transactions concerned, despite formal application of the conditions laid down by the relevant provisions of the VAT Directive and its national implementing legislation, result in the accrual of a tax advantage the grant of which would be *contrary* to the purpose of those provisions; *b)* second, objective factors must show that the *essential* aim of the transactions concerned is to obtain a tax advantage[83]. Whereas the element sub *a)* impliedly presupposes the subjective element, i.e. the intention of obtaining the tax advantage, the element sub *b)* is the objective factor that was already pointed out, in a different wording, in *Emsland-Starke* ("despite formal observance,…..the purpose has not been achieved)[84].

However, by comparing *Emsland-Starke* with *Halifax*, it can be easily noted that, whereas in *Emsland-Starke* the ECJ did not specify whether the purpose of obtaining the advantage ought to be exclusive or essential and thus, impliedly, appeared to suggest that this ought to be the exclusive purpose, in *Halifax* – by specifying that the obtaining of a tax advantage ought to be the *essential* aim – it admitted that a transaction could still constitute an abuse *if* the aim of obtaining the advantage is not the only one but is the most important one. The doubts as to whether the obtaining of the tax advantage ought to be the sole purpose or the essential purpose, and as to whether it could be possible to talk of a "general EU principle of prohibition of abuse" in the direct tax area too, as such binding on Member States, could well be raised after the 2007 *Kofoed* ruling[85], concerning the application of Directive 90/434 ("Merger Directive") which provides for tax exemption for restructuring operations within the EU[86]. In a situation in which income tax was charged on an exchange of shares with particular features and in which national legislature had not enacted specific measures to transpose Art. 11(a) of the Merger Directive, which contains an anti-abuse clause[87], the ECJ had to decide whether such an exchange of shares

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80 Ibid, para. 69

81 Ibid, para. 70

82 Ibid, para. 73

83 Ibid, para. 74 and 75

84 Case C-110/99, *Emsland-Starke*, cit., para. 52 and 53

85 Case C- 321/05, *Kofoed* [2007] ECR I-5795

86 Council Directive 90/434/EEC of 23 July 1990 "on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States", in OJ L 225, p.1

87 Merger Directive, Art. 11(a), according to which a Member State may refuse to apply or withdraw tax exemptions provided by all or part of the Merger Directive where it appears that the restructuring operations "has as its principal objective or as one of its principal objectives tax evasion or tax avoidance", and according to which the fact that one of the restructuring operations "is not

constitutes exchange of shares within the meaning of the Merger Directive, and whether the tax authorities could *react to possible abuse of rights*, by taxing the transaction, *despite the lack of implementation* of the Directive's anti-abuse clause.

After having analysed the operation and found that the exchange of shares in question was covered by the Merger Directive and thus could not, in principle, be taxed, the ECJ – by making reference to its previous case-law regarding both the exercise of fundamental freedoms (such as *Centros* and *Cadbury Schweppes*) and the access to rights conferred by EU law provisions (such as *Halifax*) - stated: "Art. 11(a) of Directive 90/434 reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but *solely* for the purpose of wrongfully obtaining advantages provided for by Community law"[88]. In one of its previous rulings on the Merger Directive, the *Leur-Bloem* ruling[89], the ECJ had already emphasized that Member States may set a presumption of tax evasion or avoidance, and may apply this anti-abuse clause of the Merger Directive (by denying the application of the tax relief provided for by the Directive), *when* the restructuring operations are not carried out for valid commercial reasons[90]. Arguably, the fact that the ECJ in *Kofoed* has stated that a provision, such as the anti-abuse clause of the Merger Directive, which expressly aims at contrasting "*tax evasion*" or "*tax avoidance*", reflects the *general* principles of prohibition of *abuse* of rights, seems to make a conceptual distinction between abuse, evasion and avoidance irrelevant from the practical viewpoint. In fact, it suggests that any form of wrongful (i.e. undue) access to tax benefits – whether the purpose is to obtain them via illegal devices[91] or via operations which conform to the letter but not to the goals of the provisions[92] - can be prevented by Member States.

Nonetheless, the wording used by the ECJ in *Kofoed*, "solely for the purpose of wrongfully obtaining advantages", could certainly raise the question whether it was to be read together with the fact that the sole purpose of obtaining tax advantages had been highlighted by the Member State concerned or whether it expressed the general principle, and, in this second case, it could raise the doubt whether/how it could be read together with the "essential purpose" of obtaining tax advantages as stressed in *Halifax*. Moreover, in *Kofoed* the ECJ indicated, as regards the second issue (whether tax authorities could react to possible abuse of rights in the absence of implementation of the anti-abuse clause of the Directive), that it is for national courts to ascertain whether there is in national law a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted

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carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives".

88 Case C- 321/05, *Kofoed*, cit., para 38, where the ECJ made reference to its previous rulings in *Centros*, *Halifax* and *Cadbury Schweppes.*

89 Case C-28/95, *Leur-Bloem* [1997] ECR I-04161

90 Ibid, para. 40.

91 In which case there would be "tax evasion" from the conceptual viewpoint.

92 In which case there would be either "tax avoidance" or "abuse" where, according to the author, the difference between the two situations, in the fields of both direct taxation and indirect taxation, lies in the artificiality of the transactions, as indicated below in the text.

in accordance with the anti-abuse clause of the Merger Directive and therefore justify its application[93]. In so doing, the ECJ indirectly found that the EU law principle of abuse of rights cannot be directly applied in the absence of a domestic anti-abuse provision, thus raising the further question as to whether a distinction needs to be drawn, regarding the relevance of this principle, between indirect taxation (*Halifax*) and direct taxation (*Kofoed*) .

In a subsequent ruling, *Part Service*[94], the ECJ had to the clarify the relation between the essentiality of the purpose of obtaining the tax advantage as condition set out in *Halifax* and the exclusivity of this purpose, as highlighted in *Kofoed* and other rulings.

In the case at issue, related parties, which were involved together in leasing arrangement transactions, had decided to conclude separated contracts with the clients, thus dividing the supply in a number of parts, rather than concluding an ordinary leasing contract. This division of the contracts had the effect of reducing the VAT burden to a lesser amount than that resulting from an ordinary leasing contract, as some of the resulting transactions felt under the scope of the exemption from VAT provided for in the Italian legislation implementing the VAT Directive. The Italian Supreme Court, before which the national tax authority had submitted its argument that the leasing arrangement had been artificially dividend to reduce the VAT burden, had thus identified the key issue in the question as to whether the division of transactions regarded in economic practice and in national case-law as essential parts of a leasing contract can constitute an abuse. Consequently, it had raised before the ECJ two interconnected questions: *a)* whether in the VAT Directive the concept of abuse of rights defined in *Halifax* as transactions the essential aim of which is to obtain a tax advantage correspond to the definition of transactions carried out for no commercial reasons other than a tax advantage or is broader or more restrictive than that definition, and *b)* whether, for the purposes of VAT, the transactions at issue could be considered to be an abusive practice.

The ECJ, after noting that, in connection with the exemptions from VAT, the VAT Directive requires Member States to prevent "any possible evasion, avoidance or abuse", explained that, in its *Halifax* ruling, it had only indicated the *essentiality* of the purpose of obtaining a tax advantage as the *minimum thresholds* for classifying a practice as abusive, which minimum threshold is thus passed in cases of transactions having the *sole purpose* of obtaining the advantage[95]. It therefore replied to the first question by stating (again) that the VAT Directive must be interpreted as meaning that there can be an abusive practice where the accrual of the tax advantage constitutes the *principal aim* of the transaction at stake, and it replied to the second question by leaving the determination of the existence of an abusive practice to national courts in light of criteria that the ECJ provided in *Part Service* itself[96].

In fact the ECJ, after repeating its general statement (already formulated in *Halifax*) whereby taxpayers may choose to structure their business so as to limit their tax liability, found that, where a transaction involves a number of services, the key question is whether it should be considered as a single transaction or as several

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[93] Case C- 321/05, *Kofoed*, cit, para. 46.

[94] Case C-425/06,*Part Service* [2008] ECR I-897.

[95] Ibid, para. 44

[96] Ibid, para. 45 and 63

individual and independent supplies of services[97]. In this respect, it specified that in certain circumstances several formally distinct services must be considered to be a single transaction where they are not independent from each other, i.e. when they form, objectively, a single indivisible economic supply which would be artificial to split[98]. The ECJ clarified that, once established that this is the case, the national courts – in order to identify an abusive practice - must verify, first, whether the result sought is a tax advantage which would be contrary to one or more objectives of the VAT Directive and, second, whether that constitutes the principal aim of the approach adopted by the parties[99].

Part Service thus confirmed the borderline between *elusion* and abuse in the VAT field[100]: whereas the minimisation of tax liability via the use of alternative possibilities or the exploitation of gaps left by the legislator can be regarded as an acceptable elusion of one of the provisions at stake, the artificiality of the transactions and the contrariety of the tax advantage sough as main purpose to one of the expressly stated objectives of the provisions constitute the elements of abuse. Arguably, the concept of elusion that can be referred to the legitimate minimisation of the tax burden is thus different from the concept of "avoidance" that under the VAT Directive Member States must prevent, together with the "abuse", when granting exemptions.

The case-law does not appear to identify this concept of "avoidance", but, having regard to the constituent elements of the abuse concept, in the author's view it may be inferred that a subtle distinction between "avoidance" and "abuse" (both forbidden) can be drawn based on the existence or not of an artificial transactions, which artificiality must exist in the abuse and is not necessary in the avoidance. The contrariety of the tax advantage to the objective of the VAT Directive provisions on exemptions or on particular operations must arguably, by definition, exist in both cases, because this element can, on its own, negatively affect the EU (and Member States) financial resources. On the other hand, if accepting that the contrariety of the tax advantage to the objectives of the Directive characterises the avoidance which the Directive requires Member States to prevent, the distinction also emerges between this concept of "avoidance" and the concept of "elusion/circumvention" which can simply be referred to the exploitation by the taxpayers of lacunae left by the legislator and to the minimisation of tax liability via the resort to different possibilities allowed by the legislator.

Although this distinction might be called into question on the ground that a prejudice to the financial interest of Member States as a main element exists both in the "avoidance" and in the "elusion/circumvention", it could well be argued that, in this second case, unlike in the "avoidance" situation, leaving the taxpayers the possibility of reducing its own tax burden is ultimately the result of legislator's own choices. This can certainly explain why the "elusion/circumvention" situation cannot be properly regarded as a "prejudice" to revenue interests and thus as illegal and subject to prohibition.

5. Different concepts or unitary concept?

[97] Ibid, para. 48
[98] Ibid, para. 50-52
[99] Ibid, para. 58
[100] Borderline which can already be deduced from *Leusden* and *Halifax* (supra, in the text).

If the concept of abuse or abusive practice used by the ECJ in the cases concerning the recourse to fundamental freedoms, namely to the freedom of establishment, is read together with the cases of access to tax benefits granted by EU law provisions, it may appear questionable whether or not the overriding concern underlying the ECJ's reasoning coincide or is different in the two types of situations.

It might in fact be submitted that, on the one hand, the concept of abuse which was spelt out in *Emsland Starke*, *Halifax* and *Part Services* finds its roots in the protection of the financial interests of the EU, to the same extent as the so-called anti-abuse clause of the Merger Directive[101] and of other tax directives[102] find their roots in the protection of the financial interests of Member States, whereas on the other hand the concept spelt out in *Cadbury Schweppes* and in other cases concerning the exercise of fundamental freedoms would appear to be implied in the notion itself, e.g., of freedom of establishment. Following this line of reasoning, the purpose of the applicable rules would be the decisive factor for reconciling these rulings[103]. As the purpose of the freedom of establishment is to make it possible a genuine economic interpenetration within the internal market, a wholly artificial arrangement which does not lead to this integration cannot benefit from the freedom of establishment. In other words, it might be argued that in the first range of situations (access to tax advantages, which affect the EU's financial resources or the Member States' financial resources) an *autonomous principle of abuse of rights* exists in EU law, whereas in the second range of situations there is no such principle but there is simply a consequence – the lack of protection under EU law for wholly artificial arrangements - deriving from the purpose itself of fundamental freedoms. From this viewpoint, it might well be submitted that, when the exercise of fundamental freedoms is at stake, there is simply an application of the "rule of reason test" which has been elaborated by the ECJ case-law in the landmark *Cassis de Dijon* ruling[104] in the area of free movement of goods: specifically, this tests consists of recognising that there are overriding reasons of public interest which can justify restricting the use of fundamental freedoms, and a "rule of reason" test would be used, for this purpose, to protect the financial interest of Member States in cases of wholly artificial arrangements, by regarding these arrangements as abusive[105]. To put it differently, in this second range of cases the abuse would be not a principle, but an inevitable way of interpreting the use of the fundamental freedoms for reasons other than achieving their own purpose (which would not affect the EU financial resources). In a still different terminology which has

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101 Council Directive 90/434/EEC, cit., retro part 4

102 Namely: Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States ("Parent-Subsidiary Directive"), in OJ L 225 , p. 6, Art. 1(2), under which the Directive "does not preclude the application of domestic or agreement- based provisions required for the prevention of fraud and abuse", and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, in OJ L 157, p. 49, Art. 5 ("fraud and abuse", which, in its first paragraph, repeats the anti-abuse clause of the Parent-Subsidiary Directive).

103 B. Kiebebeld, Anti-Abuse in the Field of Taxation: Is There One Overall Concept? Editorial, (2009) *EC tax review* 4, at 144-145

104 Case 120/78, *Cassis de Dijon* [1979] ECR 649.

105 G.Bizioli, 'Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale', 2008, Cedam, p. 181-182

been used by in scholarly debate, whereas in the case of access to financial or tax benefits granted by EU law there would be a "general principle of abuse", in the case of resort to fundamental freedoms the prohibition of abuse would only be a "principle of interpretation"[106].

However well grounded these arguments may be from the viewpoint of the *overriding concern* underlying the lack of protection under EU law for the two categories of conducts at stake, two realisations seem to be inevitable.

First, the ECJ has expressly used the wording "abusive practices" for both typologies of conducts alike, and an adverse effect for the financial interest of a Member State inevitably arises *both* in case of undue access to tax advantages granted by EU law such as by the tax directives and *in* cases of wholly artificial arrangements intended to circumvent (thus to escape) the otherwise applicable national tax law of that Member State through the resort to the freedom of establishment. From this perspective, the fact that the ECJ, in its case-law concerning the access to tax benefits granted directly by EU law provisions, has made reference to previous rulings concerning the freedom of establishment too[107], and vice-versa[108], certainly appears to be unsurprising.

Second, if the two typologies of conduct are considered not from the perspective of the underlying concern but from the perspective of the *behaviour of economic agents*, it can easily be realised that the elements of the behaviour which is regarded as abusive practice tend to coincide[109]. In fact these elements are in any case, irrespective of whether the agent aims at obtaining a tax advantage or at benefiting from a fundamental freedom: *a)* the artificiality of the operation, which formally satisfies the required conditions for accessing the benefit but substantially does not; *b)* the purpose of obtaining of the benefit, whether tax advantage or access to fundamental freedoms; *c)* as a *unique* result deriving from obtaining the benefit, the *prejudice* to the interest of either the third parties or the tax revenues; and in consequence *d)* the contrariety of this outcome to the purpose of the provisions granting the advantage or to the fundamental freedoms provisions. The lack of one of these elements would make it impossible to classify the practice as abusive practice. E.g, the element *c)* was lacking in *Centros* and in *Cadbury Scwheppes,* for in *Centros*, the ECJ was not ready to uphold the Danish legislation restricting the freedom of establishment in the absence of a proven prejudice to the interest of the third parties involved (creditors) to the same extent as in *Cadbury Schweppes* it was not ready to uphold the UK CFC legislation without a demonstration that the only outcome of the establishment of the subsidiary in Ireland had been the prejudice to the UK revenues interests. On the contrary, element *c)* was supposed to be present in *Halifax* as it could

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[106] The terms of this debate are summarised in Piantavigna, 'Conference Report: Prohibition of Abuse of Law: A New General Principle of EU Law?3-4 October 2008, Oxford (UK)', cit.

[107] E.g., in Case C- 321/05, *Kofoed*, cit., para 38 (retro, part 4), the ECJ made reference not only to *Halifax* (concerning, like *Kofoed*, a tax benefit granted by EU law), but also to *Centros* and *Cadbury Schweppes* (concerning the resort to the freedom of establishment).

[108] E.g., in *Cadbury Schweppes* the ECJ made reference to *Halifax*, retro, part 3, fn 73.

[109] This observation seems, in essence, to be shared by F.Vanistendael, '*Halifax* and *Cadbury Schweppes*: one single European theory of abuse in tax law?' 2006 *EC tax review*, 192-195, where the Author, after comparing in depth the *Halifax* and *Cadbury Schweppes* decisions, concludes that both decisions have ultimately paid attention to the economic reality of the transaction (which reality cannot but depend on the behaviour of economic agents).

be noted from the ECJ's guidelines[110], although the ECJ left to national courts the task to ascertain the abusive practice.

On a first reading, whilst these constituent elements characterise an abusive practice as regards both the access to tax (or other financial) advantages granted directly by EU law and the use of the fundamental freedoms, a difference between these two situations may be identified. Specifically, this difference may be seen in the fact that the ECJ, in *Halifax* and *Part Services*, has clarified that, in case of access to tax advantages granted by EU law provisions (the VAT Directive in those cases), the minimum thresholds for regarding a practice as abusive lies in the *essentiality* of the purpose of obtaining the tax advantage, whereas the rulings concerning the access to fundamental freedoms, in identifying wholly artificial arrangements as abusive practices, it has been referring to "*wholly* artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on profits generated by activities carried out on national territory"[111]. It might be argued that, in so doing, the ECJ has left it unclear whether, in order for a *wholly* artificial arrangement to exist, the purpose of escaping the normally applicable tax needs to be *exclusive* or can only be *essential*.

Nonetheless, in the authors' view, it is possible to infer that, even in these cases, there are indications that the *essentiality* of the purpose of escaping the normally applicable tax is sufficient for a "wholly" artificial arrangement to exist. This can be inferred from the fact that, in *Cadbury Schweppes*, the ECJ ruled that the CFC legislation was inapplicable, in case of genuine economic activity in the host State, despite the *existence of tax motives* for the secondary establishment there, and from the recognition, in *Lammers*, of the possibility for Member States to verify the objective element "..in order to determine whether the transaction….represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State.."[112]. Taking the two statements together, it can be easily argued that an arrangement is not abusive as long as tax motives, however existing, do not constitute the essential reason (as the essential reasons lies in the carrying out of a genuine economic activity). By contrast, when tax-savings motives become the essential reason the arrangements no longer correspond to primarily economic integration related reasons and becomes "wholly artificial".

Consequently, irrespective of whether the notion of abuse is to be regarded as a concept in the case of access to benefits granted directly by EU law provisions (including the right to deduction of input tax granted by the VAT Directive in the field of indirect taxation) *or* as an implication of the rules themselves in the case of exercise of fundamental freedoms (involving the assessment of the legitimacy of national direct taxation rules when hindering this exercise), an overall argument can be submitted. Specifically, it is possible to argue that the notion *is a unitary one from*

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[110] Case C-255/02 *Halifax*, cit.., para. 81: "..it must be borne in mind that it is the responsibility of national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for the reduction of the tax burden..".

[111] Case C-196/04, *Cadbury Schweppes*, cit., para. 55; Case C-105/07, *Lammers &Van Cleeffs* cit.,. para. 28.

[112] Case C-105/07, *Lammers & Van Cleeffs*, cit., para. 30.

the viewpoint of the behaviour of the economic agents (behaviour which contradicts the purpose of the provision from which the operator seek to benefit) *which attracts consequences which are unfavourable to the agents themselves* (the impossibility of accessing the financial/tax benefits granted by EU law provisions, or of resorting to the fundamental freedoms). As a result, to search the difference between the two situations, and between one area and another, it is necessary to pay attention to the way of ascertaining whether a conduct is abusive, i.e. on how to establish the existence of an abusive conduct.

In this respect, taking into consideration the statements of the ECJ concerning the proof that there is or that there is not an abusive conduct on the one hand in *Halifax* and on the other hand in *Cadbury Schweppes*, it can be noted that, whereas in the former case the ECJ limited itself to pointing out that national courts must assess whether there is abuse[113], in the latter case the ECJ stressed that the *company concerned must be given the opportunity to produce evidence* that the activity in the host State is a genuine one, and thus that there is no wholly artificial arrangements intended to circumvent the applicable national tax legislation[114].

In other words, it would appear that, regarding the taxation field, a difference might be found between the access to benefits granted by EU tax provisions and the exercise of fundamental freedoms. In the former situation, the burden of proving the abuse lies on national tax authorities, whereas in case of exercise of fundamental freedoms, the ECJ wording in *Cadbury Schweppes* suggests that it is for companies to prove that their case deserves to escape the application of anti-abuse provisions, at least *when those provisions are of a nature (such as CFC legislation) that they would automatically be applied* if the company does not demonstrate that the situation at issue does not fall within the notion of abuse. On the contrary, the *Centros* and *Inspire Arts* rulings suggest that, regarding the company law area, in case of exercise of the fundamental freedoms the burden of proof of abusive practice lies on Member States which must demonstrate the existence of abuse on a case-by-case basis[115].

6. A unitary general principle, or a principle of interpretation?

The above analysis, which has ultimately argued the existence of a unitary notion of abuse of rights, has been carried out from *the perspective of the two possible kinds of situations involved*, namely the access to (financial or tax) benefits granted directly by EU law provisions on the one hand, and the use of fundamental freedoms on the other. These possible situations, corresponding to the two types of conducts that have been considered, apply "horizontally", i.e. to several areas and specifically:

- the access to benefits applies both in the field of indirect taxation (*Halifax*, *Part Services)* and in the field of direct taxation (*Leur Bloem*, *Kofoed*), and it also applies in the common agricultural products field (*Emsland-Starke*);
- the recourse to fundamental freedoms applies in the field of direct taxation (*Cadbury Schweppes*, *Lammers*), of company law (*Centros*, *Inspire Art*) and of other free movement provisions, such as the provision of services[116].

[113] Case C-255/02 *Halifax*, cit.., para. 81
[114] Case C-196/04, *Cadbury Schweppes*, cit., para. 70
[115] Retro, part 2.
[116] Retro, part 1.

The question thus remains open as to whether a unitary notion, to be described either in terms of general principle, or of principle of interpretation, or with a *sui generis definition*, can be also deduced from the *perspective of individual areas*, i.e. through a "vertical" analysis by distinguishing an area from another. It appears to be generally accepted that a "general principle" of EU law can be elaborated by the ECJ when it applies in most, even if not in all, Member States[117] and that the distinguishing features of general principles of EU law lies in the fact that, in addition to having a role as interpretative aids and "fillers of gap" in the legislation, they can also act as overriding rules of law[118], as reflecting underlying overriding concerns. Accordingly, a "general EU principle of prohibition of abuse of right" would not need, unlike a mere principle of interpretation, national anti-abuse provisions or principles.

In the area of indirect taxation, *Halifax* and *Part Services* undoubtedly show that, in the cases when the criteria for identifying abuse indicated by the ECJ are met – which cases must be identified by the national courts – access to tax benefits provided for by the VAT Directive must be denied, *without the need for individual Member States to set specific anti-abuse clauses*. In this area, the prohibition of abuse of rights can thus be already regarded as a (directly applicable) general principle alongside other principles such as equality and legal certainty. In turn, the distinguishing feature of the VAT area lies in the fact that the *financial interests of the EU are directly affected* and that the provisions which are aimed at taking into account these financial interests are EU law provisions, *exactly as it also occurs* in the common agricultural policy field (*Emsland-Starke*).

In the area of direct taxation, on a first reading the ECJ wording in *Kofoed* – according to which it is for national courts to verify if there is in individual Member States a principle or a provision prohibiting the abuse of rights, and it is up to Member States to set national anti-abuse provisions[119] – would seem to have a clear implication. In fact, as the ECJ appeared to imply that EU law principle of abuse of rights cannot be directly applied in the absence of a domestic anti-abuse provision, and it was dealing with the application of the Merger Directive, it would seem to be inevitable to infer that the prohibition of abuse of right does not have, in the field of direct taxation, the same relevance of general principle as it has in the field of indirect taxation, even where the situation involves the access to tax reliefs granted directly by EU law. This would be so, despite the fact that the ECJ itself in *Kofoed* referred to the prohibition of abuse of rights as a general principle.

Nonetheless, this interpretation of *Kofoed* can no longer be supported if the reasoning of the ECJ in *Kofoed* is considered in its entirety and is taken together with the purpose underlying the anti-abuse clause of the Merger Directive. In fact, in *Kofoed* the ECJ assessed what is sufficient in order for a Directive to be introduced in a national legal system and, in so doing, stated that an express reproduction of the Directive wording in national provisions is not necessary for a Directive to be

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117 Lorenz, 'General Principles of Law: Their Elaboration in the Court of Justice of the European Communities' (1964) *American Journal of Comparative Law*, 1-29, pp.7-9

118 Nergelius, 'General Principles of Community Law in the Future: Some General Remarks on their Scope, Applicability and Legitimacy', in Bernitz and Nergelius (Eds), General Principles of European Community Law (2000), 223-234, p. 223, where the Author cites a speech by the President of the ECJ, Rodriguez Iglesis, held on 26 April 1999 before the Danish Parliament.

119 Retro, part. 4

regarded as implemented[120]. Moving from this premise and with regard to the anti-abuse clause of the Merger Directive, the ECJ could not but conclude that it is for national courts to verify if in the national system there is either a provision or a general principle prohibiting abuse[121], by which, ultimately, the ECJ meant that it is (obviously) for national courts to verify if the anti-abuse clause of the Directive has been implemented. Consequently, where the anti-abuse clause has not been implemented, either through the reproduction of relevant Directive's provision or through any other device, the impossibility for tax authorities to react to situations of abuse is the result of a *choice* of national legislators: the wording of the anti-abuse clause of the Merger Directive clarify that Member States *may* - rather than *must* – withdraw the benefits of the Directive in cases of operations carried out without valid commercial reasons[122]. Moreover, this *option* (rather than the obligation) for Member States to set a presumption of tax evasion or avoidance, and to apply the abuse-abuse clause of the Merger Directive (by denying the application of the tax relief provided for by the Directive) *when* the restructuring operations are not carried out for valid commercial reasons, was emphasized by the ECJ wording in *Leur-Bloem*[123]. Accordingly, the ECJ position in *Kofoed* appears to be consistent with the one in *Leur-Bloem,* i.e., in essence it appears to be a consequence of the fact that the anti-abuse clause of the Merger Directive (and of the other tax directives) does not impose Member States to withdraw the application of the benefits of the Directive, which depends on the fact that this anti-abuse clause was set to protect the *financial interests of Member States.*

It can therefore be argued that the ECJ's reference in *Kofoed* to the general principle of abuse of rights as expressed in the anti-abuse clause[124] is not inconsistent with the fact that a national anti-abuse provision is needed, simply because, in the case of the Merger Directive, the financial interests to be directly safeguarded are the interests of Member States, rather than the interests of the EU. The final choice as to whether/how to safeguard their own financial interests is thus left to Member States, who can decide whether the introduction of national anti-abuse provisions is the appropriate means to protect these interests.

It is thus possible to explain the ECJ's description of the prohibition of abuse of rights in *Kofoed* in terms of a general principle, and, in so doing, to reconcile the rulings concerning indirect taxation and access to financial benefit[125] with the ruling concerning direct taxation regarding access to direct tax reliefs[126], by asserting that the prohibition of abuse of rights can be characterised as "a general principle of EU with a *sui generis* aspect". Whereas it can be regarded as having the features of a general principle from the viewpoints of its being common to most Member States[127] and of the underlying, overriding concern of preventing improper use of rights, the *sui generis* aspect would seem to lie in the fact that it has been developed by the ECJ, and has "entered" EU law, to protect a range of different interests, and that this affects its

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120 Case C- 321/05 *Kofoed*, cit., para. 44

121 Ibid, para. 45

122 Art. 11(a) of the Merger Directive: retro, part

123 Case C-28/95, *Leur-Bloem*, cit., para. 40

124 Case C- 321/05, *Kofoed*, cit., para 38, retro, see part 4

125 Thus, rulings such as *Halifax* and *Emsland-Starke*.

126 Such as *Leur-Bloem* and *Kofoed*

127 I.e., to mailand Europe EU Member States, whose legal systems are based on civil law, which appear to have been affected by an initial elaboration of this principle in French law.

applicability. Specifically, its applicability is a direct one when the interests that the principle aims to protect are the EU financial interests (indirect taxation and access to financial benefits granted by EU law provision), whereas it is left to Member States when the principle (as expressed in the tax Directives anti-abuse clauses) serves to protect Member States' financial interests, and thus to avoid that a prejudice to Member States' revenues be the only outcome of the operations at stake. The same interpretation proves to be valid for *direct taxation* in relation to the exercise of fundamental freedoms: when the only/main outcome of the exercise of the freedoms (due to the lack of genuine economic activity) is the prejudice to the financial interests of Member States they *can* restrict the freedom by setting anti-abuse clauses such as CFC. This reading is not contradicted by several previous tax rulings concerning both companies and individuals, in which the ECJ had stated that the loss of tax revenues is not one of the grounds listed in Art. 52 of the Treaty[128] and cannot be regarded as an overriding reason in the public interest that Member States can use to justify a less advantageous treatment for cross-border situations than for domestic ones[129]: in fact, these rulings can be easily reconciled with *Cadbury Schweppes* by arguing that the ECJ statement under consideration applies to situations of genuine economic activity in the host State.

In turn, as indicated above the *outcome* of the exercise of the fundamental freedoms in cases of circumvention of national rules – in terms of existence or not existence of a prejudice for the interests of third parties as a sole outcome of the exercise of the freedom – is also the decisive element in the company law area: only where such a prejudice is proved on a case-by-case basis (*Centros*, *Inspire Art*) and no less restrictive means to prevent the prejudice is available, the Member State concerned can restrict the right of establishment. In this regard, the circumstance that, in *Inspire Arts* and in a previous company law ruling concerning companies' right of establishment via the transfer of the head office from one Member State to another, the 2002 *Uberseering* ruling[130], the ECJ mentioned, amongst the *interests whose protection could justify a restriction to the freedom of establishment*, the effectiveness of fiscal supervision[131] and even more specifically the interests of taxation authorities[132], appears to be significant. In fact, the fact that the *interests of the taxation authorities* have been mentioned in a *company law* ruling suggests once more that the abuse concept (and the prohibition of abuse principle) applying in the company law area and in the broad tax law area is a *unitary one* – and that it comes into play when a prejudice needs to be avoided - even from the viewpoint of an area-by-area analysis.

Ultimately, if accepting that the reason behind the elaboration of the prohibition of abuse of rights in the EU legal order lies in the need to strike the balance *between* the prejudice to the public interest (including revenues interests) or to specific interests (e.g. creditors' interests) *and* the integration goals of the Treaty, and consequently that it lies in the necessity to prevent the prejudice to the interests involved when this

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128 Previously, Art. 46 of the EC Treaty.

129 E.g.: Case C-264/96, *ICI* [1998] ECR I-4711; Case C-307/97 *St-Gobain* [1999] ECR I-6163; Case C-35/98, *Verkooijen* [2000] ECR I-4073; C-410/98, *Metallgesellschaft and Hoechst* [2001] ECR I-1727; Case C-422/01, *Skandia* [2003] ECR I-6817

130 Case C-208/2000, *Uberseering* [2002] ECR I-9919

131 Case C-167/01, *Inspire Art*, cit., para. 140

132 Case C-208/2000, *Uberseering*, cit., para. 92

prejudice emerges as the main (or the sole) element, a final question can be raised and answered. Specifically, it can be discussed whether the prohibition of abuse of rights emerging from the ECJ case-law tends to show a parallelism with the abuse of rights provision laid down in Art. 54 of the Charter of Fundamental Rights, under which "Nothing…shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent then is provided for herein". As this provision refers to the rights enshrined by the Charter itself and is addressed to EU institutions, to bodies, offices and agencies of the EU and of Member States when implementing EU law (as made clear by Art. 51 of the Charter), it would appear on a first reading to have a different significance and scope from the abuse of right concept emerging from the ECJ case-law and discussed in this paper, which latter concept refers to the conduct of the right holder when he aims at accessing a benefit granted by EU provisions or at exercising a fundamental freedom. The difference between the abuse of rights prohibition enshrined in Art. 54 of the Charter of Fundamental Rights and the abuse of rights concept that has been analysed would thus seem to lie both in the addressees and in the scope. Nevertheless, the entry into force of the Lisbon Treaty[133] has given the Charter of Fundamental Rights the same legal force as the Treaty on the European Union and as the EC Treaty, renamed Treaty on the Functioning of the European Union (TFEU).

For this reason, in the author's view a teleological interpretation of the Charter of Fundamental Rights and of the TFEU in light of each other appears to be appropriate for consistency of the EU legal order. Adopting such an interpretation, Art. 54 of the Charter of Fundamental Rights could be regarded as prohibiting rights from being abused, due to the abuse causing a prejudice to the victim of the conduct at stake[134]. It could also be noted that such prejudice needs to be regarded as unacceptable, at least when emerging as the main or sole outcome of a specific conduct, in light of the very objectives of social cohesion[135], that are listed amongst the ultimate goals of the EU exactly by the Treaty which provides the legal basis for EU provisions directly granting benefits as well as for the fundamental freedoms.

Ultimately, it can thus be submitted that the prejudice to other parties' interests is the feature which shows the parallelism between the principle of abuse of rights developed by the ECJ case-law and the prohibition of abuse of rights concept set out by Art. 54 of the Charter of Fundamental Rights.

7. Conclusion

The arguments put forward in the analysis carried out in the parts 2 to 5 can be ultimately summarised, at the current state of EU law, in the following table:

Areas of law	*Types of conduct*

[133] On 1 December 2009.

[134] G. Palombella, The Abuse of Rights and the Rule of Law, at p. 10, in A.Sajo (ed), Abuse, the dark side of fundamental rights, 2006 Eleventh International Publishing,

[135] Art. 4 and 14 of the Treaty.

	Direct access to benefits provided by EU law	Exercise of a fundamental freedom
Indirect tax area	Prejudice to the EU financial interests (VAT Directive): prohibition of abuse of rights as directly applicable general principle	
Direct tax area	Prejudice to the Member States financial interests (direct tax directives): prohibition of abuse of rights applicable to the discretion of Member States (via national anti-abuse clauses)	Prejudice to the Member States financial interests: prohibition of abuse of rights as justification for restrictions of the freedom of establishment if no genuine economic activity is carried out, which needs to be proved ("rule of reason approach")
Company law area		Prejudice to the specific interests of third parties: prohibition of abuse of rights as justification for restrictions of the freedom of establishment *if* prejudice is proved on a case-by-case basis in situations of circumvention of national rules protecting specific interests
Common agricultural policy	Prejudice to the EU financial interests: prohibition of abuse of rights as directly applicable general principle	
Provision of services		Prejudice to the general public interest: abuse of rights as directly applicable general principle as prejudice is presumed in cases of circumvention of national rules of conduct set to protect the public interest

In the present work, it has therefore been stressed that the existence of the prejudice (to either Member States' financial interests or the general public interest or to specific interests) makes it possible to find a unitary notion from both the perspective of the types of conduct involved and the perspective of the different areas, and that this aspect is bound to be the ultimate outcome in cases of artificial conduct (i.e., of creation of the formal conditions for obtaining benefits without the underlying required economic substance or resort to freedoms without genuine economic integration).

As a result, taking the *concept of abuse of rights developed by the ECJ case-law*, and capable of being regarded as a general principle (with a sui generis aspect), which has been here analysed with particular regard to the areas of company law and tax law, together with the *concept embodied in Art. 54 of the Charter of Fundamental Rights*[136], a conclusion seems to be inevitable. Specifically, it can be concluded that the two concepts[137] – due to the fact that they differ from each other not in the substance, but *only* from the viewpoint of the scope of rights embraced and from the viewpoint of the actors of the conduct under consideration – are complementary to one other in ensuring that, within the framework of the EU legal order on its whole, rights of whatever nature can be abused by *neither* public bodies *nor* right holders.

[136] Retro, part. 6.
[137] Or, perhaps more accurately, the two sphere of application of the same concept.