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THE PRINCIPLE OF THE PROHIBITION OF ABUSIVE PRACTICES WITHIN THE FRAMEWORK OF THE VAT DIRECTIVE IS DIRECTLY EFFECTIVE AGAINST CITIZENS (ECJ, CUSSENS AND OTHERS JUDGMENT, C-251/16, 22 NOVEMBER 2017)

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The European Court of Justice first applied the principle of the prohibition of abusive practices in non-tax decisions to counteract the European citizens' non-genuine exercise of the Treaty freedoms aimed to avoid their Member States' legislations.

The ECJ formally recognized the principle when addressing the abusive exercise of rights conferred under EU Secondary Law. The ECJ ruled that *"according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends"* and *"the application of Community legislation cannot be extended to cover abusive practices by economic operators, 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"*.

Yet it is with the Opinions of Advocate General Giuseppe Tesouro in the [Panagis Pafitis and others](#) and the [Alexandros Kefalas](#) cases that the prohibition of abusive practices was acknowledged. The Advocate General considered that the European legal order could not accept an abusive or

fraudulent exercise of rights as granted by secondary law and substantiated his argument relying on the ECJ case law on the prohibition of the abusive exercise of the Treaty freedoms. Having denied the existence of a uniform European principle on the prohibition of abuse of rights, he specifically clarified that the argument on the “abuse of rights” is interpretative in nature and as such can only be invoked when the conditions for the exercise of the right fail to exist.

The ECJ described the constitutive elements of the abusive practices in the case [Emsland-Stärke GmbH](#) on U-arrangements, entailing the immediate re-importation of goods exported to Third Countries. Following the Opinion of AG Siegbert Albert, the ECJ held that a subjective and an objective element coexist in composing abusive practices. The objective element means that artificial conditions are created to exercise the right; the subjective element is the purpose to obtain an advantage in breach of the overall aim of the provision

In the [Halifax plc](#) judgment there occurs the first application of the principle of the prohibition of abusive practices within the scope of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT). The ECJ fine-tuned the general definition of abusive practices in the [Emsland-Stärke GmbH](#) to the tax field and qualified both the elements as objective requirements.

The [Opinion of AG Poiares Maduro](#) clearly affected the decision of the Court: the AG recognised the prohibition of abusive practices as a common principle valid for the interpretation of the VAT directive (*“I am of the opinion, therefore, that this notion of abuse operates as a principle governing the interpretation of Community law, as stated by the Commission in its written observations. What appears to be a decisive factor in affirming the existence of an abuse is the teleological scope of the Community rules invoked, which must be defined in order to establish whether the right claimed is, in effect, conferred by such provisions, to the extent to which it does not manifestly fall outside their scope”*, para. 69). According to the ECJ, abusive practices require first that taxpayers’ arrangements for the accrual of tax advantages, though complying with legal conditions for application, frustrate the purpose of the law; second, that the accrual of tax benefits

constitutes the essential aim of the transaction ([paras. 74-75](#)).

As to the first point, it requires a teleological interpretation of the European provisions as applied by the taxpayer as well as an examination of the principles or provisions infringed upon; as to the second point *“the real substance and significance of the operations”* must be determined through a factual examination. More specifically, the ECJ considered *“the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden”* ([para. 81](#)) as evidence of abusive practices that national court must take into account.

The ECJ illustrated the consequences for transactions involved in an abusive practice, stating that they *“must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice”* (so called *“restitutio in integrum”* in Italian civil law) and must not lead to a penalty for which a clear and unambiguous legal basis would be necessary. Thus, in the case of an undue deduction of input VAT, the infringement of the prohibition of abusive practices results in the obligation to repay the equivalent VAT amount.

Two years after the [Halifax plc](#) decision, upon referral of the Italian Supreme Court, the ECJ clarified whether the accrual of a tax advantage constitutes the essential or exclusive purpose of an abusive transaction. In [Part Service srl case](#), the ECJ held that an abuse of rights occurs when the tax advantage, contrary to the purpose of the provisions, is the main explanation for the activity of the taxpayer, compared to other possible economic objectives such as marketing, organization, or guarantee considerations (para. 62).

In the [Cussens and others judgment](#), of 22 November 2017, the ECJ confirmed the constitutive elements of the abusive practices, as identified in its previous decisions.

Three people had abusively leased back 15 new holiday homes to artificially avoid the subsequent sale being liable to VAT in accordance with article 4, par. 9 of the Irish VAT Act 1972.

The ECJ applied the definition of abusive practices and interpreted the

Irish VAT Act as to require the Supreme Court of Ireland to deny the appellants the right to exemption from VAT abusively invoked. Formally the transactions met the conditions for the tax advantage as provided for in the Irish VAT legislation; yet the Court found them abusive in that they had been concluded among three people and a company associated with them, to unduly obtain the VAT exemption of the subsequent sales of the same properties to third parties.

The [Cussens and others judgment](#) is innovative and deserves attention because of the ECJ conclusions on the principle on the prohibition of abusive practices. The Court considers that it qualifies as a general, comprehensive and interdisciplinary European principle that can directly be invoked against an individual irrespective of the absence of national measures (paras. 27-31). This principle, therefore, does not require being transposed and does not need to be sufficiently precise or unconditional; rather it directly applies within the framework of the VAT directive. The ECJ inferred the principle of the prohibition of abusive practices from its previous decisions against the abuse of rights and abuse of law, in which it ruled that EU law cannot be relied upon for abusive or fraudulent ends and that the application of EU legislation cannot be extended to cover abusive practices by economic operators. Consequently, the ECJ concluded that the application of this prohibition is consistent with the principles of legal certainty and protection of legitimate expectations and can be applied to regulate situations occurred even before the [Halifax plc](#) judgment.

The ECJ has consistently held that national authorities have to disregard transactions that constitute an abusive practice and apply the relevant VAT legislation to the case as redefined according to the law.

The [Cussens and others](#) decision is essential for Member States, such as Ireland, that have to date failed to implement the prohibition of abusive practices in their VAT legislation. The decision is less of interest for Member States such as Italy that incorporated a specific article in the "Statute of the Taxpayers' Rights" (Law n. 212/2000). Article 10-bis of the Statute establishes a General Anti Avoidance Rule (GAAR) for all tax fields. The Italian GAAR bans the arrangement or series of arrangements without

economic substance that may formally comply with tax laws but entail a tax benefit contrary to the spirit of law, thus effectively codifying the European principle provided for in VAT directive.

For instance, the abuse of the European Treaty Freedoms was discussed in [Van Binsbergen](#), para. 13.

ECJ, [Kefalas and Others](#), para. 20; ECJ, [Diamantis](#), para.33; ECJ, [Fini H](#), para. 32.

The prohibition of abuse of rights conferred under EU Secondary Law was implicitly applied in ECJ, [Cremer/BALM](#), para. 21; ECJ, [General Milk Products GmbH](#), para. 22.

The ECJ recognized that the assessment of the transactions is for the national authorities but provided them with binding criteria to carry out this test ([para. 61](#)).

Schön, W., *Abuse of rights and European Tax Law*, in Jones J. - Harris P. - Oliver D. (Edited by), *Comparative perspectives on Revenue Law- Essays in Honour of John Tiley*, Cambridge, United Kingdom: Cambridge, 2008, pp. 78 ss..

De La Feria R. - Vogenauer S. (Edited by), *Prohibition of Abuse of Law - A New General Principle of EU Law*, Oxford, United Kingdom: Institute of European and Comparative Law, 2010. By "abuse of law" authors mean the exercise of the European freedoms of movement aimed to circumvent the legislations of the Member States.

De Carolis D., *The Reverberation Effect of the EU Notion of Abuse of Law on the Italian Tax Legal System: Towards an Enhanced Horizontal Interaction Among National General Anti-Abuse Rules?*, in *Intertax*, 45, 2017, pp. 169-174.