Common Market Law Review **56**: 703–742, 2019.

PROHIBITION OF ABUSIVE PRACTICES AS A "GENERAL PRINCIPLE" OF EU LAW

DOROTA LECZYKIEWICZ*

Abstract

This article discusses the proposition that EU law contains a "general principle" laying down a prohibition of abusive practices of various kinds, which does not have to be implemented by national law before the prohibition can be relied on against a private party. This principle was first introduced in Cussens v. Brosman, and recently confirmed by the Grand Chamber, in Ömer Altun and in N Luxembourg 1. Because of its scope and the power it creates for national authorities, the principle differs from the abuse of rights doctrine previously operating in EU law. The article argues that a principle which prohibits unspecified "abusive practices" at a general level, capable of creating new enforcement powers, is alien to pre-existing ECJ case law; and to the extent it covers also abuses of national law, it cannot be justified on constitutional grounds. It is also incorrect to refer to it as a "general principle", a tactic used by the Court to make the principle enforceable against a private party. The article argues that EU law in fact contains a limited set of abuse principles generating different effects, only some of which could be brought under an umbrella of a single principle.

1. Introduction

This article discusses the proposition that EU law contains a "general principle" laying down a prohibition of abusive practices of various kinds, whose significant feature is the fact that it does not have to be implemented by national law before the prohibition can be relied upon against a private party. This proposition was put forward by the Fourth Chamber of the Court of Justice of the EU in its judgment in *Cussens* v. *T.G. Brosman*, delivered on 22 November 2017[1] and indirectly confirmed by the Court's Grand Chamber judgment in *Ömer Altun* on 6 February 2018, which states that "[t]he principle

* Associate Professor of Law, University of Oxford and St Peter's College.

1. Case C-251/16, *Edward Cussens and Others* v. *T.G. Brosman*, EU:C:2017:881.

of prohibition of fraud and abuse of rights, expressed by that case law, is a general principle of EU law which individuals must comply with".[2]

In *Cussens*, the Court insisted not only that EU law contained an autonomous and self-standing principle laying down a prohibition of abusive practices, but also that its consequence was that a private party should be prevented from exploiting a tax advantage available under national law, exempting them from a tax whose imposition was *not* mandated by EU law.[3] The consequence of the principle laying down a prohibition of abusive practices was, according to the Court, that national authorities had the competence to review all transactions for their abusive effect. Once abuse was established, they had a duty to "disregard" transactions that constituted abuse and to subject another transaction to tax.[4] The ECJ was clear that the power and the ensuing duty existed regardless of whether the competence to intervene in the way prescribed by the Court existed in the national law.[5] In fact, the Court clearly stated that the application of the general principle is not subject to a requirement of transposition.[6] From this fact we can conclude that the power/duty to "disregard" and "redefine" was taken by the Court as stemming directly from a "general principle of EU law" prohibiting abusive practices. The practical result that was deemed acceptable by the Court on the facts of the case was that an exemption from VAT on a supply of immovable property on an occasional basis, an activity which was taxable exclusively because of the content of Irish, not EU, law,[7] had to be refused, and an obligation to pay VAT on the property sales had to be imposed on the taxpayer.

2. Case C-359/16, *Criminal proceedings against Ömer Altun and Others*, EU:C:2018:63, para 49. Note already at this stage that the *Cussens* judgment speaks of "abusive practices" more broadly, while the *Ömer Altun* judgment refers more specifically to "fraud" and "abuse of rights". For this reason, *Ömer Altun* cannot be regarded as a direct confirmation of *Cussens*. As I will explain below, also Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1 et al.*, EU:C:2018:143–147 and the parallel Cases C-116 & 117/16, *Skatteministeriet* v. *T Danmark and Y Denmark Aps*, EU:C:2018:144, decided by the Court on 26 Feb. 2019, should not be taken as confirmation of *Cussens* in its full meaning, even though they both refer to para 33 of *Cussens* to maintain that EU law contains a general principle prohibiting abusive practices.

3. Case C-251/16, *Cussens*, para 33. Art. 13 of the Sixth 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, O.J. 1977, L 145/1 (hereinafter "the Sixth VAT Directive"). The Sixth VAT Directive was repealed and replaced by Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax, O.J. 2006, L 347/1. See in particular Art. 12 of the 2006 Directive.

4. Case C-251/16, *Cussens*, para 48.

5. Ibid., para 33.

6. Ibid., paras. 28 and 53.

7. Art. 4(2) of the Sixth VAT Directive taxed "exploitation of tangible or intangible property for the purpose of obtaining income" only if the activity was carried out "on a continuing basis". According to the Sixth VAT Directive, Member States could, if they so wished, tax that kind of activity also when it was carried out "on an occasional basis". Thus, it was possible for

Ömer Altun, on the other hand, concerned a fraudulent action in obtaining an E101 certificate, whose possession, by way of an exception laid down by Article 14(1)(a) of Regulation 1408/71, exempted a posted worker residing in another State or their employer from the social security regulations of the State where work was performed.[8] Thus, the case gave rise to a more standard situation, where it was EU law that created an entitlement which permitted the employer not to contribute to the social security fund of the State where the worker had been posted. For this reason, the case did not require the application of the broader principle prohibiting abusive practices of all sorts. As the reasoning of the ECJ in *Ömer Altun* shows, the problem in the case could have been and was in fact addressed through the more specific doctrines prohibiting abuse of rights and fraud. As a result of their application, a Belgian employer who had failed to register their Bulgarian workers with Belgian authorities and to pay the required social security contributions was prevented from relying on a fraudulently obtained E101 certificate.[9] The Court also empowered the courts of the State where the worker has been posted to review and disregard the certificate issued by the social security institution of another State if that institution failed to carry out a review in the light of the available evidence within a reasonable time.[10] The national court was empowered not only to refuse the benefits which the employer would otherwise draw from a provision of an EU Regulation but also to "give a ruling on liability" "under applicable national law".[11] The ultimate objective of the Court's ruling was thus to ensure that individuals did not get access to exemptions *created by EU law* through fraudulent means and that national rules continued to apply in situations of *abuse of EU rights*, and not to prevent abuses of national rules.

Member States not to tax that activity at all. Ireland decided to tax it and, given the authority granted to it by Art. 4(3) of the Sixth VAT Directive, it was free to determine the conditions under which the activity was to be subjected to VAT. It follows that Ireland was also free to exempt certain transactions from the tax thereby imposed.

8. Council Regulation (EEC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) 118/97 of 2 Dec. 1996, O.J. 1997, L 28/1, as amended by Regulation (EC) 631/2004 of the European Parliament and of the Council of 31 Mar. 2004, O.J. 2004, L 100/1. The exception in Art. 14(1)(a) concerns posted workers that, although temporarily employed in another State, continue to be subjected to legislation of the State where they were first employed, "provided that the anticipated duration of that work does not exceed twelve months and that [they were] not sent to replace another worker who has completed [their] term of posting".

9. At para 60 of Case C-359/16, *Ömer Altun*, the ECJ held that "a national court may disregard the E101 certificates and must determine whether the persons suspected of having used posted workers ostensibly covered by certificates obtained fraudulently may be held liable under the applicable national law".

10. Ibid., paras. 54–55.

11. Ibid., paras. 55–56.

A similar statement could be made about a series of cases, recently decided by the Grand Chamber of the ECJ,[12] concerning the conditions under which the beneficial owner of interest under civil law also qualifies as beneficial owner within the meaning of the Interest and Royalties Directive.[13] Article 1(1) and (4) of the Directive exempts from taxes interest and royalty payments arising in one Member State provided that the interest or royalties are received by the company located in another Member State for their own benefit and not as an intermediary, i.e. the company receiving payment is the "beneficial owner" of the relevant interest or royalties, and that the receiving company and the paying company are "associated". Article 5 of the Directive permits the Member States to apply the national provisions "required for the prevention of fraud or abuse" and to withdraw the benefits created by the Directive "in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse". It follows that the legal context of *N Luxembourg 1* and the related cases differed fundamentally from *Cussens* in that the tax advantage that the applicants tried to exploit was *created by EU law* and the Directive expressly permitted the Member States to refuse this advantage in the case of various forms of abuse. While the Court in its judgment chose to refer to the broader concept of "abusive practices", and not just the doctrine of abuse of (EU) rights, and to that effect relied on *Cussens*, the case could have been decided by reference to the doctrine of abuse of rights and the prohibition on using EU law for fraudulent purposes. This is because the essence of *N Luxembourg 1* is identical to *Ömer Altun*. Just as in *Ömer Altun*, in *N Luxembourg 1*, the ECJ created an exception to the application of EU rules in favour of national rules, and not an exception to the application of one national rule in favour of another national rule, as it was the case in *Cussens.* The Court in *N Luxembourg 1* held also that, in situations of abuse, a national authority is both entitled and obliged to refuse the benefit created by EU law, an element which all abuse of rights cases have in common. The correctness of the refusal depended on establishing by the national authority the constituent elements of an "abuse of right", which the Court spelt out in much detail, mentioning also the evidence which should be taken as proving abuse.[14] Thus, the definition of abuse which was actually

12. Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1 et al.*, EU:C:2018:143-147; Cases C-116 & 117/16, *Skatteministeriet* v. *T Danmark and Y Denmark Aps*, EU:C:2018:144, brought against Danish tax authorities and the Danish Ministry of Finance.

13. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, O.J. 2003, L 157/49.

14. Joined cases C-115, 118, 119 & 299/16, *N Luxembourg 1*, paras. 126–139. Note that when setting out the constituent elements of abuse the Court returned to the narrower language of "abuse of rights".

operational in the cases was not taken from the "general principle" prohibiting abusive practices, but set by the ECJ for the specific legislative context, taking into account the nature of the benefit created by EU law and the regulatory element which was being exploited. And thus, in the context of the Interests and Royalty Payments Directive it is the condition of "association" that has to be abused by economic operators by setting up a company in a Member State with a lower tax rate, and making that company the beneficial owner of interest and royalties.[15] Such abuse can be addressed only by focusing on the specific elements that define an unlawful use of the exemption created by the Interest and Royalties Directives.

Given the more familiar factual and legal circumstances of *Ömer Altun* and *N Luxembourg 1*, this article investigates primarily the *Cussens* judgment as the first one in which the ECJ insisted that there was a general principle of EU law prohibiting abusive practices of various types, including those involving exploitation of deficiencies in the national regulatory regimes, and thus giving the EU law's abuse doctrine a much broader scope. It will also examine whether such a broadly formulated principle should be freely invocable against a private party in the way prescribed by the Court in *Cussens*.[16] It is accepted that combatting tax avoidance is an important policy objective and the Court's *prima facie* competence to assist national tax authorities in that struggle is not questioned. However, I will maintain that the Court's competence to lay down prohibitions of abusive practices is subject to constitutional constraints, mostly stemming from the principles the ECJ had itself laid down in earlier case law. These principles constitute legitimacy-enhancing features of the EU legal order and should not be set aside for expediency or purely utilitarian considerations. Moreover, I will question the Court's competence to regulate instances of abuse that do not threaten the effectiveness of EU law and outline the range of circumstances in which abusive practices may legitimately be subjected to Court-created rules.

The article first sets out the rules and principles governing the EU's regulation of abusive practices prior to *Cussens* (section 2). It then looks at the Grand Chamber judgment in *Halifax*,[17] which is the foundation of the Court's claim in *Cussens* that a general principle prohibiting abusive practices exists in EU law (section 3). It focuses both on the factual features of *Halifax* and the

15. Art. 1(7) of the Interests and Royalty Payments Directive.

16. Case C-359/16, *Ömer Altun* seems to confirm that that an EU law "general principle" is invocable against a private party (can impose a duty with which individuals have to comply). See para 49 of the judgment. However, the legal proposition that the Court is actually relying on in *Ömer Altun* is much narrower than that which the Court introduced in *Cussens*, and, unlike *Cussens*, the case concerned an EU regulation, not a directive.

17. Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd* v. *Commissioners of Customs & Excise*, EU:C:2006:121.

elements of the Court's reasoning that vested the legal proposition made in *Halifax* with legitimacy. In the next section, the article explains how the circumstances of *Cussens* differ from *Halifax* and what consequences follow from the observed differences (section 4). It concludes that the principle of legality and coherence-related considerations should have led the Court to refuse to apply the principle laid down in *Halifax* (hereafter "the *Halifax* principle") to the facts of *Cussens*. It is argued that, instead of insisting on the existence of a "general principle" prohibiting various forms of abuse, the Court should have decoupled them and clearly defined the circumstances in which the *Halifax* principle could empower national tax authorities to refuse the right to exemption from VAT.[18] Furthermore, it is shown that the Fourth Chamber applied an incorrect test for when a legal proposition constitutes a "general principle" (section 5). That test, when correctly applied, reveals that the different EU rules concerning abuse are not manifestations of a single overarching principle. Claiming otherwise, as the Court did in *Cussens*,[19] fails to respect the boundary between EU and national law and the protection which individuals derive from that boundary, as well as the difference between the position of EU law as a source of public bodies' duties and that as a source of standards against which private conduct is to be assessed. Towards the end of the article (section 6), I will observe that subsequent ECJ judgments, whether using the narrower concept of "abuse of rights", as in *Ömer Altun*, or referring to "abusive practices" more broadly, like *N Luxembourg 1*, did not directly confirm the *Cussens* ruling and, unlike *Cussens*, presented a set of legal circumstances that justified the language of "principles".[20] This section will also look at the Opinions of Advocate General Kokott in *N Luxembourg 1* and the associated cases, which exibit a particularly careful approach in the

18. For a discussion of the claim that already before *Cussens* we could observe in EU law the emergence of a new "general principle" prohibiting abuse of law, see the papers collected in de la Feria and Vogenauer (Eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing, 2011). The literature is unfortunately frequently characterized by misunderstandings about the "general principle" concept in EU law and the constitutional significance of labelling a legal proposition a "general principle", a point to which I will return later in the article.

19. Case C-251/16, *Cussens*, paras. 29–31.

20. As explained more fully below, the doctrine of abuse of EU rights can properly be labelled a "principle" of EU law, although not a "general principle", because its effect is to create an exception to the principle of effectiveness of EU law. The ECJ is permitting national authorities not to apply a provision of EU law creating a benefit for an individual on the ground that granting that benefit on the facts of a given case would constitute its "abuse", i.e. would be incompatible with the purpose for which the benefit has been created, or because the individual obtained access to that benefit in a fraudulent way. The abuse of rights doctrine thus neutralizes the doctrines that normally stem from the principle of effectiveness, such as the duty to disapply incompatible national rules, the duty to apply EU rules directly and the duty to interpret national rules in the light of EU law in order to achieve its objectives. The doctrine of abuse of

application of the prohibition of abusive practices and demonstrate a desire to return to a more refined doctrinal arrangement, respectful of the limits of the EU's jurisdiction and of the legitimate expectations of private parties. The articles concludes by setting out the principles which, in the light of the ECJ's pre-*Cussens* case law, should guide EU law's regulation of "abusive practices" (section 7).

2. Abusive practices in EU law

The Court's regulation of abusive practices before *Cussens*, while somewhat complex, had been entirely intelligible in the context of a multi-level governance structure of the EU and its liberal ethos. The primary focus of EU law when it comes to what could only be very imprecisely described as "abusive practices" has always been the question of abuse of EU rules by individuals, i.e. a situation where individuals are exploiting EU law in order to avoid being subjected to national rules.[21] EU law gives individuals plenty of opportunities to tear down regulatory barriers and challenge the application of national requirements to their situations. We see evidence of this in EU regulatory law and free movement and citizenship law. However, certain private acts, which overtly look like legitimate exploitation of opportunities created by European integration, in fact, constitute instances of opportunistic, calculated and often intentionally harmful to public interest behaviour. Not without controversy, following the footsteps of some legal systems,[22] EU law

rights permits, national authorities to apply national rules, and thereby to refuse to recognize the EU entitlement, because reliance on it in a given case is not regarded as a legitimate use of EU law by the individual.

21. See Kamanabrou, "Abuse of law in the context of EU law", 43 EL Rev. (2018), 534 and Saydé, *Abuse of EU and Regulation of the Internal Market* (Hart Publishing, 2016). As explained above, this pattern is also visible in *Ömer Altun*, where an employer was trying to hold off the application of Belgian law by relying on fraudulently obtained document confirming applicability of Bulgarian law, a possibility created by the Council Regulation (EEC) 1408/71.

22. It is much more common for legal systems to have law on the "abuse of power" as a public law irregularity than rules or principles on the abuse of rights by individuals. "Rights" are often defined as legally protected freedom and thus it would be illegitimate for the State to prosecute instances of their exercise. However, the scope of the right can be defined by a State and its organs (courts) under an interest-based conception of rights (rights are then seen as advancing only certain, socially desirable goals) which enables the State to treat other situations of exercising the right as instances of "abuse". Alternatively, while maintaining a freedom-based conception of rights, legal systems can maintain that rights have a "social function" and thus any exercise of the freedom protected by a right that does not conform to its social function can be regarded as its "abuse". Abuse of rights by individuals usually requires a proof of intention to harm another or at least evidence that the harm-causing activity

developed the doctrine of abuse of EU rights – a set of arguments national authorities could rely on to insist on the applicability of their seemingly EU law-incompliant rules.[23] Thus, for example, a Member State may refuse to let in a spouse of a migrant EU citizen if it can be shown that their marriage was entered into only for the purpose of obtaining entry rights.[24]

The ECJ also developed a line of case law in which it prevented traders from using free movement arguments to avoid tax liabilities. In *Cadbury Schweppes*,[25] the Court held that while normally Articles 43 EC and 48 EC (now Arts. 49 and 54 TFEU) would preclude the inclusion in the tax base of a resident company established in a Member State of profits made by a controlled foreign company in another Member State, the taxpayer will only be able to rely on this preclusion if the activities of the controlled company were not "wholly artificial arrangements intended to escape the national tax normally payable".[26]

In *Emsland-Stärke*,[27] the Court had a chance to rule on the abuse of an EU regime created by secondary law and held that evidence of abuse "must be placed before the national court in accordance with *the rules of national law*".[28] As an example of abuse that would prevent the applicant from relying on the regulation, the ECJ mentioned the situation of collusion between the

purportedly constituting an exercise of a right had no utility to the right-holder. See e.g. Gambaro, "Abuse of rights in civil law tradition", 3 E.R.P.L. (1995), 561.

23. Case C-33/74, *Johannes Henricus Maria van Binsbergen* v. *Bestuur van de Bedrijfsvereniging Metaalnijverheid*, EU:C:1974:131, para 13; Case C-212/97, *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen*, EU:C:1999:126, para 24: "It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, undercover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law".

24. See Case C-109/01, *Secretary of State for the Home Department* v. *Hacene Akrich*, EU:C:2003:491, para 57, and Art. 35 of the Citizenship Directive entitled "Abuse of rights": "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31".

25. Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd* v. *Commissioners of Inland Revenue*, EU:C:2006:544.

26. Ibid., the operative part.

27. Case C-110/99, *Emsland-Stärke GmbH* v. *Hauptzollamt Hamburg-Jonas*, EU:C:2000:695.

28. Ibid., the operative part (emphasis added). A more recent example of this type of abuse cases is Case C-423/15, *Nils-Johannes Kratzer* v. *R+V Allgemeine Versicherung AG*, EU:C:2016:604, which concerned the abuse of the right to compensation of a victim of discrimination created by Art. 25 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, O.J. 2006, L 204/23.

applicant and another private party.[29] As explained below, in *Halifax*, given the wording of the Sixth VAT Directive, the Court was able to derive the prohibition of abuse directly from the Directive. Prevention of abuse in the form of tax avoidance was considered one of the Directive's implicit objectives.[30] This enabled the Court not only to formulate the prohibition of abuse but also to lay down its limits. National authorities would be entitled to rely on the doctrine of abuse if the transactions "resulted in the accrual of tax advantage the grant of which would be contrary to the purpose of those provisions" and it was "apparent from a number of objective factors that the essential aim of the transactions concerned [was] to obtain a tax advantage".[31]

What is clear is that the Court's approach to abusive practices was careful and selective. First, it concerned only abuses of EU rights/rules, following the principle that EU law cannot be used for abusive or fraudulent purposes.[32] Allowing EU law to be used by individuals in these circumstances would undermine its authority and the legitimacy of the European project. Abuses of national rules were not at all covered by active EU doctrine. National response to instances of abuse of national rules would logically only become an EU law issue if it had an impact on the effectiveness of *EU law*.[33] This rule arises directly from the principle of conferred powers and the division of competences between the EU and the Member States. Secondly, the ECJ used different approaches depending on whether what was abused was an open-textured free movement provision contained in the Treaty, or a more precise legislative provision, whose specific purpose and function were more readily identifiable, and with respect to which it would be easier for individuals, at least in principle, to determine in advance what conduct would constitute its "abuse". The application of the ECJ-created abuse doctrine would be regulated by national law up until the ECJ developed the more precise rules, as it did in *Akrich* when it relied on the concept of "marriage of convenience" to limit the possibility of relying on EU rules by a third-country

29. Case C-110/99, *Emsland-Stärke*, para 59.

30. Case C-255/02, *Halifax*, para 71.

31. Ibid., paras. 74–75.

32. Case C-367/96, *Alexandros Kefalas and Others* v. *Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, EU:C:1998:222, para 20. Cf. de la Feria, "Prohibition of abuse of (Community) law: The creation of a new general principle of EC law through tax", 45 CML Rev. (2008), 395.

33. See Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato* v. *Lucchini SpA*, EU:C:2007:434. It seems that effectiveness of EU law has also become a sufficient connecting factor for the purpose of establishing whether a particular case or particular national rules fall within the scope of EU law and thus within the jurisdiction of the ECJ. See Dougan, "Judicial review of Member State action under the general principles and the Charter: Defining the 'scope of Union law'", 52 CML Rev. (2015), 1201.

national, a spouse of an EU migrant, to prevent their deportation.[34] Given the fact that the tests for abuse in the case of different legislative provisions would have to incorporate elements of these provisions, one could speak of a unified abuse doctrine covering all EU legislative rules only in a very abstract and therefore largely unhelpful way.[35] Thus, there is certain artificiality in trying to bring the different doctrines of EU law concerning abusive practices under the rubric of a single principle.[36]

The Court's sophisticated approach to the question of when abuse may justify disapplication of EU rules ensured, on the one hand, adequate respect for the EU's interest in having its rules enforced and, on the other, observance of the principle of legality. It also provided a minimum level of legal certainty for private parties, whether they be EU migrants and their family members or economic operators. The ECJ did not intend EU law to address all instances of abuse taking place on the territory of the EU or even all instances of abuse falling within the scope of EU law. Member States had to combat abuse involving inappropriate exploitation of national rules that did not threaten the effectiveness of EU law on their own. The Court's targeted approach was respectful of the division of competences in the EU and the values underpinning the rule of law.

3. The *Halifax* principle

Halifax concerned interpretation of the Sixth VAT Directive, in particular, as regards the question of whether a taxable person could be refused the right to deduct input VAT where the transactions from which that right derived constituted an abusive practice. The right to deduct input VAT is granted by the Directive itself in Article 17(2), although its availability to the taxpayers in *Halifax* stemmed in part from UK rules allowing a person undertaking mainly untaxed transactions to transfer leases of immovable property to another entity under its control, which was entitled to opt for taxation of the letting of that

34. Case C-109/01, *Akrich*, para 61.

35. For the same view, see the Opinion of A.G. Poiares Maduro of 7 Apr. 2005 in Case C-255/02, *Halifax*, para 64: "To my mind a general principle of Community law can certainly be considered to derive from this case-law. The Court synthesised it by stating that 'Community law cannot be relied on for abusive or fraudulent ends'. That principle, however, enunciated in that broad and rather circular way, is not, by itself, a useful instrument for assessing whether a right arising from a specific provision of Community law is being exploited abusively. A more detailed doctrine or test to determine when an abuse occurs is necessary to render it operative". (footnotes omitted).

36. That is not to say that there are no common elements in the behaviour that the Court regards as "abusive". See 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", 21 EBLR (2010), 783.

property. This enabled the person undertaking mainly untaxed transactions to deduct through the controlled company the total input VAT paid on the construction or renovation costs borne by them. Despite the unquestionably important role of national provisions in providing access to the EU right to deduct input VAT, the Court nevertheless treated the case as involving abuse of a self-sufficient EU right.[37] To the extent that applying the doctrine of abuse of an EU right to a situation in which access to the right was regulated by national law constituted an extension of that doctrine, the extension could be seen as justified on the ground that "[p]reventing possible tax evasion, avoidance and abuse [was] an objective recognized and encouraged by the Sixth VAT Directive".[38] One aspect of *Halifax* which the Court did not emphasize enough in the judgment is the fact that, as a result of the abusive practice in issue, Halifax was able to avoid paying VAT on a type of economic activity expressly taxed by the Sixth VAT Directive.[39] The judgment was thus preventing a situation in which, because of the combined effect of EU and national rules, an obligation imposed by EU law (to pay VAT on the designated activity) would have been circumvented.

The Grand Chamber of the ECJ held that the right to deduct input VAT through the arrangement put in place by Halifax could be refused but that that refusal should be restricted to situations where, as already mentioned above, "the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth VAT 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" and "the essential aim of the transactions concerned [was] to obtain a tax advantage".[40] The Court made it clear that the prohibition of abuse could not be relied on by national tax authorities where "the economic activity carried out may have some explanation other than the mere attainment of tax advantages",[41] and that it was "for the national court to verify in accordance with the rules of evidence of *national law*, provided that *the effectiveness of Community law* is not undermined, whether action constituting such an abusive practice has taken place in the case before it".[42]

It is in the context of paragraph 70 of the judgment that the Grand Chamber chose to use more general language, less tied to the Sixth VAT Directive. It held that "[the] principle of prohibiting abusive practices also applies to the sphere of VAT". This formulation does not contain any limitation as to which

37. Case C-255/02, *Halifax*, para 68.
38. Ibid., para 71.
39. Art. 4 of the Sixth VAT Directive.
40. Case C-255/02, *Halifax*, paras. 74–75.
41. Ibid.
42. Ibid., para 76 (emphasis added).

law, EU law or domestic, is being invoked by the taxable person as the justification for the absence of a tax obligation. However, it is also notable that the principle is not described as a "general principle of EU law". And in the light of the next paragraph, it is quite clear that the *Halifax* principle is not intended as a "general principle" given the fact that its source is the Sixth VAT Directive, the prevention of tax avoidance being the Directive's "recognized and encouraged" objective.[43] Further, the Court did not use the standard method of identifying the "general principles of EU law", which involves the examination of common constitutional traditions of the Member States and the relevant international instruments.[44] Moreover, paragraph 85 of *Halifax* clearly connects the principle that abusive practices are prohibited with the Directive, rendering it an interpretative principle only.[45] Thus, the broader formulation of the principle, as seemingly covering abuses of both EU and national law, is counterbalanced by the fact that the principle is treated as merely interpretative and thus cannot concern situations which are not substantively governed by the Directive.[46] Furthermore, as an interpretative principle only, the *Halifax* principle is subjected to the same limitation as the Directive from which it arises, i.e. it cannot be used independently to create obligations for private parties. That effect can be brought about only through national law.

And so, reading on, we discover that in *Halifax*, the source of the tax obligation is actually the UK implementation of the Sixth VAT Directive, which had used the option provided by Article 13B(b) to tax leases of immovable property, and not the principle proclaimed in paragraph 70.

43. Ibid., para 71.

44. Art. 6(3) TEU. Case C-144/04, *Werner Mangold* v. *Rüdiger Helm*, EU:C:2005:709, para 74.

45. See Arnull, "What is a general principle of EU law?" in de la Feria and Vogenauer, op. cit. *supra* note 18, p. 20. The importance of the distinction between a "general principle" and an "interpretative principle" will be clear below. In a nutshell, following the Court's approach in *Cussens*, we are presupposing that a "general principle" can be used against a private party. An interpretative principle can apply against a private party only if the act whose interpretation it directs can be used against that party.

46. See the Opinion of A.G. Poiares Maduro in Case C-255/02, *Halifax*, EU:C:2005:200, para 69: "[the] notion of abuse operates as a *principle governing the interpretation of Community law*, as stated by the Commission in its written observations. What appears to be a decisive factor in affirming the existence of an abuse is the teleological scope of the Community rules invoked, which must be defined in order to establish whether the right claimed is, in effect, conferred by such provisions, to the extent to which it does not manifestly fall outside their scope" (footnotes omitted, emphasis in the original). Freedman agrees. When, discussing *Halifax*, she argues that the principle laid down by it concerns the question of how to apply a specific piece of legislation and thus "it is easy to argue that the concept of abuse of EU law is simply an extended rule of statutory interpretation". Freedman, "The anatomy of tax avoidance counteraction: Abuse of law in a tax context at Member State and European Union level" in de la Feria and Vogenauer, op. cit. *supra* note 18, p. 369.

According to paragraph 74, "an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth VAT 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". Thus, application of the principle laid down in paragraph 70 is, according to the Court in *Halifax*, permitted only when the purpose of the Directive would otherwise be undermined. It follows that EU law cannot be used to combat just any form of tax avoidance that national tax authorities are trying to eradicate. Neither is it possible to use EU law to combat abusive practices whose existence poses a threat to the objectives of domestic tax law but does not threaten EU objectives.[47] These limitations are required so that the division of competences between the EU and the Member States is respected and so that individuals do not find their liberties unexpectedly curtailed by the application of "principles" of EU law. The operative part of the *Halifax* judgment is restricted to the interpretation of the Sixth VAT Directive alone, where the ECJ held that it was the Directive which precluded "any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice".[48]

As for consequences of finding an abusive practice: in *Halifax*, the Court refused to lay down the conditions under which the national tax authorities could recover the VAT, leaving this issue for national regulation, subject to the principle of proportionality.[49] Nevertheless, in paragraphs 94 and 95, it introduced a duty to "redefine" the transactions constituting an abusive practice "so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice", giving national tax authorities an unrestricted entitlement to demand repayment of the deducted amounts with retrospective effect. This is arguably the essence of the *Halifax* principle. Its content is not exhausted by the proposition that EU law

47. It should be clearly stated, however, that a threat to the Directive's objectives is not sufficient, without more, to justify the disregarding or the redefining of the transaction which enabled the tax-payer to enjoy a tax advantage. See Weber, "Abuse of law in the context of indirect taxation: Why we need the subjective intention test, when is combating abuse an obligation and other comments" in de la Feria and Vogenauer, op. cit. *supra* note 18, p. 398.

48. Point 2 of the operative part of the *Halifax* judgment. Also in Case C-359/16, *Ömer Altun*, where, as mentioned in the opening paragraph to this article, the ECJ maintained that "[t]he principle of prohibition of fraud and abuse of rights" was "expressed by that case-law" and constituted "a general principle of EU law which individuals must comply with" (para 49), the operative part presents the power created for the national courts through the principle of abuse of rights as stemming from Art. 14(1)(a) of Regulation 1408/71 and Art. 11(1)(a) of Regulation 574/72. Cf. para 27 of Case C-251/16, *Cussens*.

49. Case C-255/02, *Halifax*, para 91.

prohibits abusive practices (in the sphere of VAT), but also includes the creation of a power for national tax authorities to "redefine" transactions and demand payment. The significance of *Halifax* is thus primarily procedural or remedial (enforcement-related). Its essence is the creation of a new administrative power/duty, which subjects individuals to previously non-existing authority.[50] But that authority is carefully circumscribed in the judgment.

3.1. *The essence of the Halifax principle: Substantive or remedial?*

The question of what actually constitutes the essence of the *Halifax* principle is an important one. This is because EU law distinguishes substantive from procedural/remedial issues. It is only in the context of the latter that the Member States can rely on the principle of "national procedural autonomy", which creates two presumptions in favour of the Member States – the presumption of competence to regulate remedial issues, and the presumption of compatibility of national rules with EU law. Member States' rules can be replaced by EU legislative rules and occasionally also judge-made rules, but the Member States remain competent to regulate any outstanding issues.[51] Presumption of compatibility, on the other hand, can be dislodged if national rules do not treat EU rights in the same way as domestic rights or if enforcement of EU rules is considered "excessively difficult" (so-called principles of equivalence and effectiveness).[52] When individuals want to enforce EU rights, in addition to equivalence and effectiveness, they can also rely on the principle of effective judicial protection and Article 47 of the

50. EU law knows other instances of such "principles". See e.g. the *San Giorgio* (Case 199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, EU:C:1983:318) duty to repay the unlawfully levied charges and the *Lucchini* (Case C-119/05) duty to return an unlawful State subsidy. Both duties are presented in the case law as stemming directly from the relevant Treaty provisions (free movement provisions and the prohibition of State aid incompatible with the internal market). For more on how the Court is introducing remedial and enforcement instruments, see Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing, 2004) and id., "The vicissitudes of life at the coalface: Remedies and procedures for enforcing Union law before the national courts" in Craig and de Búrca (Eds.), *The Evolution of EU Law,* 2nd ed. (OUP, 2011).

51. As visible e.g. in the context of the *Courage* remedy. Case C-453/99, *Courage Ltd* v. *Bernard Crehan and Bernard Crehan* v. *Courage Ltd*, EU:C:2001:465, para 31. For more on how national law interacts with EU remedial rules in the context of compensatory remedies, see Leczykiewicz, "Compensatory remedies in EU law: The relationship between EU law and National law" in Giliker (Ed.), *Research Handbook on EU Tort Law* (Edward Elgar, 2017), p. 73.

52. See e.g. a recent Grand Chamber judgment in Case C-234/17, *XC and Others* v. *Generalprokuratur*, EU:C:2018:853, paras. 21–22 and the case law cited therein.

Charter of Fundamental Rights.[53] For obvious reasons, neither EU institutions nor State bodies could rely on Article 47 of the Charter, whose function is the protection of individuals. Article 47 of the Charter can be applied "against" individuals, such as in *Egenberger*,[54] only for the benefit of another individual.

Issues of substantive EU law are regulated differently. Member States' laws and practices do not enjoy the same presumption of compatibility. Standards with which they have to comply stem from the substantive provisions of EU law. Even here, however, an individual is able to rely directly on Treaty provisions or provisions of directives and decisions only if they satisfy additional conditions, known as the conditions of "direct effect".[55] Regulations, on the other hand, are described in the Treaty as "directly applicable". No other source of EU law possesses this prerogative, and it is clear that "general principles" as a category do not have the attribute of "direct applicability". The only judgment that comes close to making this claim is *Mangold*, but its relevance is limited to instances of discrimination on grounds already legislated upon by the EU.[56] Moreover, subsequent case law, while extending the *Mangold* method to some other fundamental rights, shows that for a "general principle" or a Charter provision codifying a given fundamental right to be "directly", and therefore also horizontally, "applicable", they must be sufficiently precise and unconditional, i.e. must be capable of conferring a right independently from the Directive concretizing it.[57] Moreover, the procedural consequence of *Mangold* is disapplication of national law with a negative legal effect for a private party and not direct applicability of the

53. Art. 47 of the Charter in the more recent (post-Lisbon) case law of the Court has become an independent standard of assessment of the compatibility (sufficiency/adequacy) of national remedial and procedural rules. See Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* v. *Bundesrepublik Deutschland*, EU:C:2010:811. Art. 47 of the Charter further dislodges the presumption of compatibility. However, it does not affect the presumption of competence.

54. Case C-414/16, *Vera Egenberger* v. *Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257, paras. 78–82.

55. For a recent Grand Chamber judgment to this effect, see Case C-122/17, *David Smith* v. *Patrick Meade and Others*, EU:C:2018:631.

56. Case C-144/04, *Mangold*. *Mangold* cannot be taken to lay down the proposition that "general principles of EU law" are as a category directly applicable, since in para 78 the Court held that it was actually the Directive which was precluding national rules incompatible with the principle of non-discrimination on the grounds of age.

57. Case C-176/12, *Association de médiation sociale* v. *Union locale des syndicats CGT*, EU:C:2014:2, para 47. The general principle (now the Charter provision) has to be "sufficient in itself to confer on individuals an individual right which they may invoke as such" (ibid.). See also, Case C-122/17, *Smith*, para 85.

general principle to private conduct.[58] What this means is that a general principle of EU law can only be "directly effective" against an individual if it concerns a (fundamental) EU right and if it is possible to identify the obligation it imposes on a private party precisely and exhaustively by reference to EU law. Other "general principles" would only be enforceable against private parties if the Member States implemented them in their legislation and provided mechanisms for their enforcement.[59]

Halifax as an enforcement-related principle should thus be located within the EU law of remedies and subject to the usual restrictions on the Court's competence to develop new EU rules, such as the requirement that the new rules are necessary for ensuring (full) effectiveness of *EU law*.[60] It could supposedly be claimed that "national procedural autonomy" applies only to "remedies" or "sanctions" properly so called, and the *Halifax* principle, even if it leads to tax liability, does not have a punitive element, and, therefore, should not be seen as a "sanction". The liability which *Halifax* imposes on the taxpayer is limited to the tax owed once the transaction constituting an abusive practice is disregarded. If national tax authorities wish to recover more than the tax owed, they would have to look for a basis in national (legislative) law. But it is equally true that the possibility of imposing a tax on a person abusing deficiencies in national tax regulation acts as a deterrent against future acts of abuse and thus performs some of the same functions as a penalty. We saw in *San Giorgio* and *Francovich* that the Court can introduce such technically non-punitive sanctions, but in those cases, their introduction benefited – rather than prejudicing – an individual. It is the *Lucchini* sanction which is more relevant here, because in *Lucchini* the Court imposed a duty on a national court to decide *against* an individual who had benefited from an unlawfully granted subsidy.[61] The national court was obliged to set aside the national principle of *res judicata* protecting the individual's interest in order to

58. Case C-144/04, *Mangold*, para 77. The same is true of Charter provisions which have been held to be invocable against private parties. See e.g. Case C-122/17, *Smith*, para 86.

59. This is the true significance of the so-called "no new remedies" doctrine, also referred to as "the *Rewe/Comet* doctrine", which says that the Member States do not have to create new remedies even if their current remedies do not satisfy the requirement of effectiveness unless the absence of a remedy undermines the principle of effective judicial protection of EU rights. Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd* v. *Justitiekanslern*, EU:C:2007:163.

60. See e.g. Joined Cases C-6 & 9/90, *Andrea Francovich and Danila Bonifaci and Others* v. *Italian Republic*, EU:C:1991:428, para 33; Case C-453/99, *Courage*, para 27; Case C-213/89, *The Queen* v. *Secretary of State for Transport, ex parte: Factortame Ltd and Others*, EU:C:1990:257, para 21; Joined Cases C-392 & 422/04, *i-21 Germany GmbH and Arcor AG & Co. KG* v. *Bundesrepublik Deutschland*, EU:C:2006:586, para 52.

61. Case C-119/05, *Lucchini*.

achieve an EU law-compliant state of affairs.[62] In a subsequent judgment, *Fallimento Olimpiclub*, the Court explained that the *Lucchini* obligation was not intended generally to undermine the national principle of *res judicata* because of the negative consequences which disapplication of that principle had for legal certainty.[63] The ECJ pointed out that what justified setting aside the national principle of *res judicata* in *Fallimento Olimpiclub* was the threat that its application posed to effectiveness of the "Community rules on VAT".[64]

National regulatory autonomy is obviously the undisputable starting point every time what is being threatened by reliance by individuals on national rules is effectiveness of *national law*. While EU law could, on some model, assist national courts in enforcing public interest-protecting national rules (if those were found to fall within the scope of EU law and therefore within the scope of the ECJ's jurisdiction),[65] the reasoning in those cases should start with the presupposition that whatever balance has been struck in national law between effectiveness of the law and its predictability should not be disturbed. Individuals are entitled to draw protection from the limited capacity of State authorities to intervene in their affairs.

But the line where substantive EU law ends and the presumption of national regulatory autonomy starts is not always easily identifiable. This is visible in the context of VAT. The Sixth VAT Directive imposes a range of obligations on the Member States in terms of what persons, activities and transactions have to be subject to VAT. It also exempts certain persons, activities and transactions from VAT, occasionally creating an option for the Member States to tax them using one of the permitted criteria or allowing them to set their preferred conditions subject to the requirement of the effective prevention of abuse.[66] It follows that it is the Directive itself which permits Member State not to tax certain "supplies" of goods. An EU principle which would enable national tax authorities to collect more VAT, while beneficial for the Member

62. Ibid., paras. 61–63.

63. Case C-2/08, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate* v. *Fallimento Olimpiclub Srl*, EU:C:2009:506, para 28.

64. Ibid., paras. 30–31. Note that the case concerned the same type of tax as in *Halifax* and *Cussens*.

65. EU law binds the Member States only within its scope, and the Court does not have jurisdiction to impose duties on national courts in situations falling outside the scope of EU law. See Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, EU:C:2013:105, para 22.

66. See Art. 13B according to which various "supplies" are exempted from VAT and Art. 4(3)(a) which permits Member States to tax some of these supplies "under the conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse". Now, see Arts. 131 and 158 of Directive 2006/112/EC.

States' budget, and indirectly also the EU budget,[67] is not contributing to effectiveness of *EU law*, unless the activity was taxed by that law. And it is effectiveness of EU *law*, and not the question of whether more VAT is economically beneficial for the EU, that is relevant here. This is because the constitutional boundary between EU law-constrained national competence and national regulatory autonomy is delineated by reference to the effectiveness of EU *law*, not the EU interest.[68] This can be seen in the case law. First, Member States' acts not substantively covered by provisions of EU law are regarded to fall within the scope of that law only when they affect its effectiveness.[69] Secondly, application of substantive national rules within the scope of EU law is only prohibited if it would undermine the effectiveness of that law.[70] As the Grand Chamber's judgment in *M.A.S.* shows, under EU law, the EU *interest* gives way to a (national) principle that offences and penalties must be defined by law.[71] EU *law*, on the other hand, prevails – even if it collides with a national constitutional principle.[72]

3.2. *Legitimacy of judicially imposed sanctions*

The *Halifax* judgment was relied on in *Kofoed*, a case concerning alleged abuse of Article 8(1) of the Merger Directive.[73] In *Kofoed*, *Halifax* was cited

67. A portion of VAT collected by the Member States is transferred to the EU. These payments alongside custom duties on imports from outside the EU and sugar levies and a percentage of the gross national income of each Member State are considered the EU's "own resources". As regards the VAT, standard percentage is levied "on the harmonized VAT base" of each State. Each Member State must then provide a small percentage of that base, referred to the "call rate", to the EU budget. The standard call rate is 0.3% of the notional harmonized VAT base, although for Germany, the Netherlands and Sweden (all net contributors) this has been halved for the 2014–2020 period. See European Commission, *European Union. Public Finance*, 5th ed. (Publications Office of the European Union, 2014), p. 192.

68. So, for example, actions of national authorities in relation to the taxation of interests and royalty payments made between associated companies, in issue in *N Luxembourg 1*, fall with an EU law-constrained national competence, because in the exercise of their powers, national authorities need to comply with the Directive, if necessary by giving it direct effect, interpreting national rules in its light and disapplying incompatible national rules. A principle, such as the abuse of rights doctrine, which releases them from these obligations, as a principle affecting effectiveness of EU law, may and arguably should be laid down by EU law. See also *supra* note 20.

69. See to that effect, Case C-399/11, *Stefano Melloni* v. *Ministerio Fiscal*, EU:C:2013:107, paras. 59–60. See also Case C-119/05, *Lucchini*, paras. 61–63.

70. Case C-42/17, *Criminal proceedings against M.A.S. and M.B.*, EU:C:2017:936, para 47. The case concerned penalties for VAT fraud in Italian law and the application of Italian constitutional guarantees stemming from the principle of legality.

71. Ibid., operative part.

72. Case C-399/11, *Melloni*.

73. Case C-321/05, *Hans Markus Kofoed* v. *Skatteministeriet*, EU:C:2007:408. Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers,

for the proposition that "[t]he 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*".[74] Despite the fact that what was allegedly abused in *Kofoed* was *an EU right*, and thus the Court could draw directly on *Halifax*, it refused to apply the principle of abuse of rights to the facts of the case on the ground that a Directive could not of itself impose obligations on individuals.[75] It then left it for the national court to determine, as the only other way in which the abuse in question could be combatted, whether national law contained "a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance".[76] The message in *Kofoed* was clear; it was the Member States' laws that should be employed to give effect to the true objective of the Directive in case its provisions are open to abuse. The principle that abusive practices are prohibited could be invoked against the taxpayer, but it had first to be part of that State's law, an issue over which the national court had competence.[77]

It should be observed that following the Grand Chamber judgment of 26 February 2019 in *N Luxembourg 1* and the associated cases, the *Kofoed* reasoning is no longer part of EU law doctrine. While the Court was careful not to overrule *Kofoed* in *N Luxembourg 1*,[78] the practical effect of the judgment is that in cases involving entitlements created by directives there is no space left for the argument that, because a directive cannot impose obligations on private parties, only a national principle prohibiting abusive practices can be invoked against such parties. In *N Luxembourg 1* the ECJ observed that applying the EU principle prohibiting abusive practices in the absence of a national counterpart is permitted because it is "general principle of EU law".[79] As explained below, this argument is incorrect, although the conclusion that the principle can be relied on against a private party is correct. This is because EU law is entitled to regulate when individuals can rely on EU rights and where their reliance will not be given legal effect and the relevant national rules will continue to apply.[80]

divisions, transfers of assets and exchanges of shares concerning companies of different Member States, O.J. 1990, L 225/1.

74. Case C-321/05, *Kofoed*, para 38 (emphasis added).
75. Ibid., para 42.
76. Ibid., para 46.
77. Ibid., para 47.
78. Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1*, paras. 114–117.
79. Ibid., para 118.
80. The Court itself observed in para 119 of *N Luxembourg 1* that "abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a

This, however, does not solve the problem posed by cases like *Halifax*, *Kofoed*, and *Ömer Altun* – on what ground, should national authorities have the power to impose sanctions for abusive conduct, if the relevant definitions of abuse were not available to national authorities at the time of a private party's action and the national law did not provide the authorities with a procedural mechanism of combatting abuse. So, the background problem, regrettably not expressly articulated in the three judgments, is retroactivity of judicially created sanctions. How can it be legitimate for a court, including the ECJ, to lay down a sanction applicable to pre-existing situations? One possible source of legitimacy is the traceability of the judicially imposed sanction to a pre-existing written text; in the context of EU law that would be the Treaties or the provisions of EU secondary law.[81] So, once it is realized that the power to "redefine" transactions created by the ECJ in *Halifax,* or the power to review the granting of an E101 certificate created by the ECJ in *Ömer Altun*, is a public power, we can appreciate why finding a legitimate legal basis for it is constitutionally crucial. If national law does not provide the national court or the national tax authority with the legal basis, we need to ask in what circumstances EU law should be permitted to create the power and what would be its appropriate legal basis. The legal basis needs to be invocable against individuals since its role is to legitimize a power that is used against individuals. This would exclude directives. In order to avoid that conundrum, the Court developed a doctrine according to which, while a principle derived from a directive cannot be invoked against an individual, an identically formulated principle can be used in this way if it constitutes a "general principle of EU law".[82] I will call this "the *Mangold* doctrine".

Just like *Halifax* and *Ömer Altun*, the *Mangold* doctrine has a substantive and a remedial element. The substantive element is the prohibition of discrimination on the grounds of age. The remedial element is the national court's duty to set aside a provision of national law with the effect that a new legal obligation is created for a private party.[83] That decision has been notoriously controversial but on the proper reading of the judgment, as

directive … does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally".

81. This stems from the fact that the Court has only the competences specified in the Treaties. Its jurisdiction to give preliminary ruling is limited to only two types of competences: the review of the validity of EU acts and the interpretation of the Treaties and of the acts adopted by EU institutions. See Art. 267 TFEU.

82. Case C-144/04, *Mangold*.

83. The effect of disapplying the national rule in *Mangold* was that a private party, an employer, was deprived of an immunity they possessed under national law with the effect that they were obligated to employ the claimant under a permanent, rather than a fix-term, contract.

explained above, *Mangold* is actually quite narrow. Within these narrow confines, a horizontally applicable "general principle" prohibiting discrimination on legislatively specified grounds can arguably exist independently from the directive concretizing the principle, and thus have broader effects than the directive would. The *Mangold* doctrine and its subsequent transformations (the linking of it to the Charter of Fundamental Rights in *Kücükdeveci* and restricting it to Charter provisions which are sufficiently precise in *AMS*)[84] prove that not much is "general" about EU law's "general principles". Post-*Mangold* decisions on horizontal applicability of EU fundamental rights show that the Court is unwilling to work with free-standing unwritten principles as independent sources of private party obligations. Even where a principle protects a right (as it did in *Mangold*), it has to be grounded in a written (ideally EU) source or, alternatively, constitute a fundamental right.[85]

Halifax and *Ömer Altun* stay faithful to the legal basis requirement. As I mentioned above, the operative part of *Halifax* makes a connection between the prohibition of abusive practices and the Sixth VAT Directive. However, the use of a directive as the legal basis is problematic in the light of the fact that directives cannot impose obligations on individuals (I will refer to this principle as "the *Marshall* prohibition"). What saves the ECJ's reasoning is the reliance on national implementation.[86] Without it, the Court would not have had the power to use the Sixth VAT Directive to introduce a principle which had the effect of imposing new tax liabilities on a private party. Moreover, the Court is flexible about the standard that should apply. In paragraph 81, the ECJ holds that the national court "*may* take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden".[87] The same is true of *Ömer Altun,* where the Court created a power in favour of the national authorities of the State where the worker had been posted to review and disregard the E101 certificate, but only on condition that the dialogue with the other State's institution that issued the certificate does not lead, when it should, to a review of the certificate

84. Case C-555/07, *Seda Kücükdeveci* v. *Swedex GmbH & Co. KG.*, EU:C:2010:21, para 22; Case C-176/12, *Association de médiation sociale*.

85. After Lisbon, this alternative is of little relevance because most, if not all, EU law's "general principles of fundamental rights" have been provided with a written EU basis in form of the Charter of Fundamental Rights. Thus, it is no longer necessary for the ECJ to rely on horizontally applicable "general principles"; instead, it may simply rely on the Charter and test the individual provisions for horizontal applicability.

86. Case C-255/02, *Halifax*, para 74.

87. Emphasis added. This means the Court is not obliging the national court to use the stated criteria or to find abuse whenever these criteria are met.

"within a reasonable time".[88] Moreover, the proceedings in which the certificate is challenged in the State where the worker had been posted have to be judicial proceedings,[89] as provided by the law of that State, but "with due regard to the safeguards associated with the right to a fair trial".[90] Thus, even though both *Halifax* and *Ömer Altun* concerned abuse of EU rules, the standard and the procedures applied to private conduct were a hybrid between EU law and national law.

The legal basis requirement cannot simply be circumvented by redefining the *Halifax* principle, or any EU law abuse of rights principle containing a remedial element, as a "general principle". Individuals are entitled to have their affairs regulated primarily by national law and, without a proper legal basis, EU law should not disturb this principle. EU law scholarship has put forward two propositions of when national courts and the ECJ are permitted to deny individuals protection or liberty which they would otherwise enjoy under national law. One of these propositions comes from Dougan, who in the context of discussing when horizontal direct effect of directives should be permitted, argues that some cases in which directives were applied horizontally could be reclassified as "public law" cases.[91] They involved public authorities' failure to fulfil an EU obligation. When a horizontal case can be redefined as a "disguised" vertical case, we can use the directive, Dougan argues, to set aside national law that has been opportunistically relied on by a private party.[92] The second proposition we find in the literature involves references to social justice considerations. As Weatherill pointed out, national provisions can be set aside where it helps EU law achieve a greater remedial balance between economic and social rights.[93] Thus, protection of rights, or legitimate social claims, can explain the "circumventions" of the *Marshall* prohibition, such as the duty of consistent interpretation or the *Mangold* doctrine.[94]

It is much more contentious to propose that effectiveness of EU law should prevail over the legal certainty that undisturbed application of national rules provides also in the case of EU rules whose purpose is neither the protection

88. Case C-359/16, *Ömer Altun*, para 55.

89. Ibid.

90. Ibid., para 56.

91. Dougan, "The 'disguised' vertical direct effect of Directives?", 59 CLJ (2000), 586, 604.

92. Ibid., at 606.

93. Weatherill, "Addressing problems of imbalanced implementation in EC law: Remedies in an institutional perspective" in Kilpatrick, Novitz and Skidmore (Eds.), *Future of Remedies in Europe* (Hart Publishing, 2000), p. 87.

94. See Leczykiewicz, "Effectiveness of EU law before National Courts: Direct effect, effective judicial protection, and state liability" in Arnull and Chalmers (Eds.), *Oxford Handbook of European Union Law* (OUP, 2015), pp. 219 et seq.

of an individual nor greater social justice.[95] Equally, it is difficult to understand why EU law should be permitted to worsen the position of individuals in cases which involve Member States' failure to enforce national, not EU, rules. And in certain areas what stands in the way is not just the principle of legal certainty and the limits of EU competence, but the rule of law and its corollary, the principle of legality, which in criminal law is translated into the principle of *nulla poena since lege* (no penalty without a statute), and in tax law is expressed as the principle of *nullum tributum sine lege* (no tax without a statute).[96] The principle also explains why it is standard for national tax authorities not to have a general competence to question private transactions on the ground that the advantage which a taxpayer drew from tax legislation was in conflict with the objective of that legislation.[97]

4. The *Cussens* judgment

Cussens concerned private property developers who constructed 15 holiday homes intended for sale on a site in Baltimore, Ireland. Before selling the homes, they entered into an arrangement with an associated company, under which they granted a long lease of the development site to the associated company and then took a leaseback. Subsequently, the lease and leaseback were extinguished by a mutual surrender and the developers regained full ownership. The purpose of that arrangement was to reduce the VAT liability which would otherwise arise upon the sale of the completed development. Under section 4(9) of the Irish VAT Act, no VAT was payable on those sales on the ground that the properties had previously been the subject of a transaction on which VAT was chargeable ("the first supply"), i.e. the long lease.[98] The respondent inspector of taxes assessed the developers for VAT on the sales on

95. Leczykiewicz, "Horizontal application of the Charter of Fundamental Rights", 38 EL Rev. (2013), 479. Also in the Court's view, effectiveness does not routinely prevail over legal certainty. See e.g. Case C-453/00, *Kühne & Heitz NV* v. *Produktschap voor Pluimvee en Eieren*, EU:C:2004:17, para 24.

96. The principle of legality is particularly important in these areas of the law that regulate relationships between private parties and the State (generally public law) and is less visible, although not completely absent, from private law, which, although with exceptions, regulates mainly relationships between private parties. It could even be argued that it is the principle of legality itself that motivates the distinction between public law and private law, in that public officials should be subjected to at least the same obligations as private parties, but private parties should have a more restricted set of obligations than those owed by the State and its organs. See Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 2010).

97. Weber, op. cit. *supra* note 47 and Freedman, op. cit. *supra* note 46, p. 371.

98. According to Irish law at the time, "a disposal of an interest in immovable goods … chargeable to tax", where "the goods have not been developed since the date of the

the basis that the lease and leaseback were of no effect, *inter alia* because the lease and leaseback, with subsequent surrender, lacked any commercial reality and so constituted an abusive practice in accordance with EU law. The Circuit Court agreed with the inspector's assessment. The developers appealed to the High Court. The High Court observed that the concept of abusive practice was well established as part of the case law of the ECJ and the *Halifax* principle made it unnecessary for Irish law to have an instrument directly transposing the concept of abusive practices into Irish law. However, in the conclusion the judge claimed that the arrangement was contrary to the "proper interpretation of Directive 77/388", rather than just the *Halifax* principle.[99] The developers appealed against this judgment to the Irish Supreme Court, which decided to stay proceedings and send a preliminary reference to the ECJ, asking about the various aspects of the *Halifax* principle, its provenance, scope of application, effects and relation to other EU doctrines.

As already indicated in the introduction to this article, the Fourth Chamber of the ECJ broadly agreed with the Irish High Court's reasoning. It held that EU law laid down a "general principle" prohibiting abusive practices, which was "capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt from value added tax sales of immovable goods, such as the sales at issue in the main proceedings, carried out before the judgment of 21 February 2006, *Halifax and Others* …, was delivered, and the principles of legal certainty and of the protection of legitimate expectations [did] not preclude this".[100] The Court also held that an arrangement should be regarded as an "abusive practice" when the essential aim of the transactions was to obtain a tax advantage.[101] That meant that the national court was not allowed to take into account the fact that the leases, apart from being a tax-avoidance measure, were also increasing the efficiency of the subsequent sales.

4.1. *Cussens and the Halifax principle*

In *Cussens*, the ECJ's Fourth Chamber decided to use a different mode of supplying its ruling with legitimacy than the one preferred by the Grand Chamber in *Halifax*. When laying down a general prohibition of abusive

disposal of interest" exempted a subsequent disposal of these goods (section 4(9) of the Irish VAT Act applicable at the time when the applicants sold the holiday homes). Lease counted as partial disposal of the property.

99. *Cussens* v. *Brosnan (Inspector of Taxes)*, High Court (Ireland), Judgment of 11 June 2008, [2008] IEHC 169; [2008] 6 WLUK 239; [2009] Eu. L.R. 575.

100. Case C-251/16, *Cussens*, point 1, operative part.

101. Ibid., paras. 53–56.

practices, the Fourth Chamber did not use pre-existing written law as its source. In paragraph 27 of *Cussens*, the Court expressly rejected that legitimacy path, by holding that the principle prohibiting abusive practise "is not a rule established by a directive, but is based on the settled case law". While the Court referred to a long list of cases, these cases, as the Court itself implicitly admitted, did not lay down the proposition it needed to rely on. Instead, they entrenched into EU law two much narrower propositions; that "EU law cannot be relied on for abusive or fraudulent ends" and that "the application of EU legislation cannot be extended to cover abusive practices by economic operators".[102] And thus, the only case which actually laid down the principle that covered the factual context of *Cussens* (tax avoidance) and created the remedial entitlement the Irish authorities were seeking was *Halifax*.

So *Halifax* is the only case that could potentially provide authority for what the Court did in *Cussens*. But to do that, *Cussens* would have to be sufficiently similar to *Halifax* not only in the factual but also in the legal context. And this is where the Fourth Chamber's use of *Halifax* becomes contestable. First, as recalled, *Halifax* concerned an abuse of a right expressly created by Article 17(2)(a) of the Sixth VAT Directive (the right to deduct input VAT from the tax due). *Cussens*, on the other hand, concerned a tax advantage created by Irish law, which instead of using the criterion of first occupation, as suggested by the Directive,[103] exempted from VAT transfers of property which had previously been "disposed", on condition that the first disposal was subject to tax and the property was not developed between the two disposals. Secondly, the activity carried out by the appellants in *Cussens* was not subject to tax by any rule of EU law. Instead, Ireland exercised its power to tax additional activities, expressly recognized as a power, and not a duty, by Article 4(3) of the Sixth VAT Directive.

What these differences mean is that the *Cussens* scenario should have been placed in a different category of cases, i.e. those involving reliance on national rules. And, as we recall from *Lucchini* and *Fallimento Olimpiclub*, the Court's power to regulate instances of abuse of national rules is only justified when

102. Ibid., para 27.

103. Art. 4(3) of the Sixth VAT Directive provided: "Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in para 2 and in particular one of the following: (a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand. … Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply or the period elapsing between the date of first occupation and the date of subsequent supply, provided that these periods do not exceed five years and two years respectively".

the abused national rules threaten effectiveness of *EU law* and hamper the national law in achieving an EU law-compliant state of affairs. *Cussens*, as a case concerning effectiveness of a tax imposed independently by Irish law, does not give rise to an effectiveness of EU law issue. Thus, it is Irish law that should regulate its enforcement. Irish courts were of course entitled to be inspired by the case law of the ECJ, but they should not have insisted that it was EU law which required them to disregard and redefine the appellants' transactions. What this also means is that it should have been highly relevant for the ECJ whether Irish law possessed a set of rules or a principle which enabled tax authorities to review transactions for abuse and disregard them if the finding of abuse was made. Yet, in *Cussens*, the Fourth Chamber not only maintained that absence of a national measure creating that power was not an obstacle to imposing a duty to disregard and redefine private transactions, but also prescribed in what situations the finding of abuse had to be made. Thus, national authorities are no longer free to refuse to find abuse if "the essential aim" of the transaction tested for abuse is "the accrual of a tax advantage".[104] They are also no longer free to refuse to review, disregard and redefine abusive arrangements. The Court provided them not only with a new power but also a new duty.[105] The fact that the ECJ referred to "the relevant provisions of national legislation" when discussing the "liability" to VAT of the sales which the appellants in *Cussens* had executed does not change this assessment.[106] The reality of the situation is that after *Cussens* there are no remedial issues left to be determined by national law and the national provisions the Court was referring to are just a veneer covering an autonomous EU law sanction.

4.2. *Cussens, Kofoed and the Marshall prohibition*

The exclusivity of the EU test for abuse and the irrelevance of national law as the source of the public power to disregard and redefine transactions, visible in *Cussens*, is also in direct contradiction to *Kofoed*, in which the Court rejected the proposition that the EU prohibition of abusive practices could apply in the absence of a national measure empowering tax authorities to combat abuse.[107] The judicial duty to maintain coherence of the law would suggest that *Kofoed* would be engaged with extensively in the *Cussens* judgment. This was not, however, the case. *Kofoed* was dispensed with as "irrelevant" in one sentence. The Court simply observed that "that case law [*Kofoed*] concern[ed] [a]

104. Case C-251/16, *Cussens*, paras. 47 and 53.

105. This is the first manner in which *Cussens* departs from *Halifax*. The other is the treatment of the *Halifax* principle as a "general principle", a point which is discussed separately in the later part of this article.

106. Case C-251/16, *Cussens*, para 49.

107. Case C-321/05, *Kofoed*.

provision of secondary legislation and [was] therefore not applicable to the general principle that abusive practices are prohibited".[108] The ground on which *Kofoed* was distinguished is misguided. The essence of *Kofoed* was not that it concerned a provision of secondary law, but that EU law was held not to be able to combat abusive practices without the help of national law through which the predictability of legal regulation of private conduct in EU law is frequently achieved. Predictability of the law cannot be ensured simply by the Court insisting that the case does not involve application of a directive because as the ECJ claimed, first, the principle which governed the factual situation had been laid down by the Court's case law, and second, the liability of the taxable person in relation to another transaction was based "on the relevant provisions of national legislation".[109] It is the "general principle" of EU law that changes the individual's legal position *vis-à-vis* the national tax authorities.

Kofoed and *Cussens* have more in common than the Court was prepared to admit. As we have established, *Cussens* is presented by the ECJ as an application of the *Halifax* principle, which, as *Halifax* expressly admits, is derived from the directive. The reason why *Cussens* falls within the scope of Union law is because of a directive. Thus, the distinguishing of *Kofoed* can only be interpreted as an endorsement of a proposition according to which it is legitimate to use a general principle "settled" on the basis of a directive to disregard private transactions with the effect that another transaction becomes taxable as "first supply", a proposition which is in direct conflict with the *Marshall* prohibition. It is thus no surprise that the legal principle which dictated the outcome in *Kofoed*, was reduced in *Cussens* to mean the prohibition on using the directive to set the amount of tax liability – something which in any event could not have been done on the basis of the directive.[110] This is bizarre because the *Marshall* prohibition is about the non-applicability of a directive as an independent source of a private party obligation and not the use of a directive to determine the extent of the liability that arises from it. Despite the Court's rhetorical efforts, it has to be concluded that the *Marshall* prohibition was not respected in *Cussens*. Instead, it was illegitimately circumvented by separating the issue of applicability of a general principle and its first-order consequences (the disregarding of the transaction constituting abuse and the redefining of another transaction), on the one hand, from its second-order consequences (the amount of tax liability), on the other.

This step has been taken despite the fact that the *Marshall* prohibition regulates not only the narrow question of whether a directive can impose

108. Case C-251/16, *Cussens*, para 38.
109. Ibid., paras. 27 and 49.
110. Ibid.

obligations on an individual directly and independently from other (national) legislation. The *Marshall* prohibition also reveals some of the normative foundations on which the EU legal system is based. These foundations include respect for legal certainty, integrity and relative independence of national law, and individual liberty.[111] The use of directives against individuals cannot be justified by reference to the estoppel argument (the principle that the State cannot benefit from its own failure correctly to implement a directive). Thus, directives are permitted to have only incidental effects on third-party individuals in vertical cases or create obligations for individuals only indirectly, through a change in the interpretation of national law. As explained above, *Mangold* made an exception to this principle by allowing a "general principle" concretized in a directive, and effectively taking on its content, to set aside a provision of national law with the effect that an obligation was imposed on a private party. It is the only judgment that can plausibly be used for the proposition that general principles which generate obligations for private parties can exist independently from any Treaty or legislative basis, here a directive, and therefore the ECJ case law on the limits of direct effect of directives can play no role in the Court's reasoning in a case in which a general principle is engaged. However, that judgment concerned the effective protection of EU fundamental rights and not the national or the EU's interest in effective VAT collection.

4.3. *Interpreting Halifax in the light of Mangold*

One of the unresolved doctrinal issues is how, if at all, the doctrine permitting the invocability of EU law "general principles" against individuals (the *Mangold* doctrine) is related to the principles of primacy and direct effect of EU law.[112] Both primacy and direct effect impose on national courts and also, as it seems, on national administrative bodies, the obligation to disapply conflicting national rules.[113] It is unclear whether primacy and direct effect

111. For the in-depth discussion of these themes, see Dougan, "When worlds collide! Competing visions of the relationship between direct effect and supremacy", 44 CML Rev. (2007), 931.

112. In *Mangold*, the duty to set aside a provision of national law that was found incompatible with the general principle of non-discrimination on the grounds of age is established by the Court by reference to *Simmenthal*, a quintessential primacy judgment (para 57). Nevertheless, the *Mangold* judgment does not expressly refer to the principle of primacy of EU law. Neither does it ascribe the attribute of "direct effectiveness" to "general principles".

113. Case C-103/88, *Fratelli Costanzo SpA* v. *Comune di Milano*, EU:C:1989:256, para 31, but restricted to provisions which are "directly effective", confirmed recently by the Grand Chamber in Case C-378/17, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána* v. *Workplace Relations Commission*, EU:C:2018:979, para 38, but without specifying that the duty to disapply applies only if the EU provision is "directly effective". The

are the only principles which can render national rules inapplicable. It would seem that *Mangold* opened a new way of disapplying national rules, specific to horizontally applicable "general principles". However, it is also possible to view *Mangold* as a primacy case, the general principle being the higher norm capable of setting aside a national rule, just as a Treaty provision or an applicable provision of secondary law would. Equally, it is possible to interpret *Mangold* as a direct effect case, in which the Court relied on the exclusionary effect of the direct effect doctrine. The novelty would then be the Court's extension of the doctrine of direct effect to "general principles".[114] However, *Mangold* could also be regarded as giving birth to a completely independent doctrine with both substantive (the finding of the principle) and remedial (the duty to disapply conflicting national law) elements. As an independent doctrine, *Mangold* would, however, be confined to fundamental rights cases. What *Mangold* clearly does not offer is a possibility for the Court to create a completely new remedial solution or enforcement mechanism. Does it mean that "general principles" in a horizontal or inversely vertical context could only be used to remove national rules but not in order to instruct national courts and national authorities what steps exactly they need to take to redress the violation of a fundamental right?

As we have seen, the *Halifax* principle is a composite; it has both substantive and enforcement-related elements. It creates new enforcement powers for national courts and tax authorities. However, in the context of the *Halifax* judgment, these are portrayed as stemming from the Sixth VAT Directive and its national implementation. In *Cussens*, the Court portrays the general principle prohibiting abusive practices as independent from the directive. Should the effects of the *Cussens* principle, like the *Mangold* principle, be thus confined to rendering national rules enabling abuse inapplicable? This would create symmetry between the *Cussens* principle involving abuse of national rules and the doctrines addressing abuses of EU rights/rules, where the Court allows national courts not to give effect to an EU rule that overtly seems to apply to the facts of the case. The EU prohibition of abusive practices would then stay within the bounds of the abuse of law

case shows also that the duty to disapply is just one of the obligations stemming for national authorities from the principle of primacy. See para 50: "It follows from the principle of primacy of EU law … that bodies called upon, within the exercise of their respective powers, to apply EU law *are obliged to adopt all the measures necessary to ensure that EU law is fully effective*, disapplying if need be any national provisions or national case law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case law by legislative or other constitutional means". (emphasis added).

114. This is how *Mangold* seems to be interpreted in Lenaerts and Gutiérrez-Fons, "The constitutional allocation of powers and general principles of EU law", 47 CML Rev. (2010), 1629, 1630.

doctrine and, in the context of the abuse of national rules, could be seen as an application of a broader EU law principle, the principle of primacy.

Such an understating of the *Cussens* principle would require the ECJ to engage with the question of compatibility of Irish rules introducing exemptions to the taxation of an economic activity consisting in occasional disposal of immovable property with EU law. And yet in *Cussens*, the Court rejected as inadmissible questions five and six, which concerned compatibility of the relevant provision of the Irish VAT Act with the Sixth VAT Directive. The Court's excuse was that the referring court failed to explain the reasons that led it to doubt their compatibility. Had the Fourth Chamber of the ECJ answered questions five and six it would have had to conclude that the Irish rules were not incompatible with the Sixth VAT Directive. This would bring to light the problem of the Court's competence to insist that it was EU law that should provide a remedial solution to the Irish problem of inefficient tax regulation.

5. The abuse of the "general principle" concept

The discussion in the previous section allows us to understand why the Fourth Chamber, whose clear intention had been to make the general prohibition of abusive practices invocable against private parties, decided not to mention *Mangold* in its reasoning. Instead, both the judgment and the Opinion of the Advocate General in the case,[115] mentioned *Audiolux*, even though *Audiolux* does not deal with the question of whether a "general principle" can be relied on against an individual.[116] Moreover, *Audiolux* is a negative, not a positive judgment. It focuses on when EU law denies a given legal proposition the status of a "general principle", which is when a principle lacks "the general, comprehensive character which is otherwise naturally inherent in general principles of law".[117] Thus, it does not spell out all the features that a legal proposition needs to possess before EU law will treat it as a "general principle". Moreover, *Audiolux* needs to be read in the light of its paragraph 42, where the Court held that specificity of the provisions used as the foundation for the purported general principles mitigated against treating a particular proposition as a "general principle". That shows that *Audiolux* concerned the problem of using legislative provisions to develop "general principles" and since both the Fourth Chamber and Advocate General Bobek

115. Case C-251/16, *Cussens*, para 31; Opinion of A.G. Bobek, EU:C:2017:648, para 48.

116. Case C-101/08, *Audiolux SA e.a* v. *Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG*, EU:C:2009:626.

117. Ibid., paras. 42 and 50.

claimed that the general principle in *Cussens* is independent from legislation, they should have treated *Audiolux* as irrelevant.

Where *Audiolux* is helpful is in providing EU law with a clear indication that the central feature of EU law's "general principles" is their comprehensive character, understood in the judgment as not presupposing or requiring further legislative choices.[118] A similar approach is visible in the Court's case law concerning the horizontal effect of Charter provisions. Only those provisions which are comprehensive, i.e. sufficient to confer a right independently from any EU or national legislation implementing them, are invocable against private parties[119] and thus constitute the *Mangold*-type "general principles", in contrast to "Charter principles" which are incapable of direct effect, whether vertical or horizontal.[120]

The *Cussens* judgment is not faithful to this conception of the comprehensiveness requirement. Instead of examining the self-sufficiency or the exhaustive character of the prohibition of abusive practices, it focuses on the fact that the prohibition allegedly applies "in various areas of EU law" and to rights and advantages provided by EU law in different sources of that law, the Treaties, directives and regulations.[121] Also, Advocate General Bobek believes that the criterion of "generality" of the principle prohibiting abusive practices is met through the fact that "the prohibition of 'abusive practices' or 'abuse of rights' has been applied by the Court since the 1970s in a wide range of substantive areas and in terms not specific to those areas".[122] So, while both the Fourth Chamber and Advocate General Bobek claim to be following *Audiolux,* they are in fact departing from the test set by it. "Comprehensiveness" of the principle prohibiting abusive practices is not actually established in the judgment or the Opinion. This is visible in the fact that when the Court needs to find the criteria of abuse, it refers exclusively to *Halifax* and its follow-ups.[123] The principle suddenly becomes sectoral (specific to the sphere of VAT) because only at this level can it be "comprehensive".[124] A general principle prohibiting abusive practices of various types would have to be "comprehensive" at this level of generality. But this is not what we observe in EU law. Different versions of the abuse of law

118. Case C-101/08, *Audiolux*, para 62.
119. See the case law cited *supra* note 57.
120. See the case law cited *supra* note 57.
121. Case C-251/16, *Cussens*, paras. 29–30.
122. Para 48 of the Opinion in *Cussens*.
123. Case C-251/16, *Cussens*, paras. 52–62.
124. The same is true about the *N Luxembourg 1* judgment, which gives the abuse of rights doctrine a meaning which is specific to the issue of interests and royalty payments between associated companies and not an abuse of rights doctrine or the prohibition of abusive practices, more generally. See Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1*, paras. 126–139.

doctrine in EU law provide different criteria against which private conduct can be assessed (commercial artificiality, acting against the objective of the legislation, using the law with the essential purpose of obtaining a tax advantage). There is no "general principle" prohibiting abusive practices in EU law.

5.1. *Abuse of rights or the prohibition of abusive practices?*

There is one aspect of the Advocate General's Opinion in *Cussens*, which although not expressly replicated in the judgment, may have contributed to the Court's error in holding that EU law contains a "general principle" prohibiting abusive practices as a general category. This is the claim that there is no normative difference between the term "abuse of rights" and "the principle that abusive practices are prohibited".[125] In fact, Advocate General Bobek submitted that the difference between these two doctrines was not substantive, or constitutional, as it should have been seen, but merely "terminological". Before the main body of the Opinion, the Advocate General included a section (section A of Part IV "Assessment"), which he called "Terminological note" (paras. 23–31), in which he claimed that the only difference between the abuse of rights doctrine and the prohibition of abusive practices was that the former was more appropriate for the private law context, while in public law we were dealing with legal provisions being "invoked in an 'artificial way' and undermining the legislative purpose".[126] However, that difference should not, in the Advocate General's view, prevent the Court from relying on the abuse of rights doctrine to establish the prohibition of abusive practices.[127] The amalgamation of the two doctrines seemingly allows the Court to derive the general principle pertinent in *Cussens*, which was not an abuse of EU rights case, from its "settled" case law on the abuse of EU rights.

The claim about the equivalence, if not identity, of the abuse of rights doctrine and the prohibition of abusive practices cannot be legitimately put forward. The two doctrines differ in a fundamental way. The abuse of rights requires that the individual against whom the prohibition is invoked can be

125. Para 23 of the Opinion in Case C-251/16, *Cussens*: "In its order for reference, the national court uses the term 'abuse of rights'. Those words are indeed often used by the Court, both in the area of VAT and in other substantive areas. However, seen globally, the Court in practice employs in its case law a wide range of expressions to *refer to similar or identical phenomena*. Those include references to the 'principle that abusive practices are prohibited', that 'EU law may not be relied on for abusive or fraudulent ends' or 'extended to cover abusive practices'. Alternative vocabulary including, for example 'circumvention', 'avoidance', 'wholly artificial arrangements' is also common". (footnotes omitted, emphasis added).

126. Para 25 of the Opinion in *Cussens*.

127. Ibid., para 48.

said to possess a right under the particular legal system. The scope of application of the doctrine is relatively narrow and its function is to avoid situations where rights are used against their socio-economic function or to intentionally harm others.[128] Prohibition of abusive practices is a much wider doctrine, because its application does not depend on whether there is a legal provision in the first place which creates a right – a privilege or an immunity, using Hohfeldian language. A practice can be found "abusive" also when the individual acts in the exercise of their general liberty, where their conduct is permitted by law because of the absence of regulation, not because the law expressly legitimizes such conduct, as is the case of a "right". This means that it is of fundamental constitutional importance if the law possesses a general (unwritten) principle prohibiting merely abuse of rights or abusive practices more generally. The latter principle would make criminal law redundant. In fact, it would make redundant all provisions imposing sanctions for clearly defined behaviour, because any undesirable behaviour could always be challenged *ex post facto* as "abusive".[129]

Moreover, the EU law version of abuse of rights focuses on benefits, advantages and exemptions created by EU law only. It does not cover situations where national rules are being abused with the negative effects for EU rules. Such cases are dealt with by national enforcement and remedial rules under the principle of national procedural autonomy, with the principle of effectiveness occasionally interfering, as in *Levez* or *Courage*,[130] where the ECJ prevented exploitation of national rules that would undermine the effectiveness of an EU right (to equal treatment or to undistorted competition, respectively), or the aforementioned cases of *Lucchini* and *Fallimento Olimpiclub*.[131] Thus, the move from "abuse of rights" to a prohibition of abusive practices is not just a move from a narrower to a much broader principle, but also from a principle which protects authority of EU law and frequently applicability of national rules that would otherwise have to give way to EU rules, to a principle which protects both national law against itself and EU law against a private party's reliance on national rules.

Thus, contrary to what Advocate General Bobek claims, "diversity" among different EU principles prohibiting abuse is not just a question of definition. It is not a "terminological" issue or a question of choice as to the "level of

128. See Gordley, "The abuse of rights in the civil law tradition" in de la Feria and Vogenauer (Eds.), op. cit. *supra* note 18.

129. It is only in private law that we find the use of principles (standards using open-ended concepts) to regulate private behaviour, such as the concept of fault, reasonableness, good faith or unfairness.

130. Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd*, EU:C:1998:577; Case C-453/99, *Courage Ltd*.

131. Case C-119/05, *Lucchini* and Case C-2/08, *Fallimento Olimpiclub*.

abstraction" at which we would like to examine a given practice.[132] A general principle prohibiting abusive practices subjects a greater range of private acts to EU standards. For EU law, it is important not only what these standards are, but also from where they are derived. If we establish that the standard or the sanction that its violation triggers can only be introduced as an interpretation of a directive, we encounter the issue of how its applicability can be reconciled with the *Marshall* prohibition. We also need to find a ground for the ECJ's competence to lay down a "general principle". Yes, the Court makes law, creates new standards, subjects Member States and individuals to self-created rules constantly, but this does not mean that there are no limits to what the Court can do or to the situations in which it is appropriate to use the concept of "general principle".

5.2. *Retrospective application of the "general principle" prohibiting abusive practices*

One of the rules which the *Cussens* judgment laid down is also that the prohibition of abusive practices as a "general principle" of EU law can apply to situations that obtained before both *Cussens* and *Halifax* judgments.[133] This was done on the ground that the Court's case law should be seen as interpretation of pre-existing EU law. As the Fourth Chamber observed in paragraph 41:[134]

> "The interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to EU law clarifies and defines, where necessary, the meaning and scope of [EU] law *as it must be, or ought to have been, understood and applied from the date of its entry into force*. It follows that, unless there are truly exceptional circumstances, which is not however claimed to be the case here, EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established *before the judgment ruling on the request for interpretation*, provided that in other respects the conditions for bringing a dispute relating to the application of that law before the courts having jurisdiction are satisfied".

One would be justified in wondering what EU law the Court had in mind when it mentioned "the date of its entry into force"? What legal act was "interpreted" in *Halifax*, whose interpretation, including the principle prohibiting abusive practices, can now apply to the facts of *Cussens*? That act

132. Para 30 of the Opinion in *Cussens*.
133. Case C-251/16, *Cussens*, para 44.
134. Emphasis added.

was the Sixth VAT Directive. But isn't this the very same Directive with respect to which the Court held earlier in the *Cussens* judgment[135] not to be applicable, because it could not create obligations for private parties?

The Court simply cannot have it both ways. Either the principle that abusive practices are prohibited can be legitimately proclaimed by the Court and apply retrospectively because it can be presented, in different contexts, as an interpretation of pre-existing EU provisions, or, the principle is independent from any Treaty or legislative source, exists beyond and above them, in which case it is inappropriate to use it against individuals before it is settled in the case law.[136] And, as explained earlier, the Court cannot use its own case law on abuse of EU rights as a source, because that source does not provide the Court with a formulation of the principle relevant on the facts of *Cussens*. It is *Halifax* which settled the principle that abuse of VAT provisions is prohibited by EU law. The fact that the Court did not restrict the temporal effects of its judgment in *Halifax* (an argument used in *Cussens* in para 42) is neither here nor there. *Halifax* was overtly a judgment about the correct interpretation of the Sixth VAT Directive. It is *Cussens* that claims to be laying down a "general principle", which means this was the judgment in which the temporal effects of the general principle should have been addressed.

6. Graceful retraction

There is some evidence that in the post-*Cussens* case law concerning abusive practices the Court is returning to a more constitutionally acceptable position. In *Ömer Altun*, *Cussens* is mentioned to support a narrower proposition – a prohibition on abusing "advantages provided by EU law".[137] Also in *N Luxembourg 1*, each time the Court relies on *Cussens* to make a statement of principle, it puts forward narrower propositions. These are: 1) a rule that "EU law cannot be relied on for abusive or fraudulent ends",[138] 2) a rule that "the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages

135. Ibid., para 26.

136. As explained above, substantive principles of EU law do not come down from Heaven. They require a source, a Treaty or a legislative act. The only recognized exception to that are "fundamental rights as general principles", which as Art. 6(3) TEU states, can be derived from the ECHR and the constitutional traditions common to the Member States, even though neither of the two, formally speaking, constitute a source of EU law.

137. Case C-359/16, *Ömer Altun*, para 49. Naturally, this does not fit the facts of *Cussens* and strengthens the claim that *Ömer Altun* signals a retreat from the broader proposition laid down in the *Cussens* judgment.

138. Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1*, para. 96.

provided for by EU law",[139] and 3) a view that the general principle that abusive practices are prohibited applies "against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules".[140] Even more encouraging were the Opinions of Advocate General Kokott in this and the associated cases.[141]

While Advocate General Kokott accepted that Article 5 of the Interests and Royalty Payments Directive[142] could be seen as an illustration of "the general principle of law", the primary way in which this principle should in her view generate effect was through interpretation of national law.[143] Advocate General Kokott decisively rejected direct application of Article 5 of the Directive against an individual; according to her, this was dictated by reasons of legal certainty.[144] At paragraph 103 she stated:[145]

> "*Nor could the competent authorities in the main proceedings rely directly against the individual on the basis of the general principle of EU law that abuse of rights is prohibited*. At least in cases falling within the scope of Directive 2003/49, such a principle has been given specific effect in Article 5(2) of the directive and has been expressed in a concrete manner. If it were to be permitted, in addition, to have direct recourse to a general principle of law which in terms of content is much less clear and precise, there would be a danger that the harmonisation objective of Directive 2003/49 and of all other directives containing specific provisions to prevent abuse (such as Article 6 of Directive 2016/1164) would be undermined. *Moreover, such an approach would undermine the prohibition, already mentioned, on directly applying non-transposed provisions of directives to the detriment of individuals*."

So, like the author of the present article, Advocate General Kokott appreciated the direct connection between a general principle prohibiting abusive practices enforceable against an individual and the limits of direct effect of

139. Ibid., para 97.

140. Ibid., para 102.

141. Opinion in Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1*, EU:C:2018: 143.

142. "Article 5 Fraud and abuse 1. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse. 2. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive."

143. Paras. 100 and 101 of the Opinion in Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1*.

144. Ibid., para 102.

145. Emphases added.

directives in inversely vertical situations. The former cannot be used to circumvent the latter. This means that a national law creating a power for national courts to combat abuse has to exist and cannot be substituted by an alleged EU law "general principle".

Advocate General Kokott did not go so far as to repudiate the judgment in *Cussens*. Instead, she tried to restrict it to VAT by arguing, quite unconvincingly in my view, that VAT is much more harmonized under EU law and as "coupled to the funding of the Union, has more of an impact on interests under EU law than national income tax".[146] This is a controversial argument; it would mean that EU law is permitted to generate effects incompatible with the principle of legal certainty (and the principle of legality) because effective collection of VAT by the Member States is in the EU's financial interest.[147] The legal concept which would be used to implement this extreme version of economic instrumentalism is "general principles", applied retrospectively and without national implementation. I have doubts that Advocate General Kokott intended to endorse this proposition. However, as an Advocate General she was bound by the Court's earlier case law. Hence her preference for distinguishing and confining *Cussens*, accompanied by a strong statement about the impossibility of relying on a directive to the detriment of an individual in the absence of national provisions that could be interpreted in its light and allowed the national courts effectively to address situations of abuse.

As explained at the start of this article, the ECJ decided to follow a different line of reasoning and created a duty for the national tax authorities to refuse to recognize the exemption created by Article 1 of the Interests and Royalty Payments Directive[148] in situations of "artificial arrangements", that is where a group of companies creating an association had not been set up for reasons that reflected economic reality, its structure was purely one of form, and its principal objective or one of its principal objectives was to obtain a tax advantage running counter to the aim or purpose of the applicable (national) tax law.[149] That duty is presented as stemming from the "general principle" prohibiting abusive practices, which as a "general principle" does not require implementation and is independent from the Interests and Royalty Payments Directive.[150] Thus, in the Court's view, it cannot be maintained that what is being relied on against an individual is Article 5(2) of the Directive empowering the Member States to withdraw the benefits granted to individuals by the Directive "in the case of transactions for which the principal

146. Ibid. paras. 104–106.

147. As explained above, this proposition departs from the Court's approach in Case C-42/17, *M.A.S. and M.B.*. See text cited *supra* note 68.

148. Joined Cases C-115, 118, 119 & 299/16, *N Luxembourg 1*, para 98.

149. Ibid., para 127.

150. Ibid., para 102.

motive or one of the principal motives is tax evasion, tax avoidance or abuse".[151]

The Court also decided not to rely on national law in the formulation of the test of abuse, thereby making the specific principle applied to the facts of the case fully independent from national law. However, application of national rules is not precluded by the judgment. Indeed, if relevant tax avoidance rules are available in the law of the State where interests and royalties arise the national authorities are permitted to apply them and have a duty to interpret them in the light of Article 5 of the Directive.[152]

7. Return to the orthodoxy?

What seems likely then is that the *Halifax* principle and its extension in *Cussens* to instances of abuse of national rules will be confined in future cases to the VAT context. The Court will have to explain why a "general principle" that was claimed not to be based on the Directive but on the Court's settled case law is then confined by reference to legislation (the Sixth VAT Directive). My view is that the best way forward is a return to the orthodoxy, both when it comes to the issue of how and when EU law should regulate abusive practices, and what the appropriate uses and consequences of the concept of "general principles of EU law" are. As to abusive practices, EU law should only intervene, if at all, in one of the following scenarios: (1) as an exception to direct effect of Treaty provisions, i.e. when EU free movement rights are relied on opportunistically to set aside national regulation (the *Centros* scenario); (2) as an exception to direct application of regulations and the direct effect of directives; here the abuse doctrine prevents reliance on EU acts against the State with the effect that national rules and practices continue to apply; (3) where an individual relies on a right created by EU law for fraudulent purposes; in that case national authorities should be permitted to use mechanisms available to them under national law to combat abuse, but should not be forced to deny the benefit available under written law unless the EU has legislated on the matter or the State in question has rules on abuse in its law. These three situations involve abuse of EU rules and thus concern their *in casu* effectiveness, in the sense that the application of the abuse doctrine leads to the lifting of the obligations normally stemming for national authorities from the principle of effectiveness. It is in the interest of EU law to lift these obligations in particular instances of abuse of EU rules because authority of EU law, especially at the national level, would be undermined if

151. Ibid., para 118.
152. Ibid., para 115.

national authorities were required to disapply national rules in order to respect benefits which were obtained fraudulently or purely by opportunistic exploitation of EU rules for reasons or with effects incompatible with their objectives. Abuse of national rules, on the other hand, should only be on the Court's radar as a remedial issue, i.e. as the question of whether national authorities are taking appropriate action to ensure effectiveness of EU rules. Where effectiveness of EU rules is not engaged because the abuse in issue undermines effectiveness of national rules only, the Court should refrain from laying down any rules or principles even if the matter touches upon a field regulated by EU law.

As for the concept of "general principles", the Court should at the next opportunity explain that EU law recognizes only two kinds of "general principles" and, given the status of "general principles" as primary law, the concept should not be extended to other legal propositions which might be convenient for the Court to lay down on the facts of a particular case. The two kinds of "general principles" are: (1) principles of EU constitutional and administrative law, enforceable against EU institutions and the Member States (such as the principle of effective judicial protection or the principle of proportionality); (2) general principles of fundamental rights, which with the fulfilment of additional conditions could potentially apply horizontally for the benefit of the right-bearer. In that respect, the Charter of Fundamental Rights should be seen as containing Type 1 "general principles". Some of its provisions are also Type 2 "general principles" in the sense that they can apply horizontally. No other uses of the concept of "general principles" should be permitted or endorsed by the Court; in particular the concept cannot be relied upon by a State or an EU institution against a private party. It is, however, possible to use other mechanisms developed by the Court's case law of subjecting private conduct to EU rules not formally binding on them, such as the duty of consistent interpretation or the aforementioned doctrine of horizontal applicability of selected Charter provisions.

8. Conclusion

This article looked at the putative new "general principle" of EU law, which regulates directly private conduct by rendering private transactions ineffective for tax purposes due to their "abusive" character. An EU law-relevant form of abuse takes place also, according to the ECJ in *Cussens*, when someone enters a transaction whose essential objective is the accrual of a tax advantage made possible by the provisions of national law in a situation where the tax that would otherwise be owed is due also only because of the content of national

law. The "general principle" proclaimed in *Cussens* not only subjects private conduct to review against the standard of "abuse" but also empowers and obliges national courts and tax authorities to disregard transactions which were part of the abusive arrangement with the effect that another transaction becomes subject to tax. The mechanism is portrayed as legitimate because it is a "general principle" that creates these powers and duties. The purpose of the article was to explain why it is not possible for EU law to impose such a "general principle".

In this context, the article raised three issues. First, the article examined whether it is correct to claim that specific abuse-related doctrines developed by the ECJ since the 1970s should be seen as illustrations of the broader, underlying principle. It was shown that while it is possible to present the different strands of the Court's case law as relating to a single set of ideas, it does not mean that the Court is empowered to create just any doctrine combatting any form of abuse. Secondly, the article investigated whether it is appropriate to treat the prohibition of abusive practices as a "general principle of EU law". It has been shown that both the way in which this principle emerged in the Court's judgment in *Cussens* and the enforcement-related powers and duties it has created for national courts and administrative authorities are incompatible with the values motivating the introduction and the application of the concept of "general principles" in EU law. Finally, the article looked in some detail at the powers and duties the principle creates for national authorities and discussed their relation to the Court's case law on remedies and procedures.

The *Cussens* judgment shows, in my view, how much doctrinal and theoretical work still remains to be done on the concept of "general principles" and their appropriate role in EU law. The *Ömer Altun* and *N Luxembourg 1* judgments, both citing *Cussens*, demonstrate, on the other hand, that the different strands of the Court's "abuse" case law are currently entangled in an unhelpful way, causing confusion and increasing the likelihood of incorrect rulings. Not all abuse cases are of the same species. Depending on the factual and legal context, they raise different policy and constitutional concerns. Their clear identification and categorization along the lines drawn by the rich body of the Court's earlier case law will increase the coherence and the constitutional legitimacy of future ECJ judgments.