Abus de droit in the Field of Value Added Taxation

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Summary

This article starts out with a synopsis of the place of VAT contributions within the Community Budgetary structure, and its position in relation to collection. It goes on to examine the French notion of abus de droit, *and its place in relation to the written constitution in the form of a social contract, rather than the British conventional constitution which works on different principles relating to sovereignty, the source of law and the relation between the executive and the subject. There follows an analysis of the Community position on the protection of its Financial Interests, the Special Report on the Convention on the protection of the financial interests of the European Communities and the exclusion of VAT by the Report from the measures taken in Regulations to protect these. VAT is argued to be outside the scope of this as it is a national tax, albeit on a harmonised tax base.*

The article then examines the Commission's arguments in previous case law relating to the definition of abus de droit *and the response of the ECJ to them relating to the protection of financial interests in other areas of own resources. The distinction between* abus de droit *and the notion of a sham is argued to be that of pretence. The author concludes that this development amounts to an unwarranted extension of the armoury of Customs and Excise, and questions whether this can be achieved without legislation in the United Kingdom.*

Introduction

THE aim of this article is to articulate the various anti evasion and avoidance mechanisms within the structure of VAT within the Community budget system and to develop the thesis that there is a fundamental distinction between the resources collected directly by the Communities or for their account by Member States' administrations, such as income from the Common Customs Tariff (CCT), and from Common Agricultural Policy (CAP); and those which are indirectly contributed by the Member States as a percentage from their national GDP, and as a percentage of the domestic VAT collected.

A distinction will be drawn between the scope of Community anti-evasion and avoidance measures and those available to Member States within their own fiscal systems. Reference will be made to the French concept of *abus de droit* by way of information. Further distinctions will be drawn between the approximation of the tax base accomplished under the Sixth Directive, and the issues which the Sixth Directive does not address such as anti abuse and avoidance measures relating to the collection of the tax within the scope of national legislations and budgetary protection.

The article will attempt to analyse the questions referred to the ECJ on a joined basis by the High Court in the case *Halifax Plc. and others v Customs and Excise Commissioners*[1]

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[1] [2002] STC 402.

which were joined from the appeals in *BUPA* and *Halifax*,[2] and to show that the answer is in effect a structural one.

The thesis is this: that the notion of *abus de droit*, if it exists in Community law, is applicable to the first sub-category of the Community budget, as this part is governed by directly applicable Community legislation. In relation to the second sub-category, the revenue derived indirectly from Member States' Gross National Product and the negotiated percentage of VAT, the legislation in force within the Member State concerned is that which determine the anti-evasion, anti-avoidance and fraud provisions available to Member States, but which themselves remain subject to overriding principles of Community law, such as proportionality.

The aim is to show that procedural initiatives taken under Customs Refund procedures under European Union regulations are not automatically transposable to the matters of deductibility of VAT under the Sixth Directive. The Sixth Directive does not address the issue as to how Customs & Excise should determine whether a transaction, or a series of transactions, are artificial. This is a question for each Member State's internal law, and will remain so until approximation or harmonisation of commercial and civil law and practices becomes sufficiently close to enable the matter to be settled by a further directive, or, as in the case of jurisdiction and recognition and enforcement of judicial decisions in civil and commercial matters, a regulation.

The notion of *abus de droit*, in French law

The discussion is flavoured by the fact that the ECJ has consistently refused to rise to the fly expertly laid over it by the Commission in matters of CAP and CCT abuse, and has chosen a more pragmatic concept of abusive practices.

This will be demonstrated in the analysis of the preliminary ruling in *Emslande-Stärke*.[3] The ruling and the judgment will be referred to frequently in different contexts, particularly as the Commission, perhaps a little ruefully, admitted in its argument that the ECJ had consistently refused to be drawn on whether a concept such as *abus de droit* existed within the Community legal order.

The notion of *abus de droit* appears to be of French origin, as it stems from the notion of a social contract embedded in a written constitution. Various similar concepts exist in other Member States having written constitutions, as a matter of principle.

Any consideration of national law has to be seen in the light of the ECJ's judgment in *R. v Commissioners of Customs and Excise Ex p. EMU Tabac SARL*.[4]

Whilst there is no express reference made to any notion of *abus de droit*, the case is of considerable interest, as is the very clear statement at paras 30 and 31 of the judgment which state that

> "the Community legal order does not in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect.
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> Secondly, even if the abovementioned principle were common to all the Member States, it must be noted that, as the Advocate General has observed, it is one which

[2] *Halifax Plc v Commissioners of Customs and Excise* on March 1, 2001, VAT decision 17124; and *BUPA Hospitals Limited and Goldsborough Developments Limited v Commissioners of Customs and Excise*, London VAT Tribunal, February 25, 2002.

[3] Case C–110/99, [2000] E.C.R. I–1569.

[4] Case C–296/95 [1997] E.C.R. I–1629.

> derives from civil law, and more specifically from the law of obligations, and it does not necessarily fall to be applied in the sphere of fiscal law, where the objectives are of a quite different nature."

It is to be noted that the court did not follow the Advocate General's comments relating to abuse of law and fraud in the law in paragraphs 88 and 89 of his opinion.

Here the distinction between the fiscal aspects of *abus de droit* in France, and its civil and constitutional law aspects (*fraus legis*) may need further amplification. In addition, without the benefit of reading the arguments advanced in *Halifax*, it may be that the issue of the positioning of this administrative evidential and anti-avoidance mechanism would have been addressed in relation to *abus de pouvoir*, by the administration, the possibility of obtaining advance clearance, and the remainder of a Constitutional code within which *abus de droit* can only be situated. None of these exists in English law to the extent required, even with the Human Rights Act, and Customs' insistence on this administrative remedy may have been energetically countered on this basis.

In this context, it may be informative to set out its use by the French Tax administration in certain defined areas. Its definition is more confined and stricter than the notion advanced by Customs & Excise in both *BUPA* and *Halifax*. In fact, were equivalent facts to be before a French tax tribunal, the French tax administration would have been equally at ease with the notion of *transaction fictive* or sham as a primary argument, or fictive contracts, rather than with the first arm of the French *abus de droit* doctrine, which is the *abus de droit par simulation*.

Here there is a fundamental distinction between *abus de droit* and sham. An *abus* does not necessarily involve any pretence, and may be unilateral both as to the act and as to the intention. The rights exist, they are simply used for another purpose than that for which they were intended.

First and foremost, the notion of *abus de droit* is a central part of the French constitutional position of the individual or legal person in relation to others and the organs of the State and the administration. All these are subject to a generic principle, even a legal rule, that rights and duties are exercised in a civic manner, and not abusively or fraudulently, and within and by reference to the context in which they are applicable. In other words, the notion is almost part of the constitutional relationship that each of these entities or individuals has to the others. It is not a creature of tax law. It is therefore clear that the concept is foreign to the self-regulating British culture, as there is no written constitution, defining the rights of the individual or company in relation to the State, and requiring a principle regulating the use and abuse of rights within that social contract, for want of a better term.

Apart from its impact in all areas of French law, whether it be contract, public law, private law or property law; the notion of *abus de droit* is one of the main arms of the French tax administration. Following general principles of law, the administration is faced with a presumption that on the one hand, agreements are reputed to be real and on the other, that when such transactions are reciprocal or multi-party, they are thereby deemed to be economically balanced. In effect the question of *abus de droit* in tax law has to be seen in an evidential context, as much as anything else, and takes its place within a series of rebuttals. These presumptions do not exist with the same force and relevance in English law

Were it not for this, in addition to its general powers of control, and ability to recalculate the value of fiscal elements under the control of the tax judge, the *abus de droit* procedure would otherwise appear to fulfil the administration's prayer for an absolute right to state

that a taxpayer may not use a legal right in a manner for which it may not have been designed. Taking the situation in France as an example, no more, the status of the notion of *abus de droit* in tax matters can be resumed as follows:

There are two aspects of *abus de droit* in French tax law which have become merged:
(1) The statutory notion defined under the procedural Article 64 of the *Livres des procédures fiscales*, which enables the administration to attack agreements freely intended and concluded by the parties, and, in addition to requalifying their nature, to reconstitute the reality of the operations and to reassess the tax due, and in addition to the payment of interest (0.75 per cent per month), to fix a penalty of up to 80 per cent of the amount of the reassessed tax.

The concept is such that the administration may be forced to take the advice of a Consultative Committee constituted under Article 64; if it alleges an *abus de droit*, and does not consult the Consultative Committee, or refuses to follow its position, it retains the burden of proof. There is therefore a considerable administrative protection given to the taxpayer, which doers not appear in the analysis proposed by the Commission, nor for that matter by Custom & Excise.

The *abus* referred to in the text is commonly referred to as the *abus par simulation*, *i.e.* cloaking a transaction in another form with a view to avoiding taxation, which is the only case expressly aimed at by Article 64. In effect, the administration is not bound to respect contracts which dissimulate the real effect of an agreement or a convention with the aid of clauses which

(a) give rise to a reduction in stamp duty payable;
(b) disguise the realisation or a transfer of profit or income; or
(c) which enable the avoidance, either in whole or in part, of the payment of VAT corresponding to operations carried out in the execution of a contact or a convention.

The procedure is also limited to certain taxes. It is not of general application. When wealth tax was reintroduced, a provision had to be inserted at Article L64A enabling the administrative remedy of *abus de droit* to be applied to that tax.

The *procédure d'abus de droit* is not to be confused with other French procedures such as the abnormal act of management; the requalification of fact, such as whether the services have actually been provided or not; and the reinterpretation of fictive contracts. None of these procedures involve either a fictive deed (*acte*) or a legal structure whose sole object and intention is to elude tax.
(2) The second notion, more generalised, is that of *abus de droit* by *fraus legis*, which is based on jurisprudence, perhaps best loosely described as a mixture of case law and academic and administrative doctrine. In effect, this more generic concept would correspond more to the alleged Community law concept of a fraudulent or abusive use of a community right. It involves the use of a legal right outside its proper scope to obtain an advantage which the law does not otherwise allow, and which is outside the scope of the provision.

The statutory concept of *abus de droit par simulation* may be described as attempting to present to the administration a legal situation which does not correspond to the real situation with a view to reducing the tax liability, either partially or completely. Generally, it attacks what could be described as a structure of fictive legal transactions, or shams. However, it took a decision of the Conseil d'Etat to confirm that the provision also applied to *abus* by *fraus legis*, *i.e.* fraud on the purpose of the provision. The issue now becomes

what is a sham in a heavily formalised civil law system such as France, in relation to the more pragmatic common law system. An example may be taken from a judgment of the Conseil d'Etat of March 25, 1983.

To avoid paying VAT, a taxpayer set up an Société Civile Immobilière (SCI), a form of unlimited property owning partnership with corporate form to own unfurnished commercial property, and a *Société à responsabilité limitée* ("Sarl"), or private limited company, composed of the same members as the SCI, which rented out the furniture to the tenant. The Conseil d'Etat decided that the fictive nature of the separation between the leases of the unfurnished property and the rental of the furnishings was evidenced by the fact that:

- the two companies had the same members and the same managers;
- they had exactly the same clients; and
- the leases and the furniture rental agreements had exactly the same term and were signed on the same date.

The aim of the transaction was to charge VAT merely on the furniture and not on the rental of the furnished premises.

The second arm may be described loosely as *fraus legis* or fraud on the law. This concept is closer to the notion dealt with by the ECJ within the European context. The ECJ has developed principles defining the manner and the extent to which Member States, institutions, or persons within the Union may or may not use principles of Community Law to avoid principles or rules of domestic legislation to which they may otherwise be subject.

The Conseil d'Etat however introduced the wider concept into Article L64, in a judgment of principle of June 10, 1981, effectively extending the interpretation of this article to include the second arm, thereby enabling the prohibition of transactions which had no other motivation than the eluding or attenuation of tax charges otherwise normally owed, having regard to the situation and the real activities of the taxpayer. However, in the case concerned, the administration was unable to show that the transactions concerned were fictive, as the structures concerned were not only formally valid, but fulfilled their economic purpose in other respects. Note that there is a distinction between fictive and pretence.

The difficulty in bringing this concept into British practice is that the French administration will attempt to use the procedure in circumstances which in Britain would be considered perfectly legitimate. The *abus de droit* doctrine is after all a rebuttal of a presumption that contracts are real.

The French administration's attitude towards the procedure has been sharpened by several recent contrary decisions. In effect, it frequently attempts to evoke the possibility of using the procedure to intimidate a taxpayer into accepting a reassessment, by in effect offering to forgo the 80 per cent penalty.

In addition, the Cour de Cassation has a tendency to refuse to apply the notion of *abus de droit* where there are economic, legal, or financial motivations for the transaction. For example, the Court decided that the transformation of an Sarl into an SA followed by a sale of the resulting SA's shares was not an *abus de droit*, despite the reduction of capital duty from 4.8 per cent to a forfeitary amount.

The French administrative tribunals seem to have become more reticent in accepting the assertions of the administration. This has even been taken to the point where the

economic justification for a transaction has been accepted, even though the subsidiary involved was a treasury subsidiary in Luxembourg. Indeed, the application of the 80 per cent penalty has also been refused, the tribunal basing themselves on the fact that a reassessment itself had already been a sufficient penalty.

The general notion of *abus de droit* is a part of the French system designed to ensure equality of treatment in relation to the whole. It therefore provides both a protection to the taxpayer against the administration, and at the same time, a protection of the Revenue against tax evasion and unauthorised avoidance. The necessary question is whether its more specific application in France is to be transcribed as of right into a different legal system where it may have equivalence, but no identity of concept.

Whilst it has been said that the concept itself has no sway in English law, as it is of civilist conception, the fact that the Commission has argued that the concept exists within the policing of Communities' Own resources, has led to an attempt by Customs and Excise to apply the principle out of its legal context in their interpretation of the VAT Directives.

This could ultimately lead to similar attacks by the Inland Revenue in matters of direct taxation, and stamp duty, were the Inland Revenue to decide that these taxes were part of the United Kingdom's contribution to the percentage of Gross National Product to be considered Community resources. This would show that there is a conceptual issue which may not have been fully grasped.

The main objection to the introduction of such a foreign concept is that the legal and regulatory contexts are not the same. The notion of the source of law being a written constitutional social contract between the various actors does not exist within the United Kingdom, as yet. The notion of the Crown, as a conceptual source of law, in a sense delegating the power to legislate to the Queen rather than the Crown in Parliament and its execution to the Executive weighs strongly against the notion of abuse of right in the constitutional sense of the term.

The *abus de droit* procedure in France is itself regulated by such counter remedies as *abus de pouvoir*, or abuse of administrative power, which is not as developed within the British legal system as in France. Secondly, no procedure exists for advance clearance under the present United Kingdom legislation; unlike that under L64B of the *Livre des procédures fiscales*, which presumes automatic clearance if there is no reply after six months.

Were the general approach of the Commission in CAP and CTT questions to be transposed to VAT, the mere fact of using a legal structure or a structure of contracts could lead to the refusal of the benefit of a Community right, whether it be a right of deduction or otherwise.

The ECJ however appears to leave the question of *fraude* and *abus*, to the administration's own legislation, rather than seek to endorse any common notion of *abus de droit* as a principle of Community tax law.

The Sixth VAT Directive

The Sixth Directive 77/388 is a remarkable interface between the concepts of Community law which it contains and the domestic legislation implementing it. As such, and at the risk of generalisation, its structure involves the statement of a principle of taxation within the overall concept of a value added tax, and leaves to the Member States the responsibility of implementation, and collection. VAT is a constituent part of national budgets, designed first and foremost to provide a uniform tax which does not produce the competitive

differences as the cumulative multi-stage sales taxes which it was designed to replace, and then, as a secondary issue, as a source of indirect contribution to the Community budget, at the same level as the percentage contribution of Gross National Product.

It is important here to bear in mind the distinction between direct resources, such as agricultural levies and Common Customs Tariff duties, which are collected directly for the account of the Communities by the Member States' administrations, and the indirect resources calculated as percentages of VAT and Gross National Product, which effectively pass through the budgets of the Member States, and are therefore subject to the domestic rules relating to the collection of taxes. VAT is not *per se* a Community tax, it is a tax which the Member States have introduced on a harmonised basis, taking into account national differences in law and in practice, with a view to bringing order to the economically disparate systems of sales and purchase taxes then in force.

The Sixth Directive therefore lays down principles of taxation, and provides for, what is in principle, a uniform tax base. The amount of effort which has been expended on gradually bringing Member States' internal civil and contractual laws into a position where the tax can be assessed on a uniform basis is both substantial and continual. However, the issue addressed in this paper is not the uniform basis of taxation, but rather whether the Sixth Directive actually requires uniformity of the rules concerning collection of the tax, in the areas of anti-avoidance and evasion, and whether the rules of law relating to directly collected resources, such as agricultural levies and Common Customs Tariffs, which are by definition products of pure Community law, can or should be transferable to VAT, which is by definition collected as a part of the Member States' individual budgets. The author does not believe that this is correct in the absence of further harmonisation dispositions either by directive or by regulation.

The conceptual structure of the Sixth Directive sets down principles of taxation, then provides for derogations in certain defined areas relating to each principle. It does not contain a uniform definition of abuse, or of fraud or of avoidance. In the absence of precision, this is therefore left to the domestic legislation and practice of the Member States concerned. Indeed the drafting of each of these exceptions designed to prevent fraud, evasion, avoidance and abuse leaves these concepts to the laws of the Member States. There is a certain irregularity in the drafting of the Sixth Directive which militates against an assumption that these general terms possess a specific substantial content defined by Community Law (see table below).

In recent cases before United Kingdom VAT tribunals, Customs and Excise have made some reliance on the case of *Emsland-Stärke*,[5] in support of an assertion that *abus de droit* is a general principle of Community law, and can therefore be applied universally in matters of VAT avoidance within the Member States.

What could appear at first sight to have been a final Parthian shot of little consequence by Counsel for Customs & Excise in the case of *Halifax* appears now to have become an issue which they are prepared to argue consistently. It appears that the issues of French and German law were argued energetically, but perhaps not thoroughly before the tribunal and the High Court. A preliminary ruling from the ECJ is awaited which hopefully will resolve the question of whether there is a general concept of *abus de droit*, or abuse of rights in Community law, and secondly, whether the terms of the Sixth Directive actually import such a principle directly into the laws of all Member States in matters of Value Added Tax, irrespective of whether it actually exists as a domestic concept in the state concerned.

[5] Case C–110/99 [2000] E.C.R. I–1569.

The notion of *abus de droit* has a specific substantive content and meaning in civil law jurisdictions. Before attempting an analysis of these cases, and of the preliminary rulings requested from the ECJ, it would be best to summarise certain aspects of the Communities' budgetary resources to define the scope of this debate.

This paper is written in full awareness of the Chancellor of the Exchequer's recent speech in which he made the assertion that he would be clamping down on fraud and abuse in VAT matters, doubtless referring to the acquisition of the notion of abuse of rights as part of the administration's armoury. The question is, does he actually have the legal powers which he claims, and if he does, what measure of protection is available to the taxpayer to counterbalance these? Let us bear in mind that in written constitutional practice abuse of right is necessarily counterbalanced by a doctrine of abuse of administrative power, which is comparatively undeveloped within the British legal system, as it has not been needed to the same extent.

The structure of VAT is set out in the Sixth Directive, and it is here that the balance of powers and administrative tensions between the Communities, the Community legal order, the Member States, and their respective legal and administrative structures are allocated and defined. The Directive is finely balanced to define the principles of VAT, to render them uniform on a Community basis, whilst recognising the application of the divergent systems of law and administrative practice and remedies throughout what is now the European Union. These latter necessarily affect the manner in which VAT is collected as between the various actors concerned, the supplier and the purchaser and the administration collecting the tax. In the absence of uniform laws of constitutional, administrative, contract, property, civil or other categories of law in the Communities, this is a state of fact.

VAT was the solution to the question of the harmonisation of the widely divergent sales taxes in force within the Member States who formed the European Economic Community. It is a French device, which has been adapted to be of more general application within very different legal, civil and commercial environments.

Customs and Excise have asserted that a general principle of *abus de droit* exists within the Community legal order, and more specifically in matters of the protection of the Community's budgetary resources. It goes without saying, that, if it is indeed a concept of Community Law, then it is Community law which defines its content and its scope.

The question then arises if and to what extent the collection of VAT falls within the ambit of measures protected solely by principles of Community law, as Community own resources, rather than resources collected indirectly as part of a Member States' domestic budget, of which a proportion is paid to the Community budget after collection, as part of a Member State's contribution to the EU budget, and of which the collection and protection is governed by national law.

A further question arises as to whether the Sixth Directive implies that Community principles of law relating to the collection and safeguard of its own resources apply to indirect resources such as VAT, or whether it leaves these to national legal safeguards, and the domestic budgetary protection measures in force in each Member State. In the domestic laws within the United Kingdom, the notion of *abus de droit* does not exist as such, and indeed cannot, as, by definition, it can only exist within a written constitutional structure, such as the French Code, or within a situation which is conceived and defined in a similar manner, such as the European Treaties and subordinate legislation. Its corollary, the abuse of administrative powers does not exist as such within the United Kingdom.

The issue is therefore not a question of fiscal anti-avoidance or evasion within an individual Member state's legislation and law, but rather whether the measures of protection taken by the Communities' Institutions to protect their own resources can be used by Members State's administrations as a further tool in the domestic fiscal anti-avoidance field.

In the real world, the differences in law and practice between Member States render the application of such principles outside their own context fraught with difficulty. The Sixth Directive is not a constitutional document, as it leaves discretion to the Member States as to how it is to be implemented to bring about a defined result. A regulation is.

There appears to be nothing in the Preamble to the Sixth Directive to indicate that it requires more than a uniform collection of tax under general principles of community law. It does not define the administrative measures pertaining to collection, which have been left to the Member States' domestic legislation.

The distinction within the notion of Community own resources, between those collected directly for the account of the Communities, and Member State's contributions to the Community budget

The main point is that the case of *Emsland-Stärke* concerned a customs duty matter, not a VAT matter. The difference is that customs duty matters are by definition Community own resources, collected directly for the account of the Communities, and VAT is not.

The Communities' own resources have been "acquired" by a Council Decision 70/234, and include the Common Agricultural policy levies collected directly for the account of the Communities, and a percentage of the VAT collected by, not by or for the account of the Communities, but indirectly by and the GNP of, the Member States as part of their own budgets.

The most recent Council decision on the matter, of September 29, 2000[6] is of little assistance in determining whether the Revenues referred to constitute own resources directly collected for the account of the Communities, or own resources which are contributions from the budgets of Member States, the collection and payment of which are the Member State's respective responsibilities. The distinction is nonetheless there, and is to be found in Article 2 1. 2.1. (a) CAP levies and (b) Common Customs Tariff duties are clearly the former, and the other two, which consist in rates applicable to (c) VAT receipts and (d) GNP are clearly the latter.

The distinction between "own resources collected directly for the account of the Communities" and those which are not was described in the following extract from the Special Report No.9/98 concerning the protection of the financial interests of the European Union in the field of VAT on intra-Community trade together with the Commission's replies (Submitted pursuant to Article 188c(4)(2) of the EC Treaty)[7]:

> "2.2. On July 26, 1995, because of various shortcomings and incompatibilities that were detrimental to the repression of fraud and to legal co-operation in criminal matters, the Member States subscribed to a Convention on the protection of the financial interests of the European Communities (18). The intention of this Convention was to create minimum criminal standards, starting with a single

[6] [2000] O.J. L253/42 (2000/597/EC, Euratom).
[7] [1998] O.J. C356/1.

definition of fraud for both Community expenditure and revenue. In respect of revenue, it defined fraud as 'any intentional act or omission relating to:

— the use or presentation of false, inaccurate or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of the European Communities,
— non-disclosure of information in violation of a specific obligation, with the same effect,
— misapplication of a legally obtained benefit, with the same effect'.

2.3. However, according to the explanatory report on the Convention adopted by the Council, VAT was excluded from its scope because it was not 'an own resource collected directly for the account of the Communities' (19). Accordingly, unlike other Community fields, provision was not made for ensuring an identical level of protection in all the Member States, despite the fact that it accounts for almost half the Communities' budgetary resources (20)."

This is the nub of the issue, as VAT is not an own resource collected directly for the account of the Communities, it is not subject to the anti-avoidance and abuse provisions laid down under Community Law for the protection of its own resources. It remains subject to the legislation and practice of the Member States, and therefore not subject to an identical level of protection. The Explanatory Report is a legally binding document. The question is whether the ECJ will take an initiative and impose an extension of European Law beyond the current scope of its implementing provisions.

In other words, VAT is admitted by the Commission and in effect by the Council, therefore by the United Kingdom, to have been excluded from the scope of the Regulation relied on by the Commission in Customs Duty recovery, as it is not "an own resource collected directly for the account of the Communities". This effectively confirms that any principle of abuse of rights in Community Law may only be invoked in relation to the Communities own resources in the form of CAP levies and CCT duties, not to indirect budgetary resources such as a proportion of national VAT.

The position is therefore clear. Its consequence is that Community measures of protection can apply to the collection of resources collected directly for the account of the Communities. It does not imply that they may be extended beyond this, outside the scope of the Community Law budgetary protection provisions. This would be fatal to Customs and Excise's argument.

However, do any general principles of law extend beyond this position? Is the distinction laid down in the Sixth Directive between matters of national competence and matters of Community principles becoming blurred? Or is it that the notion of uniform interpretation is now being extended to encompass the creation of a uniform procedural concept beyond the strict limits of the Sixth Directive?

The Budgetary structure of the Treaties and the Sixth Directive

The Budgetary structure of the Treaties has been to leave fiscal matters within the sole competence of Member States, subject to measures attempting to ensure an overall even application, whilst leaving Community Budgetary Resources within the ambit of the Community Institutions' control and supervision.

Emsland-Stärke[8]

Emsland-Stärke concerned an "own resources" matter, in the sense that the duty collected, and the refund concerned, were collected directly for the account of the Communities and paid out by them. The reference was made under the then Article 177 (now Article 234 EC) by the Bundesfinanzhof. In effect, the question related to the interpretation of the common detailed rules for application of the system of export refunds on agricultural products. It was not a VAT matter.

The refund procedure was uniformly laid down in a Regulation, not in a Directive, and applicable in certain specific cases defined by EC customs procedural formality. There is no doubt in anyone's mind that the Community Institutions and procedures were in play. It is sensible that certain overall concepts apply in such an area to ensure an overall equal treatment throughout the Community in such matters, and a uniform interpretation of Community regulations.

In effect, a German undertaking sold goods to a Swiss undertaking which in turn sold them on to an Italian undertaking, under an external Community transit procedure. The Export Refund had been given on the basis that the goods left the Community, which they had done. Had the matter remained there, there would have been no further issue. The problem picked up by German Customs was that the goods were immediately shipped out to Italy, by the same means of transport, and were not placed on the Swiss internal market. There was a further issue raised as to the connections between certain of the parties involved.

My first point is that the Commission intervened in this reference to the ECJ specifically to protect the Communities' own resources. The Commission proposed that the provision in question, Article 10 of Regulation 2730/79 did not constitute a sufficient basis for requiring the repayment of the export refunds granted. Notwithstanding this, it considered that, in the light of the circumstances of the case in the main proceedings, the aspect of the matter had to be examined in the light of a principle of abuse of rights. The Commission noted that the court had refrained in previous cases from setting down such a principle. It should be noted immediately that the ECJ in its judgment referred to "abusive practices" rather than upholding the Commission's proposal that a generic principle of abuse of rights could be invoked. It therefore avoided laying down a general principle of abuse of rights, and concentrated on the facts.

Here the issue becomes more fundamental than those of mere fiscal anti-avoidance or sham. The Commission cited Article 4(3) of Council Regulation No.2988/95, on the protection of the Communities' Financial Interests, which was not applicable at the material time.

> "Administrative measures and penalties
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> Article 4
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> 1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:
>
> — by an obligation to pay or repay the amounts due or wrongly received,
>
> — by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.
>
> 2. Application of the measures referred to in para.1 shall be limited to the withdrawal

[8] *supra*.

> of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.
> 3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.
> 4. The measures provided for in this Article shall not be regarded as penalties."

According to this Article:

> "acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community Law applicable in the case, by artificially creating the conditions required for obtaining that advantage shall result, as the case may be either in failure to obtain the advantage, or in its withdrawal".

Out of context, this superficially would appear to support Customs and Excise's position. But like all legal situations in Community and civil law contexts, the principle has to be viewed in the context in which it is applicable, and it was being applied in a situation where the Communities and the Member States are required to use Community principles of law to defend what was a direct Community budgetary resource, defined by Regulation and collected under Community principles. The paragraph is manifestly inapplicable to Community resources which are not directly collected for their account.

Article 1 of the Regulation confirms this:

> "1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.
> 2. 'Irregularity' shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure."

VAT is not a direct budgetary resource, and this Regulation is certainly not applicable to VAT.

The Commission then considered that the paragraph 4(3) cited above simply expresses a general principle of law already in force in the Community legal order. It is clear that this comment has been taken up by Customs & Excise who consider that it may be imported into VAT matters without further ado.

Paragraph 38 of the judgment which recalls one of the arguments presented to the ECJ, is quite explicit:

> "It [the Commission] points out that this general legal principle of abuse of rights exists in almost all the Member States and has already been applied in the case-law of the Court of Justice, although the Court has not expressly recognised it as a general principle of Community Law."

The Commission omitted to point out specifically that the concept certainly does not exist in the United Kingdom or in Ireland, where the civil law coupled with the structure of a written Constitution do not exist. What is more, the Commission was attempting to

formulate a concept of Community law within the context of a regulation. It is settled that the law of the Communities reposes on generally accepted principles of law in the Member States.

Does the reverse apply, that in analysing the content of domestic fiscal legislation, further concepts of a foreign nature can be introduced, even where these are unknown in the Member state concerned? It is here that the analysis becomes incoherent, as it depends on an *a priori*, namely that the basis of collection of the tax and the suppression of generically abusive practices is a matter of Community law.

Two issues therefore arise: in which specific areas has the ECJ actually applied the concept of *abus de droit*, and to what extent can this notion be imported into the legislation of states which do not have this general legal principle.

In my view, the issues of "own resources" aside, the existence of a written Constitution prescribing the relationship between the individual and the State is a *sine qua non* for any justification of the concept of *abus de droit* to exist in a purely domestic context. The right to claim a deduction falls more within the domestic context, not within that of the Communities' Budget.

In its argument, the Commission then cited the following cases in support of its contention

Judgment	Case 125/76	*Cremer v BALM*	[1977] E.C.R. 1593
Judgment	Case 250/80	*Töpfer and others*	[1981] E.C.R. 2465
Judgment	Case C–8/92	*General Milk Products*	[1993] E.C.R. I–799
Opinion	Case C–441/93	*Pafitis et al v Trapeza Kentrikis Ellados*	[1996] E.C.R. 1–1347

It then set out the following contentions of what would comprise an *abus de droit* or abuse of right, which it surmised from these judgments, in the form of three elements:

> 1. "An objective element; that is to say that the conditions for the grant of the benefit were created artificially, that is to say, that a commercial operation was not carried out for an economic purposes, *but solely to obtain from the Community budget the financial aid which accompanies that operation.*[8a] This required analysis, on a case by case basis, both of the meaning and the purpose of the Community rules at issue and of the conduct of a prudent trader who manages his affairs in accordance with the applicable rules of law and with current commercial and economic practices in the sector in question";
> 2. "A subjective element, namely the fact that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the Community rules"; and
> 3. "A procedural law element relating to the burden of proof".

The court appeared to follow the arguments, without expressly stating that it was, and in §52–54 of its judgment laid down the following principles:
The first principle was:

> "A finding of abuse requires, first a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved";

[8a] Emphasis added.

The second principle was:

> "an intention to obtain an advantage from the Community rules by creating artificially the conditions for obtaining it."

However closer reading shows that the court did not fully share the Commission's analysis.

The court laid down a general concept of abuse, and a principle that despite the formal observance of the Community conditions, the purpose of the rules concerned was not achieved. In other words, in order to support the notion of abuse, the executive have to show that the purpose has not been achieved. In relation to the right to deduct, for example, this distinction is important, and the court has consistently defended the purpose of Community provisions as being paramount in cases where the individual or enterprise has not entirely clean hands.[9] At this level, the notion of sole intent to obtain the financial aid was not taken as relevant.

Intention was taken in the second arm, in two ways: first to obtain the advantage and secondly by artificially creating the conditions for obtaining it.

In *Brennet*'s second case,[10] the first being simply on the interpretation of Article 18 of regulation No.1408/71, the issue of *abus* was again dealt with in relation to the objectives and aims of the Community right or obligation. Here the ECJ reiterated the principle that although national courts may take account of objective evidence of abusive or fraudulent behaviour in order where appropriate to deny the *employee* benefit of the provisions of Community law on which he seeks to rely, they must nonetheless assess such conduct in the light of the objectives pursued by these provisions. This case is important for a thorough grasp of the policy behind the ECJ's jurisprudence and interpretation, as it actually limits the scope of the powers of the administration or, in this case the employer to allege *abus* and to justify the withdrawal of a right given by Community Law as a consequence. The requirement of providing proof by an employee of illness in another jurisdiction was too onerous and disproportionate, and would hamper the exercise of the Community right concerned.

In other words, in tax matters, the Sixth Directive and other community law provisions still have to be viewed in the light of their objectives. The question of whether the provision itself is being abused is therefore a matter of community law, and not merely national law. This is of particular interest in cross-border situations, although it also has significant implications for purely domestic transactions.

First, resources or benefit are not being directly drawn from the Community Budget in VAT matters. *Emslande-Stärke* concerned a duty refund application, not a domestic tax deduction. It would be easy to dismiss the application of this enunciation to VAT matters, given the wording of the first paragraph which requires the demanding and the granting of a Community Benefit, in the form of a refund, rather than that of a Community VAT right to deduction, which is an integral part of the VAT system, and the right to which the Court has consistently upheld.

In a VAT matter, there is no obtaining of direct financial aid from the Communities budget, therefore the notion of *abus*, even if it can be stretched to include *abus de droit* is of no application, unless it exists in the Member State's domestic anti-avoidance provisions,

[9] *Brennet v Paletta* (Case C–206/94) at 2391.
[10] *ibid.*

or, failing that, as a general concept of Community law of overall application to ensure uniformity.

This position is supported by the extract from the Special Report No.9/98 mentioned above.[11] The report dealt with the definition of fraud in relation to Community expenditure and revenue. In respect of revenue, it defined fraud as "any intentional act or omission relating to:

> '— the use or presentation of false, inaccurate or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of the European Communities,
> — non-disclosure of information in violation of a specific obligation, with the same effect,
> — misapplication of a legally obtained benefit, with the same effect'."

However, according to the explanatory report on the Convention adopted by the Council, VAT was excluded from its scope because it was not "an own resource collected directly for the account of the Communities". In other words, it is the Member State's legislation which is responsible for the protection of the Member State's resources, from which a contribution is made. Had it been otherwise, the Sixth Directive would be in the form of a directly applicable regulation, subject therefore to the Community own resources protection, and not a Directive.

Accordingly, unlike other Community fields, provision was not made for ensuring an identical level of protection in all the Member States at a Community level, despite the fact that it accounts for almost half the Communities' budgetary resources.

In other words, VAT is admitted by the European Commission and in effect by the Council, therefore by the United Kingdom, to have been excluded from the scope of the Regulation relied on by the Commission as it is not "an own resource collected directly for the account of the Communities". This effectively confirms that any Community abuse of rights principle may only be invoked in relation to Community own resources, not automatically in VAT matters which remain within the questions.

Does the requirement of uniform application of VAT require that the notion of *abus de droit* be implicit?

The answer lies in the structure of the Sixth Directive itself, seen within the overall context of the Community Budget.

The common system of Value Added Tax was put in place by Member States under an obligation imposed by Article 1 of the First Council Directive 67/227. This Approximation Directive was introduced under what then were Articles 99 and 100 of the Rome Treaty, and in particular Article 100 concerning the Approximation of Laws. Bearing in mind the term "approximation", which certainly does not imply identical similarity, it may be worth reminding ourselves of their terms:

Article 99 as amended:

> "The Council shall, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, adopt provisions for the harmonisation of

[11] [1998] O.J. C356/1.

> legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 8a"

Article 100:

> "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative practice in Member States as directly affect the establishment and functioning of the common market."

There is therefore no Treaty provision which could justify the extension of these provisions to import notions of Community Law as to collection directly into the areas concerned. This may however have been obtained by the Council Decision of April 21, 1970[12] referred to in the sixth paragraph of the Preamble to the Sixth Directive "…. *whereas those resources are to include those accruing from value added tax and obtained by applying a common rate of tax on a basis of assessment determined in a uniform manner according to Community rules*". The term used is "basis of assessment", which is not identical to measures of collection. The remainder of the preamble's provisions do not infer any overall indications as to collection, saving the requirement of a uniform application of the tax.

The only paragraphs in the Preamble which could be taken to apply to taxpayers' obligations do not directly address the questions of fraud or abuse as uniform concepts, indeed paragraph 17 is drafted on the basis that the measures against these are the prerogative of the Member States:

> "[14] Whereas the obligations of taxpayers must be harmonised as far as possible so as to ensure the necessary safeguards for the collection of taxes in a uniform manner in all the Member States; whereas taxpayers should, in particular, make a periodic aggregate return of their transactions, relating to both inputs and outputs where this appears necessary for establishing and monitoring the basis of assessment of own resources;
> […]
> [16] Whereas the uniform application of the provisions of this directive should be ensured; whereas to this end a Community procedure for consultation should be laid down; whereas the setting up of a Value Added Tax Committee would enable the Member States and the Commission to co-operate closely;
> [17] Whereas Member States should be able, within certain limits and subject to certain conditions, to take or retain special measures derogating from this directive in order to simplify the levying of tax or to avoid fraud or tax avoidance".

What is also noticeable is that nowhere in the Sixth Directive is any mention made of the notion of abuse of rights, or *abus de droit*. The following table sets out the references to the terms evasion, avoidance, abuse and fraud in the Sixth Directive, in both French and English. Had the French term *abus de droit* have been employed, it would surely have been so here.

[12] [1970] O.J. L94/19.

Text	Article	Scope	Term employed
Sixth VAT Directive	13A and B	Exemptions: Services	. . . *prévenir toute fraude, évasion et abus éventuels* / preventing any possible evasion, avoidance or abuse
	14	Exemptions Importation	*ibid.*
	15	Exemptions Exportation	*ibid.*
	22.8	Taxpayer's Obligations	. . . *assurer l'exacte perception . . . et prévenir la fraude* / ensure correct collection of the tax and for the prevention of evasion
	27.1	Derogations	. . . *d'éviter certaines fraudes ou évasions fiscales* / to prevent certain types of tax evasion or avoidance
	28.C.A	Intra Community supplies	. . . *prévenir toute fraude, évasion et abus éventuels* / preventing any evasion, avoidance or abuse
	22.8 *28 C. A & B in French version*	Taxpayer's obligations on supplies within the internal market	. . . *assurer l'exacte perception . . . et pour éviter la fraude* / correct collection of the tax and for the prevention of evasion
	28.K.5	Duty Free	. . . *prévenir toute fraude, évasion et abus éventuels* / prevent any evasion, avoidance or abuse

The linguistic and semantic drift between concepts in English and in French is sufficient to render any reliance on these to justify the inclusion of *abus de droit* on the basis of the Directive alone ill-placed. However, the content of each of the terms employed is generic, and it would appear possible that the ECJ could adopt a similar practical approach to its exposition of the terms as it did in *Emslande-Stärke*[13] by resting within the context of a generic term of abusive practices, which defines the mischief in terms of its effect not by way of concept.

In addition, the structure of the Directive clearly leaves the questions of what constitutes *fraude, évasion et abus*, or evasion, avoidance and abuse to the law of the Member State concerned. It is trite comparative law that there is no identity of concept between evasion or avoidance in the English sense of the terms and *fraude* or *évasion* in the French sense of the terms, even though these terms are employed as if they had similar legal content.

The question is one which will doubtless be settled by the ECJ in the preliminary rulings procedures which have been addressed to it.

The Sixth Directive contains no strictures or guidance for a national administration in this matter because the assumption made in the drafting of the Directive was that the national budgetary safeguards, albeit doubtless different in form and in effect, were the best suited to deal with fraud, evasion, sham, abuse and avoidance in the collection of the tax, and that the directive's objective was to create a uniform basis of assessment, not a uniform anti-avoidance system which could not, by definition, be of uniform application throughout the divergent legal systems within the European Union, as it now is and as it is likely to be extended in the future.

[13] *supra*.

The references joined by the High Court to the ECJ on the issue

The actual cases on which references have been made may require the resolution of the European point. The cases involved were: *Halifax Plc v Commissioners of Customs and Excise* on March 1, 2001 (2001) VAT decision 17124; and *BUPA Hospitals Limited and Goldsborough Developments Limited v Commissioners of Customs and Excise* London VAT Tribunal February 25, 2002.

Halifax

One could be forgiven for thinking that the *abus de droit* argument put forward by Counsel for Customs and Excise in *Halifax* was a last Parthian shot following on the issues of sham and whether or not the supplies in question could actually be considered supplies if their sole objective was to obtain a right to deduction of VAT where, under Customs' analysis, there would otherwise have been none. It appears that Customs devoted a significant part of their argument to a comparison with French and German law in the area of *abus de droit*.

The issues ventilated above in this article were not raised by Stephen Oliver Q.C. in his decision in *Halifax*, he hardly devoted one paragraph to it, and, in the author's opinion rightly so. It appears that Customs cited *Emsland-Stärke* without drawing his attention to the issue underlying their assertions, which would indicate a certain lack of fundamental analysis on their part.

The call centre in question in *Halifax* actually exists. There was therefore a commercial reason underlying the structure, and the sole issue is really whether the interpositioning of two non-exempt companies to obtain a deduction was legitimate or not. The Tribunal effectively decided that the construction supply was for the Halifax and for neither of these companies, and therefore by implication rewrote the contracts.

After being effectively overturned by the High Court, which directed a remission to the Tribunal for reconsideration, the Tribunal directed that the following questions be referred to the ECJ:

> "1 (a) In the relevant circumstances, do transactions (i) effected by each participator with the intention solely of obtaining a tax advantage, and (ii) which have no independent business purpose, qualify for VAT purposes as supplies made by or to the participators (the Appellants) in the course of their economic activities?
> (b) In the relevant circumstances, what factors should be considered in determining the identities of recipients of the supplies made by the arm's length builders?
> 2 Does the notion of abuse of rights as developed by the Court operate to disallow the appellants their claims for recovery or relief of input tax arising from implementation of the relevant transactions?"

What is curious is that, were the issue to have been heard in France, the administration would have had other remedies available to it, which it probably would have been able to sustain; that is a fictive transaction, rather than *abus de droit*. There was no allegation of pretence in either *BUPA* or *Halifax* which was germane to the allegation of abuse.

The question is will the ECJ actually now be brought to define whether the notion of

abusive practices can be applied to VAT issues, rather than being restricted to CAP levies and Common Customs Tariffs?

BUPA

In the *BUPA* case, the High Court ordered a stay of proceedings and that the ECJ be requested to join the references relating to *BUPA* and *Halifax*.

The High Court asked in its third question:

> "a) Is there a principle of abuse of rights and/or abuse of the law which (independently of the interpretation given to the Directive) is capable of precluding the right to deduct input tax?
> b) If so, in what circumstances would it apply?
> c) [. . .]".

In the decision itself, the Tribunal had accepted that there is a general principle in Community Law of abuse of rights, which had developed in three particular situations:

(1) the abusive use of Community Law to circumvent national law;
(2) the abusive use of Community Law to gain a financial advantage from Community funds, the Tribunal specifically mentioned *Emsland-Stärke*; and
(3) where Community Law has been used in a manner alleged to be contrary to a national abuse of rights provision.

The Tribunal dismissed the Commissioners contention that a doctrine of abuse of rights denied the appellant's right to deduct input tax. It stated that (1) and (3) did not apply. However, in excluding (2), it relied on the distinction between a regulation and a directive, stating that both *Emsland-Stärke* and the *General Milks Case* involved a regulation, and not a directive, and stating at §129 that the distinction lay in the fact that a

> "Regulation, unlike a Directive, was the source of the rights and obligations of persons affected by it. By contrast, a Directive is not the source of the individual's rights and obligations. That will be the domestic law. If the domestic law fails to carry out the terms of the directive, then and only then will the individual have an enforceable community right."

This position is open to criticism, and the author would refer the reader to an article by Paul Farmer[14] where the matter is ably discussed.

The Tribunal excluded point 2, but said that, were it to be wrong, it would address the issues of abuse as defined by the ECJ at § 52 and 53 of its judgment in *Emslande-Stärke*.

The first principle, as indicated above, was: *"A finding of abuse requires, first a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved"*. The Tribunal found that the arrangements had been entered into with a view to frustrating the abolition of zero-rating by the United Kingdom, and further that the abuse also went to the rules relating to times of supply in order to gain an advantage over competitors entering the market after the abolition of zero-rating came into force.

The second principle was: *"an intention to obtain an advantage from the Community rules by creating artificially the conditions for obtaining it."*

[14] *Tax Journal* May 27, 2002 p.15.

However, the Tribunal made the assumption at § 136, in the author's view incorrectly, that the notion of Community rules as used by the ECJ in its judgment could include "the VAT system as presented by the Sixth Directive." There is no doubt that the phrase "Community rules" could include the provisions of the Sixth Directive. Now the French text of the judgment refers to the "réglementation communautaire", which itself implies regulations, and not necessarily a more general corpus of law stemming from such an instrument as the Sixth Directive. The Tribunal may therefore have overextended itself, by not reviewing the economics and the regulations underlying the judgment in *Emslande-Stärke*, and assuming that the answer lay in an abstract analysis rather than a practical one, based on both the Commission's and the Council's position on VAT, and its deliberately unprotected position within the framework of the "own resources" of the Community.

The Tribunal concluded that "the conditions set out by the Court in *Emslande-Stärke* were satisfied, but also that the situation was not one to which the abuse of rights doctrine could apply." However, this latter conclusion was based on a distinction as to which right was being claimed, the right to deduct under s.26 of the Value Added Tax Act 1994, or the Community right to deduct under Article 17 of the Sixth Directive.

The appellants had argued that as they were relying merely on the right under section 26 of the Value Added Tax Act 1994, the Community rules could not be applicable. In other words, there was no reliance made on any enforceable Community right under the Sixth Directive, and therefore Community law principles were not engaged. Assuming now that the appellants had brought Article 17 into play, there would then have been reliance on a Community right. Once again, the situation would have to be addressed in the light of what was in issue in *Emslande-Stärke*.

First, other than the assertions of the Commission, there is no ground to suppose that the ECJ was supporting the notion of *abus de droit*. Whilst to a large extent following the Commission's definition of *abus de droit* in §52–54 of its judgment, it specifically employed the two notion, that of objective and subjective, in dealing with a definition of abusive practices, not *abus de droit*. It specifically left the third question of proof and procedure to the national jurisdiction.

It would be mere speculation to comment on whether the fact that the court followed the Commission's substantive definitions could be construed as having underwritten them as a concept of *abus de droit*.

There is no mention of the concept of *abus de droit*, or abuse of right, as a community concept in the *Emslande-Stärke* judgment. The ECJ refers uniquely to abuse, abusive practices and to the Regulation and national procedures, and therefore does not support Custom's and Excise's argument as to *abus de droit* constituting a general notion of law.

Let us bear in mind, as did the Tribunal in the *BUPA* case, that the ECJ has found in *Metropol Treuhand* at para.42 that:

> "according to the fundamental principle which underlines the VAT system which follows from Article 2 of the First and Sixth Directives, VAT applies to each transaction by way of production or distribution after deduction has been made of the VAT which has been levied directly on transactions relating to inputs. It is settled case-law that the right of deduction provided for in Article 17 *et seq.* of the Sixth

> directive is an integral part of the VAT scheme and in principle may not be limited. That right must be exercised immediately in respect of all of the taxes charged on input transactions. Any limitation on the right to deduct VAT affects the level of the tax burden and must be applied in a similar manner in all Member States."

In other words, the right to deduction is not a matter that can be limited in principle by the Member States, whether by law or by procedure, otherwise than to the extent permitted by the Sixth Directive. The Tribunal found that the abuse was to attempt to circumvent the abolition of zero-rating on medical supplies, making these an exempt supply as prescribed by the Sixth Directive, and from this perspective there was no doubt that the procedure adopted was intended to enable deductions of input tax by virtue of the rules of date of supply.

Whilst the Commission is more directly implicated in the defence of the Communities' own resources, it is clear that the reference it made in *Emslande-Stärke* to Council Regulation (EC Euratom) No.2988/95[15] does not concern VAT matters, but those of CAP, Customs duty and excise questions within other schemes, which are themselves governed by regulations, not directives.

The ECJ in its judgment in *Emslande-Stärke* did not recognise the concept of *abus de droit* or abuse of right as a general principle of Community Law. It in fact forbore from following the Commission's argument, maintaining the position that it has always taken of analysing the actions of the parties concerned, and determining whether these were abusive or not rather than applying a general principle of abuse. This method of analysis is pertinent to Common Customs Tariff matters, and agricultural levies, which have a regulation as their legal basis.

The conclusion is that there is a very clear and fundamental distinction between the structure of VAT, as being collected by the Members States on an indirect basis, and the other Community resources, referred to as "own resources". This is born out in the different procedural and legal treatment given to each type of issue. VAT avoidance is left to the legislation of Member States as an admitted exception. "Own resources" evasion and abuse is dealt with under Community principles, as these questions are in effect regulated by directly applicable regulation, and not indirect Community legislation such as directives.

These cases do not settle the questions of whether *abus de droit* remains a concept of national law prevalent in several Member States; whether it can be considered to be of more general application as a general principle of national law, and therefore subsumed in the Community legal order, foreign as it is to British and Irish domestic law and practice; or whether it is actually a general principle of Community law which could be termed abuse of right in the sense employed by Customs. The concept of *abus de droit* may indeed have application in areas of "own resources" collected directly on account of the Community, but the ECJ did not actually state this, preferring to retain the term abuse.

The aim of this article is to show that procedural initiatives taken under Customs Refund procedures under EU regulations are not automatically transposable to the matters of deductibility of VAT under the Sixth Directive. The Sixth Directive does not consider the manner in which Customs & Excise should determine whether a transaction, or a series of transactions, are artificial. This is a question for each Member state's internal law, and will remain so until approximation or harmonisation of commercial and civil law

[15] [1995] O.J. L312/1.

and practices becomes sufficiently close to enable the matter to be settled by a further directive, or, as in the case of jurisdiction and recognition and enforcement of judicial decisions in civil and commercial matters, a regulation.

However, little thought has been given to general questions of whether the notion *of abus de droit* can exist outside a written codified constitutional framework, such as the French system, and even if it can whether its counterbalancing principle of *abus de pouvoir* should not therefore be imported. The notion of *abus de droit* could exist within the Community legal order, and in particular within the scope of a regulation, and within collection of CAP levies and CCT duties, as it is a matter of pure Community law. Where the difficulty arises is whether it is possible to transpose it through the Sixth Directive, without taking into account the distinction between the two budgetary categories: those collected directly for the account of the communities, and those which are contributions from the Member States budgets themselves. Fundamentally, VAT avoidance and collection is a matter of national budgetary and national collection and avoidance legislation.

The Chancellor's November Budget Statement on the treatment of certain types of VAT operations may need reading in this light. There is no doubt that the transactions criticised as being devoid of commercial content in *BUPA* and *Halifax* would certainly appear artificial and contrived to foreign lawyers less familiar with British tax planning structures. Indeed the thinly disguised contempt shown by French tax lawyers for certain of the more artificial schemes proposed by certain English accountants goes some way to supporting Customs and Excise's effective extension of its weaponry beyond that of sham. However this does not of itself enable the concept of *abus de droit* to be introduced into British law, otherwise than in matters relating to CAP levies and CCT duties, even assuming that the ECJ can be considered to have endorsed it. The ECJ will address these issues referred by the Tribunal and joined by the High Court later in the year.