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Editorial

Anti-abuse in the Field of Taxation: Is There One Overall Concept?

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Anti-abuse is one of the most important justifications in the case law of the European Court of Justice (ECJ). One would think that by now the concept of anti-abuse is clear for everybody. Unfortunately, this is not the case. There is a lot of debate on the precise definition of abuse and whether or not there are at least two concepts: one for direct taxes and the fundamental freedoms and one for indirect taxes and the directives.[1] In my view, that cannot be true. As described below, the confusion is caused by the ECJ due to the fact that it uses different wordings. However, this does not necessarily mean that the ECJ uses different concepts. I will try to explain this statement below.

From the case law of the ECJ in the field of direct taxes and especially from the *Cadbury Schweppes* ruling, it seems to follow that Member States are only allowed to combat abuse of law in the field of taxation in case of artificial arrangements intended to escape the national tax normally payable.[2] Taxpayers have a fundamental right of free establishment and it is even in accordance with this fundamental freedom if they choose to allocate their activities in the jurisdiction with the lowest taxes. However, if the taxpayer would make use of artificial arrangements, this could undermine the right of the Member States to exercise their tax jurisdiction in relation to the activities carried out in their territory and thus jeopardize a balanced allocation between Member States of the power to impose taxes.

One of the main questions is whether the goal to avoid taxation should be the main goal or the sole goal of that artificial arrangement. The ECJ is causing confusion by the wording used in its case law. A good example is the judgment in *Halifax*. The ECJ uses both definitions. First, the ECJ refers to the essential goal of the transactions but continues that the sole purpose of the transactions at issue in the main proceedings was to obtain a tax advantage.[3]

After *Part Services,* it seems clear that the criterion is whether or not the main/essential purpose is tax avoidance.[4] In a case where also business reasons were put forward in the field of marketing, the ECJ ruled that anti-avoidance can be a justification if obtaining a tax advance, which is not in line with the purpose of the Value Added Tax (VAT) Directive, is the essential motive for the transaction. It should be noted that some feel that it is different for direct taxes and the fundamental freedoms. However, personally I do not see any reason why this should be different for direct taxes.[5]

As indicated, the ECJ mentioned artificial arrangements. The question arises of whether the existence of an artificial arrangement is necessary to come to abuse. In other words, is it possible that in the view of the ECJ there is abuse even if there is no artificial arrangement or is the artificial arrangement a pre-condition for abuse? Different views are possible.

Based on *Part Services,* one could argue that there is no pre-condition in that respect. The existence of an artificial arrangement is just one of the objective factors that could indicate that transactions are abusive. The ECJ ruled the following:

> As regards the second criterion, the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (Halifax and Others, paragraph 81), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations.

It could be argued that abuse could follow from all relevant facts and circumstances even if there is no artificial arrangement.

From *Cadbury Schweppes*, the opposite can be derived. From the fact pattern, it was clear that the main reason for setting up a financing company in Ireland was to make use of the low taxes. Nonetheless, the ECJ ruled the following:

> Articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company

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1 See, for instance, Prof. Dr Frans Vanistendael, 'Halifax and Cadbury Schweppes: One Single European Theory of Abuse in Tax Law?', *EC Tax Review* 15, no. 4 (2006): 192–195.

2 ECJ, 12 Sep. 2006, Case C-196/04, *Cadbury Schweppes*.

3 ECJ, 21 Feb. 2006, Case C-255/02, *Halifax*.

4 ECJ, 21 Feb. 2008, Case C-42/06, *Part Services*.

5 See also ECJ, 22 May 2008, Case C-162/07, *Ampliscientifica, paras* 27–29, where the ECJ refers to both direct and indirect tax cases.

> established in a Member State of profits made by a controlled foreign company in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that controlled company is actually established in the host Member State and carries on genuine economic activities there.

Therefore, in this case, the existence of an artificial arrangement is a pre-condition for abuse.

The question is how these two judgments are related. Why the difference in approach? In my view, the main difference between the two cases lies in the purpose of the applicable European Community (EC) rules.

In *Part Services*, the ECJ clarified that in order to assess whether those transactions can be held to constitute an abusive practice, the national court must verify, first, whether the result sought is a tax advantage, the granting of which would be contrary to one or more of the objectives of the Sixth Directive and, then, whether that constituted the principal aim of the contractual approach adopted.

Since the purpose of the VAT Directive is different from the fundamental freedom of establishment, this could explain the different outcome. Crucial for the *Cadbury Schweppes* ruling is the fact that a real economic activity cannot contradict the purpose of the right of establishment, even if that real establishment was for pure tax reasons. Therefore, it is important to determine whether there is a real activity going on or whether there is an artificial arrangement. In my view, this is true for all fundamental freedoms.

Therefore, the overall concept of abuse is in my view the following: activities or transactions that contradict the purpose of the applicable EC rule and have the main goal to avoid taxation. It follows from this definition that the outcome can differ between the directives and the fundamental freedoms.