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Abuse of rights in EU VAT

The Court's tool to introduce a new
general principle of EU Law

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PREFACE

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SUMMARY

The principle of prohibition of abuse of EU law has developed throughout a variety of areas of EU law, but has for the last few years most specifically evolved into an overriding principle through the field of EU VAT.

The questions that have arisen along the lines of the Court's interpretation mainly assess the relation with legal certainty and the division of powers. When looking at the cases of *Maks Pen* and *Italmoda* without prior engagement in the abuse of rights doctrine, one is inclined to question its compliance with these core principles underpinning the EU legal order. However, by the Court's gradual extension of the scope of the principle of prohibition of abuse of EU law, through *Halifax* and *Kofoed*, the current scope of application has become defensible to a certain extent. The Court appears to have struck the balance right between legal certainty and the needs of the Internal Market in general, although the case in *Italmoda* must be considered to be a flaw within that process.

When looking at the principle from a notional standpoint, one cannot conclude differently than that it has ascended to a level of constitutional value. The principle of non-abuse possesses the elements academically designated to general principles of EU law. However, the full and direct application against individuals appears to still be a bridge too far at this time, due to a remaining lack of unified recognition in all layers of the EU legal order.

ABBREVIATIONS

AG	Advocate-General
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
EU	European Union
MS	Member State
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value added tax

1. INTRODUCTION

1.1. Introductory remarks

The development of the principle of prohibition of abuse of EU law has over the last few years become one of the main areas of interest for scholars, as its growth in status has raised the urge for research on this subject.¹ This principle, also referred to as the principle that EU law cannot be relied on for fraudulent ends, the principle of non-abuse of EU law or *fraus omnia corrumpit* (fraud corrupts everything), has quickly grown to become a prominent tool of the CJEU in denying rights relied on from the VAT Directive, in cases of established tax fraud or failure to comply with the conditions of good faith.²

With that prominence, questions arose as to what extent this principle could measure up to a general principle of EU law, as a source of EU law. De La Feria already questioned in 2008 whether the CJEU had, through its case law in EU VAT, created a new general principle of Union law.³ That question was mainly based on decisions in cases of *Kofoed*⁴ and *Halifax*⁵, but the trend had started far earlier and has evolved quickly since. Therefore, De La Feria's question has remained highly relevant and motivates one to believe that a new look at the Court's case law may deliver subsequent insights.

Although the VAT Directive⁶ provides MSs with certain discretion to adopt legislation to prevent abusive practices, the Court rather opts to rely on the prohibition of abuse as a principle of law than to interpret (transposed) rules of national law. In that sense, the case of *Italmoda*, delivered in the end of 2014, appears to be a new milestone in that evolution, whereas the Court overstepped the rules of national law and favoured the application of the general principle of non-abuse of EU law.⁷

¹ R. De La Feria, 'Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC

² R.A. Wolf, 'Mecsek-Gabona: The Final Step of the ECJ's Doctrine on Reliance on EU Law for Abusive or Fraudulent Ends in the Context of Intra-Community Transactions', *Intl. VAT Monitor*, 2013(5), 280-286, p. 280.

³ De La Feria 2008.

⁴ Judgment in *Kofoed*, C-321/05, EU:C:2007:408.

⁵ Judgment in *Halifax and Others*, C-255/02, EU:C:2006:121.

⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, replacing Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment (Sixth VAT Directive), OJ L 145, 13.6.1977.

⁷ Judgment in *Italmoda*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455.

The questions are, as a consequence, to what extent a general principle may emerge in that way, and more importantly whether the principle of prohibition of abuse of EU law can now be regarded as a fully developed, constitutional general principle of EU law. It will be interesting to see, in the furthering of this research, to what extent the approach taken by the Court has led to a Union-wide principle of non-abuse. Though many authors appear to lean towards that direction⁸, this research aims to recheck this question by also seeking notional understanding of (the creation of) general principles of EU law.

1.2. Research question

In the light of this interesting reality in EU VAT, this thesis aims to find an answer to the following research question:

To what extent should the developments in recent case law of the CJEU in the field of EU VAT be interpreted as having created the principle of prohibition of abuse of EU law as a general principle of EU law?

1.3. Outline

This question will be the thread of this research and should be kept in mind throughout the thesis. As the research question in itself is rather broad and extensive, it is important to note that the question is to be divided into three main parts, which will individually form the basis of the upcoming chapters.

The first part, which one can merely implicitly derive from the research question, is the background to this development. The development of the principle that EU law cannot be relied on for fraudulent ends within the framework of EU VAT has been a quick and peculiar development. First, the EU VAT system will be summarized, so as to create understanding for non-experts in the field. However, the construction within the Court's case law is the core of the following chapter, with the aim of providing the reader with a clear reference for the observations regarding the actual impact on EU law of more recent developments. This is achieved through an in-depth look at the abuse of rights-doctrine in EU law.

⁸ Also observed in De La Feria 2008, p. 434.

Secondly, the recent case law of the CJEU on the subject is discussed. In this chapter, the case law of the Court with significant impact on the status of the abuse of rights doctrine in EU VAT is discussed in detail, seeking to address the specific evolution of the principle in the case law.

Thirdly, as the last core notion within the research question, this thesis will address the meaning and purpose of a general principle of EU law. Mainly, it will be debated how the different interpretations of a ‘general principle’ affect the characterization of the described developments. In doing so, this part of the thesis aims to arrive at a clear view on whether there exists a distinction between the academic perception of a general principle of EU law and the principle upon which the Court appears to have arrived through EU VAT case law.

1.4. Method and delimitation

To achieve a fulfilling and comprehensive outcome to the above-described research, this thesis intends to take up a critical approach towards the developments in EU VAT and EU law as a whole. Looking at the law as it stands, including predominantly the case law of the CJEU, forms the fundament of this thesis. The assessment is thus based on the legal dogmatic method.

This thesis aims to remain as much as possible to discuss the peculiarities of the overlap between primary EU law and EU VAT. However, the development of the principle takes place throughout all areas of EU law, which compels to take account of case law from a variety of fields of application. The choice of cases is mainly based on the specific importance for the development of the principle itself, as discussed in leading doctrinal debate on the matter.

2. LEGISLATIVE AND DOCTRINAL FRAMEWORK

2.1. Introduction

First it is important to create a detailed view on the context within which the CJEU has found it opportune to introduce and maintain the principle of prohibition of abuse of EU law. In this chapter, a short glance is taken at the EU VAT system, as also the background of the prohibition of abuse of rights within EU VAT legislation. Thereafter, as will show to be appropriate, focus shifts to the development of the abuse of rights doctrine, mainly developed in CJEU case law.

2.2. Legislative background

For a good understanding of the framework within which the doctrine of abuse of rights and the combating of fraud is relevant, it is first important to discuss the legislative background and its *lacunae* within which the abusive practices are appearing. This subchapter aims to give a short description of the EU VAT system, looking at the core notions therein that are relevant in the continuation of this research. A similar approach is taken in discussing relevant notions from primary EU law, in order to show the interplay of legislative frameworks and principles within the EU.

2.2.1. Primary EU law

Within the framework of primary EU law, the scheme relevant to indirect taxes and EU VAT specifically is established mainly in Articles 28-37 TFEU, regulating the free movement of goods, the customs union and the prohibition of quantitative restrictions and the freedom to provide services in Articles 56-62 TFEU. Moreover, Articles 110-113 TFEU provide for the prohibition of fiscal discrimination and fiscal dumping with indirect taxes between MSs and enable the Council to adopt provisions to further harmonize in the field of indirect taxation.⁹

2.2.2. EU VAT in brief

The framework of EU VAT is established in secondary law of the EU, mainly enshrined in Directive 2006/112/EC (referred to as ‘VAT Directive’).¹⁰ The VAT Directive was

⁹ B.J.M. Terra and J. Kajus, *Guide to the European VAT Directives (Introduction to European VAT)*, IBFD Publications BV, 2014, p. 17 and pp. 20-24.

¹⁰ *Ibid*, p. 241.

implemented through the Council Implementing Regulation No. 282/2011¹¹, amended by Council Regulations No. 967/2012 and 1042/2013.¹²

EU VAT is a turnover tax, which is typically characterized as a ‘general indirect tax on consumption’¹³, and that terminology defines the system very concisely. Firstly, EU VAT is a general tax, meaning that, in principle, no distinction is to be made between goods or services consumed. All private expenditure is to be taxed, without discrimination. The clearest example of an opposite would be excises, which are taxes on specific goods (alcohol or cigarettes).¹⁴ As Terra and Kajus explain, the generality is essential, because services often can be substitutes for certain goods. Selectivity between services and goods, for instance by excluding the former from taxation, could stimulate the consumption of the latter.¹⁵ A consumer would drive around an aging car rather than to replace it, as the upkeep is not taxed. Another aspect of the generality is the fact that there must be a proportional relationship between the amount paid for consumption and the amount due for VAT payment. The amount to be taxed is to be certain, as a percentage of the retail price, and equal for identical goods.¹⁶ Thereby, the system aims to establish equality and legal certainty.

Secondly, EU VAT is a tax on consumption. Consumption in this sense is the expenditure to acquire a good by an individual or private person.¹⁷ More specifically, the system is aimed at taxing *end* consumption. As enshrined in Article 1(2) of the VAT Directive, VAT is to be charged exactly proportional to the price of goods and services (referring to the generality), ‘*however many transactions take place in the production and distribution process before the stage at which tax is charged.*’

¹¹ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast), OJ L 77/1, 23.3.2011.

¹² Council Regulation (EU) No 967/2012 of 9 October 2012 amending Implementing Regulation (EU) No 282/2011 as regards the special schemes for non-established taxable persons supplying telecommunications services, broadcasting services or electronic services to non-taxable persons, OJ L 290, 20.10.2012, and Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services OJ L 284, 26.10.2013. See Terra and Kajus 2014, p. 80.

¹³ Terra and Kajus 2014, p. 80, p. 241.

¹⁴ Ibid, pp. 241-242.

¹⁵ Ibid.

¹⁶ Ibid, p. 242.

¹⁷ Ibid, p. 244.

Thirdly, EU VAT is a form of indirect tax. VAT is charged on all stages of the production and distribution process¹⁸, but is not levied directly from the person on whom it ultimately falls, in this case the end consumer. The final seller bears the burden to convey the tax to the authorities, leading the common understanding to be that the indirect tax is ultimately carried forward to the end consumer, as part of the sales price.¹⁹

2.2.3. *Neutrality*

The core principle underlying this system of VAT, which makes the system functional and defensible, is the principle of fiscal neutrality. Following Terra and Kajus, the aim of this principle is in essence two-fold, namely to achieve internal and external neutrality.²⁰ Fiscal neutrality is the non-constitutional, EU VAT version of the principle of equality.²¹ When looking at the legal character of the internal notion, the aim of equality is clear. Equal is to be treated equally, applicable both to taxpayers and forms of consumption, as we saw above in the purpose of generality of EU VAT.²² Moreover, EU VAT must not distort competition, and must be economically neutral. Economic neutrality is the non-interference of VAT with the existing market mechanisms, and thereby the optimal allocation of provision of products and production.²³

Externally speaking, the abolishment of tax frontiers in the EU is the core of achieving neutrality. There should not be a difference between private expenditure in one MS *vis-à-vis* another MS.²⁴ Just as a differentiation in treatment between services and goods can affect the consumer's behavior, a difference in treatment between domestic and imported goods or services may also affect market mechanisms. This thus relates strongly to the internal aspects of fiscal neutrality, specifically economic and competition neutrality.²⁵

¹⁸ With a right to deduct input VAT on transactions within the supply chain, see below. Summarized shortly in O. Henkow, 'Neutrality of VAT for taxable persons: a new approach in European VAT?' *EC Tax Review*, 2008(5), 233-240, p. 233.

¹⁹ Terra and Kajus 2014, p. 245. See also Henkow 2008, p. 233.

²⁰ *Ibid.*, p. 248.

²¹ Judgment in *Zimmermann*, C-174/11, EU:C:2012:716. See Terra and Kajus 2014, p. 245.

²² Terra and Kajus 2014, pp. 248-249.

²³ *Ibid.*, p. 249.

²⁴ *Ibid.* pp. 250-251.

²⁵ *Ibid.*

2.2.4. *Deductions and exemptions*

In order to establish a functional ‘general indirect tax on consumption’, in a neutral manner, the EU VAT system includes a deduction mechanism.²⁶ As Terra describes, the deduction of input taxes by non-consumers forms the essence of the EU VAT system.²⁷ Following the VAT Directive, a taxable person obtains the right to deduct the tax invoiced to him on goods or services supplied to him from the tax for which he is liable in respect of his supplies. This applies similarly to (intra-Community) acquired or imported by that taxable person. Article 167 of the VAT Directive stipulates that the right of deduction arises at the moment on which the deductible tax becomes chargeable. The right to deduct or the right for refund of VAT is restricted to goods and services used for the purpose of taxable transactions.²⁸ This includes taxable transactions in another country, if such transaction would give rise to a right of deduction when the transaction had occurred in the territory of the first country.²⁹ In practical terms, it is relevant to note that MSs have the discretion to regulate, when the deductions exceed the amount of tax due, for the excess to be carried forward to the following tax period.³⁰

Supplies of goods or services that are exempt from the scope of the VAT Directive³¹, or goods or services used for non-business purposes, are not subject to VAT and therefore do not give rise to a right to deduct.³² In case of a trader that uses goods and services supplied for both taxed transactions and for exempt or non-business purposes, that trader may deduct only the proportion of the input tax that is attributable to the taxable transactions.³³ The method for calculation of that proportion, most commonly referred to as ‘pro-rata’, is provided for in Article 174 of the VAT Directive.³⁴

Lastly, an important tool within the framework of EU VAT for intra-Community traders is the zero rating of intra-Community supplies, which is listed as an exemption in Article 138 of

²⁶ Enshrined in Title X of the VAT Directive.

²⁷ B.J.M. Terra, *VAT: The Case of Value Added Tax in the European Union*, Series on International Indirect tax, University of Lund, Volume 5, ETIL, 2014, p. 145. Also characterized as such in B.J.M. Terra and P.J. Wattel, *European Tax Law*, 6th edition, Wolters Kluwer, 2012, pp. 221-222.

²⁸ Article 168 of the VAT Directive.

²⁹ Article 169 of the VAT Directive.

³⁰ Article 183 of the VAT Directive. Summarized in Terra 2014, p. 145.

³¹ As listed in Article 132 of the VAT Directive.

³² Terra 2014, p. 145.

³³ Article 173 of the VAT Directive.

³⁴ Terra 2014, p. 145.

the VAT Directive. As opposed to the other exemptions, the right to deduct remains untouched in the case of zero rating of intra-Community supplies.³⁵

2.2.5. Abuse of rights in the Treaties

The abuse of rights is a factor that plays a role in all fields of EU law, and it entails the situation of a person seeking to rely on EU right and thereby circumventing or displacing national law. When looking at EU VAT, which is based on legislation through Directives, the likely scenario is that a person seeks to rely on a European legal right (possibly transposed in national law), in order to displace or circumvent national law.³⁶ This is discussed further in the next subchapter.

The VAT Directive therefore provides for certain provisions and measures regarding VAT fraud.³⁷ These provisions mainly enable the MSs to adopt specific measures in certain areas to combat or prevent such tax evasion or tax avoidance, based on the conviction that EU law should not cover fraudulent activities.³⁸ The areas, in which the VAT Directive explicitly provides for such powers, are the following:

- The supply of services³⁹,
- The exemption of services⁴⁰,
- The exemption on importation and exportation⁴¹,

³⁵ The right to deduct is provided for in Article 168(c) of the VAT Directive. See Terra and Kajus 2014, p. 270 and pp. 958 *et seq* and R.A. Wolf, 'Mecsek-Gabona: The Final Step of the ECJ's Doctrine on Reliance on EU Law for Abusive or Fraudulent Ends in the Context of Intra-Community Transactions', *Intl. VAT Monitor*, 2013(5), 280-286, p. 280.

³⁶ Terra and Kajus 2014, p. 49.

³⁷ Judgment in *Direct Cosmetics*, C-138/86 and C-139-86, EU:C:1988:383, para 22. The Court stated that the Sixth VAT Directive incorporated an addition to the earlier existing concept of 'fraud', which is equated with tax evasion. That addition was made with adopting the concept of tax avoidance. Tax avoidance, as the Court continued, is inherently of an objective nature. As opposed to tax evasion, tax avoidance requires no intention on the part of the taxpayer for its existence.

³⁸ Judgment in *Emsland-Stärke*, C-110/99, EU:C:2000:695, para 51.

³⁹ Article 59a of the VAT Directive, providing the MSs discretion to deviate from the general place of supply rules, to prevent double taxation, non-taxation or distortion of competition.

⁴⁰ Articles 131-136 of the VAT Directive, establishing a framework of compulsory and non-compulsory exemptions of services, leaving the MSs freedom to lay down conditions to ensure correct application and prevent evasion, avoidance and abuse.

⁴¹ Articles 140-153 of the VAT Directive, providing for a framework of exemptions of intra-Community acquisitions of goods, certain types of (international) transport, exportation and services provided by intermediaries, leaving MSs discretion to, among other things, prevent avoidance.

- Taxpayers' obligations⁴²,
- Derogations⁴³,
- Intra-Community supplies⁴⁴,
- Taxpayers' obligations regarding supplies within the Internal Market⁴⁵, and
- Duty-free goods.⁴⁶

Noteworthy is also the specific mention in the preamble of the Council Implementing Regulation No. 282/2011, point 23:

*'Without prejudice to the general application of the principle with respect to abusive practices to the provisions of this Regulation, it is appropriate to draw specific attention to its application to certain provisions of this Regulation.'*⁴⁷

2.3. Abuse of rights doctrine

Besides the enabling clauses listed above, the prevention of abuse has not very extensively been established in the legislative framework. However, the CJEU has found reason and method to develop the principle more thoroughly through its case law. The specific forms in which abuse has been recognized in the case law of the CJEU will be discussed below, aiming to provide an overview of the interplay between areas of EU law in which it is applied.

⁴² Article 273 of the VAT Directive. MSs may impose obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion.

⁴³ Article 395 of the VAT Directive. In 395(1): *'The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.'*

⁴⁴ Article 138 of the VAT Directive provides for the regulation of the exemption of intra-Community supplies of goods.

⁴⁵ Article 273 and 138-140 of the VAT Directive. Articles 138-140 provide for some exceptions from the exemptions, leaving the MS to impose lower obligations for taxpayers following the earlier mentioned Article 273.

⁴⁶ Article 158 of the VAT Directive, providing MSs for discretion in ensuring the correct application of warehousing rules, preventing avoidance, evasion and abuse. Listed in Terra and Kajus, p. 49.

⁴⁷ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast), OJ L 77/1, 23.3.2011, preamble pt 23.

2.3.1. Terminology

First of all, it is convenient to settle on the terminology with regard to the abuse of rights doctrine, used for the purpose of this thesis. Pistone highlights an important distinction between the meaning of ‘abuse of law’ and ‘abuse of rights’.⁴⁸ Abuse of law refers to the improper application of a statute to situations other than those which the legislature intended to regulate and which are in conflict with the rationale of such measure. Abuse of rights, most often used in English tax literature, refers to the use of a right for an improper purposes, for instance to harm someone else’s right.⁴⁹

The object of abuse in tax matters is more generally law than rights, since the legal relations therein are not interpersonal so as to be capable to harm another person’s rights. Rather, they might deprive the tax authorities from tax.⁵⁰ For the purpose of uniformity, this thesis remains with the more commonly used term of ‘abuse of rights’ when referring to the doctrine as such. However, the distinction between objects of abuse is practical to bear in mind.

2.3.2. Forms of abuse

Terra and Kajus distinguish several forms of abuse of rights (they refer to it as the French *abus de droit*, or the Latin *fraus legis*), which they have been able to recognize from the case law of the CJEU.⁵¹ That is to say, they describe situations or scenarios in which the doctrine (or principle) has played a role.⁵² They list the following four:

- Where a person seeks to rely on a European legal right to circumvent or displace national law.

⁴⁸ P. Pistone, ‘Abuse of Law in the Context of Indirect Taxation: From (Before) Emsland-Stärke 1 to Halifax (and Beyond)’ in R. De La Feria and S. Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford, 2011, p. 381.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ De La Feria chooses to distinguish areas of EU law in which the principle has been applied, in De La Feria 2008, pp. 398 *et seq.* Other authors rely on two main forms of abuse. First, circumventing national law by relying on a fundamental freedom, and second, seeking improper advantage of a right granted by Union law. See for instance T. Tridimas, ‘Abuse of Right in EU Law: Some Reflections with Particular Reference to Financial Law’, Queen Mary School of Law Legal Studies Research Paper No. 27/2009. Available at SSRN: <http://ssrn.com/abstract=1438577>, last consulted 11 May 2015, p. 4. Essentially, the areas or forms covered are similar. However, the specific division of Terra and Kajus provides for a preferred setup for discussion for this thesis.

⁵² Terra and Kajus 2014, p. 43 *et seq.*

The first reference to abuse and abusive practices in the case law of the CJEU was made within the area of the freedom to provide services, with the judgment in *Van Binsbergen*.⁵³ The case dealt with the direct applicability of EU law provisions, regarding a Dutch legal provision stating that only persons who habitually resided in the Netherlands were allowed to act as legal representatives before an appeal court. The Court ruled that this was not compatible with the freedom to provide services in Community law, holding that all restrictions to which EU citizens might be subject on the basis of their nationality or place of residence infringe the (current) Article 56 TFEU, and are therefore void.⁵⁴ However, the Court added that requirements in place to ensure the application of certain professional rules justified by the general good, such as rules relating to organization, qualifications and professional ethics could not be held to be incompatible with the freedom to provide services. Moreover, with regard to abuse, ‘*a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article [56] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state*’.⁵⁵

This approach was continued in *Leclerc*.⁵⁶ There, the Court stated that the free movement of goods (Article 34 TFEU) cannot be relied on, when books were exported and re-imported for the purpose of circumventing national rules.⁵⁷ Similarly, in *TV10*, obligations imposed on domestic broadcasters also applied to broadcasters located in a different MS. Such measure of the MS is not in conflict with the freedom to provide services, when the activities of the broadcaster are mainly directed at the first MS and the broadcaster was just established in another MS in order to avoid the rules applicable there.⁵⁸

These cases should however not lead to the interpretation that any avoidance of stricter domestic rules amount in abuse of some sort (the CJEU did not actually refer to a principle of abuse in the cases above). The Court was faced with *Centros*, in which a company, ran by

⁵³ Judgment in *Van Binsbergen*, C-33/74, EU:C:1974:131. See De La FERIA 2008, p. 398.

⁵⁴ Terra and Kajus 2014, pp. 43-44.

⁵⁵ Judgment in *Van Binsbergen*, EU:C:1974:131, paras 12 and 13. See Terra and Kajus 2014, p. 44.

⁵⁶ Judgment in *Leclerc*, C-229/83, EU:C:1985:1.

⁵⁷ *Ibid*, para 27. See Terra and Kajus 2014, p. 45.

⁵⁸ Judgment in *TV10*, C-23/93, EU:C:1994:362. See De La FERIA 2008, pp. 401-402.

two Danish citizens, was incorporated in the UK and intended to trade in Denmark through a branch. That construction was based on the freedom of establishment (Article 54 TFEU), thereby circumventing the stricter requirements of start-up capital in Denmark. Contrary to the view of the Danish authorities, the motives on where to incorporate a company were not assessed, and the Court remained that the freedom of establishment would be sufficiently secured by satisfying the requirements of the law of the host MS.⁵⁹

- Where a person seeks to gain a financial advantage from EU funds by way of an abusive use of EU law.

General Milk Products was a case about imported cheese from New Zealand into Germany and further re-exported to other MSs. The German authorities refused certain monetary compensation for the cheese that was re-exported, as they claimed that the initial importation allowed the company wrongfully to take advantage of compensation amounts available for shipment of cheese to other MSs. The CJEU disagreed, but added that if importation and re-exportation were not realized as bona fide commercial transactions but were put in place only to wrongfully benefit from a grant, the authorities may refuse such compensation.⁶⁰

The case in *Emsland-Stärke* was a very strong and straightforward follow-up on this tendency, one that can be considered a milestone in the development of the abuse of rights doctrine in EU law. A company exported goods out of the Community, thereby receiving export restitutions following an applicable Regulation, after which it re-imported the goods back into MSs. It appeared that the export restitutions were significantly higher than the customs duties on import, leaving Emsland in a very profitable position. Although all of this was perfectly legal, the CJEU decided that the company could not rely on the Regulation to recover export restitutions, as the transactions amounted to ‘abuse of EC law’. Interestingly, the Court introduced a two-condition test to assess whether abuse is present. First, when the economic operator intends to obtain an EU benefit which was not intended for him through artificial creation of a situation meeting the EU criteria (subjective element), and second

⁵⁹ Judgment in *Centros*, C-212/97, EU:C:1999:126.

⁶⁰ Judgment in *General Milk Products*, C-8/92, EU:C:1993:82, para 21. See De La Feria 2008, pp. 408-409 and Terra and Kajus 2014, pp. 46-47.

when, although formally the criteria are met, object and purpose of the EU rule are not served (objective element).⁶¹

- Where a person uses EU law in a manner alleged to be contrary to a national abuse of rights provision.

In three Greek cases, the Court was faced with the exercise of rights by private shareholders under a Directive to object to an increase in capital instigated by the Greek State. The questions boiled down to asking whether national law on abuse of rights may be utilized to assess whether the application of a Directive provision is abusive.⁶² In *Pafitis*⁶³, the Court initially dismissed such suggestion. However, in the following case of *Kefalas*, the Court stated that such exercise of the shareholders' rights could manifestly go against the objectives of the Directive provision, and therefore was capable of constituting an abuse of rights.⁶⁴ The Court reiterated said view in *Diamantis*.⁶⁵

In *Kofoed*, the Court went on to interpret the improper use of a Directive, where national law did not provide for specific national measures aimed at implementing the anti-abuse provision. The Court held, rather remarkably, that the transposition of a Directive could also be achieved by the general legal context, so that formal re-enactment is not required.⁶⁶ This case and its implications are of key importance in the coming chapter, as is also the case for the recent judgment in *Italmoda*.

- Transactions designed solely to obtain a tax advantage.

In extension of the first form of abuse, 'where a person seeks to rely on a European legal right to circumvent or displace national law', the field of tax law has provided for a number of examples where traders came up with constructions in order to obtain tax advantages available in EU law, in EU VAT enshrined in the VAT Directive.

⁶¹ Judgment in *Emsland-Stärke*, EU:C:2000:695. See, for instance, Terra and Kajus 2014, p. 47, De La Feria 2008, pp. 408-409 and L. Cerioni, 'The "Abuse of Rights" in EU Company Law and EU Tax Law: A Re-reading of The ECJ Case Law and the Quest for a Unitary Notion', *EBLR* 2010(6), 783-813, p. 787.

⁶² Judgment in *Kefalas and Others*, C-367/96, EU:C:1998:222, para 19. See Terra and Kajus 2014, p. 47.

⁶³ Judgment in *Pafitis and Others*, C-441/93, EU:C:1996:92.

⁶⁴ Terra and Kajus 2014, p. 47. Also discussed in Cerioni 2010, pp. 786-787.

⁶⁵ Judgment in *Diamantis*, C-373/97, EU:C:2000:150. See Terra and Kajus 2014, pp. 47-48.

⁶⁶ Judgment in *Kofoed*, C-321/05, EU:C:2007:408, para 44.

Arguably, the actual starting point in the analysis of the abuse of rights doctrine in the field of tax law was not *Emsland-Stärke*, but was the twelve years older *Direct Cosmetics* case.⁶⁷ There, although not specifically using the term ‘abuse’, the Court clarified the distinction between tax avoidance and tax evasion.⁶⁸ It held that the phenomenon of tax avoidance is of an objective nature, and does not require the intention of the trader as a condition for its existence. That does not apply to tax evasion.⁶⁹ Moreover, the CJEU highlighted the difficulties arising from the different language versions of EU legislation, and thus multilingual interpretation, in the prevention of avoidance and evasion. Also, it highlighted the fundamentality of the principle of proportionality as a tool for the assessment of the measures taken by MSs to prevent avoidance.⁷⁰

As discussed above, the doctrine further developed through several areas of EU law. In the field of EU VAT, AG Ruiz-Colomer hinted towards the specific application of the abuse doctrine in his Opinion in *EMU Tabac*.⁷¹ However, the case in which the Court itself explicitly introduced the abuse doctrine in the field of EU VAT was *Halifax*.⁷² This case forms the cornerstone for the adoption of the principle in EU VAT and is discussed in depth in the coming chapter.

2.4. Concluding remarks

As we have seen, the doctrine of abuse of rights has established itself mostly through the case law of the CJEU. The establishment of the doctrine in itself has come with sufficient uncertainty and confusion, for instance because of the fact that the clear distinction between tax avoidance and evasion in *Direct Cosmetics* has not consistently been followed by the CJEU.⁷³

The application of the doctrine in different fields of EU law has presented questions as to what extent those developments may apply in parallel to the field of EU VAT. In the coming

⁶⁷ Judgment in *Direct Cosmetics*, EU:C:1988:383.

⁶⁸ Pistone 2011, pp. 383-384.

⁶⁹ Judgment in *Direct Cosmetics*, EU:C:1988:383, paras 20-24. See Pistone 2011, pp. 383-384.

⁷⁰ Ibid, paras 21-22. See Pistone 2011, pp. 383-384.

⁷¹ Judgment in *EMU Tabac and Others*, C-296/95, EU:C:1998:152. See Terra and Kajus 2014, p. 50.

⁷² Judgment in *Halifax and Others*, EU:C:2006:121.

⁷³ Judgment in *Gemeente Leusden and Holin Group*, C-487/01 and C-7/02, EU:C:2004:263, para 79. See Terra and Kajus 2014, p. 51.

chapter, the cases in which those questions have found answers are described. The particularity that the abuse theory appears to develop into a general principle of EU law, with all the recognition such status bears with it, is the focus, as the status and the perception of the doctrine of abuse of rights will show to have gradually changed.

3. THE PRINCIPLE OF PROHIBITION OF ABUSE OF EU LAW

3.1. Introduction

The doctrine of abuse of rights has thus found fast growth in status, which has raised questions on the actual reach of that doctrine and the possibility of it to introduce the prohibition of abuse of EU law as a general principle. Although the Court has been hesitant to denominate the prohibition as such, the wording and reasoning had leaned towards such interpretation for a while. In this chapter, the cases that have shown the clearest significance for the acceptance of that interpretation, some of which have partially been discussed in the previous chapter, are reviewed in depth. Thereafter, focus shifts mainly to the case that appears to have given the prohibition of abuse of EU law the definite status of an overriding principle of EU law, namely the judgment in *Italmoda*. Lastly, some questions arising from that judgment are addressed.

3.2. The introduction as a general principle of interpretation

As discussed in the previous chapter, one of the core cases where the CJEU attributed significant weight to non-abuse within the field of EU VAT is the *Halifax* judgment.⁷⁴ Below, a summary of the judgment and the Opinion of the AG show the significance of the Court's interpretation in this specific judgment. Thereafter, a similar examination of the groundbreaking judgment in *Kofoed* presents the furtherance of this interpretation.

3.2.1. *Halifax*

The judgment in *Halifax* concerned a banking company, Halifax, which enacted supplies that were largely exempt from VAT, so that it could only recover input VAT over less than five per cent of its activities. For its banking business purposes, Halifax decided to set up call centres on four different sites. As direct construction by Halifax would have led to loss of recovery of the costs, it implemented a scheme involving three of its separately VAT-registered subsidiaries, within its so-called Halifax's Companies Act group.⁷⁵

The first question referred to the CJEU related to the extent of which an activity, such as in this case, must be held to amount to an economic activity for VAT purposes, being supplies

⁷⁴ Judgment in *Halifax and Others*, EU:C:2006:121.

⁷⁵ *Ibid*, paras 12-43. Summarized in Terra and Kajus 2014, pp. 51-60 and De La Feria 2008, pp. 421-423.

of goods or services effected for consideration by a taxable person acting as such.⁷⁶ The VAT and Duties Tribunal London, referring the case to the CJEU, was particularly disturbed by the fact that the transactions undertaken by Halifax were solely aimed at obtaining a tax advantage, and those transactions had no independent business purpose.⁷⁷

In his opinion, AG Poiares Maduro reiterated that, based on the principle of neutrality and legal certainty, the activities pursued must be assessed objectively and independent of their eventual purpose and motives of the parties, in determining whether they constitute economic activities for VAT purposes.⁷⁸ The Court followed the approach of AG Poiares Maduro and held that the transactions constituted economic activities for VAT purposes, as they fulfilled the objective criteria on which those concepts are based.⁷⁹ It further substantiated said objectivity by stating that *'the question whether a given transaction is carried out for the sole purpose of obtaining a tax advantage is entirely irrelevant in determining whether it constitutes a supply of goods or services and an economic activity.'*⁸⁰

Furthermore, when looking at the abuse of rights doctrine, it is of greater significance to look at the second question. The VAT and Duties Tribunal sought to determine whether the (then Sixth) VAT Directive *'must be interpreted as meaning that a taxable person has no right to deduct input VAT where the transactions on which that right is based constitute an abusive practice.'*⁸¹

The significance of this question was that it essentially tested the applicability of the previously established notion of abuse of right by the CJEU, in other areas of EU law, in the sphere of EU VAT. Following the above-discussed cases of *Van Binsbergen*, *Emsland-Stärke* and several others, such application would lead to prevent taxable persons from obtaining a tax advantage as a result of transactions enacted for the sole purpose of acquiring that advantage.⁸² AG Poiares Maduro answered this question by following the CJEU in its previous case law. He noted that, as discussed in the previous chapter of this thesis, the

⁷⁶ Terra and Kajus 2014, p. 52.

⁷⁷ Judgment in *Halifax and Others*, EU:C:2006:121, para 43. See Cerioni 2010, p. 798.

⁷⁸ Opinion of AG Poiares Maduro in *Halifax and Others*, EU:C:2005:200, para 48.

⁷⁹ Terra and Kajus 2014, p. 56. Also in De La Feria 2008, pp. 422-423.

⁸⁰ Judgment in *Halifax and Others*, EU:C:2006:121, para 59.

⁸¹ *Ibid*, para 61.

⁸² De La Feria 2008, p. 423. Also in Terra and Kajus 2014, p. 54.

contexts within which the Court had assessed the notion of abuse were mainly to be divided in two. Firstly, concerning cases where EU law provisions are invoked abusively, in order to evade national law and secondly, in cases where EU law provisions are abusively relied upon in order to obtain advantages in a way that is in conflict with the aims and purposes of those provisions. On the basis of that background, the AG opined that a general principle of EU law could be considered to derive from that case law. The AG referred to another case in which the CJEU itself had summarized the notion as laying down that ‘EU law cannot be relied on for fraudulent ends’.⁸³

Interpreting and approving the two-fold test on determining the existence of abuse from *Emsland-Stärke*, the AG stated that the notion of abuse operates as a ‘principle governing the interpretation’ of Union law.⁸⁴ This, following *Terra and Kajus*, allows for the application of the abuse of rights doctrine parallel with a derogation based on (the current) Article 395 of the VAT Directive, and not subject to such granted derogation. They hold that the interpretation of the notion from *Emsland-Stärke* by AG Poiares Maduro in *Halifax* leads to a question of abuse focusing on whether the alleged abusive conduct is inside or outside the scope of the provision. In other words, the question of abuse as established in EU law is more a question of interpretation of that Union law provision itself, than a self-standing test of the existence of abuse.⁸⁵

More extensively, the AG continued in arguing that it is the interpretation of objective purpose of EU law provisions that should form the basis of the doctrine of abuse of rights. The subjective intentions of those claiming a right under Union law are not (as) relevant for the finding of artificiality, as also presented in *Emsland-Stärke*.⁸⁶ Whether a transaction is of an artificial nature should be determined on the basis of reviewing objective circumstances, and by interpreting the EU law provision in a teleological manner instead of just literal.⁸⁷ That is to say, according to the AG, abuse must be found to exist when an activity cannot possibly have any other purpose or justification than to trigger the application of Union law

⁸³ Opinion of AG Poiares Maduro in *Halifax and Others*, EU:C:2005:200, paras 63-64. See also the Judgment in *Diamantis*, EU:C:2000:150. Summarized in *Terra and Kajus* 2014, p. 54.

⁸⁴ *Ibid*, paras 66-69.

⁸⁵ *Terra and Kajus* 2014, p. 54.

⁸⁶ Opinion of AG Poiares Maduro in *Halifax and Others*, EU:C:2005:200, paras 70-71. See De La Feria 2008, p. 423.

⁸⁷ *Terra and Kajus* 2014, pp. 54-55.

provisions in a way contrary to their purpose.⁸⁸ Thereby, the AG arguably paralleled his view to his view regarding the first question in *Halifax*, as the underlying purpose or result of a transaction are not criteria of determining the existence of economic activities.⁸⁹

Interestingly, the AG subsequently questioned the terminology employed by the CJEU, stating the term of ‘abuse’ or ‘abuse of rights’ as a principle of interpretation of EU law may lead to confusion. Póitares Maduro here proposes the commissioning of the term ‘prohibition of abuse of EU law’.⁹⁰ Even more expressively, he continued to advocate that EU VAT could not reasonably be considered an abuse free zone of EU law, so that the application of the principle should extend to EU VAT and should not be dependent on adoption of MSs of anti-avoidance provisions following Article 395 of the VAT Directive.⁹¹ The principle must not be interpreted as conferring the right at issue, but as enabling the authorities to disallow the conferral of an EU VAT right when the granting of that right would go manifestly beyond the aims and objectives pursued by the provision relied on, in an abusive manner.⁹² However, it should not stand in the way of taxpayers choosing their business structure so as to limit their tax liability, which had been accepted by the Court in earlier cases.⁹³

Ultimately, the AG held that the VAT Directive must be interpreted as not conferring rights, even though that might appear to be the result of a literal interpretation of the provision, when two objective elements are present in the relevant situation. *‘First, that the aims and results pursued by the legal provisions formally giving rise to the tax advantage invoked would be frustrated if that right were conferred. Second, that the right invoked derives from economic activities for which there is objectively no other explanation than the creation of the right claimed.’*⁹⁴

The CJEU in its decision largely followed the AG. The Court started by firmly reiterating that a taxable person cannot enjoy a right to deduct input VAT when based on transactions

⁸⁸ Opinion of AG Póitares Maduro in *Halifax and Others*, EU:C:2005:200, paras 70-71. See Terra and Kajus 2014, pp. 54-55.

⁸⁹ Article 9(1) of the VAT Directive. See Terra and Kajus 2014, pp. 54-55

⁹⁰ Opinion of AG Póitares Maduro in *Halifax and Others*, EU:C:2005:200, para 71. See Terra and Kajus 2014, p. 55.

⁹¹ *Ibid*, para 74.

⁹² *Ibid*, para 79. See Terra and Kajus 2014, p. 55.

⁹³ *Ibid*, para 85, referring to, among others, the Judgment in *BLP Group*, C-4/94, EU:C:1995:107.

⁹⁴ *Ibid*, para 91. See De La Feria 2008, p. 422 and Terra and Kajus 2014, p. 55.

that comprise abusive practices.⁹⁵ It remained that, following *Emsland-Stärke*, EU law cannot be relied on for fraudulent ends and the application of Union law cannot be extended to cover abusive practices (solely aimed at wrongfully obtaining advantages coming forth from EU law provisions).⁹⁶

Then, as a very important comment, the Court stated that the ‘*principle of prohibiting abusive practices also applies to the sphere of VAT.*’⁹⁷ It referred to its earlier case in *Gemeente Leusden*⁹⁸, where it held that the Sixth VAT Directive recognized and encouraged the prevention of tax evasion, avoidance and abuse.⁹⁹ However, as opposed to *Gemeente Leusden*, where the Court was rather ambiguous in the margin of appreciation for MSs, the Court now emphasized the importance of legal certainty and legitimate expectations for those subject to the measures taken against abuse.¹⁰⁰ Moreover, as discussed also by the AG, the CJEU recalled that a taxable person is free in choosing the structure of his business, and that that choice may be based on factors involving tax considerations. Taxpayers may choose to opt for the structure that limits their VAT liability.¹⁰¹

The Court also formulated two requirements for the finding of abusive practices, but did so in a slightly nuanced manner as compared to AG Poiares Maduro.¹⁰² First, if ‘*the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions*’¹⁰³, as this would also be in conflict with the principle of fiscal neutrality.¹⁰⁴ Second, ‘*it must also be apparent from a number of objective factors that the essential aim of*

⁹⁵ Judgment in *Halifax and Others*, EU:C:2006:121, para 68. Arguably, and according to itself, the Court established that notion already in the Judgment in *Kefalas and Others*, EU:C:1998:222, the Judgment in *Diamantis*, EU:C:2000:150 and the Judgment in *Fini H*, C-32/03, EU:C:2005:128. Terra and Kajus are sceptical, to the extent that they seem to be of the opinion that *Fini* was more utilized as a step stool for *Halifax* than to substantively contribute to the abuse doctrine.

⁹⁶ *Ibid*, para 69. See also Terra and Kajus 2014, p. 57.

⁹⁷ *Ibid*, para 70.

⁹⁸ Judgment in *Gemeente Leusden and Holin Group*, EU:C:2004:263, para 76.

⁹⁹ Judgment in *Halifax and Others*, EU:C:2006:121, para 71.

¹⁰⁰ *Ibid*, para 72.

¹⁰¹ *Ibid*, para 73. See Terra and Kajus 2014, p. 57.

¹⁰² De La Feria 2008, p. 422. See also Piantavigna 2011, pp. 141-145.

¹⁰³ Judgment in *Halifax and Others*, EU:C:2006:121, para 74.

¹⁰⁴ Terra and Kajus 2014, p. 58.

the transactions concerned is to obtain a tax advantage'.¹⁰⁵ However, where there may be some other explanation possible for the economic activity carried out than the mere attainment of tax advantages, the prohibition of abuse is not relevant.¹⁰⁶

Lastly, with regard to the second part of the first question, the Court in summary concluded that at the finding of an abusive practice '*the transactions involved must be redefined so as to re-establish the situation that would have prevailed in absence of the transactions constituting that abusive practice.*'¹⁰⁷

Through *Halifax*, the CJEU thus explicitly extended the approach taken in the early *Van Binsbergen* and *Emsland-Stärke* judgments to the field of VAT, and introduced the abuse of rights theory to EU VAT.¹⁰⁸ The CJEU gave a definition of abuse in the field of VAT, as circumvention of tax rules through transactions essentially driven by tax reasons.¹⁰⁹ As Terra and Kajus swiftly characterize it, the artificiality, which was the second (subjective) criterion in *Emsland-Stärke*, has through *Halifax* become a mere tool to the interpretation of the facts whether essentially a tax advantage is pursued.¹¹⁰ Thereby, it went back to the case in *Direct Cosmetics*, by relying just on the objective factors for detecting abusive practices and assessing the measures of the MS against the light of proportionality.¹¹¹

Clearly, this case has been of importance in the development of the abuse of rights doctrine in general, but also for acceptance of the prohibition of abuse of EU law as a general principle of Union law.¹¹² After *Halifax*, the Court refused to confer the right to deduct input VAT on the basis of this *principle of interpretation* in several cases because the trader was aware, or ought to have been aware, of its participation in a supply chain within which abusive practices had taken place, based on the requirement of good faith in abuse cases in EU VAT, designated as the knowledge test. There, the Court allocated a rather broad classification of the principle that EU law cannot be relied upon for fraudulent ends. Where the Court in *Kittel*

¹⁰⁵ Judgment in *Halifax and Others*, EU:C:2006:121, para 75. See P. Piantavigna, 'Tax Abuse in European Union Law: A Theory', *EC Tax Review* 2011(3), 134-147, pp. 142-143.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, para 94. See De La Feria 2008, p. 422.

¹⁰⁸ De La Feria 2008, p. 422.

¹⁰⁹ Pistone 2011, p. 387.

¹¹⁰ Terra and Kajus 2014, p. 58.

¹¹¹ Pistone 2011, p. 387.

¹¹² De La Feria 2008, p. 423.

ruled that all traders in the supply chain may be affected in their rights by the inclusion of a fraudulent trader¹¹³, that scope was subsequently limited in following cases, for instance in *Mahagében and Dávid*, where the fraudulent intentions of actors following the trader in the supply chain may not affect the former trader's rights.¹¹⁴

3.2.2. *Kofoed*

Although *Halifax* formed a strong upbeat to the acceptance of the prohibition of the abuse of EU law as a general principle, the Court did not characterize the prohibition as such.¹¹⁵ Substantively, the Court certainly advocated in that direction by its teleological approach, even more so when taking account of the Opinion of AG Poiares Maduro. However, the first case in which the CJEU explicitly did so was *Kofoed*.¹¹⁶ The judgment concerned the interpretation of the abuse clause incorporated in the EU Merger Directive.¹¹⁷

Kofoed concerned a question on the charging of income tax regarding an exchange of shares undertaken by Mr Kofoed.¹¹⁸ The exchange of shares was assessed under the suspicion of breaching the anti-abuse clause in the EU Merger Directive, which holds that a MS may refuse to apply or withdraw benefits as provided by that Directive, when an exchange of shares, such as in *Kofoed*, has tax evasion or avoidance as its principal objective, or one of its principal objectives.¹¹⁹

In this case it was AG Kokott who displayed firm language in her Opinion and by following that, the CJEU proclaimed the existence of a '*general Community law principle that abuse of*

¹¹³ Judgment in *Kittel and Recolta*, C-439/04 and C-440/04, EU:C:2006:446.

¹¹⁴ Judgment in *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373. See also Wolf 2013, p. 283. Important to note, as shortly mentioned above, is the specificity of the consequence for the right to deduct here, as the zero rating of an intra-Community supply can still be refused in such a situation, following the Judgment in *R.*, C-285/09, EU:C:2010:742 and the Judgment in *Mecsek-Gabona*, C-273/11, EU:C:2012:547.

¹¹⁵ The Court's hesitance to designate the principle as overriding in *Halifax* might be perceived as the Court's intention not to create an overriding general principle. However, as the furthering of this research shows, the author is of the opinion that the case rather has the function of a stepping stone, than that it intended to call a stop to the development of the principle that EU law cannot be relied on for fraudulent ends.

¹¹⁶ Judgment in *Kofoed*, EU:C:2007:408, para 38. See De La Feria 2008, p. 433.

¹¹⁷ 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, O.J. 1990, L 225/1.

¹¹⁸ Judgment in *Kofoed*, EU:C:2007:408, paras 2 and 14. See De La Feria 2008, p. 433.

¹¹⁹ Article 11(1)(a) of the EU Merger Directive. See De La Feria 2008, p. 433.

*rights is prohibited.*¹²⁰ Moreover, the Court held that ‘*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.*’¹²¹

The Court furthermore touched upon the status it thereby gave the principle. Following the principle of consistent interpretation, it held that the anti-abuse clause of the EU Merger Directive must apply even if specific transposition thereof in Danish law is absent.¹²² The Court stated that explicit transposition of the provision is not necessary in all MSs, as a sufficiently precise and clear transposition, for individuals concerned to fully know their rights and obligations, may as well be achieved through a general legal context.¹²³ Thereby, it thus gave the Directive provision ‘reverse vertical direct effect’ to a certain extent¹²⁴, by extending the power of the MS to rely against an individual on a Directive without transposition, which is questionable in the light of legal certainty and legitimate expectations. These concerns are discussed below.

Among a broader scheme of cases, *Halifax* and *Kofoed* thus illustrate the substantiation of a trend in EU VAT case law, where the scope (and reach) of Union law is increasing by the introduction of the prohibition of abuse of EU law as a general principle of Union law. The magnitude of this trend had not yet become entirely clear in the above-discussed cases, but the recent cases of *Maks Pen* and *Italmoda* provide for subsequent interpretation.

3.3. Acceptance as an overriding principle of EU law

The cases of *Halifax* and *Kofoed*, and the framework within which those cases were decided, provide for a clear setup as regards the acceptance of the principle of prohibition of abuse of EU law as a general principle of Union law. However, the reach of that principle remained unclear, as its status *vis-à-vis* national law had not yet been tested. In two

¹²⁰ Judgment in *Kofoed*, EU:C:2007:408, para 38 and Opinion of AG Kokott in *Kofoed*, C-321/05, EU:C:2007:86, para 58. See De la Feria 2008, pp. 433-434.

¹²¹ Ibid.

¹²² Ibid, para 40 *et seq.*

¹²³ Ibid, para 44, referring to the Opinion of AG Kokott in *Kofoed*, EU:C:2007:86, para 62.

¹²⁴ For more information on direct effect of Directives, see, for instance, Craig and G. De Búrca, *EU Law: Texts, Cases, and Materials*, 5th edition, Oxford University Press, 2011, pp. 191-196.

noteworthy cases delivered in 2014, the CJEU has apparently decided that issue. In the following, those two cases, *Maks Pen*¹²⁵ and *Italmoda*¹²⁶, are discussed.

3.3.1. *Maks Pen*

Maks Pen was a wholesaler of office supplies and advertising materials. The case concerned a refusal of the right to deduct VAT in the form of a tax credit, on invoices drawn up by some suppliers to *Maks Pen*.¹²⁷ The Bulgarian tax authorities were unsure of the existence of certain invoiced supplies and whether the parties identified on the invoices were the ones who actually made the supplies.¹²⁸

Relevant for the course of this research was the second question referred to the CJEU by the national court. The Court was asked essentially whether ‘*European Union law requires that that court establish the existence of tax evasion of its own motion [...] even though, by carrying out such an examination, it would fail to comply with obligations imposed on it by the applicable national law.*’¹²⁹

The Court answered by stating that national courts must interpret the relevant national law in the light of the wording and purpose of the Directive, which requires that it does whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by that law.¹³⁰ Moreover, and more obligingly, where the court under binding national law must or may raise points of law, ‘*they must do so in relation to a binding rule of European Union law such as that which requires that national courts and authorities refuse entitlement to the right to deduct VAT where it is established, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends.*’¹³¹

Thereby, the CJEU elaborated on the already broad perception of the principle of reconciliatory interpretation in the field of EU VAT, enshrined in Article 4(3) TEU as the

¹²⁵ Judgment in *Maks Pen*, C-18/13, EU:C:2014:69.

¹²⁶ Judgment in *Italmoda*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455.

¹²⁷ Judgment in *Maks Pen*, EU:C:2014:69, paras 2 and 16.

¹²⁸ *Ibid*, paras 17-20.

¹²⁹ *Ibid*, para 33.

¹³⁰ *Ibid* para 36, relying on the Judgment in *Adeneler and Others*, C-212/04, EU:C:2006:443, para 111.

¹³¹ *Ibid*, para 39.

principle of sincere cooperation, as we saw before in *Kofoed* in direct taxation. The cited passages show that the CJEU is obliging national courts to, as far as possible within the limits of national law, raise of their own motion points of law in relation to a refusal of the right to deduct VAT, in order to achieve the purposes set out in the VAT Directive. This obligation to take such action does go beyond the initial perception of reconciliatory interpretation, when looking at the passage of *Adeneler* referred to by the Court. *Maks Pen*, though not extensively discussed in doctrine, certainly appears to demonstrate a further increase in the scope of application of the VAT Directive by relying on the importance of the principle of the prohibition of EU law.

3.3.2. *Italmoda*

This broadening of scope found more specific follow-up in a case later decided in 2014, in the judgment in *Italmoda*. The judgment was based on joined cases regarding carousel fraud, one of shoe importer Italmoda, and two alleged VAT evasion cases in *Turbu* (which were held to be inadmissible).¹³²

The Dutch Tax Authorities had refused Italmoda its rights to exemption, right to deduct input VAT and right to a refund in the context of its Intra-Community supplies¹³³, for it was found to have knowingly participated in fraudulent activities, designed to evade VAT.¹³⁴ However, access to those rights was at the material time not subject to the condition that the taxable person had not deliberately participated in VAT evasion or tax avoidance arrangements under Netherlands law.¹³⁵ This urged the Dutch Supreme Court to refer the case to the CJEU for a preliminary ruling. In its first question, which is the most (and only) relevant question in the light of this research, the national court asked whether in those circumstances, the national authorities must refuse one's rights under the Sixth VAT Directive, even though national law does not contain provisions enabling the authorities for such refusal.¹³⁶

In his Opinion, AG Szpunar relied strongly on the status of the prohibition of abuse of EU law. He opined that the good faith of a trader (or taxable person) '*reflects the general prohibition of abuse and fraud and the principle that no one may benefit from the rights*

¹³² Terra and Kajus 2014, p. 295.

¹³³ Under the Sixth VAT Directive.

¹³⁴ Judgment in *Italmoda*, EU:C:2014:2455, para 11.

¹³⁵ *Ibid*, para 14.

¹³⁶ *Ibid*, para 41.

*conferred by the European Union legal order for abusive or fraudulent ends*¹³⁷, leading him to conclude that explicit transposition in national law is not necessary for the national tax authorities to refuse rights set forth in the (Sixth) VAT Directive.¹³⁸ In doing so, the AG thus implied that the principle of prohibition of abuse of EU law, or the principle that EU law cannot be relied on for fraudulent ends, is of an overriding nature in respect of national legal systems.

Although the Opinion of the AG may have raised some eyebrows for its activist interpretation, the Court went on to explicitly follow the view of the AG. The CJEU held that *‘express authorization cannot be required in order for the national authorities and courts to be able to refuse a benefit under the common system of VAT, as that consequence must be regarded as being inherent in the system.’*¹³⁹

The Court acknowledged that the above conclusion might be held to be conflicting with the nature of the VAT Directive as a legislative instrument. It repeated its own case law, where it held that a Directive cannot impose obligations on an individual and cannot therefore be relied on as such by a MS against an individual.¹⁴⁰ However, the Court held that the referred case law does not apply in the case of fraud, stating that *‘a taxable person who has created the conditions for obtaining a right only by participating in fraudulent transactions is clearly not justified in invoking the principles of protection of legitimate expectations or legal certainty in order to oppose the refusal to grant the right in question’*.¹⁴¹

Furthermore, the Court made a short statement regarding the nature of such refusal of rights. Relying on earlier VAT case law and the AG’s Opinion, it held that the refusal of rights deriving from the VAT Directive *‘is merely the consequence of a failure to satisfy the conditions required in that respect by the relevant provisions’* which does not give rise to the protection of legitimate expectations or legal certainty.¹⁴² Moreover, as such refusal is not of

¹³⁷ Opinion of AG Szpunar in *Italmoda*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2217, paras 57.

¹³⁸ *Ibid*, paras 57 and 63.

¹³⁹ Judgment in *Italmoda*, EU:C:2014:2455, para 59.

¹⁴⁰ *Ibid*, para 55, referring to the Judgment in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584 and the Judgment in *Küçükdeveci*, C-555/07, EU:C:2010:21.

¹⁴¹ *Ibid*, para 60.

¹⁴² Judgment in *Italmoda*, EU:C:2014:2455, para 60.

the nature of a sanction or penalty, it does not give rise to the protection enshrined in Article 7 ECHR and Article 49 of the Charter.¹⁴³

3.3.3. *Departure from Kofoed*

Even if *Italmoda* might seem to be a logical follow-up on the previously discussed cases in *Halifax*, *Kofoed* and *Maks Pen*, the previously voiced concerns on legal certainty and legitimate expectations find exponential development by it as well. The difference with earlier case law is the absence of a legal basis within national law in the judgment in *Italmoda*, which concludes the development of an overriding general principle of Union law.

One could therefore conclude that the judgment in *Kofoed* is extended. Along the lines of reconciliatory interpretation, *Maks Pen* was an almost anticipated extension of the interpretation in *Kofoed*. *Italmoda* shows a further interpretation aimed at the effectiveness of the principle that EU law cannot be relied on for fraudulent ends and the connected knowledge test. The approach taken by the Court bypasses the obligation, and thereby margin of appreciation, for MSs to transpose the provisions in the VAT Directive that provide for the combating of evasion and avoidance.¹⁴⁴ This bypassing should not go unnoticed, as the Dutch authorities in *Italmoda* had transposed the VAT Directive provisions correctly¹⁴⁵, but were still obliged to overturn national law in order to secure the prohibition of abuse of EU law. In that sense, one might as well argue that *Kofoed* was thereby overruled, as the safeguard of a legal basis, already hugely stretched out in *Kofoed* and *Maks Pen*, has disappeared as from *Italmoda*.

The fact that the development may be defensible to some extent, taking into account the consistent use of the teleological interpretation in the discussed line of cases, does not exonerate the Court from respecting the core principles and legal values on which the EU is built. The expressed concerns form the core of the coming subchapter, where the development is held against the light of those principles and values.

¹⁴³ Ibid, para 61.

¹⁴⁴ Following the provisions in the VAT Directive, discussed above in chapter 2.

¹⁴⁵ Judgment in *Italmoda*, EU:C:2014:2455, para 51.

3.3.4. Contextual view

Lastly, the effect of the discussed rulings needs some interpretation in comparison with the area of direct taxation. As indirect taxation is harmonized to a larger extent than direct taxation in EU law, the Court is argued to have been hesitant to take the same steps in case law on abuse in direct tax.¹⁴⁶ In *Halifax*, the Court introduced an abuse test based on the ‘essential aim’ of the taxpayer.¹⁴⁷ The course taken in direct taxes in *Cadbury Schweppes*, decided at the same time, was more hesitant, as the CJEU there precluded just ‘wholly artificial arrangements’.¹⁴⁸ The scope of abuse seems thus to differ, depending on the degree of harmonization. This appeared to have remained the case in *Kofoed*, in the field of direct taxation, where the Court maintained a similar self-restraint attitude.¹⁴⁹

Nevertheless, the fact that the CJEU opted to incorporate the *Halifax* test in *Cadbury Schweppes*, indicates the intention to establish a unified notion of abuse. The interference of the Court is based on the principle of proportionality, and thus appeared partially dependent on the harmonization grade rather than the tax avoided.¹⁵⁰ However, Piantavigna notes that the division between harmonized and non-harmonized areas is disappearing due to the Court’s liberty in interpretation. The Court legitimates itself to act in concrete cases significant for the EU legal order, whether that is in direct or indirect tax, or in cases where there is a Directive¹⁵¹ or not.¹⁵² This arguably illustrates also the value the Court intends to give the principle, as functional throughout the entire EU legal order.

3.4. Difficulties with the activism of the Court up to and in *Italmoda*

The judgments in *Maks Pen* and *Italmoda* thus, as mentioned above, give rise to some concerns. Specifically speaking, the author finds two main issues to be discussed as a result of the apparent finalization of an overriding general principle of prohibition of abuse of EU law.

¹⁴⁶ Piantavigna 2011, p. 144.

¹⁴⁷ Confirmed the Judgment in *Part Service*, C- 425/06, EU:C:2008:108.

¹⁴⁸ Judgment in *Cadbury Schweppes*, C-196/04, EU:C:2006:544. See Piantavigna 2011, p. 144 and De La Feria 2008, pp. 432-433.

¹⁴⁹ Piantavigna 2011, pp. 144-145.

¹⁵⁰ Ibid.

¹⁵¹ As in the Judgment in *Kofoed*, EU:C:2007:408.

¹⁵² As in the Judgment in *Cadbury Schweppes*, EU:C:2006:544. See Piantavigna 2011, pp. 144-147 and De La Feria 2008, pp. 424-433.

First, the questionable relation with the principle of legality or legal certainty, as raised by overstepping the appropriate transposition of the Sixth VAT Directive into Dutch law must be explained. The nature of a Directive as a legislative instrument bears with it certain discretion for the national authorities regarding form and method¹⁵³, but this was disregarded in *Italmoda*. In extension thereof, the CJEU recapitulated that a Directive cannot of itself impose obligation on an individual, and can therefore not be relied on as such by a MS against an individual (i.e. reverse vertical direct effect).¹⁵⁴ As we saw, the Court nonetheless argued that the case law establishing this, does not apply in the case of proven fraud. But is it not codified in Article 288 of the TFEU that the Directive shall be binding on its addressees, namely the MSs, and not on individuals? Moreover, it is worth to question how this judgment fits with the fundamental notion of EU law that the institutions may only act within the limits of the competences that have been conferred upon them by the MSs, established in Article 5(2) TEU.

Second is the Court's straightforward denial in *Italmoda* that the refusal of a right under the VAT Directive could be of the nature of a penalty or sanction, in which case the rights of the defense should be respected as established in Article 49 of the Charter and Article 7 of the ECHR.¹⁵⁵ It is peculiar that this seemingly blunt statement is substantiated only by short reference to other EU VAT case law. These two issues form the core of this subchapter.

3.4.1. Comparison with the *Mangold* case

The first issue thus relates to the attribution of powers and the degree of harmonization of the EU VAT system. The system is established in a Directive, meaning that EU VAT is not an area within which the EU has been conferred the exclusive competence to act.¹⁵⁶ Even though EU VAT is largely harmonized, as shown in Article 113 TFEU by prescribing that the legislature may, '*to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition*' adopt legislation, the fact that the EU VAT system is established through a Directive must leave discretion to the MSs.

¹⁵³ Article 288 TFEU.

¹⁵⁴ Judgment in *Italmoda*, EU:C:2014:2455, para 55, referring to the Judgment in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584 and the Judgment in *Küçükdeveci*, C-555/07, EU:C:2010:21.

¹⁵⁵ *Ibid*, para 61.

¹⁵⁶ Articles 3, 4 and 288 TFEU, as also Articles 4 and 5 TEU.

Consequently, as described above, it is also not possible for a MS to invoke a Directive provision directly against an individual. This follows also from the case law of the CJEU, from as early as in *Marshall*¹⁵⁷ and *Kolpinghuis*¹⁵⁸, and confirmed in subsequent cases such as *Küçükdeveci*¹⁵⁹ and the more recent *Association de médiation sociale*.¹⁶⁰ The enactment of this ‘reverse vertical direct effect’, as we saw in *Kofoed* and *Maks Pen*, is not in line with that doctrine. The CJEU defended its approach by stating that the application of the principle of prohibition of abuse of EU law is not a direct invocation of a Directive provision, but a purposive application of the principle of sincere cooperation.¹⁶¹

The principle of sincere cooperation might have been a solution for the CJEU in *Kofoed* and *Maks Pen*, but the Court itself has also established that such interpretation has limits. Specifically, consistent interpretation of national law may only be required from the national courts up to the point where such interpretation would amount to a *contra legem* decision.¹⁶² Such limitation is based on legality and legal certainty, but the judgment in *Italmoda* does not take account of any such limitation. Does that mean that *Italmoda* is not in line with the principle of legality?

One case that is comparable in that sense is the judgment in *Mangold*.¹⁶³ There, the CJEU also overruled the limitations on the application of a Directive, as in this case the transposition period of the Directive had not yet expired. The Court held that the applicability of the general principle of Union law envisaged by the Directive should not be conditional upon the expiry of the transposition period. However, in comparison with *Italmoda*, *Mangold* concerned age discrimination in employment law. An important consideration for the Court was the fact that the principle of non-discrimination on the basis of age (in employment matters) is one of the core principles on which the initial establishment of the EU single market was based.¹⁶⁴ The principle of prohibition of abuse of EU law is not codified as such.

¹⁵⁷ Judgment in *Marshall*, C-152/84, EU:C:1986:84, para 48.

¹⁵⁸ Judgment in *Kolpinghuis*, C-80/86, EU:C:1987:431, para 9. See N. Wittock, ‘The Influence of the Principle of Union Loyalty in Tax Matters’, *EC Tax Review*, 2014(3), 171-188, p. 177.

¹⁵⁹ Judgment in *Küçükdeveci*, EU:C:2010:21, para 48.

¹⁶⁰ Judgment in *Association de médiation sociale*, C-176/12, EU:C:2014:2, para 39.

¹⁶¹ See, for instance, Judgment in *Maks Pen*, EU:C:2014:69, paras 36 and 39.

¹⁶² See, for instance, Judgment in *Adeneler and Others*, C-212/04, EU:C:2006:443, para 110. Also reiterated in the Judgment in *Maks Pen*, EU:C:2014:69.

¹⁶³ Judgment in *Mangold*, C-144/04, EU:C:2005:709.

¹⁶⁴ *Ibid*, paras 75-76. See also the recognition of the core values of the EU in Articles 2 and 3 TEU.

Moreover, *Mangold* concerned the reliance on a general principle by an individual against another individual, whereas *Italmoda* enables the reliance of a MS against an individual.

The question that must accordingly be answered is whether the approach taken in *Mangold* could apply similarly, and thus whether the principle of non-abuse of EU law is of a similar value as the principle of non-discrimination on the basis of age. This, as also the creation of an obligation for an individual *vis-à-vis* a MS, is further discussed in the next chapter.

3.4.2. *Legal certainty and legitimate expectations*

Regarding the second concern raised, it is relevant to have a brief look at the denial of the Court of a penal nature of a refusal of rights in the VAT Directive, which consequently is a denial of the rights of the defense.¹⁶⁵

It appears relevant to step back again to the judgment in *Emsland-Stärke*. In that judgment, the CJEU held that ‘*The obligation to repay is 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.*’¹⁶⁶ As we saw in *Italmoda*, the Court remains with that approach, stating that the refusal of rights from the VAT Directive ‘*is merely the consequence of a failure to satisfy the conditions required in that respect by the relevant provisions.*’¹⁶⁷ As that refusal therefore is not of a punitive nature, the rights of the defense as enshrined in Article 49 of the Charter and 7 ECHR are not applicable.¹⁶⁸

The fact remains however that the ‘conditions required’ were actually met in *Italmoda*. Following Netherlands legislation, good faith was not a condition and the Directive had been transposed correctly into national law.¹⁶⁹ The fact that the CJEU decides, in one and the same case, that the principle that EU law cannot be relied on for fraudulent ends has overriding power and that this was already a clear legal requirement for the traders in the case, is

¹⁶⁵ Judgment in *Italmoda*, EU:C:2014:2455, paras 60-61.

¹⁶⁶ Judgment in *Emsland-Stärke*, EU:C:2000:695, para 56.

¹⁶⁷ Judgment in *Italmoda*, EU:C:2014:2455, para 61.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, para 7, following the discretion provided for by Article 131 of the VAT Directive.

inconsistent with the meaning and purpose of the principles of legal certainty and legitimate expectations.¹⁷⁰

3.5. Concluding remarks

The development of the notion of abuse, the principle of the prohibition of abuse of EU law or the principle that EU law cannot be relied on for fraudulent ends has seen fast progression through the case law of the CJEU. In this chapter, it has become clear that the Court has gone from stretching the requirement of a legal basis in *Halifax*, *Kofoed* and *Maks Pen*, to arguably overstepping legality as a whole in *Italmoda*. It is peculiar to see how the teleological interpretation of EU law in general and the VAT Directive more specifically, of which the Court is a habitual user, has built on itself with the establishment of a general principle of EU law as the outcome. The purposive reasoning in *Halifax* and *Kofoed* was far-reaching, but understandable. Without those cases, the later cases in *Maks Pen* and *Italmoda* would be considered far beyond the limits of the system of VAT. However, interpreting the EU VAT system following those earlier cases, the more recent case law has become defensible. From a completely different perspective, the entire lack of certainty seen in *Italmoda* and the cases before could have easily been avoided if a comprehensive concept of abuse would be expressly incorporated in EU (VAT) legislation.¹⁷¹

The status of the principle as developed by the Court is the basis for another line of questioning. In comparison with *Mangold* it is interesting to see whether the principle, presented as such by the CJEU, fits within the silhouette of a general principle of EU law following the theoretical (or academic) perception of that concept. This is the main focus of the next chapter.

¹⁷⁰ The tense relation with legal certainty has been the core criticism among scholars discussing the introduction of the principle, even before the blunt approach of the CJEU in *Italmoda*. See, for instance, R. De La Feria, 'Introduction: Introducing the Principle of Prohibition of Abuse of Law' in R. De La Feria and S. Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford, 2011, xv-xxv, p. xxv and M. Poiares Maduro, 'Foreword' in R. De La Feria and S. Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford, 2011, vii-viii, p. vii.

¹⁷¹ Advocated, for instance, in Pistone 2011, p. 391 and in A. Lenaerts, 'The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law', *European Review of Private Law*, 2010(6), 1121-1154, pp. 1151-1154.

4. GENERAL PRINCIPLE VERSUS GENERAL PRINCIPLE

4.1. Introduction

As the final step of this research, this chapter looks at how the principle of non-abuse of EU law in its current state compares to the traditional understanding of a general principle of Union law. The review of the above-discussed developments will take place through several stages. First, the academic perception of a general principle is summarized, so as to recapitulate the traditional meaning of such a general principle. Thereafter, this perception is tested in the light of the case law in EU VAT. Also, the already introduced comparison with *Mangold* is extended, providing with a slightly different view on the application of the principle of prohibition of abuse of EU law. Lastly, the implications in practice of the current status of the principle are addressed.

4.2. The academic perception of a general principle of EU law

General principles take up a rather specific but fundamental place in the spectrum of EU law.¹⁷² They are referred to in Article 340 TFEU, in the context of non-contractual liability, as also in Article 6(3) TEU regarding fundamental rights, and have mainly performed as gap-filling mechanism within the system of EU law.¹⁷³ However, the constitutional status that certain general principles have been permitted makes them arguably superior to Union legislation. This because the acts adopted by the institutions are subject to review on the basis of compatibility with general principles.¹⁷⁴

But what does exactly constitute a general principle, with such constitutional value? This subchapter looks at that on the basis of three elements, namely the common ways of establishment, functions and characteristics of a general principle of Union law.

4.2.1. Establishment of a general principle

It is interesting and important to note that many principles were first recognized by the CJEU.¹⁷⁵ Tridimas observes that, typically, the Court first seeks guidance from the text, aims and objectives of the Treaties and the provisions of Union law. It also looks at the laws of the

¹⁷² T. Tridimas, *The General Principles of EU law*, 2nd edition, Oxford University Press, 2006, p. 10.

¹⁷³ De La Feria 2008, pp. 434-435, referring to Tridimas 2006, p. 10.

¹⁷⁴ Tridimas 2006, pp. 50-51.

¹⁷⁵ *Ibid*, p. 13. See also Craig and De Búrca 2011, pp. 109-112.

MSs and international agreements to which the Union or the MSs are parties.¹⁷⁶ The basic general principles of equal treatment, proportionality and protection of legitimate expectations were laid down in the case law in the 1950's, to safeguard economic freedoms within the Internal Market.¹⁷⁷ This does however not imply that MSs inherently have applauded this kind of development, but the Court has nonetheless shown to be a key actor by pro-actively interpreting EU law. And in several cases that judicial development was followed by Treaty amendments.¹⁷⁸

AG Léger, in his Opinion in *Hautala*¹⁷⁹, went on to identify three sources of fundamental rights and general principles.¹⁸⁰ First, he reiterated that international instruments, such as the ECHR, are important sources. Second, the convergence of the constitutional traditions of the MSs, which the AG notes to be sufficient in itself to establish the existence of a general principle, in the absence of express recognition through international instruments. Third, beyond the previous two sources and without the necessity of the recognition of a principle in either of those two ways, the AG held that it may be sufficient for MSs to have a common approach to the right at issue. Thereby, they should demonstrate the same desire to provide protection, even when the level of that protection and the procedure in place to ensure that are established differently throughout MSs.¹⁸¹

4.2.2. *Functions of a general principle*

By designating them as gap-fillers, the essential position that general principles fulfil might be underestimated. As touched upon above, general principles have been recognized to be of constitutional value, thereby functioning in superiority over EU legislation. In three core functions, general principles influence the EU legal order.

First, the term gap-filling might best be translated in the function of a general principle as aid to the interpretation by the CJEU. According to the rule of consistent interpretation, laid down in Article 4(3) TEU, where a Union measure need be interpreted, preference must be

¹⁷⁶ Ibid, p. 25 *et seq.*

¹⁷⁷ Judgment in *Fédération charbonnière de Belgique*, C-8/55, EU:C:1956:11 and the Judgment in *Pont-à-Mousson*, C-14/59, EU:C:1959:31. See Tridimas 2006, p. 7.

¹⁷⁸ Judgment in *Les Verts*, C-294/83, EU:C:1986:166. See Tridimas 2006, p. 13

¹⁷⁹ Opinion of AG Léger in *Hautala*, C-353/99 P, EU:C:2001:392.

¹⁸⁰ Tridimas 2006, p. 26.

¹⁸¹ Ibid.

given, as far as possible, to the interpretation which renders it compatible with the Treaties and the general principles of law.¹⁸² This applies both to rules of primary and secondary EU law, and both for the CJEU as for national courts.¹⁸³ Said interpretation is limited to the extent that it does not authorize interpretation *contra legem*, either against Union measures or national law by the CJEU or national court respectively.¹⁸⁴

Second, general principles function as ground for review.¹⁸⁵ This most commonly takes form of an action for annulment before the CJEU, enshrined in Article 263 TFEU, or through national courts in the form of a preliminary ruling procedure, as in Article 267 TFEU.¹⁸⁶

Third, a breach of a general principle by an EU institution may give rise to Union liability, as codified in Article 340 TFEU and developed thoroughly through the case law of the CJEU.¹⁸⁷

4.2.3. Characteristics

Despite the prominent position within the EU legal order and the essential functions it fulfils, no exact description is to be found in Union legislation of what constitutes a general principle. Also, there does not appear to be a comprehensive doctrinal agreement on the matter.¹⁸⁸ However, in leading doctrine, scholars have provided with certain attributes or characteristics a general principle typically possesses.

According to Tridimas, as a general guidance, a principle must encompass a ‘minimum ascertainable legally binding content’, either through written Union law, or otherwise widely accepted by MSs.¹⁸⁹ The CJEU seeks, in other words, for a representation of a conventional morality. This became clear in *Sweden v D*, for instance, where the Court felt obliged to

¹⁸² Among others, in the Judgment in *Commission v Council*, C-218/82, EU:C:1983:369, para 15 and the Judgment in *Rauh*, C-314/89, EU:C:1991:143, para 17. See Tridimas 2006, p. 29.

¹⁸³ In case of national courts, recalling the Judgment in *Marleasing*, C-106/89, EU:C:1990:395. See Tridimas 2006, p. 29.

¹⁸⁴ See, for instance, the Judgment in *Adeneler and Others*, EU:C:2006:443, para 110. Also reiterated in the Judgment in *Maks Pen*, EU:C:2014:69. See Tridimas 2006, p. 29.

¹⁸⁵ Craig and De Búrca 2011, pp. 109 and 525.

¹⁸⁶ Tridimas 2006, pp. 31-35.

¹⁸⁷ Judgment in *Brasserie du Pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79 *et seq.* See also Lenaerts 2010, pp. 1123-1125.

¹⁸⁸ De La Feria 2008, p. 435.

¹⁸⁹ Tridimas 2006, p. 26.

refuse an equation of same sex marriages to a marriage, because of a lack of support in the laws of the MSs.¹⁹⁰

When looking at cases in which the existence of a principle has been denied, more of the Court's deliberations become clear. Regarding cases in which the Court held that fairness is not a general principle of Union law¹⁹¹, Tridimas concludes that a lack of objective determination has been decisive. Fairness as a principle would be too abstract to have any autonomous normative concept outside the bounds of other principles such as equality, legitimate expectations and proportionality.¹⁹² Subsequently, in assessing animal welfare as a general principle, the Court ruled that the relevant convention did not impose a clear, precise and unqualified obligation, which is apparently necessary to constitute a general principle.¹⁹³

Groussot proposes two essential features, which a general principle typically possesses.¹⁹⁴ First, as implied by the term, a general principle ought to have a certain degree of generality.¹⁹⁵ This entails that a principle should be recognized, on a relevant (institutional) level, for instance by national courts.¹⁹⁶ Second, a principle must be non-conclusive. In other words, it points into a certain direction rather than that it demands a decision. De La Feria characterizes a principle as typically being of a more 'orientative' nature.¹⁹⁷ Additionally, it should possess a certain weight. This means that it must express a core value of an area of law, or of the relevant legal system as a whole.¹⁹⁸

¹⁹⁰ Ibid, referring to the Judgment in *Sweden v D and Council*, C-122/99 P and C-125/99 P, EU:C:2001:304.

¹⁹¹ In the Judgment in *Hoche v Balm*, C-174/89, EU:C:1990:270, para 31 and the Judgment in *Neumann v Balm*, C-299/84, EU:C:1985:463, para 23.

¹⁹² Tridimas 2006, pp. 27-28.

¹⁹³ Ibid, p. 27, referring to the Judgment in *Jippes and Others*, C-189/01, EU:C:2001:420.

¹⁹⁴ X. Groussot, *General Principles of Community Law*, Europa Law Publishing, 2006, pp. 129-130.

¹⁹⁵ Ibid.

¹⁹⁶ De La Feria 2008, p. 435, referring to Groussot 2006, pp. 127-130. In J.T. Lang, 'Emerging European General Principles in Private Law' in U. Bernitz, X. Groussot and F. Schulyok, *General Principles of EU Law and European Private Law*, European Monographs, Wolters Kluwer, 2013, 65-118, p. 69, it is argued that an implicit criterion is that it would be seriously unjust or unfair, in a democracy subject to the rule of law, if it were not the law.

¹⁹⁷ Ibid, referring to Groussot 2006, pp. 127-130.

¹⁹⁸ Ibid. Also summarized in S. Vogenauer, 'The Prohibition of Abuse of Law: An Emerging General Principle of EU Law' in R. De La Feria and S. Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford, 2011, 521-571, pp. 564-570.

4.3. Assessment against the development in EU VAT

Now, after looking at the common ways of establishment, functioning and the common attributes of a general principle in EU law, it is the purpose of this thesis to question whether those elements can be held to exist also in the developments in EU VAT. The question has thus, in essence, boiled down to whether the above characteristics can be recognized in a principle that has grown mainly through interpretation in fields of secondary EU law.

4.3.1. *Beyond a principle of interpretation*

When looking at the functions of a general principle, it is relevant to refer back to *Halifax*. There, the principle of prohibition of abuse of EU law was already designated as a principle of construction, or interpretation.¹⁹⁹ Although the main purpose of a general principle is to function as an interpretative tool for the Court, De La Feria adds that a distinction can be made between principles that are ‘just’ interpretative aids and principles that can function as overriding rules of law.²⁰⁰ This development for the principle at hand became clear in *Cadbury Schweppes*²⁰¹, where the principle was used to strike down non-compliant national law, i.e. as an instrument of judicial review.²⁰² In the field of indirect taxation, this was thus further substantiated in the case of *Italmoda*.

When looking at the characteristics of a general principle, according to scholarly debate, the principle of prohibition of abuse of EU law appears to meet these without much difficulty. Concerning the non-conclusiveness, the prohibition is clearly open-ended and does not necessitate a certain decision. It rather provides national courts with a test to assess the behaviour of a taxable person. The principle further expresses a core value of several legal systems of MSs, which reflects on the requirement of weight.²⁰³ Therein lies also reference to generality, which might come across a bit less convincing. The principle is recognized in most of the legal systems of MSs, but not in all.²⁰⁴ Yet, it is not necessary for the

¹⁹⁹ De La Feria 2008, p. 438, referring to the Opinion of AG Poiares Maduro in *Halifax and Others*, EU:C:2005:200, para 69.

²⁰⁰ Ibid.

²⁰¹ Judgment in *Cadbury Schweppes*, EU:C:2006:544.

²⁰² De La Feria 2008, p. 438.

²⁰³ Ibid, pp. 395 and 437.

²⁰⁴ Ibid, pp. 436-437. Also discussed in Lenaerts 2010, pp. 1125-1128.

establishment of a general principle of EU law that it is enshrined in all domestic systems, merely in most of them.²⁰⁵ That is the case with the principle of non-abuse of EU law.

However, the lack of recognition in all MSs introduces another possible issue for the status of the principle. As discussed, the establishment of a principle is commonly judge-made, but that does not mean that the Court can invent new principles at random.²⁰⁶ Vogenauer casts his doubts on the basis that, even though the principle is clearly judge-made, the CJEU has never really clarified its source.²⁰⁷ The Court has not shown that the prohibition of abuse of EU law follows from specific provisions of the Treaties, the system of the Treaties or the nature of the EU legal order. Neither has it looked at public international law or whether it is a principle common to the MSs (as stated in Article 340 TFEU).²⁰⁸ The Court seems rather to have relied on a more intuitive approach, as a matter of tacit understanding (or common sense) regarding the nature of the rules and their application in the EU legal system, equated by Vogenauer to the development of EU law in the first decades of the CJEU's existence.²⁰⁹

4.3.2. *Subsequent view on Mangold*

Bearing these observations in mind, the comparison with *Mangold* as presented above has become more concrete. To recap, in *Mangold*, the requirement of implementation of a Directive was overstepped. The Court held that the application of the principle of equality, in this case as non-discrimination on the basis of age, should not be subject to whether or not a the transposition period has expired. Now, the recent case law of the CJEU, specifically *Italmoda*, showed a similar overlooking of Directive transposition requirements. For *Mangold* to apply (to a certain extent) *mutatis mutandis*, it is thus first of all significant that the principle of non-abuse is of the same standard as the principle of equality, i.e. of constitutional value.

Following the findings in this subchapter, the principle of prohibition of abuse of law has transcended the status of a 'mere' principle of interpretation or construction, and can, especially after *Maks Pen* and *Italmoda*, be considered to have evolved into an overriding

²⁰⁵ Ibid, p. 437.

²⁰⁶ Vogenauer 2011, p. 569.

²⁰⁷ Ibid. See also De La Feria 2008, pp. 436-437, who criticizes the inconsistency and immaturity in application of the principle.

²⁰⁸ Ibid, pp. 569-570.

²⁰⁹ Ibid, p. 570.

general principle of EU law. Elaborating on the characterization as such, the overriding nature of the principle displayed in the recent cases of *Maks Pen* and *Italmoda* provides for a status similar to the description of Tridimas, in holding that principles of constitutional value are superior to written EU legislation. As it overrules the discretion of the MS to transpose measures regarding abuse, a horizontal reliance similar to *Mangold* appears acceptable in theory.

In this sense, the principle that EU law cannot be relied on for fraudulent ends appears to have gained the status of a general principle of Union law. Nonetheless, some uncertainty remains to exist with regard to the Union wide recognition of the principle. Some precaution should still be observed in the conclusion that the principle has become of constitutional status. The principle is still emerging, and although the doctrinal foundations, as questioned by Vogenauer, have been strengthened through the recent case law, the universal recognition and conceptual framework are still not entirely consistent.²¹⁰ As shown in *Italmoda*, national authorities are not yet aware of the scope of the principle. The possible clash with legal certainty, legitimate expectations and even the division of powers urges a degree of prudence in the application of the principle by the CJEU.²¹¹

Perhaps most essentially in the comparison at hand, is the fact that the Court held the requirement of good faith of a trader, as following from principle of prohibition of abuse of law, to be binding on the trader, even though the (correctly) transposed Directive in national law did not contain any such rule. *Mangold* concerned an invocation of a general principle by an individual against another individual, before the transposition period of the Directive had expired. In *Italmoda*, the principle is applied by the MS *vis-à-vis* an individual in spite of a correctly transposed Directive, which is in clash with well-established case law discussed above and with the principle of legal certainty.²¹²

The controversy around *Mangold* and *Küçükdeveci* was mainly based on that argument, although the difference in nature between applicable general principles is significantly different. The general principle of equal treatment, and specifically on the basis of age, is

²¹⁰ Ibid, p. 571.

²¹¹ Ibid.

²¹² See, among others, the Judgment in *Marshall*, EU:C:1986:84 and the Judgment in *Pfeiffer and Others*, EU:C:2004:584.

core in the EU legal system and as such codified in the Charter. However, individuals are not the addressees of the Charter, so that the principle should not be able to create obligations on individuals and thus not be applicable horizontally.²¹³ As Arnall describes, the practical implications of the principle of equal treatment were identifiable for actors both in the private and public realm, making the creation of obligations defensible. Conversely, in *Audiolux*, the CJEU observed that a principle of equality of shareholders presupposes legislative choices, based on a weighing of the interests at issue and the establishment of precise and detailed rules in advance, and cannot as such be inferred from the general principle of equal treatment.²¹⁴ Arnall thus holds that direct effect of a general principle, in horizontal situations, is prevented by the principle of legal certainty if there exists doubt about the practical applications in the circumstances of a particular case.²¹⁵

The practical implications of the general principle of non-abuse were certainly not identifiable for *Italmoda*, following the lack of universal recognition discussed above and the fact that, after legitimate legislative choices, the national legislation did not contain a requirement of good faith for *Italmoda*. Besides, when considering the main function of a general principle as gap-filler, one may wonder why a MS should be able to rely on a general principle if a legal system, such as that of the Netherlands in *Italmoda*, does not have any such gap.²¹⁶

This leaves the outcome of the judgment in *Italmoda* as dissatisfying and unacceptable. The Court appears to have rushed the implications of the constitutional status of the principle, thereby disregarding the principle of legal certainty in this case.

4.4. Necessity in practice

Aside the rash approach of the Court in *Italmoda*, this chapter shows that many of the characteristics typically held by a general principle are reflected in the principle of

²¹³ Opinion of AG Bot in *Küçükdeveci*, C-555/07, EU:C:2009:429. See Article 21(1) of the Charter, addressees in Article 51(1) of the Charter. Described in A. Arnall, 'What is a General Principle of EU law?' in R. De La Feria and S. Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford, 2011, 7-24, pp. 17-18.

²¹⁴ Judgment in *Audiolux*, C-101/08, EU:C:2009:626, para 62.

²¹⁵ Arnall 2011, p. 18.

²¹⁶ K.E. Sørensen, 'What is a General Principle of EU law? A Response' in R. De La Feria and S. Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford, 2011, 25-32, p. 31.

prohibition of abuse of EU law as it currently stands in the case law of the CJEU. Still, it bears with it some uncertainty about the origin and the scope of recognition among MSs, but the main body of a constitutional principle appears to have been crafted. Yet, the doubts about legal certainty need further addressing in the light of the principle of non-abuse in general. Those doubts strongly encourage taking a practical view at the necessity of a principle of non-abuse in EU legislation, as legal certainty and legal congruence are inherent opposites in the abuse doctrine.²¹⁷

That equation is explained by understanding the underlying two elements. First, Saydé describes that there exists a certainty of abuse.²¹⁸ As a response to the public actions undertaken by Union institutions, private actors will inevitably turn to abusive practices. The legislation cannot anticipate every scenario of artificial practice that might be left open by its provision. As we saw in *Emsland-Stärke* and *Halifax*, the CJEU unavoidably ends up being responsible for the interpretation of those artificial constructions, because the certainty of abuse does not extend to a certainty of the form of abusive practice. The form can never be predicted.²¹⁹

Second is the illusion of legal certainty. On the one hand, the principle of legal certainty is of unquestionable importance, as its function to prevent the risk of unpredictable public action.²²⁰ This was also the idea of the doubts in the discussion on *Italmoda* above. On the other hand, Saydé argues, the supremacy of legal certainty in the hierarchy of legal values, among others legal congruence, should not be unquestionable.²²¹ The prevention of unpredictability should also mean a prevention of absurd outcome, which supports the teleological interpretation by the CJEU in circumstances of abuse and the application of a general principle of non-abuse. However, the delicate balance between legal certainty and legal congruence obliges the Court to never interpret circumstances on routine.²²²

²¹⁷ Saydé 2014, pp. 211-216.

²¹⁸ Ibid, p. 211.

²¹⁹ Opinion of AG Poiares Maduro in *Halifax and Others*, EU:C:2005:200, para 73. Referred to in Saydé 2014, pp. 211-212.

²²⁰ Saydé 2014, p. 212.

²²¹ Ibid.

²²² Ibid, p. 217.

Pistone also expresses doubts in this sense. In no way is it apprehensible that the legislature has had the intention of introducing a principle of constitutional status through the enabling clauses in the system of VAT, or from other anti-abuse legislation in EU law.²²³ However, the harm done by fraud or abuse to the Internal Market is alarming, which makes it desirable that a principle as we have seen in this thesis provides for stricter borders on taxpayers' behaviour, rather than a mere principle of interpretation would.²²⁴ This is in line with the view of Lang, from which one could conclude the implicit criterion that it would amount to serious unjustness or unfairness if the principle of non-abuse of EU law were not the law.²²⁵

4.5. Concluding remarks

In this comparative chapter, it has become clear that the principle that EU law cannot be relied on for fraudulent ends has grown to a stage in which denial of a constitutional status is almost impossible. This conclusion is supported throughout the discussed literature, and a notional review of the academic perception of general principles shows that the principle can be recognized as being of constitutional status. The only difficulty lies in the degree of Union wide recognition, which appears to be a matter of time.

Due to the on-going process of recognition, a parallel application of *Mangold*, as seen in *Italmoda*, remains in clash with the principle of legal certainty. However, this chapter has also shown that this tension is inherent to the field of abuse, and the necessity of the further development of the principle of non-abuse commends continuation despite that tension. The fact remains that the judgment in *Italmoda* appears to go beyond what can be accepted as a symptom of that inherent tension, by its disregarding of the correctly transposed Directive in national legislation and imposing an obligation on *Italmoda* resulting from a general principle of EU law.

²²³ Pistone 2011, p. 390.

²²⁴ Ibid, p. 391.

²²⁵ Lang 2013, p. 69.

5. CONCLUSION

5.1. Research outcome

Now that the previous chapter has provided for the last substantive part of this research, time has come to review on the observations made, and thereby answer the question as posed in the Introduction. First, it is thus opportune to repeat the research question:

To what extent should the developments in recent case law of the CJEU in the field of EU VAT be interpreted as having created the principle of prohibition of abuse of EU law as a general principle of EU law?

It has been interesting to see the development of the Court's approach in the field of abuse of law and the implications the case law has had on the doctrine of abuse of rights throughout the years. The question as posed essentially looks at the possibility of creation of a general principle of EU law, mainly through judgments in a field of secondary EU law. Now, there are a few observations to be made in that respect. Bearing the equation of Vogenauer in mind, who to a large extent recognized the Court's approach in the early years of existence of the CJEU in the current approach²²⁶, one may wonder whether that creation is legitimate mainly through case law in a field regulated by secondary EU law. However, a comparison with the application of primary EU law in the 50's and the VAT Directive now, might not even show a noteworthy difference in the level of detail in which rules (now secondary, then primary) portray EU objectives and to which extent those are imposed on national authorities.²²⁷

Secondly, the review on typical elements of which general principles consist provided with an interesting conclusion. The principle of prohibition of abuse of EU law to a very large extent mirrors those elements, which leads to the conclusion that the realization of a principle of constitutional status has been finalized. There are however doctrinal concerns about the lack of harmonized recognition, which has shown to pose problems in *Italmoda*.

²²⁶ Vogenauer 2011, p. 570.

²²⁷ Also argued, implicitly, by stating that the difference between harmonized and non-harmonized areas of tax are vanishing, in Piantavigna 2011, p. 145.

The answer to the research question appears therefore to consist of a combination of three keywords: consistency, recognition and time.

The reader of this thesis might already unconsciously have acknowledged a difficulty in consistency without even taking into account the substance of this research. The inconsistency in terminology, whether that is the designation of the principle in itself or the reference to abuse of rights or abuse of law, is an *omen* of the substantive inconsistency within the doctrine. Substantively, that inconsistency exists in the Court's reluctance in defining the origin of the principle and the differences in the abuse test as used throughout the years.

That might well be the core of the problem with the recognition for MSs. It appears that MSs, due to the inconsistent approach of the CJEU, have not yet had the opportunity to recognize the fundamental nature of the principle to the extent that would be appropriate. And in the use of the term of appropriateness rests the answer to the question, and the view of the author. This research has led the author to conclude that the principle has established itself through case law, to an extent that should be recognized by MSs as constitutional. The necessity in practice, as also the compelling legitimacy of the use of the purposive approach of the CJEU in this area, have shown that there exists a position for a principle such as that of non-abuse of EU law in the current EU legal order.

The last keyword, time, has consequently had the first, but also has the final say in this conclusive chapter. On the one hand, the state of the legal order at this particular time has created the opportunity to develop a principle through secondary EU legislation. On the other hand, only time will allow MSs to create the awareness necessary for the principle to finalize its growth into a fully functional constitutional general principle of EU law.

5.2. Final remarks

The far-reaching effect of the teleological approach is recognizable in the current line of reasoning of the CJEU. In a previous research, the author has criticized the Court for taking this approach too far in the field of EU Competition law, with regard to the parental liability

doctrine.²²⁸ There, the adverse effects for the rights of the defense went beyond what is reasonable to achieve effectiveness of EU law. And truthfully, one of the reasons to initiate this research was the suspicion that the CJEU had taken its purposive approach too far by introducing a general principle of EU law through EU VAT.

However, the adverse effects in the case of abuse of law are significantly lower, if not non-existent in the future, so that one can hardly take issue with the approach of the Court. The necessity became clear as early as in *Emsland-Stärke*. As Saydé exemplifies, the certainty of abuse compels to allow courts their interpretative discretion.²²⁹ With 28 different legal orders implementing the EU legislation, EU law is an explicitly difficult area of law in which it is hardly possible to parallelize everything perfectly. The convincing necessity of the prohibition of abuse of EU law as a general principle, as aid for the CJEU's interpretation, makes the evolution as described defensible. This reflects the observation of Poiares Maduro, who holds that the mobility of individuals within the Union, the fragmentation and incompleteness of the EU legal system and the different legal cultures within the EU are factors increasing the complexity of the discussion on the principle.²³⁰

Nonetheless, aside the observations made on the just development of the principle and the necessity of continuation thereof in general, the fact remains that the Court appears to have been hasty in deciding *Italmoda*. Though a certain discrepancy with the principle of legal certainty may be accepted to exist, the blunt imposition of the principle on an individual, contrary to correctly transposed national law, is not acceptable in that respect. In that sense, the feeling that the purposive approach of the Court had gone too far appears to hold true for this specific case.

In the Concluding remarks of Chapter 3, the possibility of incorporating the prohibition of abuse of law explicitly in EU legislation, either in primary EU legislation or the VAT Directive specifically, was referred to as a possible solution. Thereby, cases as *Italmoda* could have been avoided. However, Tridimas makes an interesting remark in that sense.

²²⁸ P. Slegtenhorst, 'The On-going Developments of the Parental Liability Doctrine in EU Competition Law: Working Towards a Fundamental Right of Effectiveness?', Utrecht University, August 2014, not yet published.

²²⁹ Saydé 2014, p. 211.

²³⁰ Poiares Maduro 2011, p. vii.

‘One may assume that the greater the specificity of statutory provisions and guidelines articulating a prohibition, the brighter the lines which divide permissible from impermissible conduct and therefore the less the need to rely on the general principle of abuse. This assumption is not always correct. Sometimes, detailed regulation may lead to lack of transparency, contradictions and uncertainty making recourse to general principles essential. In such a context the role of a general principle is not fill gaps but make sense out of polynomy.’²³¹

In that sense, and in accordance with the view of Tridimas, a new general principle of EU law emerged through the CJEU’s case law, and that doctrine appears to have struck the right balance, generally speaking, with the needs of the practice of the Internal Market.²³²

²³¹ Tridimas 2009, p. 37.

²³² Ibid.

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