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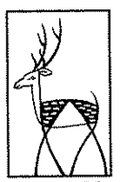

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law. From these contributions, several questions emerge as to the extent to which the concept is used in the case law of the Court of Justice, how it is used and whether it should be used at all. Is there a uniform approach to abuse in different EU law areas and ought there to be one? What is the right approach: abuse of rights, abuse of law or a constructive interpretation of the legal rules which takes into account the concept of abuse? Should the determination of abuse depend on objective or subjective criteria? What are the different implications of the concept of abuse for legal certainty? What is the right balance between the role to be played by Member States and EU law in the prevention of abuses? And what is the right balance between the role to be played by courts and the legislator in developing such a principle?

These and many other questions are addressed in the different contributions to this book. It is a unique and long awaited contribution for a topic that is in urgent need of the kind of serious and in depth analysis that is undertaken in the discussions that follow.

Miguel Poiares Maduro
Florence, January 2011

Contents

To be sure, the notion of 'abuse' as a justification, rather than a definitional component of the scope of the freedoms firmly remains. This is clear from the observation of the Court of Appeal that the ECJ's notion of abuse in *Cadbury Schweppes* was a 'limitation on the freedom of establishment constituted by the justification found by the ECJ to be permissible . . . '.[50] Given the language of the ECJ in *Cadbury Schweppes*, this is wholly unsurprising. One supposes that one should be grateful that the confusion resulting from the Court's approach to 'abuse' which gave rise to the High Court's 'single solution' has at least been put to rest. What remains, however, is the spectre of proportionality holding the balance as to when and what type of 'abuse' legitimately permits the freedom of establishment to be infringed, which as observed above,[51] has already caused Member States unexpected and, it is submitted, over-burdensome problems in relation to provisions which do not, at least at first sight, impede the Single Market at all.

What emerges from *Cadbury Schweppes* is not only that 'abuse' means different things in different contexts but also that confusion of language in relation to 'abuse' can disguise a more profound confusion between a finding of whether there is or is not breach and a finding of justified breach. That confusion is conceptually unsatisfactory and gives rise to very practical misconceptions at the level of national court proceedings.

[50] *Fleming/Condé Nast* (n 46 above), para [65].
[51] In the context of cases such as *Futura* (n 9 above): see above.

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A Single Principle of Abuse in European Union Law: A Methodological Approach to Rejecting a Different Concept of Abuse in Personal Taxation[1]

ANA PAULA DOURADO

I. HOW THE INTERPRETATIVE PRINCIPLE OF ABUSE OF LAW IS APPLICABLE TO TAXATION AND PERSONAL TAXATION

MY INITIAL CLAIM in this chapter is that there is one single principle of abuse of law in EU law (ie abuse of EU law), although its application to different fields of law, or taking into account the degree of vagueness of the EU principle or rule abused, may imply construction of second-level principles or of different guiding criteria applicable on a case-by-case basis, and adjustments resulting from a balanced application of several EU law principles leading to opposite results (eg the principles of equality, legal certainty and cohesion).[2]

In its broadest meaning, there is abuse of EU law when there is an accrual of advantages in a manner that conflicts with the purposes and aims of European law provisions.[3] However, taking advantage of an EU right in order to benefit from a more favourable domestic legal system is not a misuse of EU law (*ICI*,[4] *Emsland-Stärke*,[5] Opinion of

[1] The manuscript was finalised in October 2008. It was brought in line with the Treaty on the Functioning of the European Union, but subsequent literature and case-law of the Court of Justice were not taken into consideration.

[2] Claiming in a different or even opposite sense: W Schön, 'Abuse of Rights and European Tax Law' in J Avery Jones, P Harris and D Oliver (eds), *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge, Cambridge University Press 2008) 96; F Vanistendael, '*Halifax* and *Cadbury Schweppes*: One Single European Theory of Abuse in Tax Law?' (2006) 4 *EC Tax Review* 195; R de la Feria, 'Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax?' (2008) 45 *Common Market Law Review* 395.

[3] See AG Poiares Maduro in Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I-1609, para [63]. On whether there is a common notion of abuse to the Member States, see P Harris, '*Abus de Droit* in the Field of Value Added Taxation' (2003) 2 *British Tax Review* 131.

[4] Case C-264/96 *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-4695, para [26].

[5] Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569.

Advocate-General Geelhoed in *Akrich*,[6] *Chen*,[7] *Centros*,[8] *Gemeente Leusden* and *Holin Group*,[9] *Cadbury Schweppes*[10]).[11]

The principle of abuse is an interpretative principle[12] and in EU tax law it is an instrument with different purposes. It aims at determining whether there is abuse of EU law and at reciprocally limiting the exercise of rights conferred by European law, either directly (there is abuse of EU law 'when Community law provisions are relied upon in order to gain advantages in a manner that conflicts with the purposes and aims of those provisions'[13]) or indirectly (there is abuse of EU law 'when Community law provisions are abusively invoked in order to evade national law'[14]).

It is therefore a method of interpreting other EU law principles and rules that directly or indirectly grant rights connected to taxes, operating in a similar (but not identical) way to a General Anti-Abuse Rule (GAAR), and which aims at achieving the principle of equality in EU tax law. Although the approach of the Court of Justice regarding the fight against abusive practices is always formal (whether there is abuse; whether there is a domestic restriction; whether it is justified by public interest reasons; whether it is proportional:[15] *cf Halifax*, *Part Service*,[16] *Cadbury Schweppes*, *Thin Capitalisation Group Litigation*[17] or *de Lasteyrie du Saillant*[18] and *N*;[19] and also *Marks & Spencer*,[20] *Rewe*,[21] *Oy AA*[22]), the underlying reason for that fight is equality.

In this way, the principle of abuse aims at defining the core and boundaries of the EU legal right. The Court's case law on the concept of abuse is progressively related to the

[6] AG Geelhoed in Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607, para [96].

[7] Case C-200/02 *Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925, paras [36–40].

[8] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, paras [24, 27].

[9] Joined Cases C-487/01 *Gemeente Leusden v Staatssecretaris van Financiën* and C-7/02 *Holin Groep BV cs v Staatssecretaris van Financiën* [2005] ECR I-5337, para [79].

[10] Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I-7995, paras [57, 64, 65].

[11] Although the case law before *Emsland-Stärke* and *Halifax* accepted a much broader concept of abuse, connected to the so-called 'u-turn transactions', see Case 33/74 *Johannes Henricus Maria Van Binsbergen v Bestuur van de Bedijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case C-211/91 *Commission of the European Communities v Kingdom of Belgium* [1992] ECR I-6773; Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487; and Case C-23/93 *TV 10 SA v Commissariaat voor de Media* [1994] ECR I-4795. For more details, see de la Feria (n 2 above) 395.

[12] AG Tesauro in Case C-367/96 *Alexandros Kefalas et al v Elliniko Dimosio (Greek State) Organismos Ikonomikis Anasinkrotisis Epikhirision AE (OAE)* [1998] ECR I-2843, paras [18–27]; AG Poiares Maduro in *Halifax* (n 3 above), para [62].

[13] *Halifax* (n 3 above), para [63].

[14] *Halifax* (n 3 above), para [63].

[15] On the proportionality of anti-abuse measures in direct taxation case law, see A Zalasinski, 'Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law' (2007) 35 *Intertax* 310.

[16] Case C-425/06 *Ministero dell'Economia e delle Finanze, formerly Ministero delle Finanze, v Part Service Srl, company in liquidation, formerly Italservice Srl* [2008] ECR I-897, para [46].

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

[18] Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409.

[19] Case C-470/04 *N v Inspecteur van de Belastingdiesnt Oost/kantoor Almelo* [2006] ECR I-7409.

[20] Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837, para [57].

[21] Case C-347/04 *Rewe Zentralfinanz eG v Finanzamt Köln-Mitte* [2007] ECR I-2647, paras [51–52].

[22] Case C-231/05 *Oy AA* [2007] ECR I-6373, paras [58–60].

aim of establishing the Internal Market.[23] According to the Court, that concept should not be misused by Member States in order to create distortions of the Internal Market.[24]

In the case of non-harmonised matters, it establishes the core and boundaries of the fundamental freedoms and it is therefore a limit to the exercise of these freedoms (see *Cadbury Schweppes* and *de Lasteyrie du Saillant* and *N*).

In the case of harmonised matters, it operates in exactly the same way, but since the determinacy of the possibly abused rule is larger in comparison to the vagueness of the fundamental freedoms principles, it is easier for the Court to define the core and boundaries of the possibly abused harmonised rules and to reciprocally come to a conclusion on whether or not there has been abuse in harmonised matters.[25] But determinacy/indeterminacy is a quantitative issue and harmonised tax matters also contain vague concepts (see the issues discussed in *Halifax*,[26] *Denkavit*,[27] and *Leur-Bloem*[28]).

To consider the example of *Halifax*, under Article 5(1) of the Sixth VAT Directive: '"[s]upply of goods" shall mean the transfer of the right to dispose of tangible property as owner'. Article 6(1) defines '[s]upply of services' as 'any transaction which does not constitute a supply of goods within the meaning of Article 5'. From the perspective of a tax lawyer, what the Advocate-General proposed and the Court did in *Halifax* corresponds to a 'substance over form' interpretation, which is, after all, an interpretation according to the purpose of the provisions—the supply of goods and services.[29] The same is applicable to the interpretation of 'valid economic reasons' within Article 11 of the Mergers Directive (*cf Leur-Bloem*[30]) or to the meaning of 'leasing arrangement' in *Part Service*.[31]

In any case, the greater the vagueness of the EU principle or rule, the more cautious the Court is in safeguarding the effectiveness of European law.[32]

Moreover, the Court has to search for typical situations and criteria similar to the cases under analysis in order to reduce the vagueness of principles and rules, and in order to achieve results compatible with the rule of law. What has been called 'typifying' by legal theory is a way to describe interpretation both in civil and common law countries. Interpretation implies a circular movement: departing from the individual case, to the typical one foreseen in the rule, and then back to the individual case. In this way, criteria

[23] See for example, *Leur-Bloem* (n 28 below), para [45]. On abuse as 'a limitation of or an exception to the freedom' see AG Lenz in *TV 10* (n 11 above), para [25].

[24] Schön (n 2 above) 82; *Leur-Bloem* (n 28 below), para [45].

[25] M Lang and S Heidenbauer, 'Wholly Artificial Arrangements' in L Hinnekens and P Hinnekens (eds), *A Vision of Taxes Within and Outside European Borders: Festschrift in Honour of Prof Dr Frans Vanistendael* (The Hague, Kluwer Law International 2008) 609. The authors make a departure from that distinction but conclude that the type of legal instrument is not so important after all. Object and purpose of the rule are the decisive element, according to them.

[26] *Halifax* (n 3 above). For a critical review of the case, see J Peacock QC, 'The Law Ends Where Abuse Begins' (2001) 4 *EC Tax Journal* 142.

[27] Joined Cases C-283/94 *Denkavit Internationaal BV*, C-291/94 *Vitic Amsterdam BV* and C-292/94 *Voormeer BV v Bundesamt für Finanzen* [1996] ECR I-5063.

[28] Case 28/95 *Leur-Bloem v Inspecteur der Belastngdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, para [41].

[29] Authors tend to consider that the Court treats abuse of harmonised matters and abuse of the fundamental freedoms in a different way: Schön (n 2 above) 81; see the discussion in de la Feria (n 2 above) 425, 430.

[30] *Leur-Bloem* (n 28 above), paras [37, 46].

[31] *Leur-Bloem* (n 28 above), paras [8, 46].

[32] In this sense, Schön (n 2 above) 80–81.

can be found to progressively reduce the vagueness of law,[33] including of course the vagueness of the principles of the fundamental freedoms.

In this respect, the wholly artificial arrangement test operates in EU tax law as the classical business purpose test (although the first test is broader as it covers Articles 18 and 21 TFEU – ex Articles 12 and 18 EC): it operates through typifying criteria—recommended objective elements aimed at guiding national courts in applying the abuse concept and at allowing, in the same way, the reduction of discretionary application and the according reduction of legal uncertainty.[34] But the same is applicable to some anti-abuse rules in harmonised matters: the 'valid economic reasons' test of Article 11 of the Mergers Directive (*cf Leur-Bloem*[35]) needs to be progressively typified as it is a vague formula.

In the eternal tension that law faces, in either considering the single case (by using general principles, or by being vague, leading to legal indeterminacy) or the typical case (the average typical case or the frequent typical case) through a typified method that drastically reduces or eliminates discretionary application (using legal fictions or irrebuttable presumptions),[36] the principle of abuse of EU law clearly favours the first-mentioned purpose, in contrast to certainty, as it implies a case-by-case analysis.[37] The fact that the Court has accepted abuse of EU law as an interpretative principle in tax matters may be regarded with some suspicion in tax law, since legal certainty, prohibition of analogy, and fear from administrative and judicial discretion have been accompanied, in some Member States, by methods of interpretation that follow the literal element very closely.[38] Moreover, tax law imports most of its concepts from other legal fields, eg from private law, and that raises the issue regarding the dependent versus autonomous meaning of the imported concepts in tax law (eg provision of services, dependent worker, transfer of residence).[39]

In order to fulfil constitutional requirements concerning the competence to enact tax law and related demands of legal determinacy, in recent decades in many Member States control of abuse of tax law has normally been dealt with by a General Anti-Abuse Rule (hereinafter, also GAAR). The GAAR awards legitimate control of abuse and the vagueness of the GAAR is progressively reduced by case law.

In other words, a General Anti-Abuse Rule gives legitimacy to the tax administration and the tax courts to use the principle of abuse as an interpretative tool and progressively define the scope and borders of tax rules. In this sense, a GAAR is a formal tool to use in the principle of abuse.

Thus, it is not surprising that, in some Member States, application of the *Halifax* decision by national courts requires application of the (domestic) GAAR,[40] and that the

[33] See AP Dourado, *O Princípio da legalidade fiscal: Tipicidade, conceitos jurídicos indeterminados e margem de livre apreciação* (Lisbon, Almedina 2007) 556 and the literature therein; A Kaufmann, *Grundprobleme der Rechtsphilosophie* (Munich, Beck 1994) 112–33; F Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd edn (New York, Springer-Verlag Kg 1991) 543.

[34] See for example, *Cadbury Schweppes* (n 10 above), para [61]; *Thin Cap* (n 17 above), para [82].

[35] *Leur-Bloem* (n 28 above), para [41].

[36] Dourado (n 33 above) 612, 643.

[37] Tax law literature is normally impatient with the Court's (to a certain extent, unavoidable) methodology: see for example, R de la Feria, 'The European Court of Justice's Solution to Aggressive VAT Planning—Further Towards Legal Uncertainty?' (2006) 1 *EC Tax Review* 27.

[38] See K Vogel, 'Steuerumgehung nach innerstaatlichem Recht und nach Abkommensrecht' (1985) 4 *Steuer und Wirtschaft* 371–72. *Cf* F Zimmer, 'Form and Substance in Tax Law, General Report' in International Fiscal Association, *Cahiers de Droit Fiscal International* (The Hague, Kluwer 2002) 37–38, 50.

[39] Zimmer (n 38 above) 25–28, 56–57.

[40] See Schön (n 2 above) 78.

Court has recognised application of domestic anti-abuse concepts as long as that does not prejudice the 'full effect and uniform application of the Community law provisions allegedly relied upon in an abusive manner'.[41]

Besides, if domestic law does not contain an anti-abuse concept, EU law does not step in automatically, unless it is possible to solve the problem by interpretation.

A GAAR goes further than the interpretative principle of abuse, as beyond applying it, it also gives legitimacy to the tax administration and courts requalifying the transaction,[42] according to discretionary assessments. How far a GAAR plays a distinct role from the abuse principle depends on the accepted methods of interpretation of tax law issues, and that varies within the different legal systems.

In the context of personal taxation, abuse of law operates exactly in the same way: whether the rule referred to the Court is a domestic one or part of an EU directive, abuse of law is an interpretative principle of EU law and as such it defines the meaning and scope of the EU rules conferring a tax right.

Both the Court of Justice and national courts, when interpreting the compatibility of potentially restrictive national rules with EU law, are to apply the principle of abuse in EU law.

The Court of Justice and the national courts apply other relevant principles of EU law, such as the principle of equality, certainty and cohesion, and include any principles of domestic law that are accepted by EU law, and this may in the future imply different results according to the field of law under analysis. Playing on the field of legal pluralism, the Court accepts international tax law principles and domestic tax law principles, as long as they are not incompatible with it.

However, I will discuss the issue as to whether the Court attributes a more reduced scope to the exercise of the fundamental freedoms by an individual, and conversely, a broader scope to the abuse concept, than when corporations or similar entities are involved.

II. THE 'WHOLLY ARTIFICIAL ARRANGEMENT' TEST AS A SECOND-LEVEL PRINCIPLE TO DETERMINE ABUSE

If we compare potential discriminatory measures in cases referred to the Court involving free movement of services, such as *Safir*,[43] *Danner*,[44] and *Skandia*,[45] with cases involving freedom of establishment such as *de Lasteyrie du Saillant*, and *N* and one case involving free movement of citizens (*Schempp*[46]), we can find references to the 'fiscal vacuum' argument in the first three cases. In contrast, in *de Lasteyrie du Saillant*[47] *and N*, the Court searches for possible abusive behaviour and furthermore in the context of the cohesion argument (preserving the allocation of the power to tax between Member

[41] AG Poiares Maduro in *Halifax* (n 3 above), para [65]; Case C-206/94 *Brennet AG v Vittorio Paletta* [1996] ECR I-2357, para [25]; *Kefalas* (n 12 above), paras [21–22]; Case C-373/97 *Dionisios Diamantis and Elliniko Dimosio (Greek State)* [2000] ECR I-1705, paras [34–35]; *Centros* (n 8 above), paras [24–25].

[42] See in this sense, Lang and Heidenbauer (n 25 above) 605.

[43] Case C-118/96 *Safir v Skattemyndigheten i Dalarnas Län* [1998] ECR I-1897.

[44] Case C-136/00 *Rolf Dieter Danner* [2002] ECR I-8147.

[45] Case C-422/01 *Skandia, Ramstedt v Rikskatteverket* [2003] ECR I-6817.

[46] Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I-6421.

[47] *De Lasteyrie* (n 18 above), paras [24–26, 54].

States) (*N*[48]) and in *Schempp*[49] non-deductibility of maintenance expenses paid to a non-resident is not even considered discriminatory. It is possible that the fiscal vacuum or the cohesion argument underlies the reasoning in *Schempp*, or at least justifies the different treatment granted by domestic legislation, but no reference to that argument is made, since, according to the Court, 'the payment of maintenance to a recipient resident in Germany cannot be compared to the payment of maintenance to a recipient resident in Austria'.[50] Moreover, in *Van Hilten*[51] (a case concerning free movement of workers and not free movement of capital, according to the Court), no reference was made to potential abuse behaviour that would justify the Netherlands' restrictive regime under analysis (if it had been considered restrictive by the Court).

Taking into account existing case law, it could be tempting to say that the 'wholly artificial arrangement' test is only applicable to the freedom of establishment (*cf ICI*,[52] *Lankhorst-Hohorst*,[53] *de Lasteyrie du Saillant*,[54] *Marks & Spencer*,[55] *Rewe*,[56] *Cadbury Schweppes*,[57] *Thin Cap*[58]) and free movement of workers (*cf Emsland-Stärke*[59]).

I propose, on the contrary, that there is no difference of analysis according to the different freedoms and that the 'wholly artificial arrangement' test is applicable to verify the exercise of any freedom and is applicable not only in the context of personal taxation, but to any taxes[60] and in all fields of law. In fact, the test regarding the artificiality of the situation (or effective relocation of goods, services, persons and capital) may be used and has been used in non-specific tax matters (see *General Milk Products*,[61] *Emsland-Stärke*,[62] *Ninni-Orasche*[63]).

Let us test my claim in the field of personal taxation. Taking into account the source and the residence elements as the currently relevant connecting elements in direct taxation (and nationality in the case of property taxes), tax abuse of fundamental freedoms operates by manipulation of one of those elements. It can also occur by manipulation of the ownership of income (EU national or not), qualification of income (interest versus dividend) and attribution of income (profits/losses).

Let us take the example of free movement of services. In direct tax law, free movement of services precludes any discrimination according to the residence of the beneficiary and the provider of the service (free movement of services concerns the right of EU nationals to provide and receive services as long as two Member States are involved: see *Bent Vestergaard*[64]).

[48] *N* (n 19 above), paras [42, 47].
[49] *Schempp* (n 46 above), para [35].
[50] *Schempp* (n 46 above), para [35].
[51] Case C-513/03 *Heirs of MEA van Hilten- van der Heijden v Inspecteur van de Belastingdienst /Particulieren/ Ondernemingen buitenland te Heerlen* [2006] ECR I-1957.
[52] *ICI* (n 4 above), para [26].
[53] Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2002] ECR I-11779, para [37].
[54] *De Lasteyrie* (n 18 above), para [50].
[55] *Marks & Spencer* (n 20 above), para [57].
[56] *Rewe* (n 21 above), paras [51–52].
[57] *Cadbury Schweppes* (n 10 above), para [51].
[58] *Thin Cap* (n 17 above).
[59] *Emsland-Stärke* (n 5 above), paras [52–54].
[60] See *Part Service* (n 16 above), paras [17, 53].
[61] Case C-8/92 *General Milk Products GmbH v Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, para [21].
[62] *Emsland-Stärke* (n 5 above), para [53].
[63] Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187, paras [34–36].
[64] *Akrich* (n 6 above), paras [55–57]. Case C-55/98 *Skatteministeriet v Bent Vestergaard* [1999] ECR I-7641.

Abuse of free movement of services could occur if an individual taxpayer claimed application of a tax regime—such as deduction of expenses in the State of residence regarding payment of services provided by a resident of another Member State—and in fact either manipulated the freedom to reside in a Member State[65] or the provider had manipulated this and also therefore the source of the income (if that source is determined, as it frequently is, by the place of residence of the paying agent). Besides, the location of a permanent establishment (it can also be a paying agent, of course) can be manipulated.

Moreover, abuse can occur if an entity taxed under corporate tax law in a Member State claims to be the beneficial owner of the income and of the free movement, but instead is only an agent or nominee and the taxpayer is an individual resident outside the EU.

And finally, in the presence of associated persons, attribution of income and expenses can be abusively manipulated. The same is applicable to the movement of capital between two Member States or between a Member State and a third State—manipulation of the connecting elements residence or source (where again this often corresponds to the place of residence of the paying agent), of the attribution of income, or of the owner of the income, can lead to an abuse test. Thus, in the context of personal taxation (and income taxation in general), a wholly artificial arrangement test is relevant not only with regard to the freedom of establishment, but also when any of the other freedoms comes into play, although this acquires a special meaning according to types of cases (exit taxes, transfer of residence, controlled foreign companies (CFC), thin capitalisation, discriminatory taxation of services, dividends, interest, property), operating through the creation of objective criteria, as secondary EU legislation has already exemplified. Independent of discussing whether or not some or most of the concepts chosen are the best objective criteria to prevent tax abuse, examples of those concepts used in the directives are: the paying agent or the beneficial owner, in respect of the Savings Directive;[66] the effective residence of the taxpayer in a Member State and taxpayers subject to taxation (Article 2(1)(b) and (c) of the Parent-Subsidiary Directive);[67] the two- year holding requirement under Article 3(2) of the Parent-Subsidiary Directive; and the 'valid economic reasons' in Article 11(1)(a) of the Merger Directive.[68]

Since I claim that the wholly artificial arrangement test is a universally applicable test to check whether there is abuse of EU law, the question may be raised as to the reasons why it was not applicable in *Safir*, *Skandia*, *Danner*, *Schempp* and *Van Hilten*.

Whereas in *N*, one of the issues raised was whether Mr N had actually exercised his right to establish himself in another Member State, and therefore whether he had actually transferred his residence or whether he had artificially done so in order to avoid the Netherlands taxes on capital gains, in the above-mentioned cases, no issue regarding artificial residence or source of income was raised.

[65] See, on the meaning and scope of freedom of establishment by an EU citizen, AG Kokott in *N* (n 19 above), paras [45–57].
[66] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (Savings Directive) [2003] OJ L157/38.
[67] Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive) [2004] OJ L007/41–44.
[68] 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 (Merger Directive) [1990] OJ L225/1–5.

Let us take *Safir* as an example: according to §50 of the Swedish Premium Tax Law, the tax administration may, at the request of the policyholder, grant an exemption from payment of tax or reduce the tax by half if the company with which the insurance was taken out is subject, in the State in which it is established, to revenue tax comparable to that payable by insurance companies in Sweden.[69]

Since there was no manipulation of connecting elements, no artificial arrangement or business purpose test was conducted here. The Swedish government did not argue on the basis of abuse, but claimed instead a risk of fiscal vacuum (double non-taxation) in order to try to justify the different treatment.

III. BALANCING DIFFERENT LEGAL PRINCIPLES IN DIFFERENT FIELDS OF LAW

Since I claim that there is only one principle of abuse in EU law—and that can be justified by the absence of a hierarchy of domestic rules from the perspective of their compatibility with EU law—the issue may be raised whether that principle does not acquire special meanings according to different fields of law (eg private law versus public law or company law versus tax law).[70]

In fact, the constitutional prohibition of retroactivity for tax rules and for criminal offence rules does not have the same meaning/scope; the constitutional requirements of legal determinacy of a tax rule, of a rule that restricts a fundamental right, and of a rule that defines criminal conduct are not the same.

Conditions for being subject to a legal regime are not necessarily the same in company law and in tax law, either[71] and therefore the objective criteria for verifying whether there is an artificial arrangement may vary.[72]

However, this does not imply either a different concept of abuse nor inapplicability of the artificial arrangement test,[73] as also follows from Court's case law: see for example *Emsland-Stärke*,[74] *Ninni-Orasche*,[75] *Akrich*,[76] *Part Service*,[77] and the Opinion of Advocate-General Poiares Maduro in *Cartesio*.[78]

It is therefore sensible to admit that the scope of free movement and of abuse and the concrete application of the 'artificial arrangement test' may vary according to the field of law under analysis, since each of them is ruled by different principles accepted by EU law,[79] and in a concrete situation, articulation of different relevant principles implies a specific balance and may lead to different results.

[69] *Safir* (n 43 above), para [11].

[70] Schön (n 2 above) 85; W Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared' (2005) 42 *Common Market Law Review* 342, 345.

[71] See Schön (n 2 above) 84–85.

[72] *Cf* in a similar sense, Lang and Heidenbauer (n 25 above) 608.

[73] See KE Sørensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?' (2006) 43 *Common Market Law Review* 424, 449. In the opposite sense, de la Feria (n 2 above) esp 417.

[74] *Emsland-Stärke* (n 5 above), paras [51–54].

[75] *Ninni-Orasche* (n 63 above), paras [28–31].

[76] *Akrich* (n 6 above), para [55]: 'effective and genuine activity'. See more references to cases on free movement of workers in P Craig and G de Búrca, *EU Law, Text, Cases, and Materials*, 4th edn (Oxford, Oxford University Press 2008) 752–58.

[77] *Part Service* (n 16 above), para [53].

[78] AG Poiares Maduro in Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641, para [29].

[79] See for example, Schön (n 2 above) 342–45.

Even if, in its broad meaning, the principle of abuse is indifferently applicable when a domestic rule restricts the freedom of establishment of a company for reasons that are not related to the tax burden (*Centros*,[80] *Cartesio*[81]), and when it does, it does so in order to prevent tax abuse, application of the artificial arrangement test may vary.

It must be stressed that the Court's approach will not be consistent if the principle of abuse ceases to apply when tax treaties come into play, and if anti-abuse clauses within a tax treaty applicable between Member States will not be subject to the same tests (which is the case with limitation of benefits (LOB) clauses, according to the Court in *ACT Group Litigation*,[82] although the issue raised involved third States). Some difficult issues may arise if protocols signed by the contracting States expressly allow application of domestic anti-abuse clauses, as it is not clear whether the Court is to analyse them as domestic rules or as tax treaty rules.

Lastly, when third States are involved, the Court is more tolerant when assessing compatibility of anti-abuse rules with free movement of capital (*cf Thin Cap*, *A*[83] and the *Orange European Small Cap*[84]) but, contrary to what happens in respect of tax treaties, the Court is not inconsistent in its methodological approach, as this is the same as that mentioned above (abuse and anti-abuse are handled as justifications for restrictions).

IV. FISCAL VACUUM AS PART OF THE CONCEPT OF ABUSE

Taking the Court's reasoning into account, it seems that 'fiscal vacuum' is also admitted as an argument to interpret EU law and it is legitimate to ask whether it is being considered as part of a broad concept of abuse.[85] However, fiscal vacuum is neither connected to the business purpose, nor to the valid economic reasons[86] or to the wholly artificial arrangement tests.

According to paragraph [33] of *Safir*:

> Other systems which are more transparent and are also capable of filling the fiscal vacuum referred to by the Swedish Government, whilst being less restrictive of the freedom to provide services, are conceivable, in particular a system for charging tax on the yield on life assurance capital, calculated according to a standard method and applicable in the same way to all insurance policies, whether taken out with companies established in the Member States concerned or with companies established in another Member State.

The non-deductibility of maintenance amounts paid by a resident to a non-resident, as occurs in the Schempp case, could possibly be justified due to a risk of a fiscal vacuum.

Since neither in *Danner*, *Skandia* and *Safir*, nor in *Schempp*, is an abuse test mentioned, the question is whether the Court—or a particular Chamber of the Court—is not accepting the cohesion argument or the fiscal vacuum argument as a sort of irrebuttable presumption that may restrict rights granted by EU law, such as the fundamental freedoms.

[80] See *Centros* (n 8 above), para [24] and the case law quoted in respect of several law fields.

[81] *Centros* (n 8 above), para [27].

[82] Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673.

[83] Case C-101/05 *Skatteverket v A* [2007] ECR I-11531.

[84] Case C-194/06 *Staatssecretaris van Financiën v Orange European Smallcap Fund NV* [2008] ECR I-3747.

[85] See AG Poiares Maduro in *Halifax* (n 3 above).

[86] *Cf Danner* (n 44 above), para [56], *Skandia* (n 45 above), para [53] and *Safir* (n 43 above), para [33].

I would rather argue that the fiscal vacuum argument is not part of a broad concept of abuse, but contributes to defining the meaning and scope of the rights granted by EU law within a cohesion perspective.

V. GAAR AND SPECIFIC ANTI-ABUSE RULES AND THEIR *MODUS OPERANDI* CONCERNING THE INDIVIDUAL CASE: THE EXAMPLE OF A CASE REGARDING PERSONAL TAXATION

Either a GAAR or a specific anti-abuse rule implies requalifying the legal transaction. As mentioned above, that requalification is often not simply achieved in tax law by judicial interpretation in the absence of one of those rules.

In other words, anti-abuse rules (either a GAAR or a specific rule) go further than the principle of abuse, as beyond applying it, they also provide legitimacy to requalifying the transaction by the tax administration and courts, with there being no need to pass a new law.

Discriminatory regimes, such as exit taxes, share an anti-abuse purpose, even if they follow other purposes, as follows from *de Lasteyrie du Saillant* (paragraphs [29, 64]) and *N* (paragraphs [42–47]), and some of these regimes belong in a very broad sense to specific anti-abuse rules.

The role played by specific anti-abuse rules could presumably be played by a GAAR, which could, for example, be applied to tax capital gains when individuals have transferred their residence, or to tax non-distributed dividends by a CFC, or to tax dividends of interest paid to an associated enterprise if the amounts paid do not respect the arm's-length principle.

That role could sometimes be played even if only by teleological interpretation (ie by the principle of abuse[87]), such as taxing someone as a resident, if the tax administration and the courts conclude the person's permanent home, centre of vital interests, or habitual abode occurs in that State.

Specific anti-abuse rules, namely if they contain irrebuttable presumptions or legal fictions, contribute to achieving legal certainty as they reduce or even eliminate administrative and judicial discretion, whereas a GAAR and the principle of abuse do this to a much lesser extent (GAAR and the principle of abuse have to be progressively defined by courts).

The difference between abuse as a principle defining the core and limits of a right attributed by primary or secondary EU law and a GAAR, on the one hand, and a specific anti-abuse rule or a discriminatory measure following an anti-abuse purpose, on the other hand (such as an exit tax or a legal fiction of residence, like the one in *Van Hilten* or in *N*), lies in their relation towards the underlying case or facts. Whereas the principle of abuse as well as a GAAR considers the individual case, specific anti-abuse clauses consider the typical case, and often preclude analysis on a case-by-case basis.

'Mass tax administration' has placed tax administrations on 'emergency status' since the second half of the twentieth century, and as a consequence, legal fictions and presumptions have spread in domestic tax legislations (and tax treaties), especially since the 1980s. These have been tolerated in OECD Member States from a constitutional

[87] Although the principle of abuse is not necessarily used in teleological interpretation: see Case C-63/04 *Centralan Property Ltd v Commissioners of Customs & Excise* [2005] ECR I-11087.

point of view with the argument that they fulfil a 'second best' principle of equality (the 'achievable equality').[88] In cross-border situations, legal fictions and presumptions with anti-abuse purposes have been recommended by the OECD. All EU directives in direct tax law contain specific anti-abuse clauses and some of them use this technique, as already mentioned, which, from the point of view of EU law, can be justified by a second best principle of equality.

Taking into account the previous pages, the basic assumption is that specific domestic anti-abuse rules have to be tested, exactly like any potentially discriminatory or restrictive rule, against the principle of abuse of EU law.

As they operate in the interpretation sphere of EU law and do not aim at qualifying a legal transaction as a tax offence, and as they requalify the legal transaction, the Court tests whether those clauses qualify the facts within the framework of the principle of abuse of EU law—ie whether there is an abuse of EU law. Even if there is an abuse of domestic law, the relevant assessment is, I insist, whether there is an abuse of EU law.

In order to check how the suggested methodology operates or should coherently operate let me take as an example the facts underlying the *N* case.

The first test that should be carried out by the Court is whether Mr N actually exercised his right of establishment or actually established himself in another Member State.

If the answer is positive, then there is a domestic regime that restricts the freedom of establishment and that has to be justified.

In this situation, the Court tests, in second place, whether the restriction resulting from the application of an anti-abuse rule is proportional to fighting abuse of EU law.

VI. IS THERE A BROADER CONCEPT OF ABUSE IN PERSONAL TAXATION?

We may find, however, that the first test has to be complemented. The complementary test will take place if abuse is to be analysed under the cohesion perspective, or, in other words, if it is an issue of fair distribution of tax revenue between the Member States involved.[89]

If the answer to the complementary test is positive, a third test has to be taken, concerning how to achieve that fair distribution of tax revenue without abuse and in a proportional way, even if the person has actually exercised his right of establishment.

The complementary test, taking the *N* case as an example, leads us to ask whether:

1. The Court has a broader concept of abuse when individuals are involved, since in *Cadbury Schweppes*, it simply required the *wholly artificial arrangement test*, that is, a test on the actual exercise of the right of establishment. Thus, the wholly artificial arrangement test seems to make the cohesion perspective irrelevant.
2. Or, whether the complementary test is not indeed a refined *wholly artificial arrangement test* in the case of an exit tax, taking into account that the competence to tax capital gains at the time they are realised belongs to the States of residence involved, from the time of acquisition of the assets until the time of their sale.

I claim that the second answer is the *right* one and that there is no broader concept of abuse when individuals are involved.

[88] See Dourado (n 33 above) 537, 571, 612, 643.
[89] See *N* (n 19 above), paras [41–48].

VII. THE PRINCIPLE OF ABUSE AND LEGAL CERTAINTY

In *Halifax*, the Court made a reference to legal certainty and seems to oppose it to the aim of preventing tax abuse:

> Preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the 6th Directive [. . .]. However, as the Court has held on several occasions, Community legislation must be certain and its application foreseeable by those subject to it [. . .]. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligation which they impose on them.[90]

This excerpt from the Court seems to reveal some reluctance in attributing an interpretative role to the principle of abuse, and it may perhaps reflect dissenting opinions within the Court on the use of anti-abuse as a principle. *Halifax* also seems difficult to reconcile with *Centros*,[91] *Überseering*[92] and *Inspire Art*,[93] because in the latter three cases, the Court regards the choice of the applicable law as the core of the freedom of establishment.

On the other hand, if the Court gave a predominant role to legal certainty in the context of abuse, it would accept specific anti-abuse clauses with irrebuttable presumptions, at least in some cases.

In respect of anti-abuse clauses and irrebuttable presumptions, I suggest that the Court adopts a consistent test, accepting irrebuttable presumptions as long as they correspond to 'internationally recognised principles' that do not jeopardise the fundamental freedoms.

In fact, the Court accepts a thin capitalisation discriminatory regime if it passes the test based on the 'arm's-length principle'.[94] And the arm's-length principle is itself a legal fiction or an irrebuttable presumption, since a company is not allowed to demonstrate that its transactions should not be assessed according to the arm's-length principle.

Whether domestic restrictive anti-abuse rules such as legal fictions on the meaning of residence or a minimum holding period of assets in order to benefit from an exemption regime (as long as they are not abusive) should not be accepted by the Court can be a matter of discussion. However, that scrutiny will have to be made by the Court in any case, as the scope of the rights conferred by EU law, the anti-abuse aim and the proportionality of the measure always have to be tested against EU law.

Another issue is whether the Court does not exaggerate in its proportionality assessments. According to the Court in the *N* case, paragraph [38], the 'tax declaration required at the time of transferring the residence outside the Netherlands is an additional formality likely to further hinder the departure of the person concerned'. Curiously enough, when within a Member State there are different tax domiciles implying different tax burdens, benefiting from more favourable tax regimes often implies additional compliance costs, such as filling in returns similar to the ones required by the Netherlands in the *N* case.

[90] *Halifax* (n 3 above), paras [68–69].

[91] See a critical review of the case by E Werlauff, 'The Consequences of the *Centros* Decision: Ends and Means in the Protection of Public Interests' (2000) *European Taxation* 542.

[92] Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919.

[93] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

[94] *Thin Cap* (n 17 above), paras [83–86]; on the issue, see AP Dourado and R de la Feria, 'Thin Capitalization and Outbound Investment: Thin Capitalization Rules in the Context of the CCCTB' in M Lang, P Pistone, J Schuch and C Staringer (eds), *Common Consolidated Corporate Tax Base* (Vienna, Linde 2008) 817.

What is more, principles of tax law that are common to the Member States, which are or should be accepted as principles of the EU, such as the principle of practicability and equality (or second best equality) have been totally disregarded by the Court so far, but in a second generation of case law, they may well be taken into account.[95]

Secondary EU law ensures that domestic measures do not create distortions to cross-border investment in the EU, but directives in direct taxation also include legal fictions and irrebuttable presumptions with anti-abuse aims that would be considered incompatible with the Treaty if they were domestic rules.[96]

I suggest that specific anti-abuse clauses with irrebuttable presumptions in EU secondary law are legitimate because they are directly aimed at preventing abuse of EU law (harmonised tax law) and were not drafted to prevent abuse of domestic law (and they are not domestic law).

VIII. ABUSE AS JUSTIFICATION

In the Court's reasoning the abuse test (the artificiality of the arrangement) has recently been dealt with at the level of justifications and proportionality and not when applying the relevant freedom.[97]

If abuse and anti-abuse clauses appear at the level of justifications, this implies that they are automatically considered as restricting the fundamental freedoms, as the reasoning of the Court in *Cadbury Schweppes* (paragraphs [36–59]) very clearly demonstrates. In this context, the principle of abuse is no longer an interpretation principle aimed at defining the scope of a right granted by EU law.

In its analysis, the Court seems to overlap steps of analysis that should be considered at different levels. It does so by considering that any formal exercise of an EU fundamental freedom is within the meaning and scope of the freedom.

Instead of using the principle of abuse as an interpretative principle, in order to interpret the scope of the freedom, it presumes that taking advantage of the EU fundamental freedoms, independently of the aim and purpose of the movement, is within the scope of the freedom, and that any anti-abuse rule restricts the relevant freedom (see again *Cadbury Schweppes*, paragraphs [37–46]).

My argument is based on examples such as the following. According to the Court:

> [N]ationals of a Member State cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. They must not improperly or fraudulently take advantage of provisions of Community law [. . .].[98]
>
> However, the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty [. . .].[99]

[95] On the importance of comparative law in the case law of the Court, see K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *International and Comparative Law Quarterly* 873; M Poiares Maduro, 'Interpreting European Law—Judicial Adjudication in a Context of Constitutional Pluralism' IE Law School Working Paper WPLS08-02, 4, available at ssrn.com/abstract=1134503.

[96] See Schön, 'Abuse of Rights' (n 2 above) 81–82; and *Denkavit et al* (n 27 above), paras [23–36].

[97] Case C-364/01 *Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [2003] ECR I-15013, para [71]; *Cadbury Schweppes* (n 10 above), para [36]; see Lang and Heidenbauer (n 25 above) 607.

[98] Case 115/78 *J Knoors v Staatssecretaris van Economische Zaken* [1979] ECR 399, para [25]; Case C-61/89 *Marc Gaston Bouchoucha* [1990] ECR I-3551, para [14]; *Centros* (n 8 above), para [24].

[99] *Barbier* (n 97 above), para [71].

> As to freedom of establishment, the Court has already held that the fact that the company was established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of that freedom [. . .][100].[101]

But then, instead of applying the abuse test, the Court considers that anti-avoidance rules are restrictive or discriminatory.

This has not always been so[102] and it seems that beyond adopting a formal concept of freedom of establishment, it is easier for the Court to test the proportionality of the anti-abuse rule if this is automatically considered to be a restrictive rule and its justification is then verified.[103]

However, one previous step of analysis is clearly missing: the one concerning whether there has been a real exercise of a fundamental freedom or of a right granted by EU law. If this issue were considered by the Court, the answer would either lead to the acceptance of the anti-abuse measure as long as it was proportional to the aims of defining the scope of the right if there had been abusive behaviour; or the answer would lead to the rejection of the anti-abuse rule if the behaviour of the taxpayer was within the scope of the right granted by EU law.

Since I argue that abuse defines the core and boundaries of a right granted by EU law, whether there has been abuse has to be tested first, and if there has been no abuse, the anti-abuse rule cannot be justified.

IX. FORESEEING THE NEXT STAGES IN THE COURT'S CASE LAW: A PATH TO THE TYPICAL FEATURES OF THE CASE?

It follows on from the preceding statements that an irrebuttable presumption as part of a specific domestic anti-abuse clause cannot be accepted, because the anti-abuse measure has to be tested concerning its compatibility with EU law. The Court has consistently required application of the abuse reasoning on a case-by-case basis (*ICI*, *Lankhorst-Hohorst*, *Cadbury Schweppes*, *Thin Cap*, *de Lasteyrie du Saillant*, *N*, *Part Service*, *Lidl Belgium*[104]). As a rule, and since, as I claimed above, abuse aims at defining the core and boundaries of the EU legal right, this methodology of the Court seems unavoidable in a first stage, as it obviously grants higher efficacy to the fundamental principles, even if it precludes, to some extent, certainty.

However, the Court accepts a thin capitalisation discriminatory regime if it passes the test based on the 'arm's-length principle' and this principle is itself a legal fiction. I therefore suggested that the Court adopt a consistent test, accepting irrebuttable presumptions as long as they correspond to 'internationally recognised principles' that do not jeopardise the fundamental freedoms.

Thus, it is predictable that in the aforementioned case-by-case tests, the taking into account of every single feature of the case will at some point begin to decrease and that will happen in a progressive way.

[100] *Centros* (n 8 above), para [27]; *Inspire Art* (n 93 above), para [96].

[101] *Cadbury Schweppes* (n 10 above), paras [35–37].

[102] See, on the evolution of the ECJ case law, V Edwards and Paul Farmer, 'Abuse of Law: What Is The Value Added of The Tax Dimension?' in Hinnekens and Hinnekens, *A Vision of Taxes* (n 25 above) 302; Lang and Heidenbauer (n 25 above) 607.

[103] See Lang and Heidenbauer (n 25 above) 607–08.

[104] Case C-414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* [2008] ECR I-3601.

This methodology will belong to a second stage of the Court's case law: when referrals to the Court on abuse and its case law on the issue will have already dealt with a wide range of (tax) abuse issues, the Court will cross reference its previously created objective criteria (such as the ones recommended in *Cadbury Schweppes* or in *de Lasteyrie du Saillant*). That cross reference will still require a casuistic analysis of some elements, but will not imply interpretation of the free movement itself as a principle, and instead an analysis of the case under the previously found objective criteria (ie under the defined typical cases) will be carried out.

The individual case will be compared to the typical case and some peculiarities of the individual case will be disregarded. This will not only result from a necessity to save work and time—since most of the tests are to be applied by the referring national courts—but from the nature of legal reasoning and its urge to achieving legal certainty and equal solutions to equal or similar cases.