

The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law

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Abstract: The principle of prohibition of abuse of rights aims to correct the application of a rule of law on the basis of standards such as good faith, fairness, and justice if, despite formal observance of the conditions of the rule, the objective of that rule has not been achieved. This principle amounts to a general principle of Union law. First, a common concept of abuse of rights exists in the legal traditions of the Member States. Second, the European Court of Justice (ECJ) has gradually built a Union concept of abuse of rights (*Emsland-Stärke*, *Halifax*, *Kofoed*). However, the general principle of prohibition of abuse of rights is not expressly incorporated into the codification projects on European contract law. This principle constitutes a specific application of the general duty of good faith and fair dealing in its limitative function. In principle, this approach is valid, more specifically from the perspective of the Civil Law traditions where the prohibition of abuse of rights is likewise considered as one of the applications of the more general and autonomous limitative function of good faith (e.g., Germany and the Netherlands). However, an express incorporation of the principle of prohibition of abuse of rights would be advisable from the perspective of the Civil Law traditions where the limitative function of good faith is not autonomous but exclusively linked to the general principle prohibiting the abuse of rights (e.g., Belgium and France). Such an incorporation would be in line with the recognition of a general principle of Union law prohibiting the abuse of rights.

Résumé : Le principe de l'interdiction de l'abus de droit vise à corriger l'application formelle d'une règle de droit sur la base des principes de bonne foi, d'équité et de justice, dans la mesure où l'objectif de cette règle n'a pas été respecté. Ce principe constitue un principe général de droit de l'Union européenne. D'abord, il existe une notion commune de l'abus de droit dans les traditions juridiques des Etats Membres. En plus, la Cour de Justice de l'Union européenne a progressivement développé une notion propre de l'abus de droit (*Emsland-Stärke*, *Halifax*, *Kofoed*). Toutefois, le principe général interdisant d'abuser de ses droits n'a pas été expressément intégré dans les projets de codification du droit européen des contrats. Ce principe est considéré comme une application spécifique de la fonction limitative du devoir de bonne foi. En principe, cette approche est valable, spécifiquement du point de vue des traditions nationales, où l'interdiction de l'abus de droit constitue également une des applications de la fonction limitative de la bonne foi, qui joue un rôle autonome (e.a. Allemagne, Pays-Bas). En revanche, une intégration du principe de l'interdiction de l'abus de droit dans les projets de codification serait recommandable du point de vue des traditions nationales, où l'autonomie de la fonction limitative de la bonne foi a été condamnée et où cette fonction est soumise aux critères d'application et sanctions propres à l'abus de droit (e.a. Belgique, France). Une pareille intégration dans les projets de codification serait en

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ligne avec la reconnaissance d'un principe général interdisant l'abus de droit au niveau de l'Union européenne.

Zusammenfassung: Beim Rechtsmissbrauchsverbot geht es darum, eine Rechtsanwendung unter Rückgriff auf Maßstäbe wie Treu und Glauben oder Gerechtigkeit zu korrigieren, wenn diese Anwendung, trotz formaler Einhaltung der rechtlichen Bedingungen, das Ziel einer Regelung verfehlt. Das Verbot des Rechtsmissbrauchs ist ein allgemeiner Rechtsgrundsatz der Europäischen Union. Erstens besteht ein gemeinsamer Begriff des Rechtsmissbrauchs in den rechtlichen Traditionen der Mitgliedstaaten. Daneben hat der Europäische Gerichtshof einen eigenständigen Begriff des Rechtsmissbrauchs auf europäischer Ebene (*Emsland-Stärke*, *Halifax*, *Kofoed*) herausgearbeitet. Das Rechtsmissbrauchsverbot nimmt in den Kodifikationsprojekten des europäischen Vertragsrechts jedoch keine eigenständige Stellung ein, sondern wird als Sonderfall der Schrankenfunktion der Verpflichtung des Treu und Glauben betrachtet. Diese Vorgehensweise ist grundsätzlich zulässig, vor allem aus der Perspektive der nationalen Rechtssysteme, in denen das Rechtsmissbrauchsverbot ebenfalls als Anwendungsfall der generellen und autonomen Schrankenfunktion von Treu und Glauben gilt (u.a. Deutschland, die Niederlande). Eine ausdrückliche Aufnahme des Rechtsmissbrauchsverbots in die Kodifikationsprojekte wäre allerdings aus der Perspektive der nationalen Rechtssysteme wünschenswert, in denen die Schrankenfunktion von Treu und Glauben keine Eigenständigkeit erworben hat, sondern ausschließlich an die Anwendungskriterien und Sanktionen des Rechtsmissbrauchs geknüpft wird (u.a. Belgien, Frankreich). Eine ausdrückliche Aufnahme des Rechtsmissbrauchsverbots in die Kodifikationsprojekte wäre im Einklang mit der Anerkennung des Rechtsmissbrauchsverbots als allgemeinen Rechtsgrundsatz auf der Ebene der europäischen Union.

1. Introduction

The concept of abuse of rights refers to situations in which a right is formally exercised in conformity with the conditions laid down in the rule granting the right, but where the legal outcome is against the objective of that rule. Thus, the tension between the strict application of a rule and the true spirit of that rule is at stake. In such situations, the principle of the prohibition of abuse of rights functions as a corrective mechanism to the strict application of a rule of law: it will reduce the 'abusive' exercise of the right granted by that rule to a normal use, through reliance on fundamental standards of behaviour, such as good faith, fairness, morality, justice, or the respect of the finality of the law.¹

This contribution is divided into two main sections. In the first section, it will be examined whether the principle of the prohibition of abuse of rights amounts to a general principle of Union law (see section 2 below). Traditionally, this principle has been developed in the legal systems of the Member States in the field of private law.

¹ L. BAUDENBACHER, 'Überlegungen zum Verbot des Rechtsmissbrauchs im Europäischen Gemeinschaftsrecht', *ZfRV* (2008): 205; V. KARAYANNIS, 'L'abus de droits découlant de l'ordre juridique communautaire. A propos de l'arrêt C-367/96 *Alexandros Kefalas e.a./Elliniko Dimosio* (État hellénique)', *CDE* (1999): 521-522; A. KJELLGREN, 'On the Border of Abuse: The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community law', *EBL Rev.* (2000): 179.

Therefore, it will first be analysed how a common principle of the prohibition of abuse of rights has arisen in these legal traditions (see section 2.2 below). Progressively, the application of the principle of abuse of rights has been extended to the fields of public and international law. In addition, in the law of the European Union ('Union law'), this principle has been developed over thirty years, principally in the case law of the European Court of Justice ('ECJ' or 'Court') through preliminary rulings on the basis of Article 267 TFEU (ex Article 234 EC).² Hence, it will thereafter be examined how a Union principle of the prohibition of abuse of rights has gradually been created in the case law of the ECJ (see section 2.3 below).

In the second section, this contribution will define the role of the general principle of the prohibition of abuse of rights in a codified European contract law in light of the recent harmonization process in this field (see section 3 below). After providing a brief overview of the various codification projects (see section 3.1 below), it will be examined if and in which manner these projects refer to a principle prohibiting the abuse of rights (see section 3.2 below). On the one hand, a close connection will be established between this principle and the principle of good faith, exercised in its limitative function (see section 3.3 below). On the other hand, it will be demonstrated that the general principle of the prohibition of abuse of rights, as developed by the ECJ, is also relevant as such in private law matters where Union law is at stake (see section 3.4 below). On this basis, this contribution will evaluate whether an explicit reference to the prohibition of the abuse of rights is needed in the codification projects, or whether a link to the principle of good faith is sufficient (see section 3.5 below).

2. A General Principle of the Prohibition of Abuse of Rights in European Union Law

2.1 Concept of a General Principle of Union Law³

The only provision in the TFEU that refers to general principles of law is Article 340(2) TFEU (ex Article 288(2) EC), which refers to 'the general principles common to the laws of the Member States' in the context of non-contractual

² Following the Treaty of Lisbon, signed on 13 Dec. 2007 and entered into force on 1 Dec. 2009, the constitutional frame of the European Union is from now on based upon two treaties: the Treaty on the European Union ('TEU'), on the one hand, and the Treaty on the Functioning of the European Union ('TFEU'), amending and renaming the Treaty establishing the European Community ('EC Treaty'), on the other hand. With the Treaty of Lisbon, the pillar structure is abolished and the European Community is incorporated into the European Union. Henceforth, the European Union has a single international legal personality and exercises all current community and non-community competences. Thus, the European Union replaces the European Community. Throughout this contribution, the new numbering of the Treaties will be used for actual developments. For historical information, however, it will be referred to the EC Treaty. Moreover, the modified terminology of the Treaties will be used: it will no longer be referred to 'Community law' but to 'Union law'.

³ See for more details on this concept, T. TRIDIMAS, *The General Principles of EU Law* (Oxford: Oxford University Press, 2006), 1-58.

liability.⁴ Nonetheless, the ECJ has also applied the concept of general principles outside this context. The Court established a large number of general principles of Union law on the basis of Article 220 EC (now replaced in substance by Article 19 TEU), according to which the Court must ensure that within the interpretation and application of the Treaties the law is observed. The ECJ has included ‘general principles’ within the term ‘law’. Principles created on that basis form part of the legal order of the European Union. Hence, a breach of them constitutes an ‘infringement of the Treaties or of any rule of law relating to their application’, which is a ground for judicial review of the legality of acts under Article 263 TFEU (ex Article 230 EC).⁵

The most important source for the ECJ in formulating these general principles are the laws of the Member States, as indicated in Article 340(2) TFEU (ex Article 288(2) EC). Yet, to become a general principle of Union law, it is not necessary that a principle is common to all the laws of the Member States.⁶ It suffices that a principle is common to most of the Member States’ legal systems.⁷

General principles of Union law constitute a genuine, autonomous source of Union law. These principles have a constitutional status and are equal, in terms of hierarchy, to the Treaties. They are binding on the Union institutions and on the Member States.⁸

⁴ Article 6(3) TEU (ex Art. 6(2) EU Treaty) also refers to ‘general principles of Union law’ in the context of human rights protection.

⁵ A.S. HARTKAMP, ‘Vermogensrecht algemeen, Deel I, Europees recht en Nederlands vermogensrecht’, in *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht*, ed. C. ASSER (Deventer: Kluwer, 2008), 65; K. LENAERTS & P. VAN NUFFEL, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 2005), 711; L. NEVILLE BROWN, ‘Is there a General Principle of Abuse of Rights in European Community Law?’, in *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, ed. D. CURTIN & T. HEUKELS (Dordrecht: Martinus Nijhoff Publishers, 1994), 512; K. RIESENHUBER, *Europäisches Vertragsrecht* (Berlin: De Gruyter Recht, 2006), 17–18.

⁶ W. DEVROE, ‘Impact van door het Europees Hof van Justitie ontwikkelde algemene beginselen op privaatrechtelijke verhoudingen’, in *De invloed van het Europese recht op het Nederlandse privaatrecht, I*, ed. A.S. HARTKAMP & C.H. SIEBURGH (Deventer: Kluwer, 2007), 136; LENAERTS & VAN NUFFEL, 711: the Court applies principles that are at least implicitly present in the legal traditions of the Member States; J. NERGELIUS, ‘General Principles of Community Law in the Future: Some Remarks on the Scope, Applicability and Legitimacy’, in *General Principles of European Community Law*, ed. U. BERNITZ & J. NERGELIUS (The Hague: Kluwer, 2000), 225–226: the Court draws inspiration from ‘underlying idea(s)’ common to the Member States; W. VAN GERVEN, ‘The Emergence of a Common European Law in the Area of Tort Law: The EU Contribution’, in *Tort Liability of Public Authorities in Comparative Perspective*, ed. D. FAIRGRIEVE, M. ANDENAS & J. BELL (London: BIICL, 2000), 135; W. VAN GERVEN & S. LIERMAN, *Algemeen Deel Veertig jaar later. Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing* (Mechelen: Kluwer, 2010), 130, para. 48.

⁷ R. DE LA FERIA, ‘Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax’, *CMLRev.* (2008): 435; W. LORENZ, ‘General Principles of Law: Their Elaboration in the Court of Justice of the European Communities’, *American Journal of Comparative Law* (1964): 7–9, para. 2.

⁸ LENAERTS & VAN NUFFEL, 712; NERGELIUS, 225; J. PEACOCK, ‘The Law Ends where Abuse Begins’, *ECTJ* (2001): 147.

Within the legal order of the European Union, general principles of law play a fundamental role. These principles are considered as an increasingly important mechanism to ‘fill gaps’ in Union law.⁹ In addition, general principles of law constitute a crucial tool for the creation of a ‘common law of Europe’ and for the harmonization of private law matters.¹⁰

2.2 Recognition of a Common Principle of the Prohibition of Abuse of Rights in the Laws of the Member States

Since the laws of the Member States constitute the most important source for the establishment of general principles of Union law, the presence of a common concept of abuse of rights in the legal systems of the Member States must be examined, before determining whether such a general principle is accepted at the level of the European Union.¹¹

It is true that in the Common Law systems and in the Nordic countries, there is no general recognition of the principle of the prohibition of abuse of rights. Nevertheless, in these legal systems, pragmatic solutions are found through the use of concepts that, in concrete situations, will lead to a similar result as the prohibition of abuse of rights would do.¹²

In the Member States with a Civil Law tradition, however, the principle of the prohibition of abuse of rights is generally recognized. The source for the recognition of this principle varies. In some legal systems, the principle of the prohibition of abuse is codified (Germany,¹³ Greece,¹⁴ Luxembourg,¹⁵

⁹ DE LA FERIA, 434–435; X. GROUSSOT, ‘The General Principles of Community Law in the Creation and Development of Due Process Principles in Competition Law Proceedings: From Transocean Marine Paint (1974) to Montecatini (1999)’, in *General Principles of European Community Law*, ed. U. BERNITZ & J. NERGELIUS (The Hague: Kluwer, 2000), 187; NERGELIUS, 225; TRIDIMAS, 10.

¹⁰ W. VAN GERVEN, ‘Over codificatie, convergentie en algemene beginselen in een meergelaagd privaatrecht’, SEW (2008): 422–423, paras 15 and 16; VAN GERVEN & LIERMAN, 126–128, para. 46.

¹¹ See for an overview of the concept of abuse of rights in the legal systems of the Member States, H. FLEISCHER, ‘Der Rechtsmissbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht’, JZ (2003): 865–868; NEVILLE BROWN, 513–515; J. WOUTERS, *Het Europese vestigingsrecht voor ondernemingen herbekeken. Een onderzoek naar de grondslagen, draagwijdte en begrenzingen van de vrijheid van vestiging van ondernemingen in de Europese Unie* (Leuven: K.U.Leuven, 1996–1997), 728–730, para. 729.

¹² It might be inferred from this that the concept of abuse of rights is implicitly present in these legal systems, or that the ‘underlying idea(l)s’ are quite similar as in the legal systems of other Member States, see *supra* n. 6.

¹³ Article 226 German Civil Code. However, the prohibition of abuse of rights is generally based on Art. 242 German Civil Code, which contains a general principle of good faith. See F. RANIERI, ‘Verbot des Rechtsmissbrauchs und Europäisches Gemeinschaftsprivatrecht’, ZeuP (2001): 173–174.

¹⁴ Article 281 Greek Civil Code.

¹⁵ Article 6-1 Luxembourgish Civil Code.

the Netherlands,¹⁶ Portugal,¹⁷ and Spain¹⁸), whereas in other legal systems, it emanates from the case law (Belgium¹⁹ and France²⁰).

Moreover, with regard to the legal basis of the principle of the prohibition of abuse of rights, a fundamental distinction should be drawn. In some Civil Law traditions (Belgium and France), historically the general principle of the prohibition of abuse of rights has been created outside contract law, in the field of property law. It was built on the basis of delictual liability under Article 1382 Civil Code.²¹ Thereafter, the general principle of the prohibition of abuse of rights has been recognized in contractual matters on the basis of the duty of good faith in the performance of contracts under Article 1134 (3) Civil Code, in its limitative function.²² Nevertheless, the limitative function of good faith is not granted an autonomous role. It is entirely concretized through the strict criteria for the general principle prohibiting the abuse of rights, as developed outside the domain of contract law.²³ This means that the limitative function of good faith merely applies if one of the criteria for the prohibition of abuse is fulfilled. Thus, in these legal systems, the limitative function of good faith is fully assimilated with the general principle of the prohibition of abuse of rights ('abuse-based Civil Law traditions').²⁴

¹⁶ Article 3:13 Dutch Civil Code.

¹⁷ Article 334 Portuguese Civil Code.

¹⁸ Article 7(2) Spanish Civil Code.

¹⁹ W. VAN GERVEN, 'Algemeen Deel', in *Beginselen van Belgisch Privaatrecht, I* (Antwerpen: Story-Scientia, 1987), 184-196, paras 70-71.

²⁰ See L. CADJET, 'Abus de droit', in *Encyclopédie Dalloz, Répertoire de Droit Civil* (Paris: Dalloz, 2002).

²¹ See for Belgium, W. VAN GERVEN, 1987, 197-201, paras 72-73; see for France, J. GHESTIN, G. GOUBEAUX & M. FABRE-MAGNAN, *Traité de droit civil, Introduction générale* (Paris: LGDJ, 1994), 747-795, paras 761-808.

²² See for Belgium, Cass. 19 Sep. 1983, Arr. Cass. 1983-84, 52, Pas. 1984, 55, J.T. 1985, 56, annotation S. DUFRÈNE, R.C.J.B. (1986): 282, annotation J.L. FAGNART, 'L'exécution de bonne foi des conventions: un principe en expansion', RGAR (1985), para. 10945, R.W. 1983-84, 1480, T.B.H. 1984, 276, annotation W. RAUWS, 'Misbruik van contractuele rechten: het cassatiearrest van 19 september 1983'; S. STIJNS, *Verbintenisrecht, 1* (Brugge: die Keure, 2005), 64-72, paras 87-94; W. VAN GERVEN & S. COVEMAERKER, *Verbintenisrecht* (Leuven: Acco, 2006), 100-101. See for France, P. STOFFEL-MUNCK, *L'abus dans le contrat, essai d'une théorie* (Paris: LGDJ, 2000), 66 et seq.

²³ See for these specific criteria, S. STIJNS, 'Abus, mais de quel(s) droit(s)? Réflexions sur l'exécution de bonne foi des contrats et l'abus de droits contractuels', JT (1990): 40-41; STIJNS, 2005, 67-70, paras 91-92.

²⁴ See for Belgium, Cass. 17 May 1990, Arr. Cass. 1989-1990, 1188, Pas. 1990, 1061, J.T. 1990, 442, R.C.J.B. (1990), 595, annotation J. HEENEN; Cass. 20 Feb. 1992, Arr. Cass. 1991-1992, 583, Pas. 1992, 549, J.L.M.B. 1992, 530; STIJNS, 2005, 65-66, para. 88; VAN GERVEN & LIERMAN, 426, para. 159. See for France, STOFFEL-MUNCK, 60 and 85 et seq. See also B. FAUVARQUE-COSSON & D. MAZEAUD (eds), *Projet de cadre commun de référence: Terminologie contractuelle commune* (Paris: Société de Législation Comparée, 2008), 258-260.

In other Civil Law traditions (Germany, Greece, the Netherlands, and Portugal),²⁵ the prohibition of abuse of rights is founded on the restrictive function of reasonableness and fairness (*Treu und Glauben*,²⁶ *redelijkheid en billijkheid*²⁷). In these legal systems, the limitative function of good faith plays an autonomous role. It may also apply if the criteria for the existence of an abuse of rights are not fulfilled. Thus, the prohibition of abuse of rights is not the exclusive criterion for the limitative function of good faith but merely one of the possible applications of this function ('reasonableness and fairness-based Civil Law traditions').²⁸

Finally, as to the conditions for the existence of an abuse, a threefold distinction exists. In some legal systems, there exists a 'subjective test', according to which a subjective intention to harm is required (Austria and Italy²⁹). In other legal systems, there exists an 'objective test', requiring a harmful effect of a particular abuse (Germany, Greece, Luxembourg, Portugal, and Spain). Still other legal systems adopt an approach that can be situated between those two tests (Belgium, France, and the Netherlands): an abuse of rights does not only exist when a right is exercised with the intention of causing harm but also if a right is exercised in a careless and unreasonable manner.³⁰ Thus, in Belgium, according to a generic criterion, an abuse of rights exists if the limits of a normal exercise of a subjective right by a careful and cautious person placed in the same circumstances are manifestly exceeded.³¹

²⁵ FAUVARQUE-COSSON & MAZEAUD, *Projet de cadre commun de référence: Terminologie contractuelle commune*, 258 and 261.

²⁶ Article 242 German Civil Code.

²⁷ Articles 6:2(2) and 6:248 (2) Dutch Civil Code.

²⁸ See for Germany, H. HEINRICH, '§242', in *Palandt Bürgerliches Gesetzbuch* (München: C.H. Beck, 2006), 246-251, paras 38-86; K. LARENZ & M. WOLF, *Allgemeiner Teil des Bürgerlichen Rechts* (München: C.H. Beck, 2004), 284-290, paras 16-35. See for the Netherlands, A.S. HARTKAMP, 'Verbintenissenrecht, Deel II, Algemene Leer der Overeenkomsten', in *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht*, ed. C. ASSER (Deventer: Kluwer, 2005), 320-341, paras 312-328. However, in the Netherlands, originally the limitative function of good faith was entirely assimilated with the principle of the prohibition of abuse of rights. See E.M. MEIJERS, Explanatory Works to the Dutch Civil Code, *Parlementaire Geschiedenis*, Invoering Boek 3, 1040 and *Parlementaire Geschiedenis*, Voorlopig antwoord op vraagpunt 21, Boek 6, 43-44, discussed in S. STIJNS, *De gerechtelijke en buitengerechtelijke ontbinding van overeenkomsten* (Antwerpen: Maklu, 1994), 403: the restrictions imposed on the exercise of a right based on reasonableness and fairness, on the one hand, and on abuse, on the other hand, coincide. It follows that the criteria for the existence of an abuse of rights are useful to evaluate whether the exercise of a right is contrary to reasonableness and fairness.

²⁹ A particular expression of this subjective test lies in Art. 833 Civil Code, which, however, only concerns the abuse of the right of property.

³⁰ See for this distinction, KARAYANNIS, 524-526; NEVILLE BROWN, 513-514.

³¹ Cass. 10 Sep. 1971, Arr. Cass. 1972, concl. Proc.-Gen. GANSHOF VAN DER MEERSCH, Pas. 1972, 28, annotation W.G., R.C.J.B. (1976): 300, annotation P. VAN OMMESLAGHE, 'Abus de droit, fraude aux droits des tiers et fraude à la loi'; STIJNS, 'Abus, mais de quel(s) droit(s)? Réflexions sur l'exécution de bonne foi des contrats et l'abus de droits contractuels', 40-44.

In spite of the above variations, a common concept of abuse of rights can be accepted in most of the Member States, particularly in the Civil Law systems. It has generally been defined as ‘the exercise of a person’s rights in a manner which is unreasonable, with consequent harm to another, whether there was an intent to harm or mere carelessness or indifference as to harm resulting’.³²

2.3 Recognition of a Union Principle of the Prohibition of Abuse of Rights in the Case Law of the ECJ

2.3.1 Abusive Reliance on Union Law to Circumvent the Application of National Rules

2.3.1.1 Broad Conception of the Abuse of Rights

In view of the definition of a common concept of abuse of rights in the legal traditions of the Member States, it must now be determined whether a general principle of the prohibition of abuse of rights has been accepted at the Union level. In the initial case law of the ECJ, the emphasis was placed on situations where a right conferred by Union law, namely the right of free movement, was exercised in order to circumvent the law of a Member State.³³

The first case in which the ECJ explicitly addressed the issue of abuse of rights is *van Binsbergen*, involving a Dutch national who was acting as a legal representative in a case before a Dutch court. While the case was still pending, the Dutch lawyer moved to Belgium and thereby lost his right to act as a representative according to the Dutch rules. The ECJ considered that the Dutch law restricting legal representation to residents constituted in principle a restriction on the free movement of services. However, the Court ruled that it is legitimate for a Member State to impose restrictions on the freedom to provide services when a person exercises this freedom for the purpose of circumventing national law, *in casu* more stringent professional rules of conduct. The Court specified that such circumvention may arise where the activity is ‘entirely or principally directed towards [the] territory’ of the Member State of which the domestic rules are avoided.³⁴

The Court took a similar position in other free movement cases, such as the free movement of goods³⁵ and workers,³⁶ the freedom of establishment,³⁷ and the free movement of Union citizens.³⁸

³² NEVILLE BROWN, 515.

³³ See in general, BAUDENBACHER, 205; DE LA FERIA, 395; KJELLGREN, 179; E. SØRENSEN, ‘Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?’, CMLRev. (2006): 423.

³⁴ ECJ, 3 Dec. 1974, Case 33/74, *van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, paras 12–13.

³⁵ ECJ, 10 Jan. 1985, Case 229/83, *Leclerc v. Au blé vert* [1985] ECR 1, para. 27.

³⁶ ECJ, 21 Jun. 1988, Case 39/86, *Lair v. Universität Hannover* [1988] ECR 3163, para. 43.

³⁷ ECJ, 7 Feb. 1979, Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399, para. 25; ECJ, 7 Jul. 1992, Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265, para. 24.

³⁸ ECJ, 19 Oct. 2004, Case C-200/02, *Zhu and Chen* [2004] ECR I-9925, para. 34; ECJ, 7 Jul. 2005, Case C-147/03, *Commission v. Austria* [2005] ECR I-5969, para. 67.

In this early case law, the Court seems to give a broad conception to the abuse of rights. It might indeed be implied from its rulings that the ECJ regards all circumvention cases as falling within the scope of abuse of Union law, more specifically of the right of free movement.³⁹ The Court does not subject the right for Member States to take national anti-abuse measures, preventing the circumvention of national law, to particular conditions.⁴⁰

The Court attributed a particularly broad conception to the abuse of rights in *Daily Mail*, a circumvention case concerning the freedom of establishment in the field of company law.⁴¹ In this case, a company incorporated in the United Kingdom applied for a transfer of its central management and control to the Netherlands, with the principal aim of avoiding paying capital gains tax imposed in the United Kingdom. The company claimed that the obligation under UK law to request an authorization for such a transfer of residence was contrary to Articles 43 and 48 EC (now Articles 49 and 54 TFEU).

The ECJ ruled that the right for a company to transfer its central management and control to another Member State, while retaining its status as company incorporated under the legislation of the original Member State, did not fall within the scope of Articles 43 and 48 EC (now Articles 49 and 54 TFEU).⁴² This ruling might be perceived as giving the Member States free room to establish any national anti-abuse measures without restriction.⁴³

2.3.1.2 Emergence of Limits to the Broad Conception of the Abuse of Rights

2.3.1.2.1 Full effectiveness of Union law

In subsequent case law, the ECJ narrowed down its broad conception of the abuse of rights. This evolution in the approach of the Court started with the ‘Greek

³⁹ See DE LA FERIA, 400; VAN GERVEN & COVEMAËKER, 84.

⁴⁰ The scope of the principle of prohibition of abuse of rights seems to be broader under Union law than under the laws of the Member States. So, under Belgian and French law, cases in which a rule of law is applied in order to avoid the application of a stricter rule of law, which is normally applicable, would not fall under the doctrine of abuse of rights but are an application of the concept ‘fraude à la loi’. See X. DIEUX, ‘Développements de la maxime *fraus omnia corrumpit* dans la jurisprudence de la Cour de cassation de Belgique’, in *Actualité du droit des obligations*, ed. P.-A. FORIERS (Brussels: Bruylant, 2005), 130–142; J. MATTHIJS, ‘La fraude à la loi’, JT (1955): 541; P. VAN OMMESLAGHE, ‘Un principe général du droit: *fraus omnia corrumpit*’, in *Liber amicorum Paul Martens. L’humanisme dans la résolution des conflits. Utopie ou réalité?* (Brussels: Larcier, 2007), 596–605.

⁴¹ ECJ, 27 Sep. 1988, Case 81/87, *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483.

⁴² *Ibid.*, paras 23 and 24.

⁴³ See DE LA FERIA, 404.

challenge' cases (in particular *Kefalas* and *Diamantis*),⁴⁴ in which the Court was more cautious towards national provisions preventing an abuse of rights conferred by Union law.

These cases, referred to the ECJ by the Greek courts, concerned the alleged abuse of Article 25(1) of the Second Company Law Directive.⁴⁵ According to this provision, any increase in capital must be decided upon by a general meeting of shareholders. Contrary to this rule, in the 'Greek challenge' cases, the capital of public limited companies in financial difficulties was increased by administrative act, according to Article 8 of Greek Law No. 1386/1983. This Greek provision openly infringed Article 25(1) of the Second Company Law Directive and was therefore amended in conformity with the Directive (Greek Law No. 1882/1990).⁴⁶ However, in the meantime, several of the former shareholders of these companies had asked the Greek courts for a declaration of invalidity of the capital increase on the grounds that it violated Article 25(1) of the Second Company Law Directive. The Greek State raised the objection that the shareholders had abusively relied on Article 25(1) of the Second Company Law Directive on the basis of Article 281 of the Greek Civil Code. The national court supported this objection. This court held that the shareholders benefited from the financial recovery brought about by the capital increase through administrative act, in view of the fact that they had declined to make use of their preferential right to acquire shares at the moment of increase of capital,⁴⁷ or that they had themselves requested the intervention of the public entity in question.⁴⁸

The ECJ explicitly accepted the possibility for a national court to apply domestic provisions or principles on the prohibition of abuse of rights, in this case Article 281 of the Greek Civil Code, in order to assess whether a right granted by a Union provision, in this case Article 25(1) of the Second Company Directive, has been exercised in an abusive manner.⁴⁹ However, the application of such national provisions or principles may not prejudice the full effect and uniform application of

⁴⁴ ECJ, 12 Mar. 1996, Case C-441/93, *Panagis Pafitis and Others v. Trapeza Kentrikis Ellados A.E. and others* [1996] ECR I-1363; ECJ, 12 May 1998, Case C-367/96, *Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1998] ECR I-2843; ECJ, 23 Mar. 2000, Case C-373/97, *Dionysios Diamantis v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [2000] ECR I-1705.

⁴⁵ Second Council Directive 77/91/EEC of 13 Dec. 1976 on coordination of safeguards, which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L26/1.

⁴⁶ ECJ, 23 Mar. 2000, Case C-373/97, *Diamantis* [2000] ECR I-1705, paras 10-12.

⁴⁷ ECJ, 12 May 1998, Case C-367/96, *Kefalas* [1998] ECR I-2843, paras 14-17.

⁴⁸ ECJ, 23 Mar. 2000, Case C-373/97, *Diamantis* [2000] ECR I-1705, para. 28.

⁴⁹ ECJ, 12 May 1998, Case C-367/96, *Kefalas* [1998] ECR I-2843, paras 20-21.

Union law in the Member States. Moreover, the national provisions or principles may neither alter the scope of the Union law provision in question nor compromise the objectives pursued by it.⁵⁰ In the present cases, the Court rejected the reasoning of the national court based on the existence of an abuse of rights, since it would undermine the full effect and uniform application of Union law.⁵¹

Furthermore, the ECJ pointed out in *Kefalas* that Union law does not preclude a national court, on the basis of sufficient convincing evidence, from examining whether a shareholder bringing an action based on Article 25(1) of the Second Company Directive is seeking to derive, to the detriment of the company, an improper advantage, manifestly contrary to the objective of that provision.⁵² Similarly, the ECJ ruled in *Diamantis* that there exists a presumption of abuse of rights if a shareholder chooses a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate.⁵³

Thus, the ‘Greek challenge’ cases draw a twofold limit to the right for Member States to apply national anti-abuse provisions. First, the observance of the uniform application and full effectiveness of Union law in the application of domestic anti-abuse provisions can be considered as a guarantee to ensure that the supremacy of Union law would not be undermined.⁵⁴ Indeed, the application by a national court of domestic anti-abuse provisions, allowing derogations from Union law, seems to weaken the absolute character of the supremacy of Union law.⁵⁵ Hence, the duty for the Member States to respect the uniform application and full effectiveness of Union law in the application of their own anti-abuse provisions functions as a compromise between the principle of fairness, which prohibits the abuse of rights, and the principle of supremacy of Union law.⁵⁶

⁵⁰ ECJ, 12 Mar. 1996, Case C-441/93, *Pafitis* [1996] ECRI-1363, para. 68; ECJ, 12 May 1998, Case C-367/96, *Kefalas* [1998] ECR I-2843, para. 22; ECJ, 23 Mar. 2000, Case C-373/97, *Diamantis* [2000] ECR I-1705, para. 34.

⁵¹ ECJ, 12 May 1998, Case C-367/96, *Kefalas* [1998] ECR I-2843, paras 23–25; ECJ, 23 Mar. 2000, Case C-373/97, *Diamantis* [2000] ECR I-1705, paras 36–39.

⁵² ECJ, 12 May 1998, Case C-367/96, *Kefalas* [1998] ECR I-2843, para. 28.

⁵³ ECJ, 23 Mar. 2000, Case C-373/97, *Diamantis* [2000] ECR I-1705, para. 43.

⁵⁴ FLEISCHER, 873; M. SCHMIDT-KESSEL, ‘Rechtsmissbrauch im Gemeinschaftsprivatrecht. Folgerungen aus den Rechtssachen *Kefalas* und *Diamantis*’, in *Prinzipien des Privatrechts und Rechtsvereinheitlichung, Jahrbuch Junger Zivilrechtswissenschaftler* (Stuttgart: Boorberg Verlag, 2000), 75–76.

⁵⁵ ECJ, 9 Mar. 1978, Case 106/77, *Simmenthal* (II) [1978] ECR 629; D. ANAGNOSTOPOULOU, ‘Do Francovich and the Principle of Proportionality Weaken *Simmenthal* (II) and Confirm Abuse of Rights?’, CMLRev. (2001): 772–774; KARAYANNIS, 532; D. TRIANTAFFYLOU, ‘Abuse of Rights versus Primacy?’, CMLRev. (1999): 159; D. TRIANTAFFYLOU, ‘L’interdiction des abus de droit en tant que principe général du droit communautaire’, CDE (2002): 622–623; Y. VAN GERVEN, ‘Wetsontduiking en rechtsmisbruik in het gemeenschapsrecht’, in *Liber Amicorum W. van Gerven* (Deurne: Kluwer, 2000), 354. *Contra*: RANIERI, 170–171: the principle of supremacy of Union law finds its limits if Union law is exercised in violation of general principles of law. Particularly, the principle of the prohibition of abuse of rights functions as a general limit to the exercise of Union law.

⁵⁶ WOUTERS, 728, para. 728; Y. VAN GERVEN, 358.

Second, although Member States are formally granted the right to apply their own anti-abuse provisions to rights conferred by Union law, there is not much choice left for the national courts in assessing whether there exists an abuse of rights. In the ‘Greek challenge’ cases, the ECJ defined itself the substantive scope of the Union right at stake and reviewed itself all grounds for the existence of an abuse of rights. The Court determined itself the content of the abuse of rights (see section 2.3.1.2.1 above).⁵⁷ This evolution might be considered as a first step towards the creation of a Union concept of the abuse of rights, with its own conditions of application.⁵⁸ It might even be considered as the origin for the recognition of a general principle of Union law on the prohibition of abuse of rights.⁵⁹

2.3.1.2.2 Objectives of the provisions of Union law

In *Centros*, another landmark case following the ‘Greek challenge’ cases, the ECJ also applied a narrower conception of the abuse of rights. *Centros* concerned a company that is owned by Danish nationals but incorporated in the United Kingdom in order to circumvent the Danish rules on the payment of minimum share capital. Although the company was registered in the United Kingdom, it did not carry out any activity there. The company set up a branch in Denmark but was refused registration by the Danish authorities on the basis that the branch would, in reality, be its principal establishment. The case was referred to the ECJ concerning the question of whether the refusal to register the branch violated Articles 43 and 48 EC (now Articles 49 and 54 TFEU).

The ECJ recognized principally the right for Member States to take anti-abuse measures in order to prevent the circumvention of national rules through the application of Union law.⁶⁰ However, the conduct of the persons concerned must be assessed in the light of the objectives pursued by those provisions.⁶¹ According to the ECJ, the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise of the freedom of establishment.⁶² The Court concluded that the refusal of the Danish authorities to register the branch was contrary to Articles 43 and 48 EC (now Articles 49 and 54 TFEU).⁶³

⁵⁷ ANAGNOSTOPOULOU, 771; KJELLGREN, 191; F. LAGONDET, ‘L’abus de droit dans la jurisprudence communautaire’, J.T.D.E. (2003): 10; RANIERI, 171; RIESENHUBER, 239, para. 576; SCHMIDT-KESSEL, 2000, 76; TRIANTAFYLLOU, 2002, 622 and 624-625; S. VRELLIS, ““Abus” et “fraude” dans la jurisprudence de la Cour de Justice des Communautés Européennes’, in *Liber Amicorum H. Gaudemet-Tallon* (Paris: Dalloz, 2008), 638; WOUTERS, 727, para. 727.

⁵⁸ FLEISCHER, 874.

⁵⁹ VRELLIS, 639.

⁶⁰ ECJ, 9 Mar. 1999, Case C-212/97, *Centros Ltd v. Erhvervs – og Selskabsstyrelsen* [1999] ECR I-1459, para. 24.

⁶¹ *Ibid.*, para. 25.

⁶² *Ibid.*, para. 27.

⁶³ *Ibid.*, para. 39.

Nevertheless, the ECJ emphasized that this conclusion does not preclude Member States from adopting any appropriate measure for preventing or penalizing fraud, either in relation to the company itself or in relation to its members.⁶⁴ This can be considered an application of the general principle *fraus omnia corrumpit*: even in the absence of a circumvention qualifying as an abuse of rights on the basis of the Court's narrower conception of the prohibition of abuse, the general rule that 'fraud vitiates everything' remains applicable.⁶⁵

Thus, after the 'Greek challenge' cases, *Centros* imposes a further limit on the right for Member States to apply national anti-abuse measures. Indeed, this right is limited by the objectives of the provisions of Union law - in this case, the freedom of establishment - themselves.⁶⁶ Unlike the *van Binsbergen* doctrine, where all circumvention cases were regarded as abusive, *Centros* supports a new conception formulated by the Court, under which not all situations involving circumvention constitute an abuse of Union law.⁶⁷

2.3.2 Abusive or Fraudulent Exercise of Rights Conferred by Union Law

2.3.2.1 Establishment of the 'Abuse Test'

In recent years, the ECJ has extended the application of the prohibition of abuse of rights to every abusive or fraudulent exercise of rights conferred by Union law, whether these rights are exercised with an aim of circumventing national rules or not.⁶⁸

A landmark case, *Emsland-Stärke*,⁶⁹ concerned a German company that exported potato-based products to Switzerland, for which it received an export refund on the basis of Regulation 2730/79.⁷⁰ Yet, immediately after their release

⁶⁴ *Ibid.*, para. 39.

⁶⁵ See VAN GERVEN & COVEMAERKER, 85.

⁶⁶ W. SNIJDERS, 'Beperkende werking van redelijkheid en billijkheid: de Europese dimensie', in *De invloed van het Europese recht op het Nederlandse privaatrecht, I*, ed. A.S. HARTKAMP & C.H. SIEBURGH, 458; VAN GERVEN & COVEMAERKER, 84; Y. VAN GERVEN, 352.

⁶⁷ See DE LA FERIA, 407; KJELGREN, 191; SØRENSEN, 444-447: the Court no longer applies the principle established in *van Binsbergen* that circumvention arises where the activity is 'entirely or principally directed towards [the] territory' of the Member State of which the national rules are circumvented. Indeed, in *Centros*, no business was conducted in the Member State where the company was established (United Kingdom), and the activity was entirely or at least principally directed towards the Member State of which the national rules are circumvented (Denmark). However, the Court decided that there was no circumvention but that the conduct of the persons in question was inherent in the freedom of establishment. The approach in *Centros* seems to be difficult to reconcile with the *van Binsbergen* approach.

⁶⁸ This extension of the scope of application of the prohibition of abuse of rights contrasts with the Court's narrower conception of the abuse of rights, initiated with the 'Greek challenge' cases and *Centros*. SØRENSEN, 427.

⁶⁹ ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas* [2000] ECR I-1569.

⁷⁰ Commission Regulation 2730/79/EEC of 29 Nov. 1979 on the application of the system of export refunds on agricultural products [1979] OJ L317/1.

for home use in Switzerland, the products were transported back to Germany, unaltered and by the same means of transport, and were released for home use in that Member State. In light of this, the German authorities reclaimed from the company what they considered as an unduly granted refund. The case was referred to the Court concerning the question of whether the regulation at stake should be interpreted as precluding the company's right to an export refund.

The ECJ emphasized that the scope of Union regulations could not be extended to cover abuses on the part of the trader.⁷¹ Thereafter, the Court explicitly formulated an 'abuse test': first, a finding of an abuse requires a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Union rules, the purpose of those rules has not been achieved ('objective test').⁷² Second, it requires the intention to obtain an advantage from the Union rules by creating artificially the conditions laid down for obtaining it ('subjective test'). This subjective element can be established by evidence of collusion between the Union exporter receiving the funds and the importer of the goods in the third country.⁷³ As a consequence, the ECJ implicitly accepted that the actual intention could be established on the basis of objective circumstances, if an interested party does not openly admit its intention to obtain an advantage from Union law (so-called 'objective intentions').⁷⁴

⁷¹ ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke* [2000] ECR I-1569, para. 51.

⁷² *Ibid.*, para. 52. For the establishment of the purpose of the applicable Union law, the national court will frequently have to refer questions to the ECJ for a preliminary ruling. As to the assessment of the objective circumstances, 'purely formal' circumstances (ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke* [2000] ECR I-1569, para. 50) or 'wholly artificial arrangements' (ECJ, 12 Sep. 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006] ECR I-7995, para. 57) will point to an abuse of rights. In evaluating the 'artificial' character of a transaction, the material reality has to be taken into account, rather than the formal circumstances. See for more details, D. WEBER, 'Abuse of Law, European Court of Justice, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke*', LIEI (2004): 52-53.

⁷³ ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke* [2000] ECR I-1569, para. 53. The question arises whether the 'abuse test', with the requirement of a subjective element, only applies to the new type of abuse, namely the abusive or fraudulent exercise of rights conferred by Union law, or also to the traditional type of abuse, namely circumvention of national rules. In previous circumvention case law, the Court considered that the existence of an objective element was sufficient: BAUDENBACHER, 215. However, there are good arguments that the new 'abuse test' developed in *Emsland-Stärke* is so broad that it must encompass all types of abuse, including circumvention cases: BAUDENBACHER, 218. Thus, for circumvention cases, a subjective element would be required. As a consequence, less circumvention cases would be qualified as an abuse in future case law: SØRENSEN, 451-452.

⁷⁴ BAUDENBACHER, 216; WEBER, 53: examples are ties of affiliation, or links of a personal or economic nature. According to SØRENSEN, 451 and 454-458, the establishment of abuse requires objective evidence. Motives and intention cannot in themselves prove the existence of abuse but can merely support other, objective evidence of abuse.

The ECJ ruled that it is the duty of the national courts to establish the existence of an abuse, according to the twofold test set out above.⁷⁵ The evidence must be adduced in accordance with the rules of national law, provided that the effectiveness of Union law is not undermined.⁷⁶

Thus, building upon the ‘Greek challenge’ cases and *Centros*, in *Emsland-Stärke* the Court created for the first time a true Union principle of the prohibition of abuse of rights, with its own conditions of application. Hence, the ECJ has formally recognized the prohibition of abuse of rights in the legal order of the European Union.⁷⁷ *Emsland-Stärke* can be perceived as a crucial step towards the recognition of a general principle of Union law prohibiting the abuse of rights.⁷⁸

2.3.2.2 Further Development of the ‘Abuse Test’

The new ‘abuse test’ has been progressively applied to other areas of Union law, particularly to the field of taxation, starting with VAT cases,⁷⁹ and moving later to direct taxation.⁸⁰

2.3.2.2.1 VAT cases

A crucial VAT case, *Halifax*,⁸¹ concerned a company that decided to set up new ‘call centres’ for the purposes of its business. On the basis of Article 174 of the Common VAT System Directive⁸² concerning the apportionment of tax, the company could have recovered only 5% of the VAT paid on any construction works. However, the company set up a scheme whereby it was able to recover effectively the full amount of input VAT incurred on the building works through a series of transactions involving different companies in the Halifax group. These transactions were allegedly concluded with the sole purpose of tax avoidance.

Upon referral for a preliminary ruling, the ECJ ruled that the principle of the prohibition of abuse of rights also applied to the sphere of VAT.⁸³ Therefore, the Common VAT System Directive should be interpreted as precluding the right to deduct input VAT if the transactions on which that right is based constituted an abuse of rights.

⁷⁵ ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke* [2000] ECR I-1569, para. 59.

⁷⁶ *Ibid.*, para. 54.

⁷⁷ TRIANTAFYLLOU, 2002, 627.

⁷⁸ *Ibid.*, 628; LENAERTS & VAN NUFFEL, 715.

⁷⁹ See for a general overview, J.J.P. SWINKELS, ‘Fraus legis in Europees perspectief’, WFR (2006): 1321.

⁸⁰ See DE LA FERIA, 424–433.

⁸¹ ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise* [2006] ECR I-1609.

⁸² Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value-added tax [2006] OJ L347/1.

⁸³ ECJ, 21 Feb. 2006, Case C-255/02, *Halifax* [2006] ECR I-1609, para. 70.

Thereafter, the Court confirmed the two-part ‘abuse test’ established in *Emsland-Stärke*. First, an abuse exists if the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Common VAT System Directive and the national legislation transposing it, result in the accrual of a tax advantage, the grant of which would be contrary to the purpose of those provisions (‘objective test’).⁸⁴ Second, it must be apparent from a number of objective factors that the essential aim⁸⁵ of the transactions concerned is to obtain a tax advantage (‘subjective test’).⁸⁶ Thus, the ECJ refined the subjective element by expressly accepting so-called ‘objective intentions’,⁸⁷ implicitly admitted in *Emsland-Stärke*.⁸⁸

The ECJ concluded that it is for the national courts to establish the existence of an abusive practice, according to the rules of evidence of national law. However, the effectiveness of Union law may not be undermined.⁸⁹

The significance of *Halifax* for the doctrine of abuse in Union law is twofold. First, this case tends to generalize the scope of application of the Union concept of abuse by applying the ‘abuse test’ to another area of Union law. Second, it further develops the substance of the Union concept of abuse by refining the subjective element of the ‘abuse test’.

⁸⁴ *Ibid.*, para. 74.

⁸⁵ The distinction between a ‘sole purpose’ and an ‘essential purpose’ standard is not clear in this decision. On the one hand, the ECJ seems to imply that no abusive practice exists if the economic activity carried out may have *some other explanation* than the obtainment of tax advantages (para. 75). This points in the direction of a ‘sole purpose’ standard. On the other hand, the ECJ lists several criteria of legal, economic, and/or personal nature to determine the real substance of the transaction (para. 81). This implies a balancing exercise between several purposes against each other. Hence, this points in the direction of an ‘essential purpose’ standard. See F. VANISTENDAEL, ‘*Halifax* and *Cadbury Schweppes*: One Single European Theory of Abuse in Tax Law?’, ECTR (2006): 193.

⁸⁶ ECJ, 21 Feb. 2006, Case C-255/02, *Halifax* [2006] ECR I-1609, para. 75. Such objective factors may include the purely artificial nature of the transactions and the links of a legal, economic, and/or personal nature between the operators involved in the scheme, *ibid.*, para. 81.

⁸⁷ This ‘objective approach’ is probably a reaction to previous criticisms on the use of a subjective element in the abuse test. See WEBER, 51.

⁸⁸ The scope of the principle of prohibition of abuse of rights is broader under Union law than under the laws of the Member States. So, under Belgian and French law, the ruling in *Halifax* would not be based on the doctrine of abuse but would be an application of the principle of ‘lifting the veil’, according to which fraudulent schemes are detected and removed. Such schemes constitute invalid legal acts, defined as ‘simulation frauduleuse’ or ‘simulation illicite’. See P. VAN OMMESLAGHE, ‘La simulation en droit des obligations’, in *Les obligations contractuelles* (Brussels: Jeune Barreau, 2000), 151, 166–169, and 204–205.

⁸⁹ ECJ, 21 Feb. 2006, Case C-255/02, *Halifax* [2006] ECR I-1609, para. 76.

2.3.2.2.2 Direct taxation

A milestone case in this field, *Cadbury Schweppes*,⁹⁰ concerned the compatibility of UK legislation on controlled foreign companies ('CFC legislation') with the Treaty provisions on the freedom of establishment. In this case, a UK parent company established a subsidiary (a so-called 'CFC') in Ireland, where it was subject to a more favourable tax regime. The CFC legislation countered this alleged tax avoidance by imposing a tax charge upon the UK parent company on the profits made by its Irish subsidiary.

Upon referral for a preliminary ruling, the Court ruled that, in principle, the CFC legislation restricted the freedom of establishment.⁹¹ However, such a restriction could be justified if it aimed to prevent 'wholly artificial arrangements'.⁹² In order to establish the existence of a wholly artificial arrangement,⁹³ the ECJ referred to the two-part 'abuse test' applied in *Emsland-Stärke* and *Halifax*.⁹⁴ The CFC legislation must not be applied as soon as it is proven on the basis of objective factors that the incorporation of a CFC reflects an economic reality, namely that the CFC is actually established in the host Member State and carries on genuine economic activities there.⁹⁵ It is for the national court to carry out this test.⁹⁶

This application of a 'fraud test' based on the existence of a wholly artificial arrangement may be considered an application of the general principle *fraus omnia corrumpit*: only if a wholly artificial arrangement exists, leaving no room for the existence of an economic reality based on objective factors, CFC legislation may be imposed. Only in such a case, 'fraud vitiates everything', so that the restriction of the freedom of establishment is justified.

In *Cadbury Schweppes*, the scope of application of the Union concept of the abuse of rights was further generalized. Indeed, for the first time, the Court applied the 'abuse test' to a non-harmonized area of Union law.⁹⁷ Thus, the ECJ seems to be favourable to a harmonization of the concept of abuse of rights: the same concept of

⁹⁰ ECJ, 12 Sep. 2006, Case C-196/04, *Cadbury Schweppes* [2006] ECR I-7995.

⁹¹ *Ibid.*, para. 46.

⁹² *Ibid.*, para. 57.

⁹³ In *Halifax*, the Court still leaves some room for the national courts to apply an 'essential aim' standard: they may consider whether the tax motive is 'essential' compared to other non-tax motives. As soon as the tax motive is 'essential', an abuse exists, independently of the existence of non-tax motives. However, in *Cadbury Schweppes*, the Court categorically opts for a 'sole purpose' standard: as soon as it is established that the incorporation of a CFC in another Member State reflects an economic reality, an abusive practice is precluded. It is irrelevant whether there is also a tax motive. See DE LA FERIA, 428-429; VANISTENDAEL, 195.

⁹⁴ *Ibid.*, para. 64.

⁹⁵ *Ibid.*, para. 75.

⁹⁶ *Ibid.*, para. 72.

⁹⁷ In *Emsland-Stärke* and *Halifax*, the 'abuse test' was applied to largely harmonized areas of Union law, namely agricultural levies and VAT, forming part of the Union's own resources. On the contrary, corporate direct taxation has only been marginally harmonized and does not form part of the Union's own resources; DE LA FERIA, 410-411 and 425.

abuse can be used for all operations between Member States within the internal market.⁹⁸

2.3.3 *Towards the Recognition of a General Principle of Union Law of the Prohibition of Abuse of Rights*

The definition of a Union concept of the abuse of rights by the ECJ (*Emsland-Stärke*) and its progressive application to various areas of Union law (*Halifax* and *Cadbury Schweppes*) may be considered as an implicit recognition of a general principle of Union law of the prohibition of abuse of rights. Indeed, the identification of the proper content of a Union concept of abuse of rights is an indispensable and decisive step towards the recognition of such a general principle.⁹⁹

Moreover, in a recent case, *Kofoed*,¹⁰⁰ the ECJ explicitly referred to the prohibition of abuse of rights as a general principle of Union law. This case concerned the charging of income tax in respect of an exchange of shares undertaken by Mr Kofoed. The case addressed, among other aspects, the interpretation of an anti-abuse clause set out in Article 11(1)(a) of the Merger Directive.¹⁰¹ Invoking its judgments in *Halifax* and *Cadbury Schweppes*, the Court ruled:

Thus, Article 11(1)(a) of Directive 90/434 reflects the general Community [Union] law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community [Union] law. The application of Community [Union] legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community [Union] law.¹⁰²

This ruling clearly points to a formal recognition of a general principle prohibiting the abuse of rights on a Union level.¹⁰³

⁹⁸ See DE LA FERIA, 429–430; VANISTENDAEL, 194: ‘the ECJ has “denationalized” the concept of abuse and “Europeanized” this concept by putting the focus on its effectiveness in the Internal Market’.

⁹⁹ See DE LA FERIA, 437.

¹⁰⁰ ECJ, 5 Jul. 2007, Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet* [2007] ECR I-5795. This reference is still implicit in *Halifax*, where the Court merely refers to ‘that principle of prohibiting abusive practices’ (ECJ, 21 Feb. 2006, Case C-255/02, *Halifax* [2006] ECR I-1609, para. 70).

¹⁰¹ Council Directive 90/434/EEC of 23 Jul. 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different Member States [1990] OJ L225/1.

¹⁰² ECJ, 5 Jul. 2007, Case C-321/05, *Kofoed* [2007] ECR I-5795, para. 38.

¹⁰³ See for a recent contribution, J. ENGLISCH, ‘Verbot des Rechtsmissbrauchs – ein allgemeiner Rechtsgrundsatz des Gemeinschaftsrechts’, *StuW* (2009): 3–22.

Furthermore, the majority of the legal doctrine is in favour of the recognition of such a principle.¹⁰⁴ Nevertheless, some authors doubt the existence of a general principle of Union law prohibiting the abuse of rights,¹⁰⁵ or argue that the references in the ECJ case law merely amount to an interpretative principle of Union law.¹⁰⁶ However, in light of the developments in the ECJ case law, it seems that these views can no longer be upheld.

In conclusion, both the existence of a common concept of abuse of rights in the laws of the Member States (see section 2.2 above) and the definition of a Union concept of abuse of rights (see section 2.3 above) confirm the existence of a general principle of Union law prohibiting the abuse of rights.

3. Role of the General Principle of the Prohibition of Abuse of Rights in a Codified European Contract Law

3.1 Evolution towards a Codified European Contract Law

Initially, contract law was almost exclusively created by the laws of the Member States. Union law encompassed above all areas of public law: only there, supranational Union law existed alongside the laws of the Member States.

However, since the 1980s, progressively legislative acts of the European Union were adopted in the field of private law. These acts primarily took the form of directives¹⁰⁷ and extended to core areas of contract law, such as late payments or, for consumer contracts, standard contract terms and contractual conformity of

¹⁰⁴ Since the early legal doctrine, authors favour the recognition of a general principle of Union law prohibiting the abuse of rights: H.J. DE KLUIVER, 'Misbruik, goede trouw en Europees privaatrecht', WPNR (1998): 536; KARAYANNIS, 533-534; NEVILLE BROWN, 511 and 524-525; SCHMIDT-KESSEL, 2000, 71 and 79. See for more recent authors, ANAGNOSTOPOULOU, 774-776; BAUDENBACHER, 218; DE LA FERIA, 436-439; FLEISCHER, 874; B. HEIDERHOFF, *Gemeinschaftsprivatrecht* (München: Sellier European Law Publishers, 2005), 122; PEACOCK, 149-150; RANIERI, 170-172; D. SIMON & A. RIGAUD, 'La technique de consécration d'un nouveau principe général du droit communautaire, l'exemple de l'abus de droit', in *Mélanges en hommage à Guy Isaac* (Toulouse: PU Sciences Sociales, 2004), 579; SØRENSEN, 439-441 and 458-459; SNIJDERS, 456; TRIANTAFFYLOU, 2002, 625 and 627-628; VANISTENDAEL, 194-195; VRELLIS, 639 and 646; WEBER, 54-55.

¹⁰⁵ H. HAHN, 'Kein allgemeiner Rechtsgrundsatz des Missbrauchs- bzw. Umgehungsverbots', *Juris PraxisReport - SteuerR* (2006): Anm. 1; P. HARRIS, 'The Notion of *Abus De Droit* and Its Potential Application in Fiscal Matters within the EU Legal Order', ECTJ (2001): 194; U. KLINKE, 'Europäisches Unternehmensrecht und EuGH', ZGR (2002): 169 and 186; TRIANTAFFYLOU, 1999, 161. However, after the Court's ruling in *Emsland-Stärke*, this author recognizes that the prohibition of abuse of rights amounts to a general principle of Union law: TRIANTAFFYLOU, 2002, 628.

¹⁰⁶ According to this view, the Court's doctrine on the abuse of rights is limited to the interpretation of Union provisions. In order to determine whether an abuse of rights exists, it will be examined whether the alleged abusive behaviour falls inside or outside the scope of the Union provision. Only in the latter case, an abuse of rights exists: Opinion of Advocate General Poiares Maduro, Case C-255/02, *Halifax*, para. 69; KJELGREN, 190 and 192; O. ROUSSELLE & H.M. LIEBMAN, 'The Doctrine of the Abuse of Community Law: The Sword of Damocles Hanging over the Head of EC Corporate Tax Law?', *EU Taxation* (2006): 562.

¹⁰⁷ HEIDERHOFF, 2-3.

goods.¹⁰⁸ Through this legislative activity, innovative aspects were introduced into contract law,¹⁰⁹ influencing the laws of the Member States. The Member States not only transposed these directives as required under the EC Treaty (now TFEU) but often voluntarily extended the directives beyond their scope of application as prescribed under Union law ('extended transposition').¹¹⁰

In spite of this increasing legislative activity of the European Union in the field of contract law, the Union measures adopted in this area lacked coherence. More specifically, these provisions did not reflect a common concept of European contract law. They more often related to specific policy aims of the European Union.¹¹¹

Against this background, scholarly interest grew as regards the creation of a common concept of European contract law. For this, several research groups of legal scholars were created. These groups focused on the Europeanization of contract law but with different objectives and working methods. The most important codification projects established in this area¹¹² include the Principles of European Contract Law (PECL),¹¹³ the Principles of the Existing EC Contract Law ('Acquis Principles'),¹¹⁴ the Draft Common Frame of Reference (DCFR), prepared by a Joint Network on European Private Law ('CoPECL Network of Excellence'),¹¹⁵ and

¹⁰⁸ Directive 2000/35/EC of 29 Jun. 2000 on late payments [2000] OJ L200/35; Directive 93/13/EEC of 5 Apr. 1993 on unfair contract terms [1993] OJ L95/29; Directive 1999/44/EC of 25 May 1999 on consumer sales [1999] OJ L171/12.

¹⁰⁹ For example, further development of information duties in the precontractual phase, establishment of the legal institution of withdrawal for various areas of contract law, and strengthening of the protection against discrimination beyond the level existing in most Member States.

¹¹⁰ For example, extension of the right of withdrawal prescribed by the 'doorstep selling' directive, 85/577/EEC of 20 Dec. 1985 [1985] OJ L372/31 to contracts concluded in public areas; extension of the application of the consumer sales directive provisions, prescribed for consumer contracts, to all contracts (in German law, Art. 312 *Bürgerliches Gesetzbuch (BGB)* and Art. 434).

¹¹¹ See for an overview of the situation prior to the codification initiatives, HEIDERHOFF, 39-41; R. SCHULZE, 'The New Challenges in Contract Law', in *New Features in Contract Law*, ed. R. SCHULZE (München: Sellier European Law Publishers, 2007), 11-12.

¹¹² See for an overview of these different codification projects, HARTKAMP, 'Vermogensrecht algemeen, Deel I', 197-202; HEIDERHOFF, 220-230; SCHULZE, 2007, 12-16; C. TWIGG-FLESSNER, *The Europeanisation of Contract Law* (London/New York: Routledge Cavendish, 2008), 12-17 and 139 et seq.

¹¹³ The *Principles of European Contract Law* are published in three parts, published in 1995, 2000 (consolidated version), and 2003. See O. LANDO & H. BEALE (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (The Hague: Kluwer Law International, 2000); O. LANDO ET AL. (eds), *Principles of European Contract Law, Part III* (The Hague: Kluwer Law International, 2003).

¹¹⁴ Prepared by the Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I* (München: Sellier European Law Publishers, 2007).

¹¹⁵ CH. VON BAR ET AL. (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (München: Sellier European Law Publishers, 2009). The outline edition can be found at <http://storme.be/2009_02_DCFR_OutlineEdition.pdf> or <http://ec.europa.eu/justice_home/fsj/civil/docs/dcf_r_outline_edition_en.pdf>.

the Guiding Principles and Revised Principles of European Contract Law, elaborated by a specific working group created on the initiative of the *Association Henri Capitant des amis de la Culture Juridique Française* and the *Société de Législation Comparée*.¹¹⁶

3.2 Reference to a Prohibition of Abuse of Rights in the Codification Projects

3.2.1 PECL

In the PECL, no explicit reference is made to the principle of the prohibition of abuse of rights. However, under section 2 ‘General Duties’, Article 1:201 PECL expressly incorporates a general rule on ‘good faith and fair dealing’: ‘(1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty.’

This duty is defined in such broad terms that it establishes a truly general obligation.¹¹⁷ This obligation of good faith and fair dealing is used in an ‘objective sense’: the parties are under a duty to follow a standard of behaviour, which is given by honesty, social morality, and good practices.¹¹⁸ It is worth mentioning that the French version of the PECL only refers to a duty of ‘good faith’, whereas the English version uses the wording ‘good faith and fair dealing’. As indicated in the commentary of the English version, ‘good faith’ refers to the intention to act honestly and fairly, which is a subjective element. On the contrary, ‘fair dealing’ is the fact of acting fairly, which is an objective element.¹¹⁹ Thus, read together, ‘good faith and fair dealing’ refer to an objective standard of conduct. It follows that the term ‘good faith’ used in the French version must be understood in this broader meaning, including an objective dimension.¹²⁰

The pattern of conduct, imposed by the obligation of good faith and fair dealing, is not only required in the formation, performance, and enforcement of the parties’ contractual duties but also in the exercise of a party’s right under the contract.¹²¹ In the latter case, the exercise of existing rights may be limited on

¹¹⁶ The results of this working group are published in FAUVARQUE-COSSON & MAZEAUD, *Projet de Cadre commun de Référence: Terminologie contractuelle commune*; B. FAUVARQUE-COSSON & D. MAZEAUD (eds), *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (München: Sellier European Law Publishers, 2008).

¹¹⁷ FAUVARQUE-COSSON & MAZEAUD, *Projet de Cadre commun de Référence: Terminologie contractuelle commune*, 237; FAUVARQUE-COSSON & MAZEAUD, *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, 173.

¹¹⁸ M.W. HESSELINK, ‘The Concept of Good Faith’, in *Towards a European Civil Code* (Deventer: Kluwer, 2004), 471; F.M. SANZ, ‘Good Faith of the Parties’, in *Europäisches Vertragsrecht im Gemeinschaftsrecht*, ed. H. SCHULTE-NÖLKE & R. SCHULZE (Cologne: Bundesanzeiger, 2002), 128.

¹¹⁹ LANDO & BEALE, 115–116.

¹²⁰ See FAUVARQUE-COSSON & MAZEAUD, *Projet de Cadre commun de Référence: Terminologie contractuelle commune*, 237; FAUVARQUE-COSSON & MAZEAUD, *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, 173–174.

¹²¹ LANDO & BEALE, 113.

the basis of good faith and fair dealing (limitative function).¹²² Thus, the prohibition of abuse of rights may be considered as a specific application of the general rule of good faith and fair dealing expressed in Article 1:201 PECL. Indeed, under this rule, an abusive exercise of a right will be limited to an adequate use. For example, a party is not entitled to exercise a remedy if this is of no benefit to him and his only purpose is to harm the other party.¹²³ Likewise, if a party stands on ceremony without any good reasons, it cannot avoid a contract because this ceremony has not been respected in a particular case.¹²⁴ In addition, if a party uses dilatory tactics to put off another party, the former party is estopped from relying on the time limit if the latter party sues him after the expiration of that time limit.¹²⁵

However, such a general wording of ‘good faith and fair dealing’ in the PECL contains the risk that every Member State will give its own interpretation to that provision. Only the legal systems in which the principle of prohibition of abuse of rights is connected to the principle of good faith will infer a prohibition of abuse of rights from the general ruling on good faith and fair dealing in the PECL. Therefore, it will be examined whether a more explicit reference to the principle of the prohibition of abuse of rights in the codification projects is desirable (see section 3.5 below).

3.2.2 *Acquis Principles*

The *Acquis Principles* do not include a general rule on good faith equivalent to Article 1:201 PECL. This is because in the *acquis communautaire*, no solid basis exists for an overarching principle of good faith, serving as a single standard for all aspects of contract law. This principle rather appears in various facets depending on whether it relates to precontractual, contractual, or postcontractual matters. Therefore, the *Acquis Principles* contain individual provisions for these different aspects of the principle of good faith.¹²⁶

These individual provisions are the following: Article 2:101 *Acquis Principles* imposes a general duty on the parties to act in accordance with good faith in precontractual dealings. Article 2:103 *Acquis Principles*, relating to negotiations contrary to good faith, gives further guidelines as to the interpretation of this general duty. Article 6:301(1) *Acquis Principles* assesses the fairness of terms that have not been individually negotiated. Article 7:101(1) *Acquis Principles* imposes a duty on the debtor to perform its obligations in accordance with good faith. Article 7:102 *Acquis*

¹²² SANZ, 128.

¹²³ LANDO & BEALE, 115.

¹²⁴ *Ibid.*, 114. However, if a particular ceremony is required as a condition of validity for a contract, the contract must be annulled when this ceremony has not been respected.

¹²⁵ *Ibid.*, 114. In Belgian law, the legal concept of ‘rechtsverwerking’ could apply in such a situation. See S. STIJNS, ‘La “rechtsverwerking”: fin d’une attente (dé)raisonnable?’, JT (1990): 685.

¹²⁶ *Principles of the Existing EC Contract Law (Acquis Principles)*, Contract I, 65.

Principles imposes a duty of good faith on a creditor in the exercise of its rights to performance and remedies for non-performance. Article 7:103 Acquis Principles imposes a duty of loyalty on the debtor, according to which he must give due regard to the creditor's interests if an obligation by its nature requires the debtor to manage the creditor's affairs. Finally, Article 7:104 Acquis Principles imposes a duty on the debtor and the creditor to cooperate with each other to the extent that this can reasonably be expected for the performance of an obligation.

Contrary to the PECL, the Acquis Principles explicitly refer to the principle of the prohibition of abuse of rights in its commentaries. First, the commentary on Article 2:101 Acquis Principles expressly states that: 'an abusive exercise of a right may also fall under Art. 2:101 Acquis Principles'. This is the case, for example, if a party requires information where this information is already known to that party and due to the circumstances a further confirmation or document is not necessary either.¹²⁷

Second, and more importantly, the commentary on Article 7:102 Acquis Principles explains that this provision serves as a rule determining the limits of the exercise of rights (limitative function). This rule is expressly qualified as 'a general rule preventing the abus de droit'.¹²⁸ It deals with situations in which the right in question exists, but due to a particular context, the exercise of this right violates good faith and cannot be enforced for that reason.¹²⁹ Thus, the principle of the prohibition of abuse of rights may be understood as a specific application of the general duty of good faith, in its limitative function, expressed in Article 7:102 Acquis Principles.

3.2.3 DCFR

Like the PECL, the DCFR includes a general rule on good faith. In Book I 'General Provisions', Article I-1:102(3) DCFR provides that in the interpretation and development of the DCFR rules 'regard should be had to the need to promote good faith and fair dealing'.¹³⁰ In addition, in Book III 'Obligations and Corresponding Rights', Article III-1:103 DCFR imposes a general obligation of good faith:

(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an

¹²⁷ *Ibid.*, 67.

¹²⁸ *Ibid.*, 264.

¹²⁹ *Ibid.*, 264.

¹³⁰ CH. VON BAR ET AL. (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Interim Outline Edition (2008), 101-102; CH. VON BAR ET AL. (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Final Outline Version (München: Sellier European Law Publishers, 2009), 177.

obligation or contractual relationship. (2) The duty may not be excluded or limited by contract¹³¹ [or other judicial act].¹³²

This general obligation of good faith is used in an ‘objective sense’. Indeed, in the final outline version of the DCFR, the expression ‘good faith and fair dealing’ is defined as ‘a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question’ (Article I-1:103 DCFR).¹³³ Hence, such a pattern of conduct is required, among others, in exercising a right to performance. The principle of good faith may impose limits on the exercise of such a right (limitative function). Thus, the principle of the prohibition of abuse of rights can be considered as a specific application of this general duty of good faith, in its limitative function. Nonetheless, the general wording of ‘good faith and fair dealing’ in the DCFR contains a similar risk as in the PECL that each Member State will give its own interpretation to that rule (see section 3.2.1 above).

Parallel to the DCFR, the Guiding Principles of European Contract Law (‘GPECL’), elaborated by the specific working group formed by the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de Législation Comparée*, include a general rule on good faith and fair dealing. In this way, Article 0-301 GPECL provides that ‘each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect’.¹³⁴

This duty is defined in such wide terms that it imposes a truly general obligation on the parties: they must act in good faith from the start of contractual negotiations through the performance of the contract, or even beyond, until the extinction of the effects of the contract.¹³⁵

Furthermore, Article 0-302 GPECL imposes a duty of good faith in the performance of an obligation: ‘every contract must be performed in good faith. The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract’.¹³⁶

According to the commentary on this provision, performance in good faith supposes, among other aspects, that the parties invoke the contractual terms and exercise their contractual rights in good faith. In particular, they should only use

¹³¹ See VON BAR ET AL., 2008, 150.

¹³² Added in the final outline version: VON BAR ET AL., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, 230.

¹³³ See VON BAR ET AL., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, 178.

¹³⁴ FAUVARQUE-COSSON & MAZEAUD, *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, 537.

¹³⁵ *Ibid.*, 515.

¹³⁶ *Ibid.*, 547.

these terms and rights in accordance with the aim that justified their original stipulation.¹³⁷

Thus, the prohibition of abuse of rights is a specific application of the general rule of good faith imposed in Article 0-301 GPECL and specified in Article 0-302 GPECL. Indeed, an abuse of rights exists when, despite the formal observance of the conditions for exercising a right, the objective of this right has not been achieved.¹³⁸ As indicated above, it is precisely such a conduct that is prohibited under Article 0-302 GPECL. In such a case, the exercise of the right in question will be limited to an adequate use in accordance with its aim (limitative function). For example, a creditor may not force a debtor to perform in kind if such performance would cause the debtor unreasonable effort or expense. Likewise, termination of a contract should only be possible where there is fundamental non-performance and not where there is only a lesser non-performance.¹³⁹ Yet, the general wording of ‘good faith and fair dealing’ contains a similar risk as in the PECL and the DCFR that each Member State will interpret this provision in its own manner (see section 3.2.1 above).

3.3 Relation between the Principle of the Prohibition of Abuse of Rights and the Principle of Good Faith

3.3.1 The Prohibition of Abuse of Rights as an Application of the Principle of Good Faith

The above examination demonstrates that none of the codification projects contain an express provision on the principle of the prohibition of abuse of rights. This principle seems to be understood as a specific application of the general duty of good faith and fair dealing, in its function of limiting the exercise of rights. This can be deduced implicitly from Article 1:201 PECL, Articles I-1:102(3) and III-1:103 DCFR, and Articles 0-301 and 0-302 GPECL. Moreover, this is explicitly recognized in the commentary on Article 7:102 Acquis Principles.

The relation between the principle of the prohibition of abuse of rights and the principle of good faith is not specific to European contract law. The ECJ also sheds light on the existence of this relation in its abuse doctrine. In the ‘Greek challenge’ cases, the Court rules that there is a presumption of abuse of rights if a shareholder seeks to derive, to the detriment of the company, an improper advantage, *manifestly* contrary to the objective of that provision,¹⁴⁰ or if a shareholder chooses a remedy that will cause such a serious damage to the legitimate interests of others that it appears *manifestly* disproportionate (see section 2.3.1.2.1 above).¹⁴¹ This test, and particularly the term ‘manifestly’, may indicate that the Union

¹³⁷ *Ibid.*, 538.

¹³⁸ ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke* [2000] ECR I-1569, para. 52.

¹³⁹ FAUVARQUE-COSSON & MAZEAUD, *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, 538.

¹⁴⁰ ECJ, 12 May 1998, Case C-367/96, *Kefalas* [1998] ECR I-2843, para. 28.

¹⁴¹ ECJ, 23 Mar. 2000, Case C-373/97, *Diamantis* [2000] ECR I-1705, para. 43.

principle of the prohibition of abuse of rights is related to, or even an application of, the principle of good faith in its role of limiting the exercise of rights.¹⁴² Indeed, if a right is exercised ‘manifestly’ contrary to its objective, or in a ‘manifestly’ disproportionate manner to the detriment of others, the exercise of that right will be reduced to adequate proportions.

As such, the duty of good faith and fair dealing, on the one hand, and the principle of the prohibition of abuse of rights, on the other hand, seem to constitute two sides of the same question: a positive side, namely the duty of good faith in the performance of contracts, and a negative side, namely the prohibition of abuse of rights. Consequently, similar results can be obtained on the basis of either of these sides. Specific rules in the codification projects, such as the reduction of a stipulated payment for non-performance where it is grossly excessive (Article III-3:712(2) DCFR), can be explained both on the basis of the duty of good faith and fair dealing and on the basis of the prohibition of abuse of rights (see section 3.5 below).

3.3.2 Recognition of a Limitative Function of the Principle of Good Faith

3.3.2.1 Member States

In the laws of the Member States, the principle of good faith is generally attributed three functions: a function of concretization or interpretation, a function of supplementation, and a function of correction or limitation.¹⁴³ Although the exact definition of these functions may vary in the national legal systems, they constitute a European ‘common core’,¹⁴⁴ that is to say, a concept that is common to most of the national legal systems.¹⁴⁵

As an example, in Germany, the following functions (*Fallgruppen*) of the principle of good faith (section 242 German Civil Code) are distinguished: concretization of underlying legal values (*sinngemässe Verwirklichung des Wertungsplanes*), supplementation of duties (*Ergänzung des Wertungsplanes*), and limitation of rights (*Korrektur des Gesetzesrechts*).¹⁴⁶ In the Netherlands, the principle of good faith (Article 6:2 Dutch Civil Code) has a supplementing function (*aanvullende werking*)¹⁴⁷ and a limiting function (*beperkende werking*).¹⁴⁸ In addition, good faith

¹⁴² DEVROE, 166–168. See in the same sense, SNIJDERS, 455–456.

¹⁴³ See for an overview of these functions in the various legal systems, HESSELINK, 475–478; VAN GERVEN & COVEMAEKER, 105–109.

¹⁴⁴ HESSELINK, 477.

¹⁴⁵ It is true that the Common Law legal systems do not recognize a general principle of good faith. However, these systems often use other concepts that will lead to similar results based on ‘unfairness’. See R. ZIMMERMANN & S. WHITTAKER (eds), *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000), 653 et seq., where concrete cases demonstrate that more similarities exist between the different legal systems of the Member States based on ‘good faith’ and ‘fairness’ than at first appearance.

¹⁴⁶ D. MEDICUS, *Schuldrecht I, Allgemeiner Teil* (München: C.H. Beck, 2006), 61–62, paras 131–134.

¹⁴⁷ HARTKAMP, ‘Verbintenissenrecht, Deel II’, para. 307 et seq.

¹⁴⁸ *Ibid.*, para. 312 et seq.

plays a role in interpretation.¹⁴⁹ In Belgium, the principle of good faith (Article 1134 (3) Belgian Civil Code) is usually attributed three functions: an interpretative function (*fonction interprétative*), a supplementing function (*fonction complétive*), and a restricting, limiting, or mitigating function (*fonction restrictive, limitative, ou modératrice*).¹⁵⁰ In Italy, scholars distinguish between a supplementing function (*funzione integrativa*) and an evaluating function (*funzione valutativa*).¹⁵¹ In France,¹⁵² Greece, and Portugal, the principle of good faith equally plays an interpretative, supplementing, and correcting role, but these roles are not explicitly formulated in terms of three functions.¹⁵³

In conclusion, the Member States generally recognize a limitative function of good faith. In core national legal systems, the prohibition of abuse of rights is based on this limitative function (see section 2.2 above).

3.3.2.2 ECJ Case Law

On the one hand, in its *Neumann* case,¹⁵⁴ the ECJ has rejected the existence of a general principle of objective unfairness,¹⁵⁵ according to which:

A national authority was entitled, or even obliged, not to apply a provision of Community [Union] law in a case in which it considered that its application would lead to a result which the Community [Union] legislature would clearly have sought to avoid if it had envisaged such an eventuality when enacting the provision in question.¹⁵⁶

The Court ruled that the recognition of such a general principle would prevent the provisions of Union law from having full effect in the Member States and would prejudice the fundamental principle of a uniform application of Union

¹⁴⁹ *Ibid.*, para. 280 et seq.

¹⁵⁰ STIJNS, 'Abus, mais de quel(s) droit(s)? Réflexions sur l'exécution de bonne foi des contrats et l'abus de droits contractuels', 34. Sometimes, a fourth function is distinguished, which would allow the courts to change the content of the contract in certain circumstances ('fonction modificatrice'). However, this function has not been accepted by the majority of authors and the courts. See J. PÉRILLEUX, 'La bonne foi dans l'exécution du contrat: rapport belge', in *Travaux de l'association Henri Capitant, Tome XLIII, année 1992, Journées louisianaises de Baton-Rouge et La Nouvelle Orléans, 'La Bonne foi'* (Paris: Litec, 1994), 248.

¹⁵¹ HESSELINK, 476.

¹⁵² See for the recognition of a limitative function of good faith in France, STOFFEL-MUNCK, 66 et seq.

¹⁵³ *Ibid.*, 477.

¹⁵⁴ ECJ, 14 Nov. 1985, Case 299/84, *Firma Karl-Heinz Neumann v. Bundesanstalt für landwirtschaftliche Marktordnung* [1985] ECR 3663.

¹⁵⁵ See on this rejection of a general principle of objective unfairness, HARTKAMP, 'Vermogensrecht algemeen, Deel I', 85; SNIJDERS, 454-454.

¹⁵⁶ ECJ, 14 Nov. 1985, Case 299/84, *Neumann* [1985] ECR 3663, para. 25.

law.¹⁵⁷ If a national court asserts that the application of a Union provision would lead to a result of injustice, it can ask the Court for an interpretation of that provision or for a declaration of invalidity through the preliminary ruling procedure.¹⁵⁸

On the other hand, leaving aside this delicate issue of division of powers between the European Union and the Member States, the ECJ seems to recognize that good faith may set limits on the exercise of rights.¹⁵⁹ Significant examples concern the protection of legitimate expectations. Although this principle cannot be equated with the principle of prohibition of abuse of rights, in core legal systems of the Member States, the protection of legitimate expectations is, in one of its manifestations (namely as a standard of behaviour, for example, the concept of promissory estoppel), closely connected to the principle of the prohibition of abuse of rights.¹⁶⁰

The Court ruled in *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*¹⁶¹ and *Republik Österreich v. Martin Huber*¹⁶² that the recovery of unlawfully granted aid, from Union or national resources, could be prevented if the beneficiary of that aid had legitimate expectations that the aid was lawful. The principle of good faith will then limit the right to recover the wrongfully granted aid. Moreover, in exceptional circumstances, the ECJ excluded the possibility of relying on a provision of Union law used to challenge a legal relationship established in good faith.¹⁶³

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, para. 26.

¹⁵⁹ *Principles of the Existing EC Contract Law (Acquis Principles)*, *Contract I*, 262-263.

¹⁶⁰ See for Belgium, W. VAN GERVEN, 1987, 191-192; S. STIJNS & I. SAMOY, 'La confiance légitime en droit des obligations', in *Les sources d'obligations extracontractuelles*, ed. S. STIJNS & P. WÉRY (Brugge: die Keure, 2007), 54-58: the concept of legitimate expectations or promissory estoppel (*rechtsverwerking*) can be exclusively applied through the principle of abuse of rights (Cass. 17 May 1990, Pas. 1990, 1061). See for the Netherlands, G.J.P. DE VRIES, 'Estoppel in Dutch Law', in *La confiance légitime et l'estoppel*, ed. B. FAUVARQUE-COSSON (Paris: Société de Législation Comparée, 2007), 319-320: the concept of legitimate expectations or promissory estoppel is an application of the limitative function of good faith (Art. 6:2 Dutch Civil Code). See for France, D. MAZEAUD, 'La confiance légitime et l'estoppel: rapport français', in *La confiance légitime et l'estoppel*, ed. B. FAUVARQUE-COSSON, 266, para. 21: the principle of legitimate expectations is an application of Art. 1134(3) Civil Code or the principle of abuse of rights. See for Germany, J. VON STAUDINGERS, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Berlin: Sellier - de Gruyter, 2005), Art. 242, para. 286 et seq.: the concept of legitimate expectations or promissory estoppel (*Verwirkung*) is an application of *Treu und Glauben*, Art. 242 German Civil Code.

¹⁶¹ ECJ, 20 Mar. 1997, Case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH* [1997] ECR I-1591, para. 25.

¹⁶² ECJ, 19 Sep. 2002, Case C-336/00, *Republik Österreich v. Martin Huber* [2002] ECR I-7699, para. 59: 'Community law does not preclude the application of the principles of protection of legitimate expectations and legal certainty in order to prevent recovery of aid, partially financed by the Community, which has been wrongly paid, provided that the interest of the Community is also taken into consideration.'

¹⁶³ ECJ, 15 Mar. 2005, Case C-209/03, *The Queen v. London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119, paras 66 and 67.

3.3.2.3 European Contract Law

In addition, in the field of European contract law, there is room for the recognition of a limitative function of good faith. Indeed, the European Commission favours the introduction of a general duty of good faith and fair dealing into contract law, which is still lacking for the moment.¹⁶⁴ Likewise, the legal doctrine seems to encourage the elaboration of a ‘common European standard’ of good faith, which appears to be currently absent in European private law.¹⁶⁵ The limitative function of good faith seems to be present in the *acquis communautaire*.¹⁶⁶ Furthermore, various codification projects of European contract law incorporate a general duty of good faith and fair dealing (see section 3.2 above). This general rule on good faith includes a function of limiting the exercise of rights, as expressly recognized in the commentary on Article 7:102 Acquis Principles.

3.4 Applicability of the General Principle of Union Law of the Prohibition of Abuse of Rights Developed by the ECJ

3.4.1 Applicable to Private Law Relations

Beyond this connection of the principle of the prohibition of abuse of rights to the limitative function of the principle of good faith, the general principle of Union law of the prohibition of abuse of rights, as developed by the ECJ (see section 2.3 above), is also applicable as such to private law relations, to the extent that a question of Union law arises. First, Union law is at stake if the application of national abuse provisions undermines the full effect of rights based on Union law. This follows from the ‘Greek

¹⁶⁴ Green Paper on the review of the Consumer Acquis of 8 Feb. 2007, COM (2006) 744 final, point 4.3 (Annex I): ‘(...) a general provision could be built round the phrase “good faith and fair dealing”. This includes the idea that they show due regard to the interests of the other party, considering the specific situation of certain consumers. (...) The main advantage of an overarching general clause for consumer contracts (...) would be the creation of a tool which would provide guidance for the interpretation of more specific provisions and would allow the courts to fill gaps in the legislation by developing complementary rights and obligations’. However, this suggestion of the European Commission to include a general provision on good faith and fair dealing is not followed in the Proposal for a Directive of the European Parliament and of the Council on consumer rights of 8 Oct. 2008, COM (2008) 614 final. See on the broader context of the Green Paper and this Proposal, B. HEIDERHOFF & M. KENNY, ‘The Commission’s 2007 Green Paper on the Consumer Acquis: Deliberate Deliberation?’, *E.L.Rev.* (2007): 740; E. TERRY, ‘The Green Paper on the Review of the Consumer Acquis’, *TvC* (2007): 105 et seq.; C. TWIGG-FLESSNER, ‘No Sense of Purpose or Directions? The Modernizations of European Consumer Law’, *ERCL* (2007): 198–213.

¹⁶⁵ HEIDERHOFF, 124–124; RIESENHUBER, 236–237.

¹⁶⁶ *Principles of the Existing EC Contract Law (Acquis Principles)*, *Contract I*, 262–264, commentary on Art. 7:102 Acquis Principles: the requirement of good faith is used to limit the power of a party to exercise its rights. In this way, Art. 3(1) of Directive 93/13/EEC of 5 Apr. 1993 on unfair contract terms [1993] OJ L95/29 provides that a contractual term that has not been individually negotiated shall be regarded as unfair, if contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. Likewise, Art. 4(1) of Directive 86/653/EEC of 18 Dec. 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17 provides that a principal must act dutifully and in good faith in his relation to his commercial agent.

challenge' cases,¹⁶⁷ where the ECJ ruled that the full effect of Union rights would be prejudiced if the claim against an increase of capital in breach of Article 25(1) of the Second Company Law Directive were qualified as abusive under Article 281 Greek Civil Code (see section 2.3.1.2.1 above). This ruling applied to relations between private parties, namely a dispute brought by a group of shareholders against a private company and the remaining shareholders.¹⁶⁸

Second, Union law is at issue if the application of national abuse measures prejudices the objectives of provisions of Union law. In *Centros*, the Court ruled that a Member State is allowed to take anti-abuse measures for preventing or penalizing fraud, in conformity with the objectives of the Union provisions:

Either in relation to the company itself (. . .), or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.¹⁶⁹

Hence, this ruling equally applies to relations between private parties, namely the members of a company and their creditors.

Moreover, the principle of the prohibition of abuse of rights plays an important role in the field of European private law,¹⁷⁰ where it is expressly provided for in specific legislative acts,¹⁷¹ or constitutes an important tool for the interpretation of these acts.¹⁷²

¹⁶⁷ ECJ, 12 Mar. 1996, Case C-441/93, *Pafitis* [1996] ECR I-1363, para. 68; ECJ, 12 May 1998, Case C-367/96, *Kefalas* [1998] ECR I-2843, para. 22; ECJ, 23 Mar. 2000, Case C-373/97, *Diamantis* [2000] ECR I-1705, para. 34.

¹⁶⁸ DEVROE, 165-168, paras 58-63; HARTKAMP, 'Vermogensrecht algemeen, Deel I', 84, para. 106; RIESENHUBER, 18 and 238-239, paras 36 and 573-576; SCHMIDT-KESSEL, 2000, 63-65.

¹⁶⁹ ECJ, 9 Mar. 1999, Case C-212/97, *Centros* [1999] ECR I-1459, para. 39.

¹⁷⁰ See DE KLUIVER, 536, who stresses the importance of the existence of a general principle of Union law prohibiting the abuse of rights for the development of a European private law. Without such a general principle, divergent national principles on the prohibition of abuse of rights would threaten the unification process of private law; B. LURGER, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, 198; R. SCHULZE, 'Allgemeine Rechtsgrundsätze und europäisches Privatrecht', *ZeUP* (1993): 456-457, recognizing that the general principles of proportionality and fairness also have an impact on private law matters.

¹⁷¹ As an example, in Directive 2000/35/EC of 29 Jun. 2000 on late payments [2000] OJ L200/35, the thirty days time limit for payment does not start to run before the delivery of the goods. However, if a creditor refuses the acceptance of the goods, it were abusive for him to invoke the lacking starting point of the time limit and, accordingly, the delay of payment. See HEIDERHOFF, 122; M. SCHMIDT-KESSEL, 'Die Zahlungsverzugsrichtlinie und ihre Umsetzung', *NJW* (2001): 98.

¹⁷² For instance, according to Art. 3(1) of Directive 1999/44/EC of 25 May 1999 on the sale of consumer goods [1999] OJ L171/12, the seller shall be liable to the consumer for any lack of conformity, which exists at the time the goods were delivered. However, if the consumer causes a delay of delivery, and a lack of conformity arises before the goods were delivered, it were abusive for the consumer to bring an action of liability against the seller. See HEIDERHOFF, 123; SCHMIDT-KESSEL, 2000, 81-82.

Finally, the majority of the legal doctrine recognizes that the scope of the general principle of the prohibition of abuse of rights is not confined to the traditional areas of public law by mentioning this principle in the list of ‘other general principles’, which also affect private law matters where Union law is at issue.¹⁷³

3.4.2 *Applicable to European Contract Law*

Since the general principle of the prohibition of abuse of rights, as developed by the ECJ, may have an important impact on private law matters, this principle will equally affect European contract law. In this respect, the commentary on Article 2:101 Acquis Principles expressly refers to the ECJ case law on the prohibition of abuse of rights in private law relations where Union law is at stake: *Kefalas* and *Diamantis* on the abusive claim against the increase of capital, and *Inspire Art* on the improper recourse to freedom of establishment in the area of company law.¹⁷⁴ The commentary explicitly determines that the content of the principle of good faith is concretized through this case law.¹⁷⁵

3.5 *Need for a More Explicit Reference to the Prohibition of Abuse of Rights in the Codification Projects?*

In light of the above, it should be evaluated whether a more explicit reference to the prohibition of abuse of rights is desirable in the codification projects. Under the current approach, the prohibition of abuse of rights is understood as a specific application of the principle of good faith in its limitative function (see section 3.2 above). According to this view, it is sufficient to insert into the codification projects a general duty of good faith and fair dealing, encompassing a moderating function. However, an alternative approach would be to incorporate the general principle of the prohibition of abuse of rights, as developed by the ECJ, in a specific provision.¹⁷⁶

In principle, the current approach, based on good faith and fair dealing, is justifiable. Indeed, the limitative function of good faith has been recognized in core legal systems of the Member States and at the Union level (see section 3.3 above). More specifically, this approach is desirable from the perspective of the reasonableness and fairness-based Civil Law traditions (Germany, Greece, the Netherlands, and Portugal), where the prohibition of abuse of rights is equally

¹⁷³ DEVROE, 144, para. 22; HARTKAMP, ‘Vermogensrecht algemeen, Deel I’, 67; LENAERTS & VAN NUFFEL, 715; RIESENHUBER, 18.

¹⁷⁴ *Principles of the Existing EC Contract Law (Acquis Principles)*, Contract I, 65.

¹⁷⁵ *Ibid.*, 64.

¹⁷⁶ In this context, the principle of prohibition of abuse of rights is considered in its narrow conception, as it is generally defined in the core legal systems of the Member States, namely as the abusive exercise of rights. Thus, we do not refer to the broad conception of abuse of rights, as defined by the ECJ, including cases of circumvention of national legislation, discussed in section 2.3.

considered as one of the applications of the more general and autonomous moderating function of good faith (see section 2.2 above). Under this view, specific rules on the limitation of the exercise of rights, or the specific sanction of reduction to an adequate use of rights, can directly be based on the moderating function of good faith. For instance, the reduction of a stipulated payment for non-performance to a reasonable amount where it is grossly excessive (Article III-3:712(2) DCFR) is explained on the basis of the limitative function of good faith.¹⁷⁷ Hence, an explicit reference to the general principle of the prohibition of abuse of rights would not constitute an added value.¹⁷⁸

However, the alternative approach, based on the incorporation of the general principle of the prohibition of abuse of rights, might be preferable from the perspective of the abuse-based Civil Law traditions (Belgium and France), where the limitative function of good faith is not autonomous but exclusively linked to the general principle of the prohibition of abuse of rights (see section 2.2 above). Under this view, specific rules limiting the exercise of rights, such as the prohibition to invoke a valid term excluding or restricting liability in case of abuse (Article III-3:105(2) DCFR) or the reduction of a stipulated payment for non-performance to a reasonable amount (Article III-3:712(2) DCFR), or the specific sanction of reduction, can only be based on the principle prohibiting the abuse of rights. Hence, an explicit incorporation of this principle would constitute an added value in two ways.

First, an incorporation would make specific rules on the limitation of the exercise of rights in the codification projects more acceptable for legal systems with an abuse of rights tradition, since these rules could be explicitly connected to the principle of the prohibition of abuse of rights. Second, an explicit incorporation of the principle prohibiting the abuse of rights would remove the above discussed risk that every Member State would give its own interpretation to the general wording of ‘good faith and fair dealing’ (see section 3.2.1 above). A clear link would be established between the principle prohibiting the abuse of rights and the general duty of good faith.

Such an incorporation into the codification projects of the general principle of the prohibition of abuse of rights, as developed by the ECJ, would be conceivable, since this principle has gradually been recognized as a general principle of Union law (see section 2.3 above). This general principle has a broad scope of application and may therefore also affect private law matters, including contract law, where a

¹⁷⁷ See for other examples, Art. III-3:105(2) DCFR (a valid term excluding or restricting liability may not be invoked if contrary to good faith and fair dealing) or Art. III-3:302(3)b DCFR (specific performance cannot be enforced if unreasonably burdensome or expensive). These rules are directly based on the moderating function of good faith and fair dealing, expressed in Art. III-1:103 DCFR.

¹⁷⁸ The current approach also seems acceptable from the perspective of the Common Law and Nordic legal systems, which do not openly recognize a general principle of good faith but often reach similar results based on ‘unfairness’ through the use of other concepts. See ZIMMERMANN & WHITTAKER.

question of Union law arises (see section 3.4 above).¹⁷⁹ Moreover, from the perspective of the abuse-based traditions, it could even be considered to include specific, non-exhaustive, criteria for the existence of an abuse into the codification projects, which are recognized as a common concept in the various legal traditions of the Member States. Indeed, in the abuse-based traditions, the general principle of the prohibition of abuse of rights finds a smooth application in the case law due to the existence of such specific criteria, concretizing the limitative function of good faith.¹⁸⁰ Similarly, an incorporation of such specific criteria into the codification projects could lead to a more transparent use of the principle of prohibition of abuse of rights at the Union level.

4. Conclusion

In conclusion, the prohibition of abuse of rights amounts to a general principle of Union law. Not only does a common concept of abuse of rights exist in the legal traditions of the Member States but also the importance of the principle of the prohibition of abuse of rights has increased in the case law of the ECJ. The Court has gradually built a Union concept of abuse of rights, with its own conditions of application (*Emsland-Stärke*, *Halifax*, and *Cadbury Schweppes*), which has been explicitly qualified as a general principle of Union law (*Kofoed*).

Yet, the general principle of the prohibition of abuse of rights, as developed by the ECJ, is not expressly incorporated into the codification projects on European contract law. This principle constitutes one of the applications of the general duty of good faith and fair dealing in its limitative function. In principle, this approach is valid, particularly from the perspective of the reasonableness and fairness-based Civil Law traditions, where specific rules limiting the exercise of rights (e.g., the reduction of a stipulated payment for non-performance if it is grossly excessive) can directly be based on the moderating function of good faith and fair dealing.

This approach also seems to be acceptable from the perspective of the Common Law and Nordic traditions, which do not openly recognize a general principle of good faith but often reach similar results, based on ‘fairness’, by using other concepts.

¹⁷⁹ Indeed, in the abuse-based legal traditions, the general principle of the prohibition of abuse of rights, as developed outside the field of contract law - in property law - underlies the introduction of a similar institution into contract law through the moderating function of good faith. This limitative function may even only be applied if the specific criteria for the general principle of abuse of rights, as developed outside contract law, are fulfilled (see s. 2.2 *supra*). Based on this model, the Union concept of abuse of rights, also created outside the domain of contract law but with an impact on private law relations, could concretize the limitative function of good faith (see section 3.4.2 *supra*, commentary on Art. 2:101 Acquis Principles).

¹⁸⁰ See for an overview of these specific criteria, STIJNS, ‘Abus, mais de quel(s) droit(s)? Réflexions sur l’exécution de bonne foi des contrats et l’abus de droits contractuels’, 40–41; STIJNS, 2005, 67–70, paras 91–92.

However, an explicit incorporation of the general principle of prohibition of abuse of rights would be desirable from the perspective of the abuse-based Civil Law traditions, where specific rules limiting the exercise of rights (e.g., the prohibition to invoke a valid term excluding or restricting liability in case of abuse, or the reduction of a stipulated payment for non-performance if it is excessive) can only be explained through the principle prohibiting the abuse of rights. Such an express incorporation would also be in line with the recognition of a general principle of Union law prohibiting the abuse of rights in the case law of the ECJ.