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On Prohibition of Abuse of Law as a General Principle of EU Law

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It is now more than a decade since the judgment in *Halifax*, and nearly two since it was referred to the CJEU by a UK court.[1] It is hard to overstate its significance: the decision is arguably one of the most important ever delivered by the Court within the field of taxation, and beyond. After many years developing the principle of prohibition of abuse of law, the co-constitutive process of reverberation that characterises the development of principles of EU law had finally reached its cognisance stage:[2] the passage from dormant status to full consciousness, the moment of collective recognition of the existence of this principle.[3] Since entering the post cognisance period there have been many CJEU decisions densifying the principle, and much has been written on it, and them – including in this Review. Yet, whilst there seems to be unanimous agreement as regards the existence of the principle, its exact nature is still a contested issue. In particular, the question that still lingers is whether the principle of prohibition of abuse of law should be characterised as a general principle, or as an interpretative principle.

It is true that, in many cases the exact nature of the principle will be, from a practical perspective, irrelevant,[4] as one of the main function of general principles is to operate as interpretative aids, and gap fillers.[5] There are, however, many situations where the distinction is legally, and practically, relevant: beyond their role as interpretative aids, general principles can also act as overriding rules of law,[6] they can therefore trigger *contra legem* interpretation, acting as instruments of judicial review, and apply directly at national level, in the absence of domestic legislation to the effect. General principles have, therefore, all the legal functions of interpretative principles, as well as others – and it is the presence of those other legal functions which makes the characterisation of principle of prohibition of abuse of law as a general principle, or as an interpretative principle, crucial for taxation. An interpretative anti-avoidance principle would only be applicable in the presence of EU legislation, and would be limited by its wording; whilst, a general anti-avoidance principle can be applied in the absence of EU legislation, and act as an instrument of judicial review. Determining the exact nature of the principle, therefore, matters.

This Editorial presents the case in favour of characterising the principle of prohibition of abuse of law as a general principle of EU, arguing that not only does it display the key characteristics of such principles but that, following the most recent CJEU decisions, its characterisation as such is now settled case law.

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[1] Case C-255/02, ECLI:EU:C:2006:121.

[2] For an analysis of this process see R de la Feria, "Introducing the Principle of Prohibition of Abuse of Law" in R de la Feria and S Vogenauer (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Oxford: Hart Publishing, 2011), xv.

[3] R de la Feria, 'Prohibition of Abuse of (Community) Law – The Creation of a New General Principle of EC Law Through Tax' (2008) *Common Market Law Review* 45, 395.

[4] P Farmer, 'VAT Planning: Assessing the 'Abuse of Rights' Risk' *Tax Journal* (27 May 2002) 15-17.

[5] X Groussot, 'The General Principles of Community Law in the creation and development of due process principles in competition law proceedings: From Trans ocean Marine Paint (1974) to Montecatini (1999)', in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (The Hague, Kluwer Law International, 2000), 185-204.

[6] J Nergelius, 'General Principles of Community Law in the Future: Some Remarks on their Scope, Applicability and Legitimacy', in U Bernitz and J Nergelius, fn. 5, 223-34.

Cussens and Others and the Danish Cases

One of the most significant decisions on the discussion concerning the characterisation of the principle of prohibition of abuse of law as general or interpretative – and one which has framed much of the debate since it was decided in 2012 – is that in *3M Italia*.[7] In that case concerning the taxation of dividends, asked about the applicability of the principle in light of *Halifax* and *Cadbury Schweppes*, the Court stated that 'no general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation'.[8] The statement was interpreted as indicating a limited scope of application of the principle within the field of non-harmonised direct taxation,[9] and even confirming the non-existence of an EU general anti-avoidance principle insofar as non-harmonised taxes were concerned.[10] Although such interpretations may have been too restrictive, and the decision did not deny the existence of the principle of prohibition of abuse of law, it is undoubtedly true that it did lend argument to the claim that the principle did not display the characteristics of a general principle of EU law. Yet, if this was indeed the Court's intention, it is argued that this decision has now been reversed.

The first indication that this was in fact the case came in 2014, in *Italmoda*, a case concerning VAT fraud. In it the Court asserted that 'express authorisation cannot be required in order for the national authorities and courts to be able to refuse a benefit under the common system of VAT'.[11] A few years later, the decision in *Cussens and Others*, also concerning VAT, confirms the Court's view on the matter, expressly stating that 'the principle that abusive practices are prohibited may be relied on … even in the absence of provisions of national law'. [12] As the Court indicated in that judgment, this characteristic of the principle entails more than interpretation; it implies direct applicability, which is a feature of general, rather than interpretative, principles. A year later, in *N Luxembourg 1 and Others*, a decision on a group of cases concerning the compatibility of Danish law with the Interest and Royalty Directive, the Court – expressly invoking the judgement in *Italmoda* – stated that 'even if it were to transpire, in the main proceedings, that national law does not contain rules…Member States must, therefore, refuse to grant the advantage resulting from [the Directive], in accordance with the general principle that abusive practices are prohibited'.[13]

Beyond attributing to the principle of prohibition of abuse of law characteristics that are inherent to general principles of EU law, the judgments in *Cussens and Others* and in the Danish cases, together with other recent ones, are also noteworthy for their wording. In *Cussens and Others* the Court confirmed that the principle 'displays

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[7] Case C‑417/10, ECLI:EU:C:2012:184.
[8] ibid, para 32.
[9] L. de Broe and D. Beckers, 'The General Anti-Abuse Rule of the Anti-Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of Law' (2017) *EC Tax Review* 133, 138. See also R Szudoczky, '*3M Italia*: Tax Amnesty Aimed at Concluding Tax Litigation Prolonged for an Unreasonable Time Does Not Constitute State Aid' (2013) 12 *European State Aid Law* 162.
[10] C. Panayi, *European Union Corporate Tax Law* (Cambridge, Cambridge University Press, 2013), 337 et seq.
[11] Case C-131/13, ECLI:EU:C:2014:2455, para 59. For an analysis of the case, see R. de la Feria and R. Foy, '*Italmoda*: the birth of the principle of third-party liability for VAT fraud' (2016) *British Tax Review* 262.
[12] Case C‑251/16, ECLI:EU:C:2017:881, paras 33-34.
[13] Case C-115/16, ECLI:EU:C:2019:134, paras 117-121.

the general, comprehensive character which is naturally inherent in general principles of EU law';[14] and in *N Luxembourg 1 and Others* it further by stating that 'it is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends".[15] Similar wording has been recently used by the Court in *T Danmark*,[16] and in *Argenta Spaarbank* the Court referred to the Special Anti-Avoidance Rule (SAAR) in the Parent-Subsidiary Directive as a reflection of 'the general EU law principle that abuse of rights is prohibited'.[17] These decisions were not the first occasions in which the Court characterised the principle as a general principle of EU law – indeed it had done so already in *Kofoed.*[18] It is also true that relying solely on the terminology used by the Court would amount to a strictly formalist approach, which is difficult to justify in the context of previous terminological confusions in this area. Whilst relevant, therefore, the wording used by the Court cannot be the sole determining factor in the characterisation of this principle as a general one,[19] and indeed such designations of the CJEU have in the past been questioned.[20] Yet, as discussed below, it is argued that these decisions have finally settled the debate that has been raging since the decision in *Halifax*, on the true nature of the principle of prohibition of abuse of law as a general principle of EU law.

General vs Interpretative Principle

Although there is no full doctrinal agreement on what constitutes a general principle of EU law,[21] the main characteristics usually attributed to them, namely generality, weight, and non-conclusiveness, are all present in the jurisprudence of the CJEU regarding the principle of prohibition of abuse of law.[22] Beyond these key characteristics, however, there are several other factors that confirm the principle, as it stands today – after in particular the decisions in *Cussens and Others* and the Danish cases – as general, rather than merely interpretative.

First, as it has been argued,[23] the conceptualisation of the principle of prohibition of abuse of law as interpretative ignores the second element of the abuse of law test – which many have sought to argue, in cases such as *Weald Leasing,* is its main element – namely artificiality, under which the principal aim of the transaction is to obtain an advantage. A finding that the application of the rule in question is contrary to its purpose is not regarded as sufficient; the reliance of those invoking the rule must be abusive – this is more than reading down the relevant rule through interpretation. This reality was acknowledged by Advocate General Mazak in *RBS Holdings*, who

[14] Case C‑251/16, ECLI:EU:C:2017:881, para 70.
[15] Case C-115/16, ECLI:EU:C:2019:134, para 96.
[16] Case C-116/16, EU:C:2019:135, paras 70-71.
[17] Case C-39/16, EU:C:2017:813, para 60. On the relevance of the principle in direct taxation directives, see also A. Cordewener, 'Anti-Abuse Measures in the Area of Direct Taxation: Towards Converging Standards Under Treaty Freedoms and EU Directives' (2017) *EC Tax Review* 60.
[18] Case C-321/05, ECLI:EU:C:2007:408, para 38.
[19] Arguing event against its necessity, see S. Prechal and M. de Leeuw, 'Transparency: A General Principle of EU Law?' in U. Bernitz, J. Nergelius and C. Cardner (eds), *General Principles of EC Law in a Process of Development* (Alphen aan den Rijn, Wolters Kluwer 2008), 201, 203.
[20] J. Raitio, 'The Principle of Legal Certainty as a General Principle of EU Law' in U. Bernitz, J. Nergelius and C. Cardner, fn. 19, 47, at 52.
[21] As reported by X. Groussot, *General Principles of Community Law* (Europa Law Publishing, 2006) 129-30.
[22] For a detailed analysis see R. de la Feria, fn.3.
[23] ibid.

stated that interpreting a provision of EU law and establishing an abusive practice were 'conceptually distinct and should accordingly be dealt with one after the other'.[24]

Second, the principle has been used by the CJEU on various occasions as an instrument of judicial review of national legal provisions. It was arguably in that capacity that the principle was applied in *Cadbury Schweppes* and other direct taxation cases regarding non-harmonised areas: in these cases the principle of prohibition of abuse of law does not influence the interpretation of the scope of the freedom of establishment, which is deemed to apply, but on the contrary, it is used as a stand-alone exception to the applicable free movement right; this then resulted in the disapplication of the national provisions, as per the principle of supremacy of EU law, *not* in an interpretation of the national provision in conformity with EU, as per the principle of indirect effect.

Third, it is now clear that the principle applies in the absence of national legislation to the same effect. Arguably, it was this characteristic that sparked the various preliminary references to the Court coming from the UK courts, following the decision in *Emsland-Stärke*: it is hardly coincidental that these cases emerged from the UK, which lacked at that time a general anti-avoidance, or anti-abuse provision; it rather reflects the willingness of HMRC to invoke what was then known as the abuse of rights doctrine against VAT avoidance schemes, in the absence of national legislation to that effect. It does not result necessarily from either the statement in *Kofoed* – according to which, in the absence of the transposition of a specific anti-avoidance provision in Merger Directive, the principle should not substitute it – or that in *3M Italia* – according to which there is no obligation upon the Member States to combat abusive practices in the field of direct taxation – that the principle does not apply in the absence of national legislation. Yet, to the extent that it could have been interpreted in that manner, as discussed above, the decision has now been reversed in *Italmoda*, *Cussens and Others*, *N Luxembourg 1, and T Danmark*.[25]

Finally, whilst the terminology used within CJEU is still not uniform, it is noteworthy that there are now several – and growing – number of statements confirming the nature of the principle of prohibition of abuse of law as a general principle of EU law, not only made by several Advocates General, but also by the Court itself, the most recent of which in *Cussens and Others*, *Argenta Spaarbank*,[26] *N Luxembourg 1*,[27] and *T Danmark*.[28] Indeed a brief analysis of the various statements on the general vs interpretative nature of the principle of prohibition of abuse of law, as summarised in Table 1 below, highlights the fact that not since 1998 has an Advocate General expressly supported the characterisation of the principle as interpretative – although in 2004 the Advocate General in *Chen* did express some reservations as to its characterisation as general;[29] on the contrary, not only there have been multiple references to the principle as a general principle of EU law, but these have grown in intensity since the decision in *Halifax*. In this regard, it is also significant to note that, as it is acknowledged within the EU

[24] Case C-277/09, ECLI:EU:C:2010:566, para 29.
[25] On the constitutional significance of *Cussens and Others* see D Leczykiewicz, 'Prohibition of abusive practices as a "general principle" of EU law' (2019) 56 *Common Market Law Review* 703.
[26] Case C-39/16, EU:C:2017:813, para 60.
[27] Case C-115/16, ECLI:EU:C:2019:134, paras 96-97. See also, in the area of free movement of workers, Case C‑359/16, *Ömer Altun*, ECLI:EU:C:2018:63, para 49.
[28] Case C-116/16, EU:C:2019:135, paras 70-71.
[29] Case C-200/02, n. 67 above, ECLI:EU:C:2004:307, at para 111.

constitutional law doctrine, one of the most significant roles of Advocates General has been their contribution to the development of general principles of EU law.[30]

Table 1: CJEU References to Nature of EU Principle of Prohibition of Abuse of Law

GENERAL PRINCIPLE	INTERPRETATIVE PRINCIPLE
Centros (Advocate-General La Pergola), 1999 *Diamantis* (Advocate-General Saggio), 2000 *Halifax* (Advocate-General Maduro), 2006 *Kofoed*, 2007 *Bozkurt* (Advocate-General Sharpston), 2010 *Oberto and O'Leary* (Advocate-General Mengozzi), 2014 *CASTA and Others*, 2016 *Cussens and Others*, 2017 *Argenta Spaarbank*, 2017 *N Luxembourg 1*, 2018 *T Danmark*, 2019	*Kefalas* (Advocate-General Tesauro), 1998 *Chen* (Advocate General Tizzano), 2004

Over the last decade various arguments have been presented against the characterisation of the principle of prohibition of abuse of law as a general principle of EU law. Most of these have now been expressly addressed by the jurisprudence of the CJEU,[31] but two arguments are arguably still relevant, and thus merit closer scrutiny. The first is that the principle is inconsistently applied by the Court, and that this lack of uniform application somehow prevents its characterisation as a general principle of EU law.[32] The answer to this argument, however, is that uniformity of application is not a fundamental characteristic of general principles, due to their inherent structural generality and scope-related generality.[33] It is not surprising therefore that, as mentioned above, the intensity and the scope of application of a general principle may vary depending on the subject matter, and that this is a phenomenon present as regards other (uncontested) general principles of EU law, such as the principle of proportionality.[34]

The second argument is that characterising the prohibition of abuse of law as a general principle carries significant risks of undermining the general principle of legal certainty.[35] The characterisation as a general principle does

[30] N Burrows and R Greaves, *The Advocate General and EC Law* (Oxford, Oxford University Press, 2007) 7; and T Tridimas, 'The role of the Advocate General in the development of Community Law: Some reflections' (1997) 34 *Common Market Law Review* 1349, 1386.
[31] R. de la Feria, fn. 3, at 436-37.
[32] N. Brown, 'Is there a general principle of abuse of rights in European Community Law?', in Heukel and D Curtin (eds), *Institutional Dynamics of European Integration*, Vol. II, (Martinus Nijhoff Publishers, 1994) 511, 511.
[33] C. Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19 *European Law Journal* 457, 461.
[34] T. Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *European Law Journal* 158.
[35] A. Arnull, 'What is a General Principle of EU Law?' in R. de la Feria and S. Vogenauer, fn. 2, ch 2, at 22-23.

indeed carry risks to legal certainty, as expressly acknowledged by Advocate General Maduro in *Halifax*,[36] which should not be underestimated. The principle of legal certainty is inherent to any legal system and in essence requires that the application of the law to a specific situation must be predictable.[37] Within the EU context, the principle was first invoked by the CJEU in 1961,[38] has long been recognised as general principle of EU law,[39] and it often features in the case law of the CJEU, with reportedly over 2,500 decisions of the Court making express reference to it.[40] Despite its notorious ambiguity and vagueness,[41] it is said to encompass several other principles, and in particular the principle of legitimate expectations, which requires that those who act reasonably and in good faith on the basis of the law should not see those expectations defrauded.[42]

The contra-argument to the contention that the principle of prohibition of abuse of law should not be characterised as a general principle of EU law because it undermines legal certainty is two-fold. Firstly, acknowledging the risks which characterising the principle of prohibition of abuse of law as a general principle of EU law, does not – indeed cannot – equate to denying its existence; disagreeing with a specific legal development, cannot mean denying that the development ever took place. Secondly, the principle of prohibition of abuse of law must be balanced against other principles, and vice-versa, other principles must be balanced against the principle of prohibition of abuse of law; indeed conflicts between two or more general principles is not uncommon, and a balance must always be achieved between different principles that 'form part of the Community legal system'.[43] Despite its status as a general principle of EU law, the principle of legal certainty is not absolute and should not be safeguarded at all costs, but rather outweighed by other legal principles.[44] As demonstrated by the CJEU case-law, often resource to other general principles will undermine legal certainty:[45] paradigmatic examples of this phenomenon would be cases involving the general EU principle of proportionality,[46] or the general principle of the general EU principle of equal treatment.[47]

It is therefore in this context that the discussion as regards the risks to legal certainty presented by the EU principle of prohibition of abuse of law should be held. Those risks are often raised in the context of general anti-avoidance

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[36] Case C-255/02, ECLI:EU:C:2005:200, para 77.
[37] J. Raitio, fn 20, at 52.
[38] Case 42/59, *SNUPAT*, ECLI:EU:C:1961:5.
[39] See amongst many others, cases 52/69, *Geigy*, ECLI:EU:C:1972:73; C-323/88, *Sermes*, ECLI:EU:C:1990:299; C-154/05, *Kersbergen-Lap*, ECLI:EU:C:2006:449; C-345/06, *Heinrich*, ECLI:EU:C:2009:140; C-337/07, *Altun*, ECLI:EU:C:2008:744; C-201/08, *Plantanol*, ECLI:EU:C:2009:539; C-72/10, *Costa*, EU:C:2012:80.
[40] J. Van Meerbeeck, 'The principle of legal certainty in the case-law of the European Court of Justice: from certainty to trust' (2016) 41 *European Law Review* 275.
[41] ibid.
[42] J. Raitio, fn. 20, at 54.
[43] Case C-255/02, ECLI:EU:C:2005:200, para 84.
[44] J. Raitio, fn. 20, at 58.
[45] On the balancing of the principle of legal certainty with that of legality, for example, see X. Groussot and T. Minssen, '*Res judicata* in the Court of Justice case-law: balancing legal certainty with legality?' (2007) 3 *European Constitutional Law Review* 385.
[46] T. Lyons, 'State Aid, Taxation and Abuse of Law' in R. de la Feria and S. Vogenauer, fn. 2, at 508.
[47] Joined cases C-402/07 and C-432/07*, Air France*, ECLI:EU:C:2009:716; and C-581/10 and C-629/10, *Deutsche Lufthansa and Others*, ECLI:EU:C:2012:657.

mechanisms;[48] however, as it has been argued, these principles 'cut(s) across an immemorial debate between two legitimate objectives of any legal order: legal certainty (the tendency to yield predictable legal outcomes) and legal congruence (the tendency to yield equitable legal outcomes)';[49] or said in a different way, the principle of prohibition of abuse of law should be set in the context of the wider debate over security versus justice. Blind respect for legal certainty and the rigid respect of the letter of the law will lead to inequity, and jeopardise what has been designated as 'legal congruence'.[50] This is particular true in the context of EU law, not least since hard law is often difficult to approve, so that reliance on judicial discretion in its application is particular necessary in the context of changing realities.[51]

All the above leads to the inescapable conclusion that it is now settled case law that the principle of prohibition of abuse of law is a general principle of EU law, rather than an interpretative one, with all the legal consequences which being characterised as such entails. In particular, it follows that the new General Anti Avoidance Rule (GAAR), as set out in Article 6 of the Anti-Tax Avoidance Directive,[52] must be seen merely as a partial codification of this general principle, as applied to taxation. This codification is natural – demonstrated by the fact that, despite key differences, there are clear parallels between the EU process, and that witnessed in other jurisdictions – and it can be helpful, creating in effect an hierarchy of EU anti-avoidance rules.[53] Yet, this does not take away from the magnitude of this development: it represents the culmination of a process that, arguably, started many decades ago. Like many other things in our lives at present, a new normal to which we all must adapt.

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[48] J. Freedman, 'The UK GAAR' in M Lang *et al* (eds), *General Anti-Avoidance Rules (GAARs) – A Key Element of Tax Systems in the Post-BEPS World* (Amsterdam, IBFD, 2016). See also M. Gammie, 'Moral Taxation, Immoral Avoidance – What Role for the Law?' (2013) *British Tax Review* 577.

[49] A. Sayde, *Abuse of EU Law and Regulation of the Internal Market* (Oxford, Hart Publishing, 2014), at 167.

[50] ibid, 168 et seq.

[51] As discussed in R. de la Feria, 'EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox' in M. Lang *et al* (ed.), *Recent VAT Case Law of the CJEU* (Vienna, Linde, 2016).

[52] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, 1-14.

[53] These points are further developed in R. de la Feria, 'EU General Anti-(Tax) Avoidance Mechanisms' in G. Loutzenhiser and R de la Feria (eds), *The Dynamics of Taxation – Essays in Honour of Judith Freedman* (Oxford: Hart Publishing, 2020), Ch. 8, forthcoming.