

Abuse of Law in the Context of EU Law

Sudabeh Kamanabrou*

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Summary

Abuse of law in the context of EU law has been a subject of some debate. In recent cases the European Court of Justice shows a tendency towards mixing different approaches from earlier judgments. This article takes a critical view on this development. It points out that, relating to abuse in the context of EU law, two groups of cases can and should be distinguished: on the one hand, the inappropriate use of a provision of EU law and, on the other hand, the inappropriate use of national law with the help of EU law. This differentiation has an impact on the handling of abuse cases. It is the decisive factor in deciding how to introduce the concept of abuse into the application of law. Furthermore, it affects the answer to the question if national law or a general principle of EU law is to be applied.

Introduction

Since the European Court of Justice's (ECJ's) ruling in the *van Binsbergen* case, the Court has repeatedly touched upon the problem of abuse of law in the context of EU law.¹ Among the most recent examples are the *Kratzer*, *Cervati and Malvi*, *WebMindLicenses*

* Professor of Labour Law, Co-Director of the Institute for Labour and Social Protection, Bielefeld University, Bielefeld, Germany.

¹ *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (33/74) EU:C:1974:131; [1975] 1 C.M.L.R. 298. For readability, in this article the term EU law is used throughout regardless of the date of a ruling.

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and *Torresi* cases.² The variety of the topic makes for an interesting and complex subject for research. Abuse of law involving EU law covers different areas of European law such as labour law, agricultural policy, tax law and various fundamental freedoms. It has been the subject of intensive research.³ Recent rulings of the ECJ show a tendency towards a standardised formulation combining phrases from different cases. This might be seen as a welcome consolidation of the Court's judgments if it were not for the fact that the cases belong to two categories which are essentially different.

This article aims to show that, on the subject of abuse of law in the context of EU law, two groups of cases are to be distinguished. It will deal with categorising abuse of law first and then go on to cover the ECJ's different approaches towards abuse. On this basis, it will address further questions related to the topic, namely whether the prohibition of

² *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG* (C-423/15) EU:C:2016:60; [2017] 1 C.M.L.R. 813; *Malvino Cervati and Società Malvi Sas di Cervati Malvino v Agenzia delle Dogane and Agenzia delle Dogane – Ufficio delle Dogane di Livorno* (C-131/14) 14 April 2016 EU:C:2016:255; *WebMindLicenses kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* (C-419/14) EU:C:2015:832; [2016] 2 C.M.L.R. 671; *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata* (C-58/13 and C-59/13) 17 July 2014 EU:C:2014:2088.

³ There are several doctoral theses on the subject, in particular M. Baudenbacher, *Vom gemeineuropäischen zum europäischen Missbrauchsverbot* (Baden-Baden: Nomos, 2016); R. Ionescu, *L'abus de droit en droit de l'Union européenne* (Brussels: Bruylant, 2012); K. Ottersbach, *Rechtsmissbrauch bei den Grundfreiheiten des Europäischen Binnenmarktes* (Baden-Baden: Nomos, 2001); A. Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Oxford: Hart, 2014); A. Zimmermann, *Das Rechtsmissbrauchsverbot im Recht der Europäischen Gemeinschaften* (Münster: LIT, 2002). Besides these, the anthology edited by R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law* (Oxford: Hart, 2011) offers a comprehensive analysis of the subject by various authors. For reasons of space articles are not mentioned in this footnote but will be cited subsequently.

abuse of law in the context of EU law is an aspect of the interpretation of EU law or a legal principle and whether national law or a general principle of EU law applies.

Categorising abuse of law

Abuse of law may take different forms. Thus, some effort has been made to categorise its manifold manifestations.

Fraud – establishing the facts of a case

A helpful distinction is that between fraud, on the one hand, and abuse, on the other hand.⁴ Fraud in this context means that the person concerned presents false facts.⁵ With fraud, the problem lies in the ascertainment of facts. The *van de Bijl* case and the *Paletta*

⁴ See H. Fleischer, “Der Rechtsmißbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht” (2003) JZ 865, 870; A. Kjellgren, “On the Border of Abuse“ (2000) EBLR 179-180; W. Schön, “Der “Rechtsmissbrauch” im Europäischen Gesellschaftsrecht” in Wank et al (eds), *Festschrift für Herbert Wiedemann* (München: Beck, 2002), pp. 1271, 1277-1279; S. Vogenauer, “The Prohibition of Abuse of Law: An Emerging General Principle of EU Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 560; S. Whittaker, “Comments on ‘Abuse of Law’ in European Private Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 253, 258-259. M. Baudenbacher, *Missbrauchsverbot*, 2016, p. 427 expressly refrains from making this distinction.

⁵ A. Kjellgren, “On the Border of Abuse“ (2000) EBLR, 179, 180. See also A. Lenaerts, “The Role of the Principle *Fraus Omnia Corruptit* in the European Union: A Possible Evolution Towards a General Principle of Law?“ (2013) *Yearbook of European Law*, 460, 492-493.

cases are examples of fraud.⁶ By contrast, abuse means that the individual aims at gaining an advantage by way of shaping the law.⁷ The main focus in fraud cases is on ascertaining whether or not the conditions of the rule of law invoked by the person concerned are met. Thus, it is useful to distinguish cases of fraud from cases which are about the correct legal assessment only. Fraud cases will not be pursued further in this article.

Distinctions without impact on the handling of cases

Other distinctions are ultimately no help in dealing with cases of abuse. This applies to the differentiation between cases concerning primary law or secondary law, which does not go beyond a mere description.⁸

The same can be said for the distinction between cases of rule avoidance and rule appropriation.⁹ In some cases the acting party invokes a provision of EU law in order to avoid

⁶ *C. C. van de Bijl v Staatssecretaris van Economische Zaken* (130/88) EU:C:1989:349; [1989] E.C.R. 3039; *Alberto Paletta and others v Brennet AG* (C-45/90) EU:C:1992:236; [1992] E.C.R. I-3423; *Brennet AG v Vittorio Paletta* (C-206/94) EU:C:1996:182; [1996] E.C.R. I-2357.

⁷ H. Eidenmüller, “Abuse of Law in the Context of European Insolvency Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 137, 142; H. Fleischer, “Der Rechtsmißbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht” (2003) JZ 865, 870; W. Schön, “Der “Rechtsmissbrauch” im Europäischen Gesellschaftsrecht” in R. Wank et al (eds), *Festschrift für Herbert Wiedemann*, 2002, pp. 1271, 1278.

⁸ M. Baudenbacher, *Missbrauchsverbot*, 2016, p. 419; W. Schön, “Der “Rechtsmissbrauch” im Europäischen Gesellschaftsrecht” in Wank et al (eds), *Festschrift für Herbert Wiedemann*, 2002, 1271 1273.

⁹ This distinction is made by H. Fleischer, “Der Rechtsmißbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht” (2003) JZ 865, 869; W. Schön, “Der “Rechtsmissbrauch” im Europäischen Gesellschaftsrecht” in Wank et al (eds), *Festschrift für Herbert Wiedemann*, 2002, 1271, 1275; S. Vogenauer, “The Prohibition of Abuse of Law: An Emerging General

the application of a provision of national law. For example, in the *Cadbury Schweppes* case, a company established companies in another Member State in order to avoid the home State's tax regime and benefit from the more favourable rules of the host State.¹⁰ Other cases are not about avoiding national law but about advantages granted by EU law or national law. Among these is the *General Milk* case concerning the application of positive monetary compensatory amounts to certain exports.¹¹ The distinction between rule avoidance and rule appropriation may serve to illustrate abuse situations, but is of a descriptive nature only and does not in itself lead to different solutions.

A third distinction that need not be pursued is that between circumvention and abuse.¹² Cases of rule avoidance are often, but not necessarily, cases of circumvention. For example, nationals of a Member State wishing to avoid national law that is not compliant with EU law are not circumventing any rules of law.¹³ Anyway, as both circumvention and

Principle of EU Law" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 526-527, 529.

¹⁰ *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* (C-196/04) EU:C:2006:544, [2007] 1 C.M.L.R. 43. Other examples are *J. Knoors v Staatssecretaris van Economische Zaken* (115/78) EU:C:1979:31; [1979] 2 C.M.L.R. 357 and *van de Bijl* (130/88) EU:C:1989:349.

¹¹ *General Milk Products GmbH v Hauptzollamt Hamburg-Jonas* (C-8/92) EU:C:1993:82; [1993] I-779. Another example is *Sylvie Lair v Universität Hannover* (39/86) EU:C:1988:322; [1989] 3 C.M.L.R. 545.

¹² S. Vogenauer, "The Prohibition of Abuse of Law: An Emerging General Principle of EU Law" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 555-557. By contrast, H. Fleischer, "Der Rechtsmißbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht" (2003) JZ 865, 870 is in favour of the distinction.

¹³ See among others *Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* (367/96) EU:C:1998:222; [1998]

abuse concern the inappropriate avoidance or use of a rule of law for the purpose of this article there is no need to distinguish further between them.

Abuse of law – a case of acting contrary to a rule’s objective

Although in this article I strive to discuss the problem of abuse of law detached from the perspective of a particular legal system, the German distinction between two types of abuse is to be touched upon briefly here. It has no direct impact on the handling of abuse cases in the context of EU law but helps to characterise abuse cases in this setting. In German law, *individueller Rechtsmissbrauch* is distinguished from *institutioneller Rechtsmissbrauch*. In the first case, the person concerned exercises a right in a way that is improper, violates a duty or is not covered by a legitimate interest.¹⁴ This type of abuse implies an infringement of the principle of good faith which arises from the circumstances of the individual case.¹⁵ In the second case, the decisive factor is not the disapproval of the individual’s behaviour. Rather, it is the behaviour being in conflict with the purpose of a legal provision that characterises this kind of abuse.¹⁶ In the context of EU law, abuse

E.C.R. I-2843 and *ÖBB Personenverkehr AG v Gotthard Starjakob* (C-417/13) 28 January 2015 EU:C:2015:38.

¹⁴ C. Schubert, “§ 242 BGB” in F. J. Säcker, R. Rixecker, H. Oetker and B. Limperg (eds) *Münchener Kommentar zum BGB*, 7th edn (München: Beck, 2016), at [243]. S. Vogenauer, “The Prohibition of Abuse of Law: An Emerging General Principle of EU Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 555 sums up the notion of “abuse of rights” in different Member States in similar terms.

¹⁵ C. Schubert, “§ 242 BGB” in F. J. Säcker, R. Rixecker, H. Oetker and B. Limperg (eds) *Münchener Kommentar zum BGB*, 7th edn 2016, at [210]; D. Olzen and D. Looschelders, “§ 242 BGB” in *Staudinger BGB*, revised version (Berlin: de Gruyter, 2015), at [217].

¹⁶ C. Schubert, “§ 242 BGB” in F. J. Säcker, R. Rixecker, H. Oetker and B. Limperg (eds) *Münchener Kommentar zum BGB*, 7th edn 2016, at [212]; D. Olzen and D. Looschelders, “§ 242

cases are of the latter kind.¹⁷ Only in the *Diamantis* case did the ECJ make references to circumstances in which the claimant may have acted contrary to good faith.¹⁸ This being the case, the concept of abuse of EU law may be more readily acceptable for legal systems rejecting this legal concept on a national level as prohibition of abuse in this form is not based on a condemnation of behaviour. It does not relate to the principle of good faith but to the objectives of a rule of law. To consider the purpose of a regulation is a common feature in the legal systems of the Member States.

Abuse of EU law or abuse of national law

The distinction that holds the key to dealing with abuse in the context of EU law is that between abuse of EU law on the one hand and abuse of national law on the other hand. In some cases the question is whether or not the use of a provision of EU law does not comply with this provision's objective. In other cases the individual's actions are in accordance with EU law. In these cases, the question is whether the provision of EU law permits restrictions by the Member States which in their turn have to be observed by their nationals.

BGB" in *Staudinger BGB*, 2015, at [217]. This is not to say that there is no subjective element involved in this kind of abuse. It only means that the assessment of the individual's behaviour is not the main point. Subjective elements will not be discussed in this article.

¹⁷ See also the similar statement by S. Vogenauer, "The Prohibition of Abuse of Law: An Emerging General Principle of EU Law" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 555-556.

¹⁸ *Dionysios Diamantis gegen Elliniko Dimosio und Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* (C-373/97) EU:C:2000:150; [2000] E.C.R. I-1705 at [40-43].

Behaviour in accordance with EU law

In cases of the second category, the objective of the provision of EU law concerned does not require to prevent the action in question. The use of that rule by the acting person is consistent with its objective. This can best be illustrated with cases concerning discrimination of nationals in the field of fundamental freedoms. In these cases, the national authorities wish to see national law applied.¹⁹ They claim abuse of EU law by the acting person who, from their perspective, evades national law with the help of EU law. If requirements vary from Member State to Member State, the person concerned may use a fundamental freedom to achieve the application of the law of a Member State different from his home state. The EU law allows precisely for this kind of choice between national rules.²⁰ Thus, if the home state did not insist on applying its law on nationals who migrated within the EU, there would be no question of abuse.

For example, in the *Centros* case two Danish nationals residing in Denmark registered the Centros Ltd in England and Wales. The director of the Company, which never traded since its formation, wished to register a branch of Centros in Denmark. Her request was denied. The authorities claimed that Centros did in reality not want to establish a branch in Denmark but rather tried to establish a principal establishment by circumventing the relevant domestic law, especially the minimum capital requirement. The ECJ held that the provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their regis-

¹⁹ S. Weatherill, "Fitting 'Abuse of Rights' into EU Law Governing the Free Movement of Goods and Services" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 49, 54.

²⁰ *Torresi* (C-58/13 & C-59/13) EU:C:2014:2088 at [48]; Opinion of A. G. La Pergola in *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) EU:C:1998:380; [1999] 2 C.M.L.R. 551 at [26]; R. Ionescu, *L'abus de droit*, 2012, pp. 19-23. See also *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.* (C-167/01) EU:C:2003:512; [2005] 3 C.M.L.R. 937 at [96].

tered office within the Community to pursue activities in other Member States through a branch. It therefore does not constitute an abuse of this freedom if a national of a Member State sets up a company in another Member State with less restrictive rules and then sets up branches in other Member States.²¹ The Court then turned to the question whether the denial of the registration was justified – which was not the case.²²

In the fairly recent *Torresi* case, two Italian nationals each obtained a university law degree in Italy which they had recognised in Spain. In Spain they were registered as lawyers.²³ Their request to be registered as lawyers in Italy in the special section of the lawyers' register relating to lawyers holding a professional title issued in a Member State other than the Italian Republic and established in the Italian Republic was denied. The authorities considered the request to be not in accordance with the objectives of Directive 98/5²⁴ and possibly abusive.²⁵ The ECJ ruled that the right of EU nationals to choose the Member State in which they wish to acquire their professional qualifications as well as the Member State in which they intend to practise their profession is inherent in the exercise of the fundamental freedoms guaranteed by the Treaties. The Court went on to say

²¹ *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) EU:C:1999:126 at [26-27]. See also *Inspire Art* (C-167/01) EU:C:2003:512 at [137-138].

²² *Centros* (C-167/01) EU:C:1999:126 at [31-38].

²³ For background on the so-called „Spanish solution“ see G. di Federico, “Joined Cases 58 and 59/13, C-58/13 and C-59/13 Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell’Ordine degli Avvocati di Macerata, Judgment of the Court (Grand Chamber) of 17 July 2014“ (2015) Vol. 21, *European Public Law*, Issue 3, 481, 483-488; R. Mastroianni and A. Arena, “Free movement of lawyers and the Torresi judgment: a bridge too far?“ (2015), *EuConst* Vol. 11, 373, 373-374, 382.

²⁴ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L077/36.

²⁵ *Torresi* (C-58/13 & C-59/13) EU:C:2014:2088 at [9-13].

that the actions of the applicants fell within the cases in which the objective of the Directive is achieved. In itself they could not be considered to constitute an abuse of the right of establishment laid down in Art. 3 Directive 98/5.²⁶

Furthermore, EU law is not abused if a person applying artificially for a post tries to gain compensation on grounds of discrimination after receiving a rejection letter. According to the ECJ such a person cannot rely on the protection offered by Directives 2000/78²⁷ and 2006/54²⁸. A different interpretation of the Directives would be incompatible with their objectives.²⁹ But that does not prejudice the question whether or not such an applicant may successfully claim compensation under national law. This depends on the scope and interpretation of the Member States' law which may go beyond the Directive's scope. With regard to EU law the decisive point is that such an applicant is not protected by EU law. If national law grants him rights, there is no infringement of EU law.

A last example of cases in which the individuals' actions were in accordance with EU law but came into conflict with national law are those of Greek shareholders challenging reso-

²⁶ *Torresi* (C-58/13 & C-59/13) EU:C:2014:2088 at [48-49]. M. Jánošíková, "La libre circulation des avocats ou l'abus de droit?" (2014), JCP 2158, 2160 rightly considers the decision predictable. For a critical view see A. Iermano, "Il *favor* della Corte di giustizia dell'unione europea per gli *abogados* italiani: note a margine della sentenza *Torresi* del 17 luglio 2014" (2015), Studi sull'integrazione europea, Vol. X, 135, 152; R. Mastroianni and A. Arena, "Free movement of lawyers and the *Torresi* judgment: a bridge too far?" (2015), EuConst Vol. 11, 373, 381-383.

²⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

²⁸ 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 (recast) [2006] OJ L204/23.

²⁹ *Kratzer* (C-423/15) EU:C:2016:604 at [35].

lutions to increase capital that were not adopted by the general meeting.³⁰ The Greek legislation on which the resolutions were based was not compliant with Art. 25 of the Second Council Directive 77/91/EEC³¹. Therefore, the shareholders did not abuse EU law when they relied on this provision of the Directive.³²

Inappropriate use of EU law

While in the abovementioned cases EU law does not require to prevent the behaviour of the person concerned, other cases are indeed about abuse of EU law. These cases involve, inter alia, fundamental freedoms,³³ export refunds³⁴ and the Sixth VAT Directive³⁵. If the

³⁰ *Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others* (C-441/93) EU:C:1996:92; [1996] E.C.R. I-1347; *Kefalas* (367/96) EU:C:1998:222; *Diamantis* (C-373/97) EU:C:2000:150.

³¹ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L26/1.

³² This pattern is repeated in the *Starjakob* case in which an employee refused to cooperate in the application of a discriminating provision of national law. In such cases alleging abuse is actually rather a bold move as the national law the Member State wishes to enforce is not compliant with EU law.

³³ *Lair* (39/86) EU:C:1988:322; *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* (C-413/01) EU:C:2003:600; [2004] 1 C.M.L.R. 638.

³⁴ *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* (C-110/99) EU:C:2000:695.

³⁵ *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* (C-255/02) EU:C:2006:121; [2006] 2 C.M.L.R. 943; *WebMindLicenses* (C-419/14) EU:C:2015:832. The Sixth VAT Directive is the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States

individual's behaviour is abusive, EU law is misused. National rules may be involved as well. However, in contrast to the cases mentioned under a), the purpose of the relevant provision of EU law has not been achieved. It is EU law that has to be protected from abuse.

For example, in the *Lair* case the French claimant applied to the German authorities for a maintenance and training grant for the pursuit of her university studies. A condition for entitlement to that grant was her status as migrant worker. The ECJ held that it would constitute abuse if a worker had entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State and that such abuse is not covered by EU law.³⁶ If there is evidence for such abusive behaviour it does not only affect the national rules on student assistance but the freedom of movement for workers as well. The behaviour of the person concerned is not in accordance or even neutral with regard to EU law but is contrary to its objective.

In the *Emsland-Stärke* case goods were exported to a non Member State and then imported back into the EU. For the export an export refund was paid. The decision to grant this refund was revoked and repayment demanded when the authorities learned about the re-import.³⁷ In this decision the ECJ developed its two-part abuse test. The Court confirmed its earlier finding that EU law does not cover abusive behaviour and went on to specify the objective and subjective elements required for a finding of abuse. First, it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of these rules has not been achieved. Secondly, a subjective element is required. The essential aim of the transactions con-

relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1977] OJ L145/1 as amended by Council Directive 95/7/EC of 10 April 1995 [1995] OJ L102/18.

³⁶ *Lair* (39/86) EU:C:1988:322 at [43].

³⁷ *Emsland-Stärke* (C-110/99) EU:C:2000:695 at [7-9].

cerned must be to obtain an advantage from the EU rules by creating artificially the conditions laid down for obtaining it.³⁸ Again it is EU law that is abused if these requirements are met, as in these cases the objective of the provision of EU law is not achieved.

The same is true for cases about the right to deduct input tax. In the *Halifax* and the *WebMindLicenses* cases the ECJ held that the principle of prohibiting abusive practices applies to the sphere of VAT and reverted to the criteria established in the *Emsland-Stärke* case. Thus, 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 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 these provisions. Secondly, it must be apparent from a number of objective factors that the essential aim of the transactions concerned is (solely) to obtain that tax advantage.³⁹

Interim conclusion

Abuse in the context of EU law may consist in the improper use of a provision of EU law or in the improper use of a provision of national law. In the first case the objective of the provision of EU law is not achieved. In the second case the objective of the provision of EU law in question is either achieved or the provision of EU law is not applicable. The distinction between abuse of EU law and abuse of national law affects the answers to the

³⁸ *Emsland-Stärke* (C-110/99) EU:C:2000:695 at [51-53].

³⁹ *Halifax* (C-255/02) EU:C:2006:121 at [68-70, 74-75]; *WebMindLicenses* (C-419/14) EU:C:2015:832 at [35-36]. See also the discussion of this term by E. Sabatakakis, “L’abus de droit et l’artificialité : une clarification du débat entre montages artificiels et montages purement artificiels” (2014) *Revue de l’Union européenne*, 344, 357-361 and S. Vogenauer, “The Prohibition of Abuse of Law: An Emerging General Principle of EU Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 539-540.

individual aspects discussed in connection with abuse in the context of EU law as will be shown after a glance at the ECJ's different approaches towards abuse.

The ECJ's different approaches towards abuse

Although the ECJ does not openly distinguish between abuse cases concerning a provision of EU law and abuse cases concerning a provision of national law, differences in dealing with these two types of abuse cases can be identified in its case law.

Inappropriate use of a provision of EU law

In cases of abuse of EU law the ECJ has repeatedly stated that the rule in question is not applicable. The wording of the rulings varies but not the key statement. In the *Lair* and *Ninni-Orasche* cases the Court held that "... abuses are not covered by the Community provisions in question".⁴⁰ In the *Cremer* case it ruled that the scope of the regulations in question "... must in no case be extended to cover abusive practices."⁴¹ In the *Italmoda* case the ECJ formulated as follows "... abusive or fraudulent acts cannot form the basis of a right under EU law".⁴² The common thread of the rulings is that a provision of EU law cannot successfully be invoked if its objective is not achieved. To assess a situation with regard to abuse of EU law the Court developed the abovementioned two-part test,

⁴⁰ *Lair* (39/86) EU:C:1988:322 at [43]; *Ninni-Orasche* (C-413/01) EU:C:2003:600 at [36].

⁴¹ *Peter Cremer v Bundesanstalt für landwirtschaftliche Marktordnung* (125/76) EU:C:1977:148; [1977] E.C.R. 1593 at [21]. This phrase was repeated almost verbatim in *Emsland-Stärke* (C-110/99) EU:C:2000:695; [2000] E.C.R. I-11569 at [51].

⁴² *Staatssecretaris van Financiën v Schoenimport 'Italmoda' Mariano Previti vof and Turbu.com BV and Turbu.com Mobile Phone's BV v Staatssecretaris van Financiën* (C-131/13, C-163/13 & C-164/13) 18 December 2014 EU:C:2014:2455 at [57].

requiring an objective and a subjective element.⁴³ This test has repeatedly been used to deal with possible cases of abuse of rules of EU law.⁴⁴

Inappropriate use of national law with the help of EU law

If the behaviour in question is in accordance with EU law, the ECJ approaches the question of abuse in a different way. The Member State may enforce a national rule on prohibition of abuse of law if the application of this rule complies with EU law. If the EU law in question is a fundamental freedom or part of a directive intended to facilitate the realisation of a fundamental freedom, the discussion focusses on justification of the national law restricting the fundamental freedom. If the allegation of abuse is not made in the context of a fundamental freedom, the Court points out that national rules must be in compliance with EU law.

For example, in the *Centros* case the ECJ examined whether the behaviour of the person concerned was covered by the freedom of establishment. As this was the case it then went on to examine if the Member State may adopt measures in order to prevent evasion of its legislation or if the restrictions of the national rules were justified by other reasons.⁴⁵ The earlier judgments *Knoors* and *TV10*, among other examples, follow much the same pat-

⁴³ See above fn. 38.

⁴⁴ *WebMindLicenses* (C-419/14) EU:C:2015:832 at [35-36]; *Malvino Cervati* (C-131/14) EU:C:2016:255 at [32-52]; *Ministero dell'Economia e delle Finanze and Others v Francesco Cimmino and Others* (C-607/13) 9 July 2015 EU:C:2015:448 at [61-69]; *Società Italiana Commercio e Servizi srl (SICES) and Others v Agenzia Dogane Ufficio delle Dogane di Venezia* (C-155/13) 13 March 2014 EU:C:2014:145 at [31-39]; *Halifax* (C-255/02) EU:C:2006:121 at [68-70, 74-75]; *Eichsfelder Schlachtbetrieb GmbH v Hauptzollamt Hamburg-Jonas* (C-515/03) EU:C:2005:491; [2005] E.C.R. I-7355 at [39].

⁴⁵ *Centros* (C-212/97) EU:C:1999:126 at [24-30, 31-38].

tern: the ECJ examines whether the individual's behaviour falls into the scope of the provision of EU law in question. As this is so, it goes on to examine whether the Member State concerned may enforce the application of its rules anyway. In the *Knoors* case the Court ruled that if according to a directive authorisation to practise a certain trade has to be granted to persons who practised this trade in another Member State, this right may not be denied to nationals of the Member State in which the person applies for authorisation to practise the trade.⁴⁶ Although the Member States have a legitimate interest to prevent their nationals from evading the application of their national legislation as regards training for a trade, the conditions laid out in Directive 64/427/EEC⁴⁷ exclude abuse.⁴⁸ In the *TV10* case the ECJ for once acknowledged the Member State's interest to apply its domestic rules to one of its own nationals broadcasting from a neighbouring country. Although the actions of TV10 fell under the principle of freedom to provide services, the Member State was permitted to enforce domestic rules that ensured the pluralist and non-commercial content of programmes.⁴⁹

Examples for cases about the allegedly abusive evasion of national law outside the context of fundamental freedoms are the *Pafitis*, *Kefalas* and *Diamatis* cases. In these cases Greek nationals tried to avoid national rules that were contrary to the Second Council

⁴⁶ *Knoors* (115/78) EU:C:1979:31.

⁴⁷ Council Directive 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries) [1964] OJ 117/1863.

⁴⁸ *Knoors* (115/78) EU:C:1979:31 at [26].

⁴⁹ *TV10 SA v Commissariaat voor de Media* (C-23/93) EU:C:1994:362; [1994] E.C.R. I-4795 at [17-26].

Directive 77/91/EEC⁵⁰. In the *Pafitis* case the ECJ held that Art. 25 of this Directive precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances may be increased by an administrative measure, without a resolution of the general meeting.⁵¹ It went on to say that if a Member State wished to apply a national rule in determining whether a right conferred by EU law is being exercised abusively, the application of such a rule must not prejudice the full effect and uniform application of EU law in the Member States.⁵² The Court did not find that the claimant's behaviour was abusive.⁵³ It referred to this ruling in the *Kefalas* and *Diamantis* cases using the same line of reasoning and adding thoughts on a constellation that may be deemed abusive in the *Diamantis* case.⁵⁴

Mix and mismatch – case law disregarding the level on which abuse is in question

In recent judgments the ECJ has repeatedly quoted the two-part test developed in the context of abuse of EU law in cases concerning abuse of law on a national level. Examples include the *Kratzer*, *Starjakob* and *Torresi* cases. In all three cases the Court held that for a finding of abuse it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the pur-

⁵⁰ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L26/1.

⁵¹ *Pafitis* (C-441/93) EU:C:1996:92 at [14-60].

⁵² *Pafitis* (C-441/93) EU:C:1996:92 at [68].

⁵³ *Pafitis* (C-441/93) EU:C:1996:92 at [70].

⁵⁴ *Kefalas* (367/96) EU:C:1998:222 at [23-27]; *Diamantis* (C-373/97) EU:C:2000:150 at [32-44].

pose of these rules has not been achieved.⁵⁵ This is not a sensible approach if the dispute concerns the avoidance of a provision of national law without improper use of a provision of EU law. This may be why the Court did not go into this point in any further detail with exception of the *Torresi* case. In the *Kratzer* case the ECJ held that persons applying artificially for a post cannot rely on the protection offered by Directives 2000/78 and 2006/54.⁵⁶ If that is the case, it does not make sense to examine if the objectives of these Directives have been achieved.⁵⁷ The *Torresi* case was not about abuse of EU law either. That was noted by the Court when it examined the objective of Directive 98/5.⁵⁸ Instead of using the *Emsland-Stärke* test the ECJ should have examined whether the restriction of the freedom of establishment by the administrative decision was justified or not. Last but not least, in the *Starjakob* case the person concerned did not wish to comply with a discriminatory provision of national law. There was no question of abuse of a provision of EU law and it was rather obvious that the Member State could not rely on a rule prohibiting abuse to make its national adhere to national law that is not compliant with EU law.⁵⁹

A glance at the *Kefalas* and *Diamantis* cases show that this development of the case law is not entirely new. As stated above, the national rules the shareholders sought to avoid in these cases were not compliant with EU law. In both cases the ECJ rightly noted that the application of a national rule on abuse must not detract from the full effect and uniform

⁵⁵ *Kratzer* (C-423/15) EU:C:2016:604 at [39]; *Starjakob* (C-417/13) EU:C:2015:38 at [56]; *Torresi* (C-58/13 & C-59/13) EU:C:2014:2088 at [45].

⁵⁶ *Kratzer* (C-423/15) EU:C:2016:604 at [35].

⁵⁷ In this case it would not have made sense to remind the national court that the application of a national rule prohibiting abuse must not prejudice the full effect and uniform application of EU law in the Member States either as, as shown above, EU law is not affected if national law grants fake applicants rights.

⁵⁸ *Torresi* (C-58/13 & C-59/13) EU:C:2014:2088 at [47-49].

⁵⁹ *Starjakob* (C-417/13) EU:C:2015:38 at [57].

application of EU law.⁶⁰ Still, both judgments show the first signs of mixing the relevant aspects of the two different case groups as the Court states that the behaviour of the person concerned would have to be considered abusive if he brought an action for the purpose of deriving, to the detriment of the company, an improper advantage, manifestly contrary to the objective of the Directive in question.⁶¹ This phrase describes an abuse of EU law which was not really at issue in these cases.

It might be argued that the ECJ needs to examine the question of abuse of EU law before it goes on to consider if national law restricting the individual's rights may be enforced. But the aforementioned cases do not show this structure of a twofold approach. The Court just mixes phrases from both case groups in situations that concern alleged abuse of national law.

Interim conclusion

While the ECJ often uses different approaches for the two different case groups of abuse, it shows tendencies to combine them in more recent judgments. The case groups should not be handled uniformly as, as will be shown below, they require different approaches.

Prohibition of abuse – a principle of interpretation or a legal principle?

A major topic of discussion is how to introduce the concept of prohibition of abuse into the application of law. While some say that this concept is part of the interpretation of the provision of law in question,⁶² others regard it as a free-standing principle of law.⁶³ To

⁶⁰ *Kefalas* (367/96) EU:C:1998:222 at [22]; *Diamantis* (C-373/97) EU:C:2000:150 at [34].

⁶¹ *Kefalas* (367/96) EU:C:1998:222 at [28]; *Diamantis* (C-373/97) EU:C:2000:150 at [33].

⁶² A. Arnulf, "What is a General Principle of EU Law?" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 23; M. Baudenbacher, "Überlegungen zum Verbot des

answer this question, the abovementioned distinction is to be taken into account. In the event of EU law being used in such a way that the objective of the provision of EU law is not achieved, considerations about abuse of law are part of the interpretation of the provision of law in question. If the objective of the EU law does not require the behaviour of the person concerned to be prevented, it is for the national courts to decide how consider-

Rechtsmissbrauchs im Europäischen Gemeinschaftsrecht (2008) ZfRV, 205, 214; H. Eidenmüller, “Abuse of Law in the Context of European Insolvency Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 137, 142; Gordley, “The Abuse of Rights in Civil Law Tradition” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 33, 42-43; C. Nizzo, “L’abuso dei “diritti comunitari: un quesito non risolto” (1997) *Diritto del commercio internazionale*, 766, 770; K. Ottersbach, *Rechtsmissbrauch*, 2001, pp. 64-65; A. Sagan, “The Misuse of a European Company according to Article 11 of the Directive 2001/86/EC” (2010) *EBLR*, 15, 25; K. Ziegler, “‘Abuse of Law’ in the Context of Free Movement of Workers” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 295, 314.

⁶³ R. de la Feria, “Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of Law through Tax Law” (2008) *C.M.L. Rev.*, 395, 436-439; U. Klinke, “Europäisches Unternehmensrecht und EuGH. Die Rechtsprechung in den Jahren 1998-2000” (2002) *ZGR*, 163, 186; P. Reuß, “*Forum Shopping*” in *der Insolvenz* (Tübingen: Mohr Siebeck, 2011), p. 246. In favour of such a legal figure (without actually acknowledging its existence at the time of writing) L. N. Brown, “Is there a General Principle of Abuse of Rights in European Community Law?” in D. N. Curtin and T. Heukels (eds), *Essays in Honour of Henry G. Schermers*, Volume II (Dordrecht: Nijhoff, 1994), p. 511, 522; R. Ionescu, *L’abus de droit*, 2012, pp. 350-352; A. Lenaerts, “The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law” (2010) *ERPL*, 1121, 1138-1139; J. Snell, “The Notion of and a General Test for Abuse of Rights: Some Normative Reflections” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 219, 220-223; K. E. Sørensen, “Abuse of Rights in Community Law: A Principle of Substance or merely Rhetoric?” (2006) *C.M.L. Rev.*, 423, 430; S. Vogenauer, “The Prohibition of Abuse of Law: An Emerging General Principle of EU Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 558-559.

ations about abuse of national law are to be introduced. The technique may vary across the Member States.

Inappropriate use of a provision of EU law

If a provision of EU law is abused, the misuse can be prevented by way of interpretation of the rule in question. It does not make sense to say that a person has a certain right under a provision of law even if it is used inappropriately, just to immediately deny it on grounds of abuse with the help of a free-standing principle of law claiming that the objective of the rule is not achieved by the behaviour of the person concerned. If the objective of the rule in question is central to the classification of a behaviour as abusive, which is true, it can and should be taken into account at the stage of interpretation. To quote Advocate General La Pergola "... to determine whether or not a right is actually being exercised in an abusive manner is simply to define the material scope of the right in question."⁶⁴

This view is in accordance with the relevant case law of the Court. As shown above, the ECJ has repeatedly ruled that EU law is not applicable in cases of abuse.⁶⁵ In the above-mentioned cases it uses phrases like "are not covered", "the scope must not be extended to cover" and "cannot form the basis". These terms show that the right the individual claims does not exist from the start.

The objection may be raised that the wording of the provision in question limits its interpretation.⁶⁶ To this it can be responded that going beyond the wording of the law is not the same as deciding *contra legem*. Limits to interpretation serve to maintain the separa-

⁶⁴ Opinion of A. G. La Pergola in *Centros* (C-212/97) EU:C:1998:380 at [20].

⁶⁵ See above fn. 40-42.

⁶⁶ J. Snell, "The Notion of and a General Test for Abuse of Rights: Some Normative Reflections" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 219, 223.

tion of powers. The courts are not allowed to undermine the legislator's decisions in order to assert their own ideas of how the law should be. But in this regard, the application of a free-standing principle in abuse cases is not less invasive than the teleological interpretation of the provision in question. With both methods, the person concerned may not successfully invoke EU law although its requirements are being met as the purpose of the rule has not been achieved. With both methods, the objective of the law is given priority over its wording.

Inappropriate use of national law with the help of EU law

If the objective of the EU law is achieved, the teleological interpretation of EU law is not the way to address the problem of abuse of law. It is for the Member States to decide how they deal with rule avoidance or appropriation on a national level.⁶⁷ The ECJ has no jurisdiction in this matter. Its jurisdiction is limited to abuse of EU law, that is the inappropriate use of a provision of EU law. That does not mean that the cases in this group are to be assessed without any reference to the objectives of EU law. The link with objectives of EU law derives from the individual's invocation of a provision of EU law. Thus, it has to be determined if the EU law permits the Member State to deny the individual the asserted right. The Member State may do this under the following circumstances: The person concerned will not be able to successfully invoke a provision of EU law if his behaviour does not fall into its scope. Likewise, he cannot rely on EU law that is applicable but permits restrictions by the Member States. So if the dispute is about the misuse of national law,

⁶⁷ Contrary to the view of S. Vogenauer, "The Prohibition of Abuse of Law: An Emerging General Principle of EU Law" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 529-530 the fact that EU law is involved in these cases as well as in the cases of inappropriate use of a provision of EU law does not necessarily lead to the application of similar requirements to establish the existence of abuse in all cases.

the objective of the provision of EU law as well as the objective of the national provision of law is taken into account by the ECJ as on the one hand the scope of the EU law has to be determined and on the other hand restrictive measures by the Member States need to be justified. However, that does not make it a matter of teleological interpretation of EU law including aspects of abuse. With its rulings on the objective of rules of EU law and on legitimate reasons for restrictions the Court rather defines the framework within which the Member States can organise their national rules. Once it is established that the Member State may take the aspect of abuse of law into account,⁶⁸ it is a question of national law how the concept of prohibition of abuse of law is enforced. Depending on the respective rules of the Member States this may be done by teleological interpretation or by way of a free-standing principle.

This view is in accordance with most of the relevant case law of the Court. As shown above, the ECJ mostly refrains from citing the *Emsland-Stärke* test in cases that are not about the inappropriate use of a provision of EU law.⁶⁹

Application of national law or application of a general principle of EU law

Another point of discussion is whether abuse in the context of EU law is to be dealt with by national law or by a general principle of EU law. The ECJ held that national courts may apply a provision of national law in order to assess whether a right arising from a

⁶⁸ It should be noted that, as A. Kjellgren, “On the Border of Abuse“ (2000) EBLR 179, 192 rightly states, by the ECJ’s standards there is only a narrow field for the actual application of national rules against abuse of law.

⁶⁹ See the judgments referred to in fn. 46, 47, 50, 52 and 55.

provision of Community law is being exercised abusively.⁷⁰ The First, Fourth and Fifth Chamber referred to a “general Community law principle” or a “general principle of EU law” respectively.⁷¹ In February 2018 the Grand Chamber picked up this phrase calling the principle of prohibition of fraud and abuse of rights a general principle of EU law.⁷²

Inappropriate use of a provision of EU law

As stated above, the improper use of a provision of EU law can – and should – be prevented by interpretation of the rule in question.⁷³ In these cases it is neither national law nor a general principle of EU law that results in the inapplicability of the EU law.

If it were assumed, contrary to the view put forward here, that abuse of EU law is to be prevented by a free-standing principle, a general principle of EU law prohibiting abuse would be needed. Although some derive such a general principle from the Court’s case

⁷⁰ *Diamantis* (C-373/97) EU:C:2000:150 at [34]; *Kefalas* (367/96) EU:C:1998:222 at [21, 29]. See also *Hans Markus Kofoed v Skatteministeriet* (C-321/05) EU:C:2007:408; [2007] 3 C.M.L.R. 875 at [46].

⁷¹ *Edward Cussens, John Jennings, Vicent Kingston v T.G. Brosnan* (C-251/16) 22 November 2017 EU:C:2017:881 at [31]; *Foggia - Sociedade Gestora de Participações Sociais SA v Secretário de Estado dos Assuntos Fiscais* (C-126/10) EU:C:2011:718; [2011] E.C.R. I-10923 at [50] and *Kofoed* (C-321/05) EU:C:2007:408 at [38]. See also *Italmoda* (C-131/13, C-163/13 & C-164/13) EU:C:2014:2455 at [43, 46] (using the term “general principle” without the addition “of EU law”).

⁷² *Ömer Altun, Abubekir Altun, Sedrettin Maksutogullari, Yunus Altun, Absa NV, M. Sedat BVBA, Alnur BVBA, the other party to the proceedings being: Openbaar Ministerie* (C-359/16) 6 February 2018 EU:C:2018:63 at [49].

⁷³ See text above under the heading “Prohibition of abuse – a principle of interpretation or a legal principle?”.

law,⁷⁴ a general principle of EU law prohibiting abuse of law is not to be recognised.⁷⁵ The ECJ derives general principles of EU law from the national laws and constitutional traditions of the Member States. It also takes into account international treaties signed by

⁷⁴ J. Basedow, “Das Verbot von Rechtsmissbrauch und Gesetzesumgehung im europäischen Privatrecht” in *Festschrift für Michael Stathopoulos* (Ant. N. Sakkoula, 2010), pp. 159, 172; R. de la Feria, “Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of Law through Tax Law” (2008) C.M.L. Rev., 395, 436-439; A. Lenaerts, “The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law” (2010) ERPL, 1121, 1138-1139; J.-P. Maublanc, “Réévaluation de L’abus de droit à la lumière de la jurisprudence communautaire sur les pratiques abusives” 2007, *Revue du Marché commun et de l’Union européenne* (No. 507), 267, 268; K. E. Sørensen, “What is a General Principle of EU Law? A Response” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 25, 27; S. Vogenauer, “The Prohibition of Abuse of Law: An Emerging General Principle of EU Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 563-570 (“emerging principle”).

⁷⁵ A. Arnulf, “What is a General Principle of EU Law?” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 20-21; M. Baudenbacher, *Missbrauchsverbot*, 2016, p. 471; M. Dougan, “Some Comments on the Idea of a General Principle of Union Law Prohibiting Abuses of Law in the Field of Free Movement for Union Citizens” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 355-359; P. Farmer, “Prohibition of Abuse of (European) Law: The Creation of a New General Principle of EU Law through Tax: A Response” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 3-4; A. Kjellgren, “On the Border of Abuse” (2000) EBLR 179, 192; Opinion of A. G. Tesouro in *Kefalas* (367/96) EU:C:1998:41 at [21-27]; S. Weatherill, “Fitting ‘Abuse of Rights’ into EU Law Governing the Free Movement of Goods and Services” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 49, 61 (with regard to Free Movement of Goods and Services); S. Whittaker, “Comments on ‘Abuse of Law’ in European Private Law” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 253, 259-260.

the Member States.⁷⁶ While the law of the Member States may provide a sufficient basis for such a general principle,⁷⁷ its effect would not correspond to that of general principles of EU law in general. General principles of EU law are referred to when interpreting the written rules of EU law. Furthermore, they are binding for Union institutions as well as for the Member States acting within the scope of the Treaties.⁷⁸ In this capacity, general principles of EU law set limits to the power of the authorities. They are a yardstick for the

⁷⁶ A. Arnall, “What is a General Principle of EU Law?” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 8; M. Herdegen, “General Principles of EU Law – The Methodological Challenge” in U. Bernitz, J. Nergelius and C. Cardner (eds), *General Principles of EC Law in a Process of Development* (Austin: Kluwer Law International, 2008), 343, 346-351; B. W. Wegener, “Art. 19 EUV” in C. Callies and M. Ruffert (eds), *EUV/AEUV*, 5th edn (München: Beck, 2016), at [37]. See also X. Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006), p. 56-57.

⁷⁷ This view is taken by J. Basedow, “Das Verbot von Rechtsmissbrauch und Gesetzesumgehung im europäischen Privatrecht” in *Festschrift für Michael Stathopoulos*, 2010, pp. 159, 167 and A. Lenaerts, “The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law” (2010) ERPL, 1121, 1128; See also F. Ranieri, “Verbot des Rechtsmissbrauchs und Europäisches Gemeinschaftsprivatrecht” (2001) ZEuP, 165, 173. By contrast, A. G. Tesouro in his opinion in *Kefalas* (367/96) EU:C:1998:41 at [22-23] takes a rather sceptical view.

⁷⁸ A. Arnall, “What is a General Principle of EU Law?” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 12; M. Dougan, “Some Comments on the Idea of a General Principle of Union Law Prohibiting Abuses of Law in the Field of Free Movement for Union Citizens” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 355-256; T. Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford: Oxford Univ. Press, 2006), pp. 29-35; B. W. Wegener, “Art. 19 EUV” in C. Callies and M. Ruffert (eds), *EUV/AEUV*, 5th edn, 2016, at [37].

legality of an EU institution's or a Member State's measure.⁷⁹ But this is not how the principle of prohibition of abuse works.⁸⁰ On the contrary, it sets limits to the EU citizen invoking EU law.⁸¹ Thus, the principle of prohibition of abuse is not a general principle of EU law.⁸²

⁷⁹ M. Dougan, "Some Comments on the Idea of a General Principle of Union Law Prohibiting Abuses of Law in the Field of Free Movement for Union Citizens" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 355-356; Opinion of A. G. Tesouro in *Kefalas* (367/96) EU:C:1998:41 at [19].

⁸⁰ A. Arnall, "What is a General Principle of EU Law?" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 21; P. Farmer, "Prohibition of Abuse of (European) Law: The Creation of a New General Principle of EU Law through Tax: A Response" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 3-4.

⁸¹ A. Arnall, "What is a General Principle of EU Law?" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 20-21; M. Dougan, "Some Comments on the Idea of a General Principle of Union Law Prohibiting Abuses of Law in the Field of Free Movement for Union Citizens" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 355, 356.

⁸² According to S. Vogenauer, "The Prohibition of Abuse of Law: An Emerging General Principle of EU Law" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 521, 566 there is no reason why a general principle of EU law may not impose obligations on private persons. This view cannot be based on the cited texts by X. Groussot and H.-H. Lidgard, "Are there General Principles of Community Law Affecting Private Law?" in U. Bernitz, J. Nergelius and C. Cardner (eds), *General Principles of EC Law in a Process of Development* (Austin: Kluwer Law International, 2008), 155, 171 and T. Tridimas, *The General Principles of EU Law*, 2nd edn, 2006, pp. 47-50. While they mention relevant case law of the Court not recognising such an effect, they do not comment on it. Certainly, one may broaden the concept of general principles of EU law by applying them against private persons. But that would be a significant expansion in relation to the traditional term that requires justification for which one cannot rely on the conventional views on general principles on EU law.

This view is not affected by the fact that three Chambers and of late the Grand Chamber, too, referred to the principle of prohibition of abuse as a general principle of EU law.⁸³ With regard to the earlier of these decisions scholars rightly raised doubts as to whether the Chambers really meant to recognise a general principle of EU law as described above although the Grand Chamber – at the time those doubts were voiced – refrained from doing so.⁸⁴ Arnall has convincingly argued that as this expression is rather casually used in the *Kofoed* case the Chamber may well have meant it in a wider sense.⁸⁵ Prohibition of abuse of law can be called a (general) principle without classifying it as a general principle of EU law as described above. For example, Advocate General Poires Maduro sees prohibition of abuse as a general principle of EU law governing the interpretation of EU law.⁸⁶ Advocate General La Pergola, too, regards the principle that rights conferred under EU law may not be relied on for fraudulent or abusive ends as a general principle of Community law. This does, however, not prevent him from locating the question of abuse in the sphere of interpretation as he says that to determine whether or not a right is being exercised in an abusive manner is simply to define the material scope of the right in ques-

⁸³ *Altun and Others* (C-359/16) EU:C:2018:63 at [49]; *Cussens and Others* (C-251/16) EU:C:2017:881 at [31]; *Foggia* (C-126/10) EU:C:2011:718 at [50]; *Kofoed* (C-321/05) EU:C:2007:408 at [38].

⁸⁴ A. Arnall, “What is a General Principle of EU Law?” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 20; A. Sagan, “The Misuse of a European Company according to Article 11 of the Directive 2001/86/EC” (2010) EBLR, 15, 24-25.

⁸⁵ A. Arnall, “What is a General Principle of EU Law?” in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 7, 20 (referring to *Kofoed* (C-321/05) EU:C:2007:408 only, as *Foggia* (C-126/10) EU:C:2011:718 had not been decided at the time of publication of his article).

⁸⁶ Opinion of A. G. Poires Maduro in *Halifax* (C-255/02) EU:C:2005:200; [2006] 2 C.M.L.R. 943 at [64, 69, 72].

tion.⁸⁷ Finally, the First Chamber's wording is not uniform. In the *Italmoda* case it referred to a "general principle" without the addition of "of EU law".⁸⁸ In view of all this, the meaning of phrases like "general principle" or "basic principle" is to be determined in the particular context. It may be meant as a general principle of EU law in the technical sense. It may just as well be used descriptively, indicating that the question of abuse is to be considered generally. Considering the casual use of the term "general principle of EU law" in the aforementioned Chamber decisions it was probably not meant in the technical sense. This also applies to the recent ruling in the *Altun* case. While this is a judgment by the Grand Chamber, the passage about prohibition of abuse of rights being a general principle of EU law is but a glancing remark and may well be understood in a non-technical sense.⁸⁹

Inappropriate use of national law with the help of EU law

If avoidance or appropriation of a rule on a national level is at issue, the problem of abuse has to be dealt with by means of national rules.⁹⁰ In these cases EU law does not need to be protected against misuse and it does not require the EU citizen's actions to be prevented. That is all that matters from a perspective of EU law. Thus, it is not a principle of EU

⁸⁷ Opinion of A. G. La Pergola in *Centros* (C-212/97) EU:C:1998:380 at [20].

⁸⁸ *Italmoda* (C-131/13, C-163/13 & C-164/13) EU:C:2014:2455 at [43, 46]. See also *Argenta Spaarbank NV v Belgische Staat* (C-39/16) 26 October 2017 EU:C:2017:813 at [60], where the Fifth Chamber used the term "general EU law principle".

⁸⁹ *Altun and Others* (C-359/16) EU:C:2018:63 at [49].

⁹⁰ H. Eidenmüller, "Abuse of Law in the Context of European Insolvency Law" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 137, 143.

law that applies to the case.⁹¹ The question is whether the restriction intended by national law is permitted by the relevant provision of EU law or not.⁹² If so, the Member State may enforce its provisions using its national rules on prohibition of abuse. It is not a question of EU law if such rules exist and which requirements they impose. If there is no such rule or if its conditions are not met, the concerned individual's behaviour cannot be prevented on grounds of abuse.

As stated above, EU law must be observed when national rules preventing abuse are being applied.⁹³ Otherwise, the full effect and uniform application of EU law might be compromised. It is for the ECJ to determine the objectives and scope of the relevant provisions of EU law. Accordingly, the Court provided the framework for the application of national rules prohibiting abuse in the relevant case law by defining the objectives of the EU law in question and pointing out the need to ensure the full effect and uniform application of EU law. Concerns regarding the primacy of EU law over national law are thus removed.⁹⁴

⁹¹ A differentiating solution is also put forward by R. Ionescu, *L'abus de droit*, 2012, pp. 440-442, 492: A general principle of EU law is to be applied in harmonised areas, while in other areas the Court monitors the application of national law.

⁹² See S. Weatherill, "Fitting 'Abuse of Rights' into EU Law Governing the Free Movement of Goods and Services" in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law*, 2011, pp. 49, 61.

⁹³ See text above under the heading "The ECJ's different approaches towards abuse".

⁹⁴ H. Fleischer, "Der Rechtsmissbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht" (2003) JZ 865, 873; A. Kjellgren, "On the Border of Abuse" (2000) EBLR 179, 190-191. Several authors expressed concern about the supremacy of EU law, among them J. Basedow, "Das Verbot von Rechtsmissbrauch und Gesetzesumgehung im europäischen Privatrecht" in *Festschrift für Michael Stathopoulos*, 2010, pp. 159, 183; C. Nizzo, "L'abuso dei "diritti comunitari: un quesito non risolto" (1997) *Diritto del commercio internazionale*, 766, 770; K.

Conclusion

In the context of EU law, two groups of cases of abuse must be distinguished. The first group consists of cases in which a provision of EU law is used inappropriately. In these cases the objective of the relevant provision of EU law is not achieved. The second group consists of cases in which the individual's actions are in accordance with EU law. In these cases the objective of the relevant provision of EU law is achieved. The dispute is about avoidance or misuse of a rule of national law. Even though the ECJ does not openly make this distinction, its case law shows that it usually approaches the two case groups differently.

Contrary to the Court's approach in some of its more recent judgments the distinction should be maintained as it is relevant for the handling of the different types of abuse cases. If a case is about abuse of EU law, the situation can be dealt with by interpretation of the provision in question. If a case is about abuse of national law it is for the Member State to determine if and how it prevents such behaviour. In neither case a general principle of EU law is to be applied. This naturally applies to cases about abuse of national law as measures against abuse of national law are at the discretion of the Member State concerned, provided that the full effect and uniform application of EU law is not prejudiced. It applies to cases about abuse of a provision of EU law as well as a general principle of EU law prohibiting abuse in the technical sense of the term is not to be recognised. This does not constitute a gap in the protection of EU law against abusive practices as abuse can effectively be prevented by way of interpretation of the relevant provision of EU law.

Ottersbach, *Rechtsmissbrauch*, 2001, pp. 54-55. By contrast, D. Triantafyllou, "Abuse of rights versus primacy?" (1999) C.M.L. Rev. 157, 161-162 sees recognition of a general principle of EU law to be applied by the Member States' judges as a threat to the primacy of EU law.