

ALTERNATIVE TECHNIQUES FOR COMBATING THE ABUSE OF LAW EMPLOYED BY EU LAW

TÉCNICAS ALTERNATIVAS PARA COMBATER O ABUSO DE DIREITO EMPREGADO PELA LEGISLAÇÃO DA UE

Dimitris Liakopoulos¹
Tufts University

Abstract

The present study/research aims to understand the functioning of prohibition of abuse of law in European Union, as a "legal technique" to deny the exercise of the right or exclude the application of EU law where a behavior is found abusive by the private. Such an analysis is indeed the starting point for understanding more deeply the normative meaning of this prohibition, also by placing it in relation with the other protection techniques of which the Union system disposes. More specifically, through a comparison with the use of alternative techniques, the aim of the research is to define whether this prohibition can be considered as an effective technique in EU law, that is to say concretely applicable to the fight against abuse. The role of the Court of Justice of the European Union in the fight against abuse: final considerations on the extent of the prohibition of abuse and its operation in EU law. The main objective of the research was to understand the legal meaning and operation of the prohibition on the abuse of rights in EU, as a legal technique to exclude the application of EU law or to deny the right attributed by EU law where abusive behavior by the private individual is found.

Keywords

Abuse of law. European union law. Social tourism European jurisprudence. Free movement. CJEU.

Resumo

O presente estudo / pesquisa tem como objetivo entender o funcionamento da proibição de abuso de direito na União Europeia, como uma "técnica legal" para negar o exercício do direito ou

¹Full Professor of European Union Law at the Fletcher School-Tufts University (MA in international law and MA of Arts in Law and diplomacy). Full Professor of International and European Criminal and Procedural Law at the De Haagse Hogeschool-The Hague. Attorney at Law a New York and Bruxelles. ORCID ID: 0000-0002-1048-6468. The present work is updated until January 2019.

excluir a aplicação do direito da UE quando um comportamento é considerado abusivo pelo privado. Com efeito, essa análise é o ponto de partida para compreender mais profundamente o significado normativo dessa proibição, colocando-a também em relação às outras técnicas de proteção que o sistema da União dispõe. Mais especificamente, através de uma comparação com o uso de técnicas alternativas, o objetivo da pesquisa é definir se essa proibição pode ser considerada uma técnica efetiva no direito da UE, ou seja, concretamente aplicável à luta contra o abuso. É o papel do Tribunal de Justiça da União Europeia na luta contra os abusos: considerações finais sobre a extensão da proibição de abusos e o seu funcionamento no direito da UE. O principal objetivo da pesquisa foi entender o significado e o funcionamento da proibição de abuso de direitos na UE, como uma técnica legal para excluir a aplicação do direito da UE ou negar o direito atribuído pelo direito da UE quando o comportamento abusivo da indivíduo particular é encontrado.

Palavras-chave

Abuso de direito. Direito da união europeia. Turismo social. Jurisprudência europeia. Livre circulação. TJUE.

SUMMARY

1.SHORT INTRODUCTION;

2.ABUSE OF LAW AS AN OVERRIDING REASON OF GENERAL INTEREST;

3.THE IMPERATIVE MOTIFS' TECHNIQUE IN THE JURISPRUDENCE THAT DEALT WITH ABUSIVE CONSTRUCTIONS: SOME FIRST CONFLICTING INDICATIONS;

4.APPLICATION OF THE TECHNIQUE OF IMPERATIVE REASONS IN RELATION TO CIRCUMVENTION IN DIRECT TAXATION;

5.C-196/04, CADBURY SCHWEPES AND CADBURY SCHWEPES OVERSEAS CASE LAW OF 12 SEPTEMBER 2006: NARROW LIMITS WITHIN WHICH IMPERATIVE GROUNDS OF GENERAL INTEREST OPERATE;

6.SOME CONSIDERATIONS ON THE ROLE OF PROPORTIONALITY PRINCIPLE IN THE FIGHT AGAINST TAX AVOIDANCE;

7.C-196/04, CADBURY SCHWEPPEES AND CADBURY SCHWEPPEES OVERSEAS CASE OF 12 SEPTEMBER 2006 AS A STARTING POINT FOR A CLEARER DEFINITION OF "PURELY ARTIFICIAL CONSTRUCTION";

8.LIGHTS AND SHADOWS OF IMPERATIVE REASONS OF GENERAL INTEREST: A COMPARISON WITH THE PROHIBITION OF ABUSE OF LAW;

9.THE TECHNIQUE OF RESTRICTIVE INTERPRETATION OF PROVISIONS OF EU LAW;

10."U-SHAPED" CONSTRUCTIONS COMPARED TO THE RESTRICTIVE INTERPRETATION OF SECONDARY LEGISLATION;

11.C-311/06, NATIONAL COUNCIL OF ENGINEERS CASE OF 29 JANUARY 2009: NATIONAL STATE V. STATE OF ACQUISITION OF THE TITLE;

12.FROM CASES: C-109/01, AKRICH OF 22 SEPTEMBER 2003 AND C-127/08, METOCK AND OTHERS OF 25 JULY 2008 TO C-1/05, JIA CASE OF 9 JANUARY 2007: CHANGE OF COURSE OF CJEU JURISPRUDENCE;

13.A COMPARISON: THE TEST OF EFFECTIVENESS OF THE CONNECTION WITH THE HOST COUNTRY IN THE CASE OF "SOCIAL TOURISM";

14.SOME BACKGROUND OBSERVATIONS. IS RESTRICTIVE INTERPRETATION AN EFFECTIVE

TECHNIQUE? A COMPARISON WITH C-456/04, AGIP PETROLI SENTENCE OF 6 APRIL 2006;

15.CONCLUDING REMARKS.

1. SHORT INTRODUCTION

The analysis of the jurisprudence concerning cases in which the abusive construction involves more than one system, resulting in the "artificial" creation of a connecting element, has led us to give a negative answer to the question whether the prohibition of abuse in such a context can be considered an operative legal technique in EU. This is because, beyond the statements of principle, CJEU shows not leaving space for the application of the prohibition, as outlined in the context in which a single system was involved, with the characters crystallized in the abuse test elaborated by the jurisprudence starting from C-110/99, *Emsland-Stärke* judgment of 14 December 2000².

EU system, however, seems to have other techniques to combat abuse, the analysis of which is the subject of this paragraph. More in detail, as already mentioned, in cases where individuals, through the exercise of freedom of movement, pre-establish the conditions to circumvent the legislation of the member state of belonging and apply other national legislation to the most favorable ones, CJEU has, for the most part, admitted as a palliative the appeal by the state concerned to the overriding reasons of general interest.

With reference, however, to the invocation of the freedoms of movement by private individuals in order to circumvent the otherwise applicable national legislation and at the same time seek the application of the secondary legislation of EU, or in cases where the private individual invokes an advantage deriving by a status conferred by EU law on the exercise of the

²ECLI:EU:C:2000:695, I-11569.

freedoms of movement, the Luxembourg court has shown a certain propensity for the restrictive interpretation of Union rules, in place of the application of the abuse doctrine.

It is necessary, however, to verify whether these techniques, in contrast to the prohibition of abuse, prove to be effective, in the sense of allowing an effective contrast to the abuse. To this end, a targeted analysis will be carried out of the application mechanisms of imperative reasons of general interest, verifying their functioning in concrete terms, and then analyzing the use of the restrictive interpretation of "community" freedoms or secondary legislation, focusing on free movement of persons.

2. ABUSE OF LAW AS AN OVERRIDING REASON OF GENERAL INTEREST

The theory of imperative reasons of general interest has found fertile ground for development concurrent with the emergence of the prohibition of indistinctly applicable restrictive measures, also defined as the principle of access to the market. The pretense claim that the measures which, although without any discriminatory effects, in substance, are nevertheless a non-justifiable obstacle to circulation are also prohibited, is tempered by the possibility offered to the member state to justify such measures, where certain conditions are satisfied. The overriding reasons relating to the public interest must therefore be conceived as the counterpart of the extension of the concept of an obstacle to measures which are applicable without distinction.

This balance is well explained in terms of negative integration³, a method of removing obstacles to the freedoms of movement which consists in entrusting the courts of the Union with the task of deciding whether the requirements of free movement or the regulations of member states prevail. In particular, the negative integration is achieved when the rules

³B. BERTRAND, *Que reste-t-il des exigences impératives d'intérêt général?*, in Europe, janvier 2012.

adopted at national level are not applied, as they are considered incompatible with the freedoms of movement and with free competition in the internal market⁴. This technique has allowed CJEU to bring an ever-increasing number of national regulations under its control, at the same time extending, through its own jurisprudence, the number of potential justifications that member states can invoke in defense of the rules subject to control.

As is known, over time the jurisprudence established a parallelism between the rules on the freedom of establishment and the free movement of goods⁵, on the one hand, and the rules on the freedom to provide services⁶, so that today we can refer to a global approach to all the freedoms of movement. In other words, there is a tendency towards a unitary discipline of the different freedom of circulation of productive factors in the community area, fundamentally based on the principle of mutual recognition of the regulatory choices of member states, as a next step, and more evolved at least in the prospect of building up an effective internal market, compared to the mere national treatment⁷.

In particular, the method used by CJEU to determine whether a non-applicable applicable legislation constitutes a

⁴P. J. OLIVER, *Oliver on Free Movement of Goods in the European Union*, Hart Publishing, Oxford & Oregon, Portland, 2010, pp. 135ss.

⁵V. HATZOPOULOS, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Sakkoulas/Bruylant, Atene-Bruxelles, 1999, pp. 107ss. N. BERNARD, *La libre circulation des marchandises, des personnes et des services dans le Traité CE sous l'angle de la compétence*, in *Cahiers de Droit Européen*, 34, 1998, pp. 11ss.

S. DEAKIN, *Regulatory competition in european company law*, in D. C. ESTY, D. GERADIN (a cura di), *Regulatory competition and economic integration*, Oxford University Press, Oxford, 2001, pp. 198ss.

⁶J.-G. HUGLO, *Liberté d'établissement et libre prestation des services*, in *Revue Trimestrielle de Droit Européen*, 32 (4), 1996, pp. 742ss.

⁷P. OLIVER, W. H. ROTH, *The internal market and the four freedoms*, in *Common Market Law Review*, 41 (4), 2004, pp. 407 ss., contra: V. HATZOPOULOS, *Exigences essentielles, impératives ou impérieuses; une théorie, des théories ou pas de théorie du tout?*, in *Revue Trimestrielle de Droit Européen*, 34, 1998, pp. 201-202.

restriction on the freedom of establishment or the freedom to provide services, strongly recalls the formula developed in the judgment of C-120/78, *Cassis de Dijon* case of 20 February 1979⁸ in relation to goods, according to which a restriction is contrary to the free movement of goods even if applied in a non-discriminatory way, unless it is justified by imperative requirements and satisfies the proportionality test⁹.

Bearing in mind the whole of the approach adopted by CJEU, it will then be necessary to focus first on the structure and on the salient characteristics of the exception of the imperative requirements invoked by the member state. CJEU has thus come to consider that even the application to the nationals of other member states of professional rules without distinction applicable to all those engaged in a given activity and thus without albeit indirectly, discriminatory effects, may constitute a restriction on the right to establishment, unless the state proves that these are rules justified by reasons of general interest. It follows that the free movement of persons and services does not end with the mere prohibition of discrimination, but also entails the prohibition of applying to beneficiaries of that freedom all those regulations which, although without distinction, have the effect of hindering exercise of the rights included in the free circulation. CJEU jurisprudence, since the 1980s and even more in 1990 with regard to the right of establishment¹⁰, has brought a decisive step towards

⁸ECLI:EU:C:1979:42, ECR 00649. For more details see: A. TRYFONIDOU, *Further steps on the road to convergence among the market freedoms*, in *European Law Review*, 16, 2010, pp. 36ss.

⁹A.H. TÜRK, *Judicial review in European Union law*, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, *Steiner & Woods European Union law*, Oxford University Press, Oxford, 2017, pp. 37ss C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 788ss.

¹⁰CJEU, C-55/94, *Gebhard v. Consiglio dell'Ordine degli avvocati e Procuratori di Milano* of 30 November 1995, ECLI:EU:C:1995:411, I-04165 and in the same spirit see: C-120/78, *Rewe-Zentral* of 20 February 1979, ECLI:EU:C:1979:42, ECR 00649.

a broader concept of restrictions that must be eliminated by virtue of the freedoms in question.

Attention will then be paid, more specifically, to the paradigmatic case of tax avoidance, in relation to which a consolidated jurisprudence has been built. Once the application of the technique in question has been analyzed and in particular the elements of differentiation with respect to the prohibition of abuse, it will be necessary to evaluate its effectiveness in combating abuse.

Measures are legitimate if and to the extent that two other conditions are met, which at the same time incorporate a qualitative element, namely the control of the need for the measure at issue, and a quantitative element, namely the control of the adequacy of the measure to the objectives prosecuted, even if often jointly treated¹¹. The national restrictive measure must, in other words, be objectively suitable to guarantee the realization of the objective of protection it sets itself. This means, according to what is stated in the Pretoria, that, in order to satisfy the requirement of eligibility, restrictive measures must pursue the general interest objective in a consistent and systematic way. It is therefore a matter of verifying that the application of the law is not so strict as to nullify, in specific cases, the achievement of the general interest objective that is intended to be guaranteed.

The last condition of eligibility, which is also the most relevant, because it is better able to make a strict selection of national measures, is compliance with the principle of proportionality¹². In the majority of the cases brought to the attention of CJEU, the disputed measures were censored as they went beyond what was necessary to achieve the desired result. It is

¹¹V. HATZOPOULOS, *Exigences essentielles, impératives ou impérieuses; une théorie, des théories ou pas de théorie du tout?*, op. cit., pp. 204ss.

¹²A. HARTKAMP, C. SIEBURGH, W. DEVROE, *Cases, materials and text on european law and private law*, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss.

therefore the latter criterion that deserves greater attention¹³. Moreover, the submission of measures to strict control of proportionality explains why CJEU quite easily accepts the wide variety of grounds of general interest invoked by member states.

The national measure, in a nutshell, should not impose any restrictions beyond what is strictly necessary to achieve the general interest of objective pursued. Therefore, if a state has a choice between several measures suitable to achieve the goal, it must choose the means which would reduce the freedom to trade. This is, as can be seen from the vague wording, a requirement that can take on the most varied facets in individual cases of species.

Lastly, it should be noted that it is up to the member state which maintains a restrictive measure in its law to justify it on the grounds of overriding reasons of general interest, and to the internal judge, with the aid of the interpretation of CJEU, to verify the reliability of justification. This introduces a relative presumption of incompatibility with the Treaty of national regulations, which can be overcome by the member state by demonstrating the presence of conditions just examined, interpreted in a restrictive way by the jurisprudence of CJEU.

3.THE IMPERATIVE MOTIFS' TECHNIQUE IN THE JURISPRUDENCE THAT DEALT WITH ABUSIVE CONSTRUCTIONS: SOME FIRST CONFLICTING INDICATIONS

As CJEU has already observed, in addition to verifying the abuse of private sector's behavior, when questioned on this point by the national court, it has also sought to establish the compatibility with Union law of restrictive measures adopted by

¹³CJEU, C-33/74, Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid of 3 December 1974, ECLI:EU:C:1974:131, ECR 01299, par. 12. C-76/90, Sager of 25 July 1991, v. Dennemeyer of 25 July 1991, ECLI:EU:C:1991:331, I-04221, par. 12-15.

the member state, in light of the doctrine of imperative reasons of general interest.

It is now necessary to deepen this aspect, noting first of all how the jurisprudence, on this point, proved to be rather fluctuating and not always precise in the analysis of the constitutional elements of the test coined from the judgment of C-120/78, *Cassis de Dijon* case of 20 February 1979.

It must be emphasized here that inevitably the attitude of CJEU in this regard is influenced by the questions that are asked from time to time by the national court and the defense invoked by the member state concerned. However, one can try to reach a systematization. Indeed, it may be noted that, rarely, the only reason of general interest in the fight against abuse was the object of attention; more frequently, the same state flanked by other justifications, other times it was not invoked at all. Starting from the latter hypothesis, the previously C-212/97, *Centros* analyzed case of 9 March 1999¹⁴, in which Denmark, in addition to invoking the prohibition of self-abuse, had put forward as a justification obligation, for limited liability companies, to set up and release a minimum share capital, the need to protect potential creditors of the company itself, preventing the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capital was insufficient¹⁵. Consequently, CJEU submitted the restrictive measures to the *Gebhard* test, to conclude that the required conditions were not met in the present case.

First of all, the restrictive measures did not appear to be able to meet the stated objective of protecting creditors, as it

¹⁴CJEU, C-212/97, *Centros v. Ltyd v. Erberrevs-og Selskabsstyrelsen* of 9 March 1999, ECLI:EU:C:1999:126, I-01459,

¹⁵L. CERIONI, The “abuse of rights” in EU company law and EU tax law. A re-reading of the ECJ case law and the quest for a unitary notion, in *European Business Law Review*, 21 (4), 2010 pp. 792ss. considers that the CJEU would suggest in this way that, without negative effects for the protection of creditors, there can be no abusive behavior, despite the choice of a less restrictive company regime for the establishment of the company which would then carry out all the activities through a branch in another Member State.

would have been sufficient to carry out some activity by the company in the United Kingdom in order to obtain registration, without thereby protecting creditors¹⁶. Secondly, since C-212/97, Centros case of 9 March 1999 presented itself as a company under English law, creditors should have been adequately informed that it was governed by foreign law; in any case, they could have referred to community rules to protect them, such as the fourth and the eleventh companies' directives.

In any case, the legislation in question did not pass the proportionality test, since, according to CJEU, it would have been possible to adopt less restrictive measures of the right of establishment, such as giving the public creditors the legal possibility of constituting the necessary guarantees.

More interesting for our purposes, however, are those cases, already analyzed under the different profile of the prohibition of abuse, intended as an autonomous protection technique, in which CJEU has taken into account the fight against abuse also as justification for restrictive national measures.

It should be noted here that, in many of the cases analyzed in the previous chapters, the analysis of the abuse is placed in a "limbo", in the sense that the "imperative reasons of general interest" justify, in turn, the restrictive measures adopted from time to time by the member state to combat abuse. In other words, measures to combat abuse are admissible, where the abuse is being circumvented by particularly deserving standards of protection.

To better understand this statement, it may be appropriate to proceed with an exemplification, citing first of all C-

¹⁶Thus, paragraph 37. The CJEU accordingly establishes that the refusal to register the branch of the company incorporated in another Member State is incompatible with the European Union provisions, while underlining, again, in closing, that such a interpretation "does not rule out that the authorities of the Member State concerned may take all appropriate measures to prevent or penalize fraud both with regard to the company itself, possibly in cooperation with the Member State in which it is constituted, and to the members (...)", (par. 38).

33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* case of 3 December 1974. CJEU with this ruling, has ruled out incompatibility with the provisions of the Treaty of national legislation which requires those who exercise a profession connected with the administration of justice to establish their residence in the circumscription of certain judicial bodies, when the same appears to be objectively necessary to ensure compliance with professional provisions linked, in particular, with the functioning of justice and with respect for deontology, interests that fall precisely within the category of imperative reasons of general interest, stating that, in particular, "this applies if the provider fails to comply with these rules through his residence in another member state"¹⁷. In this passage we can understand the role played, in CJEU's thought, by the particular merit of the interests protected by the legislation that we intend to circumvent.

Moreover, this conception is even clearer from the continuation of the judgment, where a distinction is made with the case in which "the member state does not subject the provision of certain services to any kind of professional qualification or discipline and establishes the residence requirement with reference to its territory in general. If indeed, within a member state, the exercise of a given activity is absolutely free, claiming residence in the state means imposing a restriction incompatible with articles 59 and 60 of the treaty"¹⁸, since the proper functioning of justice can be guaranteed with less burdensome obligations, for example by prescribing the election of a domicile where the judicial communications can be directed (...) "¹⁹.

CJEU thus adopts an intermediate position, partly focusing on the fact that national legislation could be circumvented,

¹⁷C-33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* of 3 December 1974, op. cit.,

¹⁸M. POIARES MADURO, M. WIND, *The transformation of Europe: Twenty-five years on*, op. cit. pp. 321ss. A. MANGAS MARTÍN, *Tratado de la Unión Europea*, *Tratado de Funcionamiento*, op. cit.

¹⁹A. MANGAS MARTÍN, *Tratado de la Unión Europea*, *Tratado de Funcionamiento* ed. Marcial Pons, Madrid, 2018.

and partly on the characteristics of the national legislation circumvented.

Likewise, in the already analyzed broadcasting cases, and in particular in C-148/91, *Veronica Omroep Organisatie v. Commissioner of Media* case of 3 February 1993, CJEU first focuses on the objective of national law to safeguard freedom of expression of the different social, cultural, religious or philosophical components existing in Netherlands, recognizing that, as a general interest, the same could legitimately be pursued by the state concerned. It is only at a later stage that it admits that a member state can treat the national broadcasting organization as being established in another member state to circumvent the more restrictive legislation of the state of origin²⁰.

In other words, CJEU recognizes the legitimacy of the adoption of restrictive measures that have the effect of preventing abuse, if they are placed in a system coherently aimed at achieving a general objective, such as maintaining a system pluralistic and non-commercial or the proper administration of justice. We are dealing with a peculiar application of the principle of abuse: in these cases, in fact, the measures granted to the host state in application of the prohibition of abuse, which in fact result in the equivalence, for the purpose of the applicable legislation, of the lender to subjects performing the same activity as established, must be justified in the need to guarantee objectives of general interest²¹.

It is not easy, therefore, to establish what the "community" judges would have decided if the objective of the national measures had not been of general interest. However, it has

²⁰C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media* of 3 February 1993 *Veronica* of 3 February 1993, ECLI:EU:C:1993:45, I-00487, par. 12.

²¹For more details see: C. DENYS, *Affaire no C-19/92, Dieter Kraus et Land Baden- Württemberg*, in *Cahiers de Droit Européen*, 32, 1994, pp. 638ss. L. J. SMITH, *Postgraduate degrees, vocational training and reverse discrimination: the narrow divide*, in *European Law Review*, 19, 1994, pp. 67ss. W.H. ROTH, *Case C-19/92, Dieter Kraus v. Land Baden-Württemberg, Judgement of 31 March 1993*, in *Common Market Law Review*, 30, 1993, p. 1251 ss.

already been stressed that this is an "embryonic" jurisprudence, in which it is at least hypothetical an application, however inaccurate, of the prohibition of abuse.

With the Kraus²² sentence, the fight against abuse in the particular field of diplomas was instead invoked by the member state as the only reason justifying the state measures which made the use of a university degree obtained in another member state subject to the issue of authorization by the competent administration, without the autonomous prohibition being emphasized²³.

²²CJEU, C-19/92, Kraus of 31 March 1993, ECLI:EU:C:1993:125, I-01663. Mr Kraus, a German national, and the Land Baden-Wuerttemberg, opposed the dispute as to the latter's refusal to recognize that the use of the postgraduate university degree obtained by Mr Kraus in the United Kingdom in the absence of prior authorization, prescribed by the German legislation. Mr Kraus, in fact, had refused to formally request authorization, claiming that the fact of requiring prior authorization for the use of a university degree obtained in another Member State constituted an obstacle to the free movement of persons and a discrimination, prohibited by the EEC Treaty, since such authorization was not required for the use of a diploma issued by a German institute.

²³The CJEU had already ruled in a similar case, C-61/89, Bouchoucha of 3 October 1990, ECLI:EU:C:1990:343, I-03551, par. 14. legitimizing the French legislation which, in the absence of harmonization, reserved osteopathy only for holders of the medical degree. At that juncture, the CJEU noted that, lacking a European Union regulation of the osteopath profession, each Member State is free to regulate the exercise of this activity on its territory, without giving rise to discrimination between its own citizens and those of other States. members (par. 12). In particular, a Member State has a legitimate interest in preventing some of its citizens from escaping the empire of national laws in the field of vocational training, thanks to the possibilities offered by the Treaty. "This would occur in particular if the fact, for a national of a Member State, of having obtained in another Member State a diploma, the extent and value of which is not recognized by any European Union provision, could oblige the Member State origin to allow him to carry out activities related to that diploma on his territory, where the performance of such activities is reserved for holders of a higher qualification mutually recognized at European Union level and that this reserve does not appear to be arbitrary (...)" (par. 15). It therefore resolves the question raised by the Cour d'appel of Aix-en-Provence in the sense that, in the absence of harmonization at European Union level of activities pertaining exclusively to the exercise of the medical profession, Article Article 52 of the Treaty (now

CJEU recalls that, although in the absence of harmonization concerning the conditions of use of the postgraduate diploma, the power to determine the modalities for the use of the aforementioned title to be subject to the individual member states, the provisions on freedom of establishment "preclude any provision concerning the conditions for the use of a supplementary university degree obtained in another member state, which, even if it applies without discrimination on grounds of nationality, may hinder or discourage the exercise by community citizens, including those of the member state which issued the measure itself, of the fundamental freedoms guaranteed by the Treaty"²⁴.

Article 49 TFEU) does not preclude a Member State from reserving a paramedical activity, such as osteopathy in particular, solely for holders of the medical degree.

²⁴Paragraph 35. It should be noted that the CJEU, thus ruling, does not accept the thesis proposed by AG Van Gerven in his Opinion of 13 January 1993, according to which "the prohibition, punishable by penalties, of using false diplomas is sufficient in itself to broadly protect the good faith of the public", which would be enough to make such national legislation contrary to the principle of necessity and/or proportionality (paragraph 13). It is interesting to note that, from the point of view of the abuse, the AG distinguished the present case from the Bouchoucha case: "This reservation of the Bouchoucha judgment to the general principle set out in the Knoors ruling does not seem relevant to me in this case. It should be read in relation to the subject-matter of the dispute, which, as I have already noted (par. 15), concerned the use of a diploma (British) which, according to the holder's claims, gave access to a regulated profession (in France). Well, so it is not in the present species, since Mr. Kraus does not try to use his LL.M. for the purpose of exercising a regulated profession in the Federal Republic of Germany, but only intends to take advantage of the degree connected to the diploma. Furthermore, the reservation made in the Bouchoucha judgment is motivated by the concern to avoid that, thanks to the possibilities offered by the Treaty, national citizens attempt to circumvent, in a sector as sensitive as the medical and para-medical one, the application of internal laws in access to a regulated profession. The judgment in question should rather be read in the light of the CJEU's case-law referred to in paragraph 13: case-law, from which it is inferred that the national rules designed to prevent the fundamental freedoms guaranteed by the Treaty from being abused are compatible with the purpose, for example, to circumvent the mandatory internal

However, according to the usual scheme, the member state may call for justification of non-discriminatory restrictive measures, overriding reasons of general interest, provided that, of course, the measures in question guarantee the achievement of the aim pursued and do not go beyond what is necessary to achieve this purpose.

In the present case, CJEU acknowledges that the national measure "aims to protect the public against the misuse of university degrees obtained outside the territory of the member state concerned"²⁵. Having recalled that "even" EU law does not prevent a member state from adopting, in the absence of harmonization, measures to prevent the possibilities offered by the Treaty from being abused and contrary to the legitimate interests of that state, further confirming the rationale of the state ban. CJEU concludes that "the need to protect a public not necessarily competent against the abusive employment of university degrees that have not been issued in accordance with the rules issued for this purpose in the state in which territory the holder of the diploma intends to use it is a legitimate interest to justify a restriction, by the member state concerned, of the fundamental freedoms guaranteed by the Treaty"²⁶.

However, it states that a national regulation establishing such a procedure must satisfy certain conditions in order to be compatible with the principle of proportionality. In this regard, CJEU specifies how the authorization procedure should have the sole purpose of verifying whether the postgraduate university degree has been regularly issued, as well as being easily accessible and not entailing the payment of excessively high administrative

rules on vocational training. As I have pointed out in this connection, however, the protection, the authorization, claiming that the fact of requiring prior authorization for the use of a university degree obtained in another Member State constituted an obstacle to the free movement of persons and discrimination, forbidden by the EEC Treaty, since such authorization was not required for the use of a diploma issued by a German institute.

²⁵CJEU, C-61/89, Bouchoucha of 3 October 1990, op. cit.

²⁶CJUE, C-61/89, Bouchoucha of 3 October 1990, op. cit.

rights. Furthermore, decisions that deny authorization must be susceptible to judicial review and, to this end, the interested party must be able to know the reasons on which they are based. Finally, the penalties imposed for failure to comply with the authorization procedure must not be disproportionate to the gravity of the infringement. Ultimately, a set of rules must be observed to ensure the satisfaction of the principle of proportionality²⁷.

The examination of these cases shows how jurisprudence has made a variable use of the reason for the fight against abuse, so that this brief examination cannot lead to conclusive conclusions.

In particular, if it is clear that the abuse can be invoked by member states at different levels, the attitude of CJEU with regard to the fight against the abuse as a reason of general interest is not as sure. To be honest, even from Kraus pronouncement there is a greater propensity to invoke the abuse as a justification for the restrictive measures adopted. It is not understandable, however, whether, over and above the statements of principle, to consider justification abuse can be said to be effective. Moreover, it would be inappropriate to draw a general rule from an isolated case.

Starting from these considerations, we explain the need to analyze a particular strand, that of tax avoidance, in which the jurisprudence of CJEU is not only consolidated, but has made an effort to analyze the constituting elements of the significant test.

4. APPLICATION OF THE TECHNIQUE OF IMPERATIVE REASONS IN RELATION TO CIRCUMVENTION IN DIRECT TAXATION

As was already observed in the area of direct taxation, which, it should be recalled, is a largely non-harmonized matter, EU has had the opportunity to deal with abusive situations perpetrated by companies established in a particular member state

²⁷A. HARTKAMP, C. SIEBURGH, W. DEVROE, Cases, materials and text on european law and private law, op. cit.

that, in order to circumvent the tax legislation of the same and move towards more favorable regulations, the so-called tax havens have invoked the freedom of secondary establishment, creating in these last states secondary centers of "convenience", to which transfers taxable profits.

As you will see, in the first cases in which the case law was compared with this phenomenon, before C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas of 12 September 2006²⁸, abuse was always²⁹ and only talked about in terms of fight against tax evasion, which justifies restrictive measures by national authorities.

C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006 was intended, from a certain doctrine, as a watershed towards an autonomous notion of abuse of right³⁰, also on the basis of the overall view that transpires from the operated references from CJEU itself, first of all to C-255/02, Halifax and others case of 21 February 2006³¹. However, it has already been observed that consistent claims are not always applied to the principle statements of the case law. In this sense, it can be assumed, on the contrary, that this pronouncement represents the proof of the incapacity, at present, of CJEU to attribute such autonomy to the concept. In fact, we have already seen how CJEU has promptly excluded it. The same abuse was instead brought back to the imperative reasons of general interest. It therefore appears useful, for our purposes, to examine first the case law before the C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006, in which

²⁸ECLI:EU:C:2006:544, I-07995.

²⁹CJEU, joined cases C-397/98 and C-410/98, Metallgesellschaft and others, of 8 March 2001, ECLI:EU:C:2001:134, I-01727, par. 37. for more details see: N. BAMBENS, *The principle of non-discrimination in international and european tax law*, IBFD, Leiden, 2012.

³⁰CJEU, C-307/97, Saint-Gobain ZN of 21 September 1999, ECLI:EU:C:1999:438, I-0616, par. 35. A. DE GRAAF, M. EVERS, *Limiting benefit shopping cit.*, p. 281 ss.

³¹ECLI:EU:C:2006:121, I-01609.

the constitutional elements of the technique were already present in the nuce, which will then be subsequently replicated, at the same time verifying the operating conditions of the ban on a case-by-case basis.

In this regard, a methodological clarification must first be carried out. The study of the jurisprudence in this paragraph will focus less on the facts of the case as the basis of the judgment. This choice is justified by the fact that the previous paragraphs responded to the need to first outline the presence and characteristics of the abusive manifestations, and then analyze CJEU's response to the same, as well as the underlying reasons. On this occasion, however, having established that there is a detachment between abusive behavior and the application of the related prohibition, we want to investigate the alternative techniques employed by the law, with a view to providing an overview of the consequences of choosing to bring the doctrine back of the abuse of law in terms of justifications against tax avoidance.

In this regard, it can already be anticipated that the prohibition of restrictive fiscal measures has traditionally been framed by CJEU as a prohibition of discriminatory measures that treat cross-border situations in a manner that is less comparable to internal situations. Indeed, according to settled case-law, while it is true that the matter of direct taxation falls within the competence of member states, it is also true that the latter must exercise that power in compliance with Union law. In particular, as far as we are concerned, the freedom of establishment of companies established in accordance with the legislation of a member state, having their registered office, central administration or principal place of business in EU territory, consists of the right to carry out their activity in another member state through a branch, or an agency. As stated, the rules on freedom of establishment aim to ensure the benefit of national legislation of the host member state; as noted in case law, however, they also preclude the state of origin from impeding the establishment in another member state of its own national or of a company constituted according to its own

legislation. In view of this, CJEU's orientation is constant in considering that the national regulations restricting the freedom of establishment can be justified in an abstract way in the fight against tax avoidance, which is an overriding reason of general interest, but only if they possess precise characteristics, including first of all proportionality and selectivity. The national measures, in fact, must be suitable to "hit" the only abusive constructions. In other words they must take what has been called a shotgun approach³². In this, as we can see, CJEU does nothing more than apply to the present case more general considerations which fit the grounds of general interest according to CJEU jurisprudence.

5. C-196/04, CADBURY SCHWEPPE'S AND CADBURY SCHWEPPE'S OVERSEAS CASE LAW OF 12 SEPTEMBER 2006: NARROW LIMITS WITHIN WHICH IMPERATIVE GROUNDS OF GENERAL INTEREST OPERATE

CJEU jurisprudence is consolidated by accepting in principle that member states can take remedies to counter tax evasion of taxpayers who take advantage of the Treaty provisions relating to freedom of movement and, in particular, those on freedom of establishment, to take advantage of the more favorable tax regime of another member state.

However, it recognizes this possibility within very narrow limits.

Thus, in *ICI*³³, EU judicature was called upon to rule on the possibility of justifying the difference in treatment created,

³²See, N. VINTHER, E. WERLAUFFE, Tax motives are legal motives-The borderline between the use and abuse of the freedom of establishment with reference to the Cadbury Schweppes Case, in *European Taxation*, 6, 2006, pp. 385ss.

³³CJEU, C-264/96, *Imperial Chemical Industries plc (ICI) v. Kolmer*, of 16 July 1998, ECLI:EU:C:1998:370, I-04695. The referring CJEU essentially asked whether the freedom of establishment precluded a legislation of a Member State which, as regards the companies established in that Member State and forming part of a consortium through which they hold a holding company, subordinated

with reference to the freedom of establishment, by a national legislation which used the criterion of the seat of subsidiaries to provide differentiated taxation treatment of these companies, direct, inter alia, to reduce the risk of tax evasion. Such risk, as claimed by the United Kingdom government, was determined by intra-group transactions aimed at organizing a transfer of charges from non-resident subsidiaries to a subsidiary resident in the United Kingdom and, on the other hand, to make profits appear to subsidiaries residents. According to this approach, the legislation at issue aimed therefore at preventing the creation of subsidiaries abroad for the purpose of subtracting taxable assets from the British tax authorities.

CJEU, in reply, excludes that the fight against tax evasion may be invoked in the present case, by concisely observing that "the legislation at issue in the main proceedings does not have the specific objective of excluding purely artificial constructions from a tax advantage whose purpose is to evade the UK tax law, but generally considers any situation in which companies controlled by a group are in majority established, for any reason, outside the United Kingdom". It notes that "the establishment of a company outside the United Kingdom does not in itself entail tax evasion, given that the company in question is nevertheless subject to the tax law of the State of establishment"³⁴.

the right to remission. tax on the condition that the holding company's business was to hold exclusively or principally the shares of subsidiaries established in the Member State concerned. For analysis see: S.E. BÄRSCH, *Taxation of hybrid financial instruments and the remuneration derived therefrom in and international cross-border context: Issues and options for reform*, ed. Springer, Berlin, 2012.

³⁴CJEU, C-324/00, *Lankhorst-Hohorst GmbH* of 12 December 2002, ECLI:EU:C:2002:749, I-11799. The referring CJEU doubted the compatibility with the freedom of establishment of national legislation adopted to combat under-capitalization, which substantially offset a subsidiary from the fiscal point of view on account of the fact that the parent company was established in another Member State to the subsidiary. For more analysis see: O. F. GRAF KERSSENBRÖCK, *In the wake of Lankhorst-Hohorst*, in *Intertax*, 2004, pp. 306ss. D. GUTMANN, L. HINNEKENS, *The Lankhorst-Hohorst case*. The

In these first affirmations of community jurisprudence, it seems to be seen to be contrary to the recognition in principle that the fight against tax evasion may rise to the rank of a plea capable of justifying measures which are restrained as restrictive. However, CJEU clearly points out that the lack of any selectivity in UK legislation is essentially equivalent to considering the establishment itself in another member state as elusive, which is why it can only be defined as an unjustified restriction on the establishment of subsidiary companies in another member state.

This last statement will be taken up in the subsequent jurisprudence. Suffice it to cite the C-324/00, *Lankhorst-Hohorst GmbH* sentence of 12 December 2002³⁵ with which CJEU, resuming the previous *ICI*, sanctioned the incompatibility with the freedom of establishment of the German discipline on funding by non-resident members, as the same objective was not to avoid that, through artificial constructions, tax advantages otherwise unreachable could be obtained, but was suitable to include any

ECJ finds German thin capitalization rules incompatible with freedom of establishment, in *EC Tax Review*, 3, 2003, pp. 90ss. L. IDOT, *Un régime différencié pour l'octroi du crédit d'impôt en matière d'impôt sur les sociétés est contraire à l'article 43 CE*, in *Europe*, 55, février 2003, pp. 17ss. N. VINTHER, E. WERLAUFF, *The need for fresh thinking about tax rules on thin capitalization: the consequences of the judgment of the ECJ in Lankhorst-Hohorst*, in *EC Tax Review*, 3, 2003, pp. 97ss.

³⁵ECLI:EU:C:2002:749, I-11799. The referring CJEU doubted the compatibility with the freedom of establishment of national legislation adopted to combat under-capitalization, which substantially offset a subsidiary from the fiscal point of view on account of the fact that the parent company was established in another Member State to the subsidiary. For more analysis see: O. F. GRAF KERSSENBRÖCK, *In the wake of Lankhorst-Hohorst*, in *Intertax*, 2004, pp. 306ss. D. GUTMANN, L. HINNEKENS, *The Lankhorst-Hohorst case. The ECJ finds German thin capitalization rules incompatible with freedom of establishment*, in *EC Tax Review*, 3, 2003, pp. 90ss. L. IDOT, *Un régime différencié pour l'octroi du crédit d'impôt en matière d'impôt sur les sociétés est contraire à l'article 43 CE*, in *Europe*, 55, février 2003, pp. 17ss. N. VINTHER, E. WERLAUFF, *The need for fresh thinking about tax rules on thin capitalization: the consequences of the judgment of the ECJ in Lankhorst-Hohorst*, in *EC Tax Review*, 3, 2003, pp. 97ss.

legitimate situation in which the parent companies had their headquarters outside the German Republic a situation which does not in itself entail a risk of tax evasion, given that the company in question is nevertheless subject to the tax legislation of the State in which it is established³⁶.

These decisions marked the start of a long series of rulings in which the Luxembourg judge, in a manner that was truly less cryptic, repeatedly considered the need to combat tax evasion as a valid justification for restrictive national measures, initially intended as part a wider range of justifications, normally the cohesion of tax system and the effectiveness of fiscal controls, and subsequently also appreciating it as the only justification³⁷.

A particular mention in this regard is given by ruling C-436/00, X and Y sentence of 12 December 2002³⁸, in which CJEU affirmed positively that the need to safeguard the coherence of tax system, the fight against tax evasion and the effectiveness of tax controls are overriding reasons of general interest capable of justifying regulations that restrict the fundamental freedoms guaranteed by the Treaty³⁹.

³⁶Paragraph 37. Moreover, the CJEU adds in paragraph 38, according to the findings of the referring CJEU itself, that in this case there is no abuse, since the loan actually intervened to reduce, in favor of the appellant in the main proceedings, the burden of financial interests resulting from your bank credit. Furthermore, it is apparent from the documents that Lankhorst-Hohorst was, for the years 1996 to 1998, at a loss, for amounts largely higher than the interest paid to LT BV.

³⁷Judgment of the CJEU in case C-436/00, X and Y of 21 November 2002, ECLI:EU:C:2002:704, I-10829, concerning Swedish legislation concerning the sale of shares in companies constituted in accordance with the legislation of a Member State in which the transferor holds an investment of a subsidiary established in the Kingdom of Sweden by that company.

³⁸CJEU, C-436/00, X and Y of 12 December 2002, op. cit.,

³⁹The CJEU considers that: "the measure adopted by the Kingdom of Sweden is not suitable for achieving the objective that should be pursued, ie that the transfer is effectively taxed in Sweden for the capital gains realized on the shares sold, in particular if the sale is produced before a definitive transfer of the latter abroad. In fact, it must be stated that, in the event of the sale of Type C shares, the transfer benefits in any case of a postponement of the tax payment on the

The referring court wondered about the compatibility with the freedom of establishment and the free movement of capital of the discipline that applies to the transfer of shares of companies to a different tax treatment depending on the nature of the transferee. The national authority argued that in the present case the only objective of the transfer to a Swedish company established for that purpose, rather than to a Belgian company, was to enjoy tax advantages. In this regard, he recalled that, according to CJEU jurisprudence, a member state has the right to take measures to prevent, thanks to the possibilities offered by the Treaty, that some citizens attempt to evade the empire of national laws abusively and that, furthermore, data subjects cannot abusively or fraudulently use Union law. The national authority claimed that the risk of tax evasion would first of all have raised doubts as to the applicability of the freedom of establishment because, in this case, there would have been indications of a possible abuse of that freedom. Only in the alternative, he argued that that risk could have been relied upon to justify a possible restriction on the freedom of establishment, by way of overriding reason of public interest. CJEU follows the suggested biphasic approach, first excluding the abuse and then verifying if the reasons could be justified by imperative reasons of public interest.

He, However, judged the norm submitted to his unsuitable⁴⁰ and necessary attention in relation to the objective

capital gains realized on the shares sold. Now, in response to a question put by the CJEU, the Swedish Government has not been able to show that, for this type of assignment, there are different objective situations from which it can be deduced that the potential risk resulting in a permanent transfer abroad of the the transfer, with regard to its tax liability, is essentially in different terms for the sale of type A and type B shares (...)" (par. 63).

⁴⁰Judgment of the CJEU: C-9/02, Hughes de Lasteyrie du Saillant of 11 March 2004, ECLI:EU:C:2004:138, I-02409. The national CJEU asked whether the art. 52 TEC (now 49 TFEU) opposed the establishment, by a Member State, for the purpose of preventing the risk of tax evasion, of an imposition system, on the date of transfer of the domicile of a tax payer outside France, of capital gains on social rights, where the latter were determined by the difference between the value of these rights on the date of said transfer and their purchase price. This

pursued. In this latter regard, in particular, CJEU reiterated that a general presumption of tax evasion or fraud cannot be based on the fact that the transferee company or its parent company is established in another member state, or justify a measure tax that undermines the exercise of a fundamental freedom guaranteed by the Treaty, whereas this was precisely the case of the legislation under examination. The latter, in fact, did not have the specific purpose of excluding purely artificial transactions whose purpose was to circumvent the Swedish tax legislation from a tax advantage, but concerned, in a general manner, any situation in which, for any reason, the sale underpaid was made in favor of a company established in accordance with the legislation of another member state in which the originator held an investment or a subsidiary established in the Kingdom of Sweden by that company⁴¹.

tax only applied to taxpayers who held rights in the social profits of a company that exceeded 25% of such profits at any time during the last five years preceding the aforementioned date. The peculiarity of the wording lay in the fact that it concerned the imposition of latent capital gains. The CJEU immediately notes that the taxpayer wishing to transfer the domicile outside French territory, in the exercise of the right guaranteed to him by art. 52 of the Treaty (now art. 49 TFEU), is subject to unfavorable treatment compared to a person who retains his residence in France. However, it checks whether this provision can be justified. For more details see. S. KODANIS, French exit tax incompatible with the freedom of establishment, in *European Taxation*, 4, 2004, pp. 375ss. J.P. MAUBLANC, Liberté d'établissement- Incompatibilité avec les traités communautaires de la taxation à la sortie par l'article 167 bis du CGI CJCE 11 mars 2004 no 9/02 de Lasteyrie du Saillant, in *Revue du Marché Commun et de l'Union Européenne*, 444, 2004, pp. 684ss.

⁴¹Paragraph 24. The French Government stated that the adoption of the provision at issue was inspired by the behavior of certain taxpayers consisting in temporarily transferring their tax domicile before transferring securities for the sole purpose of avoiding the payment of capital gains tax due in France. Even more clearly, as reported in the Opinion of the AG in paragraphs 53 and 54, "The French Government, which has presented the most detailed arguments on this point, explains that the contested provision seeks to prevent what should be defined as an abuse of law, ie the fraudulent use by a taxpayer of the freedoms conferred on him by European Union law. In this regard, the Government points out that a Member State is free to define the way in which capital gains are taxed, particularly as regards tax rates. It would therefore be entirely legitimate

The ruling in C-9/02, Hughes de Lasteyrie du Saillant case of 11 March 2004⁴² also specified that the national regulations cannot, without exceeding what is necessary to achieve the intended purpose, presume the intention to circumvent the tax legislation by part of any taxpayer who transfers his domicile outside the member state of belonging.

Although this statement does not present particular traits of innovation in itself considered, it is interesting to note the factual context in which it was made: the French government, in fact, to justify the obstacle posed to the freedom of establishment by national legislation, referred the objective of avoiding an abusive use of this freedom in order to circumvent tax legislation, expressly

for each Member State to take appropriate measures to prevent the taxation of capital gains from being deprived of substance because of abusive behavior. In the present case, that behavior consists in the fact that a taxpayer temporarily transfers his tax residence outside France before transferring securities for the sole purpose of avoiding the payment of capital gains tax payable in France. In this case it would not be a normal exercise of the freedom of establishment, but of an abusive use of this freedom, in order to circumvent the tax legislation (...)".⁴²ECLI:EU:C:2004:138, I-02409. The national CJEU asked whether the art. 52 TEC (now 49 TFEU) opposed the establishment, by a Member State, for the purpose of preventing the risk of tax evasion, of an imposition system, on the date of transfer of the domicile of a tax payer outside France, of capital gains on social rights, where the latter were determined by the difference between the value of these rights on the date of said transfer and their purchase price. This tax only applied to taxpayers who held rights in the social profits of a company that exceeded 25% of such profits at any time during the last five years preceding the aforementioned date. The peculiarity of the wording lay in the fact that it concerned the imposition of latent capital gains. The CJEU immediately notes that the taxpayer wishing to transfer the domicile outside French territory, in the exercise of the right guaranteed to him by art. 52 of the Treaty (now art. 49 TFEU), is subject to unfavorable treatment compared to a person who retains his residence in France. However, it checks whether this provision can be justified. For more details see. S. KODANIS, French exit tax incompatible with the freedom of establishment, in *European Taxation*, 4, 2004, pp. 375ss. J.P. MAUBLANC, Liberté d'établissement- Incompatibilité avec les traités communautaires de la taxation à la sortie par l'article 167 bis du CGI CJCE 11 mars 2004 no 9/02 de Lasteyrie du Saillant, in *Revue du Marché Commun et de l'Union Européenne*, 444, 2004, pp. 684ss.

linking it to the prohibition of abuse. In fact, it noted that "it would be an application in the tax area of what CJEU considered as "abusive exercise" of a right conferred by Union law⁴³. CJEU, in response, does not limit itself to excluding proportionality in negative, but provides very precise indications on the question of how to avoid the risk of evasion with less restrictive measures of freedom of establishment, in particular suggesting to provide "taxation of the taxpayer who, after a relatively brief stay in another member state, returns to France after having realized his capital gains, which would avoid jeopardizing the situation of taxpayers whose sole objective is to exercise in good faith the freedom of establishment in another member state"⁴⁴.

This option had already been proposed by the conclusions of the AG Mischo, where it was pointed out that a taxpayer's decision to settle abroad does not in itself imply a tax fraud and, as a consequence, it is up to the tax administration of the member state concerned to try, on a case by case basis, the existence of a risk of tax evasion. In particular, as regards the French government's claim that the transfer of securities shortly after departure from France constituted a sure indication of the desire to evade the tax, the AG very pragmatically finds that the departure for another member state, in order to undertake a new professional activity it can involve considerable expenses, which may be linked to this new activity or derive from the need to buy, for example, accommodation. Therefore, it cannot be assumed that the mere transfer of shares shortly after the transfer of the

⁴³CJEU, C-370/90, C-370/90, *The Queen/Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* of 7 July 1992, op. cit., and the conclusions presented on 13 March 2003, par. 64. The AG, while acknowledging that the case-law recognized the fight against tax evasion as an overriding reason of general interest, points out that the national provision in question determines, an "irrefutable presumption of tax fraud".

⁴⁴M. LANG, *The Marks & Spencer case-The open issues following the ECJ's final word*, in *European Taxation*, 6, 2006, pp. 54ss. T. O'SHEA, *Marks and Spencer v. Halsey (HM Inspector of Taxes): Restriction, justification and proportionality*, in *EC Tax Review*, 6, 2006, pp. 66ss.

domicile is sufficient to reveal the fraudulent intention. On the other hand, he admits that a criterion based on the speed of return to France would be, a priori, a closer relationship with the aim of preventing the taxpayer from circumventing the tax through the simple expedient of a short stay in another member state, during which the securities would be sold⁴⁵.

Finally, in the pronouncement of C-446/03, Marks & Spencer, Plc v. David Halsey case of 13 December 2005⁴⁶ which precedes less than a year Cadbury Schweppes, CJEU has the opportunity to apply in a more organic way the compatibility test, in relation to the legislation that introduces a different tax treatment between the losses suffered by a subsidiary resident and those by a non-resident subsidiary. Thus, as regards the justification for tax evasion, CJEU recognizes that the possibility of transferring the losses of a non-resident subsidiary to a resident company carries the risk that, within a group of companies, losses are organized in management of companies registered in member states where the rates of taxation are higher and in which, consequently, the tax value of losses is higher, so that restrictive legislation such as the one in question pursues legitimate objectives compatible with the Treaty and guarantees the realization of these objectives⁴⁷.

⁴⁵Parr. 49-51. A. ZALASINSKI, Some basic aspects of the concept of abuse in the tax case law of the European Court of Justice, in *Intertax*, 2008, pp. 163ss, notes how this ruling shows that the Court of Justice is increasingly inclined to recognize that cross-border activities can increase the risk of tax avoidance for Member States. Therefore, in principle, the prevention of tax abuses appears to be a valid justification for restrictions on free movement, provided that the measures are proportionate.

⁴⁶ECLI:EU:C:2005:763, I-010837. K. DZIURDZ, C. MARHGRABER, *Non discrimination in european and tax treaty law. Open issues and recent challenges*, Open issues and recent challenges, Linde Verlag, Wien, 2015.

⁴⁷Paragraph 55. "At a time when, in a Member State, the parent company demonstrates to the tax authorities that these conditions are met, it is contrary to Articles 43 EC and 48 EC to exclude the possibility for the latter to deduct from its taxable income in that Member State the losses incurred by its non-resident subsidiary. In this context, it is still necessary to clarify that the Member States

It states, however, that the legislation cannot be applied, exceeding what is necessary for the attainment of the objectives pursued, in the case in which "the non-resident subsidiary has exhausted the possibilities of taking into account the losses existing in its state of residence for fiscal year considered in the application for remission, as well as previous fiscal years, possibly by transferring such losses to a third party, or attributing such losses to profits made by the subsidiary during the previous financial years, and losses of the foreign subsidiary they may be taken into account in its state of residence for future tax purposes either by itself or by a third party, particularly if the subsidiary is sold to the latter"⁴⁸.

6. SOME CONSIDERATIONS ON THE ROLE OF PROPORTIONALITY PRINCIPLE IN THE FIGHT AGAINST TAX AVOIDANCE

The indications that can be drawn from these first pronouncements are manifold. First of all, it is beyond doubt that, in the view of CJEU, the fight against tax avoidance could be an overriding reason of general interest capable of justifying, in the abstract, a restrictive national measure. In this sense, the abuse of law rises to the role of justification for the inequalities of treatment caused by national legislation, as an imperative reason of general interest⁴⁹.

remain free to adopt or maintain in force rules having the specific objective of excluding purely artificial constructions from a fiscal advantage, the purpose of which is to circumvent national tax legislation (see in this sense, cited judgments par. 26, and de Lasteyrie du Saillant, par. 50)" (par. 56 and 57).

⁴⁸A. ZALASINSKI, Some basic aspects of the concept of abuse in the tax case law of the European Court of Justice, in *Intertax*, 2008, pp. 160ss.

⁴⁹V. EDWARDS, P. FARMER, The concept of abuse in the freedom of establishment of companies: A case of double standards?, *op. cit.*, pp. 213ss, they point out how, in reality, this first jurisprudence did not provide a certain answer to the question about the possibility of a "doubling" of the concept of abuse, which can be understood as a tool to limit the concrete application of

However, the fact that none of national laws subject to examination by EU judicature has emerged unscathed from the proportionality test is, however, a fact. It has been pointed out that CJEU, sometimes not even on the merits of question, other times providing more precise indications to member state, has come to deny compliance with national law of such congenital national measures, finding mostly the too broad scope of their formulation, which also led to hitting non-elusive operations. Indeed, control by Union's legal system regarding the constituent elements of justification proves to be severe, affecting all the laws that establish a general presumption of circumvention or fraud, on the basis that the assignee company or its parent company is based in another member country. This seems reasonable, because otherwise it would end up nullifying the freedom of establishment itself. In short, it serves an element of selectivity, because otherwise the establishment in another member state would be considered in essence to be in itself elusive. On the other hand, it is necessary to highlight immediately the difficulties faced by a norm, necessarily abstract and general, in precisely defining the operations that are certainly abusive. On this point, this case law, with the exception of what was said in *Lasteyrie du Saillant* with reference to the element of "rapidity of return", offers, among other things, little hint as to what constructions should be considered abusive, the national measure is justified.

This can be explained by taking into account what has just been stated. CJEU may not have felt the need to establish the criteria for identifying an abusive situation, given that the national measures in question had such a wide margin of application, to be clear that they had not been specifically designed to counteract abusive behavior⁵⁰.

fundamental freedoms, in based on the consideration that certain constructions are not worthy of protection, either as justification.

⁵⁰K. LENAERTS, The concept of "abuse of law" in the case law of the European Court of Justice on direct taxation, in *Maastricht Journal of European and Comparative Law*, 22, 2015, pp. 336ss.

In any case, what is already evident is how member states and CJEU demonstrate that they have different perceptions about what may or may not be considered abusive: while the former tend to qualify any taxpayer conduct that is abusive as a reduction of tax revenue for the state, CJEU, on the other hand, accepts that a certain transaction is considered abusive only when the loss of tax revenue is the result of a purely artificial construction, the purpose of which is to circumvent tax law.

Problems that have just been brought to light regarding the definition and verification of abuse, as well as the related satisfaction of the proportionality element, will indeed be more fully developed in C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas sentence of 12 September 2006, which represents, compared to previous jurisprudence, a coherent evolution of CJEU's thought, a "form of linear development". C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006 offered CJEU a good opportunity to explain what the expression "construction of pure artifice" actually meant.

7. C-196/04, CADBURY SCHWEPPEES AND CADBURY SCHWEPPEES OVERSEAS CASE OF 12 SEPTEMBER 2006 AS A STARTING POINT FOR A CLEARER DEFINITION OF "PURELY ARTIFICIAL CONSTRUCTION".

In C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006, CJEU has been able to deal with the controlled foreigner companies legislations, legislative measures aimed at repressing the practice of transferring the taxable profits generated by companies established in a member state to companies controlled by them and established in countries with a lower level of taxation. In short, these are measures intended to be applied when the profits earned by the controlled foreign company of a company that is tax-resident in the member state in question are subject to a much lower tax than that applied in that member state. By way of derogation from the common law and

provided that the conditions of one of the normally accepted exceptions are not met, these regulations provide that such profits are included in the taxable base of the parent company from the moment they are realized.

Under that provision, Cadbury Schweppes company, tax resident in the United Kingdom, was also taxed on profits made by its subsidiaries, which had been established in Ireland solely because their financing activities of the Cadbury Schweppes group could benefit from a more favorable tax regime.

CJEU, once rejected the possibility of invoking the prohibition of abuse in this case, has been called, in the alternative, to establish whether such legislation is congenital, restrictive only of the freedom of establishment, where it leads to an unequal treatment among companies resident based on the level of taxation applied to the company in which they hold a controlling interest, could be justified on grounds of combating tax evasion.

Such a restriction, abstractly justifiable if there are overriding reasons of general interest, must overcome the usual test established by CJEU jurisprudence: the protective measure must therefore be suitable to ensure the achievement of the aim pursued and not exceed what is necessary to achieve it. In particular, since the British legislation in the "for theft" procedure of exempt cases used *inter alia* the motive test, making an assessment about the absence of elusive purposes by resident members⁵¹, CJEU has posed the problem of understanding if the same test, as conceived, was or not suitable to limit the application of anti-avoidance rules only to purely fictitious constructions.

CJEU, after recalling that a restriction on freedom of establishment must have the specific purpose of hindering conduct

⁵¹In essence, it requires that the resident company demonstrates, on the one hand, that the significant decrease in UK tax which would result from the transactions between that company and the SEC was not the objective, or one of the main objectives, of the transactions and, secondly, that the obtaining of a reduction of the tax by distraction of profits in the sense of that legislation was not the main reason, or one of the main reasons, of the establishment of the SEC.

consisting in creating purely artificial constructions, designed to circumvent the normal tax on profits, considers it useful to make a parallel with the abusive practices of Marks & Spencer, consisting in organizing transfers of losses, within a group of companies, towards companies established in member states that apply the highest tax rates and in which, consequently, the tax value of the losses is higher, noting that both behaviors described are such as to violate the right of member states to exercise their tax jurisdiction in relation to activities carried out on their territory.

Such importance is not of little importance: in Marks & Spencer, in fact, the legislation was so suitable to repress tax avoidance, but not proportionate to this end. What is interesting to note, therefore, is how CJEU, in principle, labeled the constructions described as abusive. The abusiveness of the former construction, however, is not sufficient to establish the legitimacy of the law, reasoning from which it is clear that the control of the legislation is placed at a different level from that of factual reality, a significant element of differentiation between technique of imperative reasons of general interest and the prohibition of abuse.

What makes the pronouncement commentary innovative compared to the jurisprudence just analyzed is however the following. CJEU, in fact, after having also ascertained the suitability of legislation to combat the circumvention⁵², in verifying its proportionality, recalls the abuse, understood as an imperative reason that justifies the adoption of a national restrictive measure, as already established in all other context⁵³.

⁵²In this regard, the CJEU notes that "by providing for the inclusion of the profits of a SEC subject to a very favorable tax regime in the taxable base of the resident company, the said legislation allows counteracting practices aimed at nothing other than circumventing the tax normally due on profits generated by activities carried out on the national territory. As noted by the French, Finnish and Swedish Governments, such legislation is therefore appropriate for achieving the objective for which it was adopted (...)"(par. 59).

⁵³G.T.K. MEUSSEN, Cadbury Schweppes: The ECG significantly limits the application of CFC rules in the Member States, op. cit., pp. 19, criticizes the CJEU view regarding the burden of proof. According to the author, in fact, the

CJEU, taking up the test coined in C-110/99, *Emsland-Stärke* case of 14 December 2000 and then reiterated in C-255/02, *Halifax* and others case of 21 February 2006 judges UK legislation on European Cooperative society (SEC) compatible with EU law only insofar as the inclusion, in the taxable base of a company resident in a member state, of profits made by a controlled foreign company established in another state, when such profits are there subject to an imposition level lower than the one applicable in the first state, concerns pure construction designed to circumvent national tax. On the contrary, application of such tax measures must be excluded if, from objective and verifiable elements by third parties, it appears that, even if there are reasons of a fiscal nature, the subsidiary is actually implanted in the state of establishment and exercises effective economic activities. On this point, it is stated that such a finding must rest on objective and verifiable elements on the part of third parties, "relating, in particular, to the level of physical presence of SEC in terms of premises, personnel and equipment"⁵⁴.

CJEU should have clearly stated that it is the Member State in question that has to provide proof of the existence of a construction of pure artifice (and not, vice versa, that the company resident to provide proof which is not a purely artificial construction). In the same spirit see also: par. 67. It should be noted that the CJEU recalls in detail only the first of the three criteria detailed in the Opinion of the AG, namely the level of physical presence of the subsidiary in the State of establishment, linking it to the effectiveness of the activity it provides. In particular, according to the lawyer general, "even if the subsidiary proves to be just a simple executive instrument, because the decisions necessary to perform the services for which it is paid are taken at other levels, it is legitimate to consider the reconditioning of such benefits are a mere artifice of the state of establishment (...)" (par. 113).

⁵⁴The value added by the subsidiary's activity should also be verified. This is undoubtedly the most delicate criterion to be implemented if the services provided by the latter actually correspond to the exercise of real activities in the State of establishment, but nevertheless useful for taking account of the objective situation in which the services provided by the subsidiary are missing. of any economic interest in relation to the activity of the parent company, to derive a totally artificial creation, given that the price paid by the parent company

In other words, the national legislation in question can be applied only if SEC turns out to be a "phantom" or "screen" company, that is to say a fictitious installation, which does not exercise any effective economic activity on the territory of the member state of establishment⁵⁵.

The conclusion reached by CJEU, from the point of view of artificiality, is nothing more than the logical result of definition of establishment and its ratio, which is clearly evident from the Treaties, as interpreted by the community jurisprudence⁵⁶.

for the services in question seems, in some way, without compensation (...)" (par. 114).

⁵⁵The CJEU adds that "On the other hand, as the AG observed in par. 103 of the Opinion, the fact that the assets corresponding to the profits of the SEC could well have been carried out also by a company established in the territory of the Member State in which it is located. the resident company can not permit the conclusion that there is a construction of pure artifice "(paragraph 69). Must agree with R. KARIMERI, A critical review of the definition of tax avoidance in the case law of the European Court of Justice, in *Intertax*, 2009, pp. 308-310, when he states that, at first sight, the fact that the element of artificiality has been used to define in negative the purpose of freedom of establishment and correlatively the activities not covered on the basis of the objective element could be anomalous , both as an objective index of the desire to obtain an improper advantage, it is easy to repeat that the purpose of a rule, objective evidence and motives, in practice, are closely related. It is clear, in fact, that the CJEU will have to decide whether there has been an advantage contrary to the purposes of the rule, following which it may be relevant to assess whether abusive motivations exist, but, in practice, the verification of the reasons and the achievement of the purpose the norm takes place simultaneously, since it is largely based on the same objective evidence of artificiality. the great virtue of the test of purely artificial construction consists precisely in providing clear and unequivocal evidence of the abusive will, while demonstrating that the purpose of the tax rule in question has not been met.

⁵⁶Note that case C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas of 12 September 2006 was not an isolated ruling but was also applied in the UK in the Vodafone 2 case (C-203/05, Vodafone 2 of 20 August 2008, ECLI:EU:C:2008:460, not published), in which the CJEU of Appeal ruled that the CFC legislation could be interpreted in such a way as to comply with EU law, adding a new one exception, according to which the restrictive measure does not apply if the CFC is actually established in another Member State and carries out effective economic activities there. After being "received" by the national

The absence of the aforementioned human and technical equipment, in fact, would prevent the setting up of objective elements that would help third parties to recognize the establishment and would therefore not allow the exercise of an economic activity having an indefinite duration. Consequently, the enjoyment of freedom of establishment would have no justification and would require the need to find natural arrangement of the secondary establishment in the state where the primary establishment is exercised.

Apart from considerations related to the impact on provisions of SEC on such a ruling, which is reasonably clear in excluding the legislation in question from being applied in its original form⁵⁷, the innovativeness of the judgment can be found, in conclusion, under two different and linked profiles: the formula "constructions of pure artifice", already used but not yet defined

jurisdiction, this same ruling has then contributed to take a larger step, starting the legislative reform of the CFC legislation in the United Kingdom in the European Union sense since 2011. Perhaps a weight may have had the request of the May 2011 Commission to the United Kingdom to make further changes to the CFC rules, considering the inadequate response to Cadbury Schweppes (see Case No. 2009/4105, IP/11/606 of 19/05/2011). See in argument: T. O'SHEA, *CFC Reforms in the UK-Some EU Law Comments*, in *EC Tax Journal*, 13, 2012-2013, pp. 65ss. M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, Oxford University Press, Oxford, 2014. M. HELMINEN, *European Union tax law: Direct taxation*, IBFD, Leidend, pp. 102ss.

⁵⁷J. PETEVA, *Abuse under EC tax law and the standard of review of the European Court of Justice*, in M. LANG, P. MELZ, *Value added tax and direct taxation: Similarities and Differences*, IMF, Amsterdam, 2009, pp. 498ss. It is recalled that "the mere fact that a resident company obtains a loan from a related company established in another Member State can not establish a general presumption of abusive practices, or justify a measure that jeopardizes the exercise of a fundamental freedom guaranteed by the Treaty", but "To be justified by reasons for combating abusive practices, a restriction on the freedom of establishment must have the specific purpose of hindering conduct consisting in creating purely artificial constructions, devoid of economic effectiveness and aimed at circumventing the normal tax on profits generated by activities carried out in the national territory (...)".

precisely by the previous jurisprudence, as well as the transposition to imperative reasons of general interest of the criterion elaborated in C-110/99, *Emsland-Stärke* case of 14 December 2000 with regard to the prohibition of abuse of law.

However, it is necessary to ask whether such a transposition proves to be appropriate. Before tackling this issue, however, it is necessary to check whether the test used by CJEU to establish the proportionality of the measure has been confirmed in subsequent rulings.

To date, the jurisprudence, on this point is consolidated⁵⁸. The judgments which, after C-196/04, *Cadbury Schweppes* and *Cadbury Schweppes Overseas* of 12 September 2006, have dealt with proportionality, have in common the fact that they adopted the same approach with regard to the notion of "purely artificial" construction, which becomes an indispensable starting point for tax measures to be justified.

However, this notion constitutes the starting point for arriving at more meditated results. First of all, CJEU specifies that where tax legislation does not allow the scope of its application to be determined a priori and with sufficient precision and, consequently, does not meet the requirements of legal certainty, according to which the rules of law must be clear, precise and predictable in their effects, in particular when they may have negative consequences on individuals and companies, it cannot be considered proportionate to the objectives pursued.

⁵⁸Paragraph 82. The question was raised about the compatibility with the freedom of establishment of the United Kingdom legislation which limited the possibility for a resident company to deduct the interest paid on loans granted by a parent company, whether directly or indirectly, for tax purposes, resident in another Member State, if the resident company would not have suffered such a restriction if the interest had been paid on loans granted by a parent company established in the United Kingdom. In particular, the national CJEU wondered whether the solution to such a question would change if it could be shown that the loans supplemented an abuse of rights or formed part of an artificial construction intended to circumvent the tax legislation of the Member State of residence of the borrowing company.

Jurisprudence, then, in the judgment of proportionality, clarifying what has already been established in C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas* case of 12 September 2006, gives a decisive weight to the distribution of the burden of proof, evaluating the legitimacy of national anti-fraudulent measures adopted in this regard. In particular, it has been reiterated that the existence of artificial constructions creates per se the conviction of the presence of a willingness to avoid the payment of tax normally due following the exercise of an economic activity; however, the taxpayer must be given the opportunity to prove the absence of any abusive practice.

In order to be compatible with treaty provisions, national regulations, in short, must regulate the examination of objective and verifiable elements, which make it possible to identify the existence of a construction of pure artifice implemented solely for tax purposes, providing for the possibility of taxpayer to produce, without excessive administrative burdens, elements relating to commercial reasons underlying the transaction in question.

This is a discriminating factor in the eyes of CJEU, and demonstration is given by the test *Claimants* ruling, the first case in which the Luxembourg judge was called upon to apply the concept of abuse explained in C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas* case of 12 September 2006.

The Anglo-Saxon tax measure object of attention aimed at countering the practice of "undercapitalization", under which a corporate group tries to reduce the taxation of profits generated by one of its subsidiaries, choosing to finance this subsidiary through loans rather than own funds, allowing it to transfer profits to a parent company in the form of deductible interest when calculating its taxable profits, and not in the form of non-deductible dividends. In this way, when the parent company is based in a country where the rate of taxation is lower than that applicable in the subsidiary's country of residence, the tax debt is transferable to a country where the tax burden is lower.

CJEU seems to admit the compatibility of EU law with the Anglo-Saxon legislation, which passes the proportionality test. Having recalled, on the basis of the C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006, that the requirement of proportionality is not satisfied by a national legislation that does not have the specific objective of excluding from a fiscal advantage purely of artificial constructions designed to steal the company from such legislation, CJEU observes that, on the contrary, "legislation of a member state can be justified on grounds of the fight against abusive practices when it provides that the interests paid by a subsidiary resident to a non-resident holding company are qualified as distributed profits only if and to the extent that they exceed what they would have agreed in a competitive environment, that is, commercial conditions that could have been applied by such companies if these had not belonged to the same corporate group (...). The circumstance and the loan was obtained on terms other than those that would have been applied in a fully competitive regime, constitutes for the member state of residence of the borrowing company "an objective and verifiable element by third parties to establish whether the transaction in question represents , in whole or in part, a construction of pure artifice, fundamentally aimed at removing the company from the tax legislation of that member state (...)"⁵⁹.

Such legislation must be considered as not exceeding what is necessary to prevent abusive practices, on the double condition that, when the verification of these elements shows that the transaction in question corresponds to a construction of pure artifice devoid of real commercial logics, the tax payer be able, without excessive administrative burdens, to produce elements relating to any commercial reasons for which such transaction has been concluded, and that the retraining of interest paid as distributed profits is limited to the part of such interest that

⁵⁹Paragraph 81. In this regard, the question is whether, in the absence of special relations between the companies concerned, the loan would not have been granted or if it would have been granted for a different amount or interest rate.

exceeds what would have been agreed in the absence of special relations between the parties or between the latter and a third one⁶⁰.

It corroborates this approach in C-311/08, SGI case of 21 January 2010⁶¹, in which CJEU, even more clearly, considers proportionate to the objectives pursued by the Belgian tax measure, always based on three elements: the suspicion that a transaction exceeds what the companies concerned would have agreed in a system of full competition; the possibility for the tax payer, without excessive administrative burdens, to produce elements relating to any commercial reasons for which this transaction has been concluded; a correction limited to the fraction that exceeds what would have been agreed in the absence of a situation of interdependence between companies⁶².

⁶⁰In contrast, in the case C-105/07, *Lammers & van Cleeff* of 17 January 2008, ECLI:EU:C:2008:24, I-00173 the CJEU excludes the compatibility of the Belgian legislation aimed at combating undercapitalization, as it went beyond what was necessary to achieve that objective: "even if interests granted to non-resident companies are retrained as dividends as soon as they go beyond such limit, it can not be ruled out that this redevelopment also applies to interests recognized as remuneration for loans granted under conditions of full competition "(paragraph 33).

⁶¹ECLI:EU:C:2010:26, I-00487.

⁶²Similarly, in the judgment of the case C-182/08, *Glaxo Wellcome GmbH & Co. KG v. Finanzamt München II* of 17 September 2009, ECLI:EU:C:2009:559, I-08591. The CJEU observes, in conclusion, that "Since legislation such as that in the main proceedings does not permit the limitation of its application to pure construction on the basis of objective factors , but extends to all cases in which the resident taxpayer has acquired shares in a company resident by a non-resident shareholder at a price which, for whatever reason, exceeds the nominal value of such shares, the effects of such legislation must be beyond what is necessary to achieve the objective of preventing frames of pure artifice, devoid of economic effectiveness and made for the sole purpose of unduly benefiting from a tax benefit "(paragraph 100) .Normative by virtue of which an" extraordinary "benefit or "without consideration" was subject to taxation by the resident company, if the company had granted it to a company in another Member State, against which that first company is linked, directly or indirectly, by interdependence. The legislation in question made it possible to adjust for tax purposes situations in which the companies concerned had been affected in their

Some considerations regarding the meaning of "purely artificial" construction.

From the study of jurisprudence in this field, it emerges that CJEU has dealt with national tax laws that were going to hit the most disparate infragroup operations judged by the elusive state, fragmentary inevitably involving differentiated responses. However, the indications provided allow us to carry out some system considerations.

It is first of all certain that the national legislation can be a bulwark of imperative reasons, provided that it refers to a concept of "europeanized" abuse, not necessarily in line with what is found and sanctioned nationally⁶³. From this point of view, everything is played on the selectivity of the norm: the same must be suitable to contain the artificially constructed cases and not those characterized by an effective exercise of fundamental freedoms and, therefore, responding to the objectives underlying them.

The concretization of what is meant by "purely artificial construction" depends on legislation that from time to time is subject to examination⁶⁴. On the negative side, it is not

relationships by conditions which did not correspond to what they would have applied in a fully competitive regime (...)"

⁶³F. VANISTENDAEL, Halifax and Cadbury Schweppes: One single european theory of abuse in tax law?, in EC Tax Review, 6, 2006, pp. 194ss. The author points out that a construction that a Member State considers tax evasion only because it does not receive income, can be classified by the CJEU simply as an exercise of fundamental freedoms, which thus acquire the role of "saving clauses" for abusive practices think in a national perspective; in terms of taxation, this same theory can eventually lead to inequalities, always according to the same perspective, interfering with the distribution of the tax burden.

⁶⁴For example, in the case C-123/11, A Oy of 21 February 2013, ECLI:EU:C:2013:84, published in the electronic Reports of the cases, par. 27, the CJEU, following the case C-446/03, Marks & Spencer, Plc v. David Halsey of 13 December 2005, ECLI:EU:C:2005:763, I-010837, established that the legislation of a Member State which excludes, in the event of a merger between a parent company resident in that State and a subsidiary resident in the the possibility for the parent company established in that Member State to deduct from its taxable income the losses of the incorporated subsidiary established in

enough to hit those practices suggested by the finding of significant differences between tax bases or tax rates applied in different member states, which are designed to circumvent the tax normally payable in the member state in which it is established the company that granted this advantage. In fact, as already stated, in essence, tax are legal motives.

Union order, to admit the legitimacy of national legislation, therefore requires a *quid pluris*, fully delineated only starting from the pronouncement of C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006. Thus, tax measures cannot provide for any absolute presumption, but to strike only those operations that prove to be artificial. The assessment of artificiality changes, however, depending on the legislation that is relevant: we now look at the lack of activity of subsidiaries, when the conditions of full competition and when the absence of the state of necessity⁶⁵, all considered objective elements and verifiable by third party to establish whether the transaction represents, in fact, a construction of pure artifice. In fact, these are indices that can be traced back to the rationality and normality of the operation, which is not surprising given the role it assumes in the assessment of the absence of economic effectiveness.

In this regard, it should be noted that in reality there is not always a one-to-one correspondence between the construction of pure artifice and the elements just described. And indeed the language of CJEU, which is not exempt from this point of ambiguity, feeds the misunderstanding that assimilates artificiality to the absence of economic reality⁶⁶. Defining artificiality as an

another Member State, goes beyond what is necessary to achieve the essential part of the objectives pursued, in a situation where the non-resident subsidiary has exhausted the possibility of accounting for losses in its State of residence, which is the responsibility of the parent company to demonstrate.

⁶⁵A. SAYDÉ, *Defining the concept of abuse of Union law*, in *Yearbook of European Law*, 33 (1), 2014, pp. 151-152.

⁶⁶The dichotomy between the case C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas of 12 September 2006, on the one hand, and the Centros

absence of economic reality would, however, excessively reduce the scope of anti-consumer legislation. Taking the C-524/04, *test Claimants in the Thin Cap Group Litigation* cause of 13 March 2007⁶⁷, it is indisputable that "real" amounts of money have been transferred from the subsidiary to the parent company. The test of artificiality thus questions only the economic rationality of the operation, that is to say a payment of interest, rather than a distribution of dividends, given its tax profitable consequences. Ultimately, therefore, the question raised by the test of artificiality is not whether there is a real economic transaction (economic reality) in place, but if the legal construction chosen to carry out this operation has a rational economic explanation, beyond to the regulatory benefit pursued (economic rationality).

What is striking, starting from the examples that have been made, is then how the statements CJEU imply a requirement that for a regulation is very difficult to satisfy: it requires, in fact, that it is "stitched" exactly on the unlawful case. This is even more so given that, in the view of CJEU, it must be the legislation itself and not the administration proceeding to provide for such a

vein (C-212/97, *Centros* of 9 March 1999), on the other hand, would in truth be only apparent. In fact, the fact that the creation of a company in a certain State solely for the benefit of more advantageous legislation does not constitute an abuse, even when the institution carries out all its activities in the state of establishment, it is a fact that it is questioned in case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas* of 12 September 2006. If then there is no abuse even if the institution does not carry out any activity in the legal system whose law the private individuals have decided to exploit, when, as in *Cadbury*, the subsidiary actually and effectively operates in the Member State in which it is been created (Ireland), the choice to locate the company in a system different from the one of origin can not even more be considered an abusive conduct. The exercise of real economic activity in the member country of establishment then automatically excludes the abuse of EU law, but its absence does not only imply an abuse, representing only a presumption of abuse. The reason for which the right of establishment implies the actual exercise of an economic activity must then be understood as the recognition of the possibility of overcoming possible presumptions of abuse by proving the exercise of an effective activity in the member country whose law there you want to benefit.

⁶⁷ECLI:EU:C:2007:161, I-02107.

selection, as a tribute to a principle of legal certainty. Where the standard also affects operations whose economic effectiveness is indisputable, proportionality is to be excluded. Going even further, it could also be said that CJEU actually requires a kind of codification of anti-abuse clauses to the national legal system.

In conclusion, one last point to be explored remains. Given that the use purely artificial construction formula, even with the criticalities just highlighted, seems incontestable, has raised the problem of understanding how the same is compatible with the jurisprudence on pseudo-foreign corporations⁶⁸. Several solutions have been proposed in doctrine, which can however be traced back to two great lines of thought: there are those who have argued that

⁶⁸There are those who argued that, in the CJEU's opinion, what matters is that real economic activities are carried out in relation to secondary establishment activity, such as T. O'SHEA, *The UK's CFC rules*, op. cit., pp. 30. Precisely from this observation it would therefore be possible to reach a conciliation: the cases: Segers (C-79/85, Segers of 10 July 1986), Centros (C-212/98, Centros of 9 March 1999) and C-167/01, Inspire Art of 30 September 2003, in fact, concerned all companies that were taxed in the United Kingdom under the tax rules of the country and that, although they had moved of the branches of activity in other Member States, in any case they remained Anglo-Saxon companies that carried out an effective economic activity.

the two jurisprudences could be reconciled⁶⁹ and who, on the contrary, considered it preferable to exclude it⁷⁰.

In particular, the position of those who, like the AG Poiares Maduro, supported a trend reversal in CJEU jurisprudence: while in cases of pseudo-foreign corporations, in fact, the artificiality of operations had been considered irrelevant to establish the existence of an abuse, in C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006, on the contrary, abuse and artificiality are considered two closely related concepts⁷¹. Similar facts to those examined in C-212/97, Centros case of 9 March 1999 therefore could not fall into the new test, as CJEU in C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas

⁶⁹According to other scholars, the various conclusions reached by the CJEU should be motivated by looking at the consequences of the operations on a case-by-case basis for the interests of third parties, a prospect that could demonstrate the similarity of the concept of abuse in the field of company law and in the field of tax law. the use of a different terminology, such as L. CERIONI, The "abuse of rights" in EU company law and EU tax law, op. cit., pp. 795-796. How the choice of a more favorable company law is not alone enough to prove the existence of an abuse if not accompanied by proven prejudice for the protection of specific interests of third parties, for example of creditors, in equal measure the choice to exercise the freedom of establishment in a Member State with tax legislation which is more favorable than that of the Member State of origin alone is not sufficient to prove the abuse, that is to say a "construction of pure artifice", but can become so if the absence of genuine economic activity in the host Member State demonstrates that the sole objective and result is to cause injury to the economic interests of the home Member State.

⁷⁰In particular see: N. VINTHER, E. WERLAUFF, Tax motives are legal motives, in the European Taxation, 46, 2006, pp. 385, pp. 384-385, make a distinction upstream, between subjects, to conclude that tax law should draw the boundary line between use and abuse differently from company law to prevent the exercise of European Union freedoms degenerate into a pure "cherry-picking" tax, so the dividing line should be set according to whether the structure is genuine or not in the sense already specified above.

⁷¹J. VELLA, Sparking regulatory competition in european company law: A Response, in R. DE LA FERIA, S. VOGENAUER (a cura di), Prohibition of abuse of law: a new general principle of EU law?, Oxford University Press, Oxford, 2011. pp. 129ss.

case of 12 September 2006 explicitly refers to "screen" companies as examples of purely artificial constructions.

In this way, CJEU would have wanted to overcome the Centros doctrine, so that the new test would apply to company law, even if, in any case, the use by CJEU of the adverb "purely" would indicate that the required requisites to companies not to be considered fictitious, they should not be viewed in an excessively restrictive manner⁷².

This thesis does not fully convince, presenting, among other things, some incongruities under the temporal profile. It has already been observed, as it is not in the pronouncement in C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006, that CJEU uses for the first time the expression "purely artificial constructions", already in mind, a formula already presented, among other things, in ICI sentence of 1998. Well, CJEU, in C-167/01, Inspire Art case of 30 September 2003, does not seem to have paid the slightest attention to ICI sentence and the pure artifice construction that appears there⁷³. This could mean, on a speculative basis, that "community" judges understood the two parallel jurisprudences.

However, it seems that a high consideration is relevant to the reasoning followed by CJEU, which first identifies the applicable provisions, as well as their object and purpose, and deals only with the question of artificiality of the buildings, in the moment it goes to analyze the justification for restrictive measures and the fee for proportionality. Following this reasoning, CJEU may not have felt the need to distinguish C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12

⁷²L. CERIONI, The "abuse of rights" in EU company law and EU tax law, op. cit., pp. 795ss.

⁷³ECLI:EU:C:2003:512, I-10155, par. 96. In the same spirit see also the case: C-411/03, SEVIC Systems of 13 December 2005, ECLI:EU:C:2005:762, I-10805. For more details see also: P. MÄNTYSAARI, The law of corporate finance: General principles and European Union law, ed. Springer, Berlin, 2010, pp. 254ss. J. BORG-BARTHET, The governing law of companies in European Union law, Hart Publishing, Oxford & Oregon, Portland, 2012, pp. 136, 143ss.

September 2006, by sentences: C-212/97, Centros of 9 March 1999 and C- 167/01, Inspire Art of 30 September 2003. In fact, the element that best resolves the apparent contradiction between these decisions always seems to be the same: we are faced with a further demonstration of the fact that the prohibition of abuse of law and the overriding reasons of general interest are two techniques, which lead to distinct results. The question, indeed, is closely linked to the more general problem pertaining to the elements of distinction between these two techniques, which will now be examined.

8. LIGHTS AND SHADOWS OF IMPERATIVE REASONS OF GENERAL INTEREST: A COMPARISON WITH THE PROHIBITION OF ABUSE OF LAW

In the preceding pages it was observed that CJEU used the technique of imperative reasons of general interest to admit the restrictive measures of member states aimed at protecting their legal system from the elusions made possible thanks to the triangulation of legal systems.

This has emerged with particular clarity with reference to the regulations used at national level to combat tax avoidance. The doctrine has questioned the reasons why the cases mentioned were not decided by the use of prohibition on the abuse of right⁷⁴, bearing in mind that the state concerned asserted the fight against tax avoidance to justify its own legislation, so that CJEU clearly the

⁷⁴F. VANISTENDAEL, Halifax and Cadbury Schweppes: One single european theory of abuse in tax law?, in EC Tax Review, 15, 2006, pp. 193ss.op. cit., pp. 423. according to which the underlying economic idea is that if a Member State develops competitive and attractive economic infrastructures for investors, including through the reduction of taxes, so that the appeal of its tax system is growing, another Member State can not to think about introducing compensatory tax levies that burden on their residents established in the State with the most captivating legislation. This would result in a fragmentation of the single market in a variety of markets, thus hindering fundamental freedoms. Nevertheless, the "splitting the market" criterion must balance itself with the legal notion of abuse of the law to avoid excessive compression of the national interest.

invocation by the member state of the abuse is considered legitimate. In fact, it is even more difficult to understand why the approaches in these cases differ when looking at how CJEU defined, starting from the C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006, the criteria for verifying the proportionality of measure, using the same Emsland-Stärke test.

Such an attitude, at first sight indecipherable, is nothing but the confirmation that CJEU does not use the prohibition of abuse of law not so much (and not only) to promote competition between jurisdictions and to exclude arbitrary limitations of freedoms of movement by member states, but above all for "structural" reasons, already exposed in the previous paragraphs. EU system, in other words, does not have the right tools to select in these cases the abusive situations, differentiating them from those that are not, since the test of abuse, for how thought out, does not respond to the purpose.

This statement leads us to illustrate the differences that have emerged, in the study of their respective applications, between the two techniques, starting from C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas sentence of 12 September 2006, particularly interesting because it examines them both.

The C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006 describes the same test applied in cases: C-110/99, Emsland-Stärke of 14 December 2000 and C-255/02, Halifax and others of 21 February 2006. Paradigmatic hypotheses of application of the prohibition of abuse of right to constructions involving a single legal system. This cross-reference was read, from a certain doctrine, as a concrete embodiment of the intention of CJEU to create a notion of abuse of unit law at EU level, so that the same concept of abuse, with the same characteristics, could be used with reference to all cross-border transactions occurring within the internal market. This would have led to a "denationalization" of this notion.

These statements are only partially correct. Certainly it can be considered that a test with the same characteristics has been

invoked, just as it can be said that CJEU, without a shadow of a doubt, has taken a different approach from that of member states, which often fall into the temptation to "label" as abusive all those constructions united by the obtaining of a tax saving. However, this does not mean that the notion of abuse is unitary: in fact, C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas case of 12 September 2006 does not show that CJEU is inclined to carry out the same test to identify abusive practices that occur in different areas of EU law.

On this point, it should be noted first of all that the issue of abuse is treated as a restriction on freedom of movement, justified only on certain conditions.

Already here we find a distinctive trait, particularly clear, *inter alia*, in C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas of 12 September 2006, with the prohibition of abuse: applying the latter, in fact, to the person or to the company that seeks to avail itself of a Union law for an improper or fraudulent end, the right itself is denied, so that one could not properly speak of a restriction on free movement.

More important is the fact that, in the hypotheses described above, one no longer looks at the operation itself, but at how the normative, necessarily general and abstract, has been constructed. And indeed, all the reasoning of CJEU aimed at verifying the legitimacy of the restriction is centered on the suitability and proportionality of the national legislation, which must specifically concern the construction of pure artifice, devoid of economic effectiveness, whose sole purpose is to obtain a tax benefit. The advantage of the approach that makes the sanction to abuse a reason for justification, moreover, is precisely that of allowing the exercise of a control of proportionality of the legislation⁷⁵.

⁷⁵A. ILIOPOULOU-PENOT, *Liberté de circulation et abus de droit*, in E. DUBOUT, A. MAITROT DE LA MOTTE (a cura di), *L'unité des libertés de circulation: in varietate concordia?*, ed. Bruylant, Bruxelles, 2013, pp. 196ss.

In this respect, the fact that, in some of the cases studied, the member state, and consequently CJEU, did not even investigate the abuse of the behavior or even excluded it⁷⁶ cannot be overlooked. From here we can understand how the two arguments, on the norm and on the abusive manifestation, are carried out in parallel, in a disjointed way: the Union judge, in other words, does not deal with the construction in itself, nor asks the national judge to do so, but only with the legislation, regardless of whether or not is in presence of an abusive manifestation.

What has just been affirmed allows us to highlight even the greatest limits to the effectiveness of the theory of imperative motives. This legal technique, in fact, presents as its main drawback the very fact of focusing on the control of national anti-abuse measures, and therefore on the behavior of member states, rather than on the control of abusive behavior in question. From this point of view, first of all the problem arises, which is not an easy solution for the member state, to limit *ex ante* the general legislation to pure construction. As proportionality control is congenial, member states, in fact, encounter strong limitations in introducing specific legislation or in invoking general principles in order to combat the phenomenon of law shopping⁷⁷. If CJEU jurisprudence shows how the restrictive national rules applicable "to every situation" (in other words, measures that do not take into account the specific circumstances that indicate an abuse), "for any reason" (therefore without taking into account the subjective will

⁷⁶Suffice it to mention *Kraus*, in which it is clear from the facts of the case that the question was not so much the abuse of Mr Kraus, but rather his refusal to seek authorization, or the pronouncement *Lankhorst-Hohorst GmbH*, in which the CJEU, in paragraph 38, explicitly excludes the presence of an abuse.

⁷⁷According to M. POULSEN, *Treaty/Directive shopping and abuse of EU law*, in *Intertax*, 2013, pp. 236, underlining how two opposing interests clash in this area: on the one hand, the legitimate need of the Member States to effectively counter such behavior; on the other hand, the implementation of the integration and the related need not to introduce unjustified restrictions on free movement and the right of the tax payer to legitimately benefit from favorable tax legislation in other Member States.

of abusing) are, according to CJEU, a too general means of combating abuses, it is difficult to determine how extensive or how narrow the anti-abuse rules should be from time to time to pass the compatibility test with EU law⁷⁸. As it was said, CJEU seems "surgical" in its statutes, requiring among other things, for the purpose of compliance with legal certainty, that the legislation itself should provide for that selectivity that allows it to be proportionate, without leaving discretionary spaces to the national administration. In other words, what emerges is how CJEU refuses to unify if in the concrete case under its attention there can be an abuse, while requiring, at the same time, that the national legislation looks to the concrete case. Hence the second limit of the technique in question: we cannot neglect, in fact, how the private who abuses EU law in a state in which there is no anti-abuse legislation, benefits from a wider application of EU law compared to a private individual operating in a state where such provisions have not been adopted⁷⁹. In other words, in almost identical circumstances, that is to say abusive, the private individual will be sanctioned or not by admitting the restriction on his freedom of movement, depending on whether the member state has adopted legislation prohibiting abuse, a finding that helps understand the fallacy of the thesis that the concept of abuse would be europeanized.

9. THE TECHNIQUE OF RESTRICTIVE INTERPRETATION OF PROVISIONS OF EU LAW

In order to try to limit the abusive behavior of individuals, in addition to allowing the member state to invoke imperative grounds of public interest, the EU judge makes use of

⁷⁸D. WEBER, Abuse of law in european tax law: An overview and some recent trends in the direct and indirect tax case law of the ECJ-Part 2, in *European Taxation*, 13, 2013, pp. 313ss.

⁷⁹See, W. SCHÖN, Abuse of rights and european tax law, in J. A. JONES, P. HARRIS, D. OLIVER (a cura di) *Comparative perspectives on revenue law- Essays in honour of John Tiley*, Cambridge University Press, Cambridge, 2008, pp. 78ss.

another technique, that of teleologically oriented interpretation, which makes it possible to delimit the scope of a provision of the Treaty or of secondary legislation, in such a way as to exclude it from having regard to abusive conditions. This is true of a technique that is certainly familiar to him, since CJEU, in fact, is institutionally responsible for interpreting the rules of the Treaties⁸⁰. In so doing, CJEU can avoid coming to the point of declaring the existence of an abuse of EU law. It is sufficient, in fact, to give a specific definition of the scope of application of the community rules, to exclude the case of private individual who tries to re-enter illegally under EU law.

However, this inclination should not lead to the view that the prohibition of abuse governs the interpretation of EU law. If it is true, in fact, that CJEU, in the face of possible cases of abuse, has responded to the questions posed by delimiting the scope of application of law, at the same time in many of these cases has made clear, sometimes explicitly, sometimes implicitly, through the arguments carried out, the existence of a different and independent prohibition of abuse.

On this point, it should be pointed out that, from a pragmatic point of view, it does not seem so important to establish whether the prohibition of abuse should be considered an exception to EU law or a principle that regulates the interpretation of the scope of EU law, since the result we reach is ultimately the same⁸¹, the opposite is not true.

⁸⁰M. POIARES MADURO, *Interpreting european law: Judicial adjudication in a context of constitutional pluralism*, in *European Journal of Legal Studies*, 1, 2007, pp. 8ss. It must be borne in mind that the interpretation of a provision of European Union law provided by the CJEU is limited to clarifying and specifying the meaning and scope of the provision, as it should have been understood and applied from the moment of its entry into force. It follows that the rule thus interpreted can and must be applied by the judge also to legal relationships which arose and developed before the interpretative sentence, provided, on the other hand, the conditions exist for submitting to the competent CJEU a dispute concerning the application of that rule.

⁸¹Likewise, the judgment of case C-202/97, FTS of 10 February 2000, ECLI:EU:C:2000:75, I-00883, with reference to the problem of temporarily

It is, in fact, important to verify whether the scope of application of the law is outlined through the technique of teleological interpretation or on the basis of an independent prohibition of abuse. This is because, only in this second case a verification of the existence of the subjective element, that is to say elusive or fraudulent motivation, which allows, *inter alia*, to circumscribe the restrictive scope of interpretation.

It is therefore clear that these are two separate instruments, but the close link must not be underestimated. Indeed, it is clear that, by intending the prohibition of abuse as an exception to EU law, the scope of this principle depends directly on the scope attributed to the freedoms of movement. Reducing the scope of law means to say, in substance, that some potentially abusive practices do not fall under the law and, as such, are not permitted⁸². At the same time, from a quantitative point of view, the probability that there are behaviors that fall within the prohibition of greatly reduced abuse.

In this section, without pretension of exhaustiveness, a paradigmatic series of pronouncements will be considered, adopting

posted workers, deserves to be mentioned. In par. 43, in fact, the CJEU has clarified the meaning of the phrase "to exercise normally the activity in the territory of the State in which they are established", emphasizing the necessity that the enterprise carries out in an effective way, or preponderant, its activity in the place of settlement.

⁸²According to: A. ILIOPOULOU-PENOT, *Liberté de circulation et abus de droit*, op. cit., pp. 188ss, "(...) it will therefore look at both cases that mention the abuse, and in cases where the CJEU could have referred to the abuse, but did not do so, even in spite of the fact that the issue had been raised by the governments of the Member States. As a paradigmatic example, the CJEU's judgment in joined cases C-267/91 and C-268/91, *Kech and Mithouard* of 24 November 1993, ECLI:EU:C:1993:905, I-06097, in the matter of free movement of goods, in which the CJEU, in arriving at the conclusion that "Article. Article 30 of the EEC Treaty must be interpreted as not applying to the legislation of a Member State which generally prohibits the resale below cost", points out in paragraph 14 that economic operators increasingly invoke art. 30 of the Treaty in order to challenge any legislation which, while not involving products from other Member States, has the effect of limiting their commercial freedom, the CJEU considers it necessary to review and clarify its case law on the matter (...)".

an approach that focuses more on the method used by CJEU, than on the single case, for the same reasons that have already been exposed in the first section. It is appropriate to clarify in this regard how, in the context of freedom of movement, sometimes the reasoning underlying the restrictive interpretation, that is, the desire to exclude abusive situations from the protection of EU law, is made explicitly, as in many of the judgments already analyzed in terms of the prohibition of abuse; other times, however, the issue of abuse is so present, but without the concept being explicitly invoked. The goal, however, also in this context, is to understand the functioning of the technique of restrictive interpretation, the differences with the prohibition of abuse and its effectiveness.

10."U-SHAPED" CONSTRUCTIONS COMPARED TO THE RESTRICTIVE INTERPRETATION OF SECONDARY LEGISLATION.

The technique of teleological interpretation has sometimes been used by CJEU to deal with the "U" operations denounced by the state of origin, which sees the national citizen re-enter the territory with the new "dress", depending on the working citizen, of a qualified professional, or a provider of services or companies in another member state. The citizen, thus, invoking EU law, acquires a subjective legal position or advantages which otherwise would not have been entitled in the state of origin. It is thus well understood that, in these cases, the invocation by the private individual of the EU-primary law⁸³ or derivative towards the state of origin may alter the division of the regulatory powers at the base of the internal market, being the state in question, on the basis of the principle of mutual recognition, called to recognize the

⁸³Reference is made to cases in which the recognition of professional qualifications (previous paragraphs) and of the right of residence pertaining to the family member of a third country was discussed.

rules on products, qualifications, services and all that is in conformity with the rules of the state of origin⁸⁴.

Such a construction, as already noted above, always involves three systems; however, it can change the role played by the state system involved, different from the one of origin: a destination for the purchase of an advantageous situation, a case that is part of the phenomenon of system shopping, or simply a vehicle of transnationality.

It is considered relevant to examine, taking up some of the profiles illustrated in the previous paragraph, two cases that best demonstrate the conscious choice of CJEU to interpret EU law strictly and which highlight the different role of the state other than the original as we can see in cases: C-311/06, National Council of the engineers of 29 January 2009 and C-109/01, Akrich of 22 September 2003, studying now the mechanism of operation⁸⁵.

⁸⁴K. AMSTRONG, Mutual recognition, in C. BARNARD, J. SCOTT, *The law of the single european market: Unpacking the premises*, Hart Publishing, Oxford & Oregon, Portland, 2002, pp. 225. For an analysis of the C-56/96, VT4 v. Vlaamse Gemeenschap of 5 June 1997, ECLI:EU:C:1993:584, I-031143 in which the CJEU provided a restrictive interpretation of the criteria for identifying television broadcasters subject to the jurisdiction of a Member State pursuant to art. 2, n. 1, of the Directive, in the sense that a television broadcaster is subject to the jurisdiction of the Member State in which it is established and where there are several offices, of the State in which the broadcaster has the center of activity, with reference, in particular, to the place where the planning policy is decided and the final composition of the programs to be broadcast.

⁸⁵ECLI:EU:C:2003:491, I-09607. For more details see: R. PLENDER, *Quo vadis? Nouvelle orientation des règles sur la libre circulation des personnes suivant l'affaire Akrich*, in *Cahiers de Droit Européen*, (1-2), 2004, pp. 261 ss. C. SCHILTZ, *Akrich: A clear delimitation without limits*, in *Maastricht Journal of European and Comparative Law*, 12, 2005 (3), pp. 241ss. E. SPAVENTA, *Case C-109/01, Secretary of State for the Home Department v. H. Akrich*, judgment of the Full CJEU of 23 September 2003, [2003] ECR I- 9607, in *Common Market Law Review*, 42, 2005, pp. 225ss. The question of the national CJEU is also recalled: in particular, it was necessary to determine whether or not a European Union citizen could make use of the provisions of the Directive on the recognition of professional qualifications in his Member State of origin in

11. C-311/06, NATIONAL COUNCIL OF ENGINEERS CASE OF 29 JANUARY 2009: NATIONAL STATE V. STATE OF ACQUISITION OF THE TITLE.

C-311/06, National Council of engineers of 29 January 2009, takes on particular importance as it allows to highlight the distinction between the technique of restrictive interpretation and the prohibition of abuse, as well as the favor of CJEU in the context of species, well highlighted by the contrast with the arguments of the AG Poiares Maduro, in favor of the application of the prohibition of abuse.

In order to avoid unnecessary repetition, it is necessary here only to recall how the construction put in place by Mr. Cavallera was beyond doubt in the perspective of the member state, since the move to Spain could not be motivated except by the desire to circumvent the more restrictive Italian legislation about the requirements for access to the profession of engineer. It was therefore necessary to establish whether it could invoke Directive 89/48/EC on the mutual recognition of diplomas for its own benefit⁸⁶.

order to have a diploma which was the result of mere homologation. of a three-year university degree course followed in his home Member State, without however requiring the citizen in question to have completed additional academic or professional training in the Member State of graduation.

⁸⁶Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications in the OJEU L 255, 30.9.2005, p. 22 ss. (hereinafter amended by Directive 2013/55 of the European Parliament and of the Council of 20 November 2013), has adopted the following definition of "training qualification": they must include "diplomas, certificates and other qualifications issued by an authority of a Member State designated in accordance with the laws, regulations and administrative provisions of that Member State and which enshrine professional training acquired predominantly in the European Union". However, recital 12 specifies that the Directive does not concern "the recognition by Member States of recognition decisions taken by other Member States in accordance with this Directive. Therefore, holders of professional qualifications which have been recognized under this Directive may not use that recognition in order to obtain, in their Member State of origin, rights other than those conferred by the professional

To this end, CJEU was asked to verify the existence of the three cumulative conditions required by art. 1, lett. a), so that the qualification or professional experience for which recognition is sought can be considered a diploma, which is the keystone of the general system of recognition of higher education diplomas provided for by the Directive. More specifically, the Directive requires that the diploma be issued by the competent authority of a member state; establish a cycle of post-secondary studies with a minimum duration of three years; and finally give access to a profession in the country of origin.

In the present case the problematic condition was evidently the second: it was, in fact, undisputed that the defendant had not followed any professional or academic training in Spain, so that the diploma of mechanical engineer obtained in Spain was the result of a mere homologation of the Italian university degree with the title of Spanish engineer. Therefore, the problem was posed of deciding whether to accept a notion of "diploma" that would include the aforementioned hypothesis. CJEU, as already mentioned, excludes it, adopting an interpretation of the Directive, defined restrictive primarily from the AG Poiares Maduro. In this case, the first and third requirements had certainly been fulfilled. The diploma, in fact, had been issued by the Spanish Ministry of Education and Science, authorized, in the light of Spanish legislation, to award diplomas as an industrial technical engineer; similarly, the Spanish diploma relied on by the defendant, in fact, authorizes him to practice as a mechanical engineer in the State issuing the diploma, namely Spain.

More precisely, starting from the aim of Directive 89/48/EC, which is to eliminate obstacles to the exercise of a profession in a member state other than the one issued the diploma which confers the professional qualifications in question, the Luxembourg states that a qualification which establishes professional training, such as that of an engineer, cannot be

qualification obtained in that Member State, unless demonstrate that they have obtained additional professional qualifications in the host Member State (...)".

assimilated to a "diploma", pursuant to the Directive, in the absence of the acquisition, total or partial, of qualifications in the context of the education system of the member state which issued the title *de quo*. That is because, by reasoning to the contrary, it would be possible for a person who has exclusively received a license issued by that member state which, in itself, does not give access to that regulated profession to access it equally, without however having the type-approval certificate obtained in Spain certifies an additional qualification or professional experience. A result would therefore be achieved "contrary to the principle enshrined in Directive 89/48/EC, and set out in its fifth "recital", according to which the member states retain the right to establish the minimum qualification level necessary to guarantee the quality of services provided on their territory"⁸⁷.

CJEU therefore resolves, in a few lines, the question submitted to it, without admitting the slightest temperament, in a perspective focused exclusively on the organization of the state of origin and on the consequences that the recognition of the invokable nature of the Directive would entail for it; which clearly shows how CJEU had a clear idea of the abuse committed by the

⁸⁷It should be noted that the EC, to support the thesis of the restrictive interpretation of the concept of diploma, referred to the twelfth recital of Directive 2005/36/EC, which excludes from its scope "(...) recognition by Member States of recognition decisions taken by other Member States under this Directive (...) in order to obtain, in their Member State of origin, rights other than those conferred by the professional qualification obtained in that Member State, unless (the persons concerned) prove that they have obtained additional professional qualifications in the host Member State (...)". However, the AG points out that this approach is not convincing because the decision relied on by Mr Cavallera is not a "recognition decision" based on the directive, but a type approval decision taken on the basis of national law. The Italian diploma, in fact, is not a "diploma" pursuant to art. 1, lett. a) of the Directive. This is precisely the problem in this case, given that the title obtained by Mr Cavallera in Italy, although sanctioning a three-year cycle of studies, does not however allow access to the profession of engineer in that state (...) the type approval and then the registration of engineers in Spain took place solely on the basis of national law and did not take place on the basis of Directive 89/48 (...) (par. 27).

Italian citizen. It is interesting to note, however, this reasoning, seen from the perspective of the "host" state, which, on closer inspection, after the homologation becomes, according to the EU legal system, that of origin, show some incongruity, rightly highlighted by the conclusions of the AG Póiares Maduro, which was inclined towards a wider interpretation of the Directive, accompanied by the use of the prohibition of abuse.

The AG in particular, first of all pointed out the risk that such an interpretation of the Directive, such as to exclude the approval decision from the notion of diploma, would have determined exclusion from the scope of the Directive of situations which, on the other hand, would fully covered by the objective of free movement, for example the cases in which such a decision was taken by a member state in which the profession was later exercised.

It was then established that an overly restrictive interpretation of the Directive could have undermined the principle of mutual recognition of diplomas based on the principle of mutual trust⁸⁸.

In fact, based only on a literal interpretation of the second requirement, it does not seem to reveal the modalities or procedures on the basis of which the diploma was issued, nor in which territory the training activities were followed, provided that they took place in overwhelming majority in community territory. It corroborates such an interpretation art. 3, first paragraph, lett. a) of the Directive, which prohibits member states from refusing to grant access to a profession to a citizen even in cases where he

⁸⁸See parr. 31-33 of the conclusions. With this in mind, Spain must be considered free to determine access to the profession of engineer in Spain either on the basis of a decision to approve a training carried out on the territory of another Member State or on the basis of a diploma certifying its formation since the only requirement in the Directive is to impose that the certificate states 'that the holder has successfully completed a cycle of post-secondary studies of a minimum duration of three years (...) showing that (...) possesses the professional qualifications required for access to a regulated profession in that Member State (...)' (par. 34).

"holds the diploma prescribed in another member state for access (a) to that profession on its territory(...)"⁸⁹. Applying such a reasoning to the specific case, since Spain believed that Mr. Cavallera had the professional skills necessary to exercise in his territory, it is not clear how it was possible to deny the qualification of the diploma that the state had issued to him.

Looking back on some considerations regarding the effectiveness of this technique, the analysis of this case clearly demonstrates how CJEU used the restrictive interpretation to sanction abusive behavior, thereby demonstrating the adoption of a vision that favors the national state, otherwise, he would be deprived of his skills in accessing professions. However, it was also shown that another interpretation would have been plausible, and how, certainly, it would have been more in line with the principle of mutual trust that must animate relations between member states, repeatedly invoked by CJEU itself⁹⁰.

⁸⁹Conclusions of the AG Poiares Maduro presented in case C-419/02, BUPA Hospitals Ltd and University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise of 21 February 2006, ECLI:EU:C:2006:122, I-01685, par. 63.

⁹⁰In particular, the judgment of case C-130/88, Van de Bijl of 26 September 1989, ECLI:EU:C:1989:349, I-03039 is recalled here, in which the CJEU, faced with the objection of the national authority concerning the validity of the certificate issued by the United Kingdom, stated that, in principle, the host State is "normally bound by the declarations contained in the certificate issued by the Member State of origin" and "can not call into question the accuracy of the indication of the activities exercised by the person concerned or their duration (...)" (par. 22 to 23), except in cases where the attestation produced contains a manifest inaccuracy. On this point, AG Darmon in his conclusions presented on 19 April 1989 referred to the maxim *fraus omnia corrumpit* as a general principle common to the Member States, stating that, since fraud spoils everything, "a host State which does not have them. wanted, of a certain number of elements proving that the competent authority of the State of origin was misled when the certificate is issued can oppose such fraud (...)" (par. 17).

12. FROM CASES: C-109/01, AKRICH OF 22 SEPTEMBER 2003 AND C-127/08, METOCK AND OTHERS OF 25 JULY 2008 TO C-1/05, JIA CASE OF 9 JANUARY 2007: CHANGE OF COURSE OF CJEU JURISPRUDENCE

C-311/06, National Council of engineers case of 29 January 2009 analyzed the hypothesis in which the choice of private to go to another member state to acquire a new role is determined by the most favorable discipline of the same, so that there is a case of system shopping. C-109/01, Akrich case of 22 September 2003, on the other hand, represents the paradigmatic case in which the private person moves to any other order whose legislation is indifferent to the sole purpose of creating that intra-community situation that allows to benefit from EU rights.

The EU judge excluded the applicability of Regulation n. 1612/68 to the case under examination, as Mr Akrich, citizen of Morocco, married to a citizen of the Union, could not claim a prior "legal stay" in a member state at the time it was its transfer to another member state. In particular, even in this case CJEU considered that such an interpretation was "in line with the economy of community provisions aimed at guaranteeing the freedom of movement of workers within the community, the exercise of which cannot penalize the migrant worker and his family"⁹¹. This is based on the assumption that "when a Union citizen established in a member state and married to a third-country citizen who does not have the right to reside in that member state, moves to another member state to subordinate employment, the fact that his spouse does not have the right, deriving from art. 10 of Regulation n. 1612/68, to settle with him in that other member state, cannot constitute a less favorable treatment than that enjoyed before that citizen of the Union enjoyed the possibilities offered by

⁹¹CJEU, C-109/01, Akrich of 22 September 2003, ECLI:EU:C:2003:491, I-09607.

the Treaty on the movement of persons"⁹². In other words, the absence of such a right, in this case, would not be such as to dissuade the citizen of the Union from exercising the traffic rights recognized by art. 45 TFEU.

Such conclusions undoubtedly have some similarities with those just analyzed in C-311/06, National Council of engineers case of 29 January 2009: the teleological interpretation carried out by CJEU conflicts with the literal interpretation, since the prior legal stay was not required from the Regulation between the mandatory requirements of the stay; the perspective that CJEU makes its own is that of the state of origin, whose competence in attributing or not the residence permit to non-EU citizens would otherwise be scratched; finally, it is evident how this technique has been used to counteract what was perceived as an abusive behavior.

This last aspect is confirmed, if ever there was need, in some passages of C-1/05, Jia sentence of 9 January 2007⁹³. CJEU, in fact, in answering the question of the referring court on the possibility of transposing in the case brought before him for reviewing the judgment in Akrich, he first points out that the factual background of the dispute which gave rise to the Akrich

⁹²CJEU, C-1/05, Jia of 9 January 2007, ECLI:EU:C:2007:01, I-00001. For details see: F. KAUFF-GAZIN, *Droit de séjour de l'ascendant à charge, membre de la famille du ressortissant communautaire*, in *Europe*, 86, 2007, Comm. n. 86, pp. 14-15. J. H. REESTMAN, *No legal residence requirements for the admission of family members with a third-country nationality of migrated Union citizens*, in *European Constitutional Law Review*, 3, 2007, pp. 463ss. A. TRYFONIDOU, Jia or "Carpenter II": the edge of reason, in *European Law Review*, 32, 2007 pp. 909ss.

⁹³ECLI:EU:C:2007:01, I-00001 Paragraph 31. The CJEU recalls in paragraph 30 that in the Akrich case with reference to a situation of a couple, he intended to return to the United Kingdom using European Union law, so that Mr Akrich could enter that country as a spouse of a citizen of the Union who had used his freedom of movement, "the referring CJEU before which the dispute was pending had asked the CJEU what measures the Member States could take to combat the behavior of family members of a European Union citizen who did not fulfill the conditions established by national law for entering and staying in a Member State.

judgment was different, since, in C-1/05, Jia case of 9 January 2007, "is not charged the member of the family in question to stay illegally in a member state or to try to avoid abusively the application of national immigration legislation"⁹⁴. Exactly from such considerations, it is excluded that the condition of prior legal residence in another member state, as formulated in C-109/01, Akrich sentence of 22 September 2003 can be transposed *sic et simpliciter* in C-1/05, Jia case of 9 January 2007, resulting in the absence of the element of abuse.

C-1/05, Jia case of 9 January 2007, as well as proving the fear of abusive behavior that led CJEU to adopt an extremely restrictive interpretation that is not in line both with the literal content of the rules, and with the previous C-60/00, Carpenter of

⁹⁴CJEU, C-459/99, MRAX of 25 July 2002 ECLI:EU:C:2002:461, I-06591 and the case: C-60/00, Carpenter of 11 July 2002, ECLI:EU:C:2002:434, I-06279. In the MRAX ruling the CJEU had stated, *inter alia*, that "Article 4 of Directive 68/360 and 6 of Directive 73/148 must be interpreted as meaning that they do not authorize a Member State to refuse to issue a residence permit and to take a measure of expulsion against a third-country national who can provide proof of his identity and of his marriage to a national of a Member State, for the sole reason that he entered the territory of the Member State concerned illegally (emphasis added)" (par. 80). See in argument for more analysis and details: S. ACIERNO, *The Carpenter judgment: fundamental rights and the limits of the European Union legal order*, in *European Law Review*, 28, 2003, pp. 398ss, it is noted, with regard to Carpenter, that if the specific circumstances relating to the two cases could well explain the different reasoning followed by the CJEU, it is difficult to draw a general rule in relation to the rights and status of family members of Union citizens who are illegally present on the territory of the Union. As rightly stated by the. the question remains to understand whether irregular migrants fall within the scope of EU law. Article. 49 EC, read in light of the fundamental right to respect for family life, must be interpreted as meaning that it precludes the Member State of origin of a service provider established in that State, who provides services to recipients established in other States Member States, deny the right of residence in its territory to the spouse of that lender, a national of a third country, even if he does not have a residence permit in any Member State (see par. 46). for more details see: N. ROGERS, R. SCANNEL, W. ROBINSON, *Free movement of persons in the enlarged European Union*, Sweet & Maxwell, London, 2012, pp. 190ss.

11 July 2002 and in C-459/99, MRAX case of 25 July 2002⁹⁵, also demonstrates the will of CJEU to delimit as much as possible the application of the Akrich pronouncement "sewing it on" those cases in which it is possible to verify, in practice, an abuse. Well, this also seems to be the greatest limit to which the adoption of a restrictive interpretation can lead: the latter, to be honest, does not fit the concrete case, being instead generalized; as such it can be taken literally by the national authorities, without them incurring an infringement of EU law.

This could also be the most plausible reason why, in less than five years, CJEU has been forced to overturn the previous expansive jurisprudence of the free movement of workers with the C-127/08, Metock and others case of 25 July 2008⁹⁶, which found it incompatible with Directive 2004/38/EC for national legislation requiring the family member to have previously resided legally in another member state prior to his arrival in the host member state⁹⁷. CJEU, justifying the assumption, points out that no provision of Directive 2004/38/EC subordinates the application of the latter on the assumption that the family members have previously resided in a member state. He then admits that he declared "in par. 50 and 51 of the aforementioned C-109/01, Akrich sentence of 22 September 2003 which, in order to enjoy

⁹⁵It is also noted that AG Geelhoed in his conclusions in Akrich proposed a solution based on MRAX and Carpenter, suggesting that third-country nationals who entered the territory of an unlawful Member State should fall within the scope of Regulation no. 1612/68, even if their state was illegal and therefore the refusal of the Member State should have been valid as an exception invoking reasons of public interest.

⁹⁶CJEU, C-127/08, Metock and others of 25 July 2008, ECLI:EU:C:2008:449, I-06241. The referring CJEU emphasizes that none of the marriages at issue in the main proceedings was a fictitious marriage.

⁹⁷C. COSTELLO, Metock: Free movement and "normal family life" in the Union, in *Common Market Law Review*, 46, 2009, pp. 587ss. J. FAULL, Prohibition of abuse of law: A new general principle of EU Law, in R. DE LA FERIA, S. VOGENAUER (a cura di), *Prohibition of abuse of law: a new general principle of EU law?*, Oxford University Press, Oxford, 2011, pp. 291-293.

the rights referred to in art. 10 of Regulation n. 1612/68, a third-country citizen, spouse of a Union citizen, must legally reside in a member state when he moves to another member state, in which the Union citizen emigrates or has emigrated", to then say clearly that "this conclusion must be rethought". This is because "the enjoyment of such rights cannot depend on a prior legal residence of such a spouse in another member state"⁹⁸. Interpretation that, a fortiori, is required in relation to the new Directive 2004/38/EC, which aims to strengthen the free movement and residence rights of all Union citizens.

This leads to an antithetical conclusion with respect to *Akrich*, whereby the refusal by the host member state to recognize the rights of entry and residence of family members of a Union citizen is such as to dissuade the latter to move or reside in that member state, even if his family members do not already reside legally in the territory of another member state.

13. A COMPARISON: THE TEST OF EFFECTIVENESS OF THE CONNECTION WITH THE HOST COUNTRY IN THE CASE OF "SOCIAL TOURISM"

In the previous paragraph the main limitations that the jurisprudence encounters in the use of the restrictive interpretation of the secondary legislation to combat U-shaped operations analyzed, where sometimes it comes to solutions not entirely consistent with the principles that inform the Union legal framework. It is now necessary to verify whether these same limits

⁹⁸Thus, the CJEU concludes that "since the third-country national, family member of a Union citizen, derives from Directive 2004/38/EC entry and residence rights in the host Member State, the latter may limit such rights only in compliance with articles 27 and 35 of the said directive", thereby relying on the jurisprudence according to which, where there is a secondary legislation, the tools against the abuse must be sought within the same discipline, and not be entrusted to restrictive initiatives by the Member States. In this way, the notion of abuse in this area seems to have been mainly attributed to the abuse of family law, with the help of a fictitious marriage.

are also found with regard to the use of the restrictive interpretation contrary to social tourism.

CJEU has ruled on several occasions on disputes that are in fact linked to the claims of individuals, nationals of a member state, to have access to certain social benefits in the host state, claims based on the assumption of being part of a social category, as that of worker, student, or even, with the development of Union law on this front, of Union citizen, with the possibility of asserting the principle of equal treatment descending from EU law.

These cases, it is recalled, in which the hypothesized abuse affects only two systems, that of EU and that of the host state, while in no way the state of origin is involved: the private, that is, the tip to obtain a benefit granted by the member state, by unduly invoking a subjective position attributed by EU law, which entitles equal treatment with national citizens.

Initially, when the individual was still considered "productive factor", from a purely economic point of view, it was a matter of understanding whether the individual could claim the status of worker, the only category that could benefit from free circulation and to which, by virtue of principle of non-discrimination, certain benefits were due to the host state, such as grants or scholarships.

As is well known, the requirement to carry out an economically significant activity has since disappeared with the introduction of Union citizenship, which has led to the prohibition of discrimination on grounds of nationality to play a central role in the framework of the rules on free movement of persons. However, differences remain of considerable importance as regards the right of residence and equal treatment, depending on whether it is a simple citizen or an economically active person. Even today, therefore, the question is raised whether a particular subject can

invoke the provisions concerning the free movement of economically active subjects, or only those concerning citizens⁹⁹.

Indeed, precisely the presence of significant differences in EU law, with reference to the attribution of the right of residence and equal treatment, between active and non-active citizens, has created in the past, and still creates, an incentive for certain individuals to try to be recognized as active citizens, in particular subordinate workers, in order to gain access to a wider range of social benefits in the host state¹⁰⁰.

This type of behavior has required EU to define and, consequently, the national authorities to put into practice a clear and coherent border between the different categories of citizens. CJEU, in this regard, applied the test of effectiveness of the activity carried out to assign the status of worker, resolving the issue of

⁹⁹The same happened with reference to the freedoms attributed to self-employed workers. As is known, in fact, the established worker is required to comply with national provisions, unlike the service provider, who, however, is in principle subject to the law of the State of origin and not to that of the State destination of the service. Having to distinguish the two freedoms, the CJEU used the interpretative technique. See, in particular, the judgment of case C-55/94, Gebhard v. Consiglio dell'Ordine degli avvocati e Procuratori di Milano of 30 November 1995, ECLI:EU:C:1995:411, in which the CJEU has established the temporary nature of the provision of services, must be assessed taking into account the duration, frequency, frequency and frequency of continuity of the service itself.

¹⁰⁰Thus, for example, in the judgment of case C-344/87, Betray of 31 May 1989, ECLI:EU:C:1989:226, I-01621, the CJEU ruled out that they can be regarded as real and effective, those activities which represent only an instrument for the re-education or reintegration of those concerned (paragraph 17); furthermore, in the judgment of case C-197/86, Brown v. Secretary of State for Scotland of 21 June 1988, ECLI:EU:C:1988:323, I-03205, he excluded that a national of a Member State obtains the right to a grant in another Member State as a worker, when it is undisputed that he has become solely as a consequence of his admission to the university in order to undertake the studies in question (parr. 27 to 28). or more details see: S. WEATHERILL, *Law and values in the European Union*, Oxford University Press, Oxford, 2016. G. ROBINSON, *Optimize European Union law*, ed. Routledge, London & New York, 2014, pp. 137ss.

possible abuse of a given social condition in order to obtain social benefits, otherwise not due.

Likewise, the case law has been asked to establish when the citizen of the Union, irrespective of the active role he plays, can access the welfare services of the host state¹⁰¹. In response to member states fear regarding an expansion of "social tourism"¹⁰², CJEU has adopted the criterion of effective integration, which requires verification of the existence of real links between the migrant citizen and the company that welcomes it¹⁰³. It has been

¹⁰¹We remember the landmark decisions from the CJEU: C-184/99, *Grzelczyk* of 20 September 2001, ECLI:EU:C:2001:458, I-06193. C-456/02, *Trojani* of 7 September 2004, ECLI:EU:C:2004:488, I-07573. For more details see: F. PENNING, M. SEELEIB-KAISER, *European Union citizenship and social rights: Entitlements and impediments to accessing welfare*, Edward Elgar Publishers, Cheltenham, 2018. E. CLOOTS, *National identity in European Union law*, Oxford University Press, Oxford, 2015.

¹⁰²In the *Grzelczyk* judgment (C-184/99, *Grzelczyk* of 20 September 2001, ECLI:EU:C:2001:458, I-06193) the CJEU, passing the previous case C-197/86, *Brown v. Secretary of State for Scotland* of 21 June 1988, ECLI:EU:C:1988:323, I-03205, admitted that "The fact that a citizen of the Union conducts university studies in a Member State other than that of which he is a national can not, in itself, deprive him of the possibility of using the ban of any discrimination based on citizenship "(paragraph 36), after having noted that" the status of a citizen of the Union is intended to be the fundamental status of nationals of the Member States which allows those of them in the same situation to obtain , regardless of citizenship and subject to the exceptions expressly provided for in this regard, the same legal treatment (...)" (par. 31). For more details see: S. CURRIE, *Migration, work and citizenship in the enlarged European Union*, ed. Routledge, London & New York, 2016. F. PENNING. M. SEELEIB-KAISER, *European union citizenship and social rights. Entitlements and impediments to accessing welfare*, Edward Elgar Publishers, Cheltenham, 2018.

¹⁰³In the *Trojani* ruling, (C-456/02, *Trojani* of 7 September 2004, ECLI:EU:C:2004:488, I-07573.) the CJEU also concluded that "a citizen of the European Union who does not have a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC (now arts. 45, 49 and 56 TFEU) can, by virtue of his status as a citizen of the Union, enjoy a right of residence for the direct application of art. 18, n. 1, EC "(paragraph 46), after reiterating that" the host Member State may find that a national of another Member State who has made use of social assistance no longer meets the requirements to which his right of residence is subject. In that case, the host Member State may

observed that such a concept of real connection serves, on the one hand, to base the claims of Union citizens who are not workers at equal treatment and, on the other, as a guarantee against social tourism¹⁰⁴, since it is legitimate that member states require a real and effective connection with the territory or with the company of the state in which access to social benefits is requested¹⁰⁵.

In this way, the need for genuine integration is used to resolve the tension between the right of migrant citizens to transnational solidarity and the power of member states to shape

adopt a removal measure, subject to the limits imposed by European Union law. However, recourse to the social assistance system by a citizen of the Union can not automatically lead to such a measure (see, to that effect, Grzelczyk, (C-184/99, Grzelczyk of 20 September 2001, op. cit., par. 42 and 43) (...)" (par. 45).¹⁰⁴See, for example, the judgment of the case C-209/03, Bidar of 15 March 2005, ECLI:EU:C.2005:169, I-02119, where it is stated, in paragraphs 57 and 59: "As regards aid to cover student maintenance costs, it is also legitimate whereas a Member State grants such aid only to students who have demonstrated a certain degree of integration in the society of that State (...) the existence of a certain degree of integration can be considered to have been proven following ascertaining that the student in question stayed for a certain period in the host Member State (...)" O. GOLYNKER, Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity, in *European Law Review*, 30, 2005, pp. 117ss. C. O'BRIEN, Real links, abstract rights and false alarms: the relationship between the ECJ's real link case law and national solidarity, in *European Law Review*, 33, 2008, pp. 643ss.

¹⁰⁵R. WHITE, Free movement, equal treatment, and citizenship of the Union, in *International and Comparative Law Quarterly*, 55, 2005, pp. 905ss, it is noted that the test of the real and effective connection is a fair and effective way of recognizing the legitimate concerns of the Member States. He noted that this test is in fact a way to enable Member States to rely on a potentially indirectly discriminatory precondition, by limiting the access of EU citizens to social assistance. P. J. NEUVONEN, In search of (even) more substance for the "real link" test: comment on Prinz and Seeberger, in *European Law Review*, 39, 2014, pp. 134ss, considers that this diversity of approach is partly due to the fact that the test of the actual link can justify different outcomes, depending on how the substance of the link is defined.

their social security system and to avoid abuses of law of the host state, in the form of social tourism¹⁰⁶.

The line that dealt with the complex problems generated by the interaction between the freedom of movement and the restrictions made by the member states with reference to their social system, resolving them by defining what is meant by real and actual activities or even by sufficient degree of integration, it is extremely substantial¹⁰⁷. Suffice it to recall some cases that are of particular interest to our purposes, considering the problem of abuse.

First of all, remember the C-53/81, *Levin v. Staatssecretaris van Justitii* case of 23 March 1982¹⁰⁸. In this judgment, CJEU was able to state that, while part-time working is not excluded from the scope of rules relating to the free movement of workers, these rules apply only to exercise of real and effective

¹⁰⁶A. SAYDÉ, *One law, two competitions: An enquiry into the contradictions of free movement law*, in *Cambridge Yearbook of European Legal Studies*, 2010-2011, pp. 395ss.

¹⁰⁷It is recalled here that the CJEU had been called, *inter alia*, to determine whether the right of access and residence in the territory of a Member State could be denied to a worker who was pursuing, by entry and stay in a Member State, mainly for purposes other than the exercise of a subordinate activity. In part. 16 affirms that: "From the wording of the principle of the free movement of workers and the placing of the relevant provisions in the Treaty, it is clear that these rules guarantee only the free movement of persons who exercise or intend to "economic activity" (...)".

¹⁰⁸See par. 21. *Levin's ruling (C-53/81, Levin v. Staatssecretaris van Justitii of 23 March 1982, ECLI:EU:C:1982:105, I-01035)* was then resumed in the judgment of case C-66/85, *Lawrie-Blum v. Land Baden-Württemberg* of 3 July 1986, ECLI:EU:C:1986:284, I-02121, where, in providing the concept of worker, the CJEU states that "even the fact that the trainee only performs a reduced number of hours per week and receive only a wage below the minimum salary of a tenured teacher at the beginning of the career precludes his qualification as a worker. In the aforementioned *Levin* ruling (C-53/81, *Levin v. Staatssecretaris van Justitii* of 23 March 1982), the CJEU has in fact declared that the concepts of "worker" and "subordinate activity" must be understood so as to include those who, not carrying out a full-time activity, receive only a lower remuneration than contemplated for full-time activity, provided that this involves the exercise of real and effective activities.

activities. However, the activities being so small as to be considered purely marginal and accessory are excluded from this sphere¹⁰⁹. These are formulas that express nothing other than the need, inherent in the same principle of free movement of workers, that the advantages conferred by EU law on the basis of this principle can be demanded only by those who actually do or intend to actually carry out a subordinated activity¹¹⁰.

¹⁰⁹CJEU, C-138/02, Collins of 23 March 2004, ECLI:EU:C:2004:172, I-027093. Mr. Collins, a US and Irish citizen, after working part-time and occasionally in the United Kingdom between 1980 and 1981, returned there in 1998 to find work in the social services sector, asking for compensation for job seekers, who was refused because he did not usually reside in that Member State. See, E. MUIR, *Statut et droits du demandeur d'emploi-travailleur-citoyen: confusion ou rationalisation?*, in *Revue du Droit de l'Union Européenne*, 2004, p. 249ss.

¹¹⁰C. COSTELLO, *Citizenship of the Union: above abuse?*, in R. DE LA FERIA, S. VOGENAUER (a cura di), *Prohibition of abuse of law: a new general principle of EU law?*, op. cit., pp. 348ss. G. DAVIES, *The high water point of free movement of persons: Ending benefit tourism and rescuing welfare*, in *Journal of Social Welfare and Family Law*, 26, 2004, pp. 211–222. Contra M. DOUGAN, *Some comments on the idea of a general principle of Union law prohibiting abuses of law in the field of free movement for Union citizens*, in R. DE LA FERIA, S. VOGENAUER (a cura di), *Prohibition of abuse of law: a new general principle of EU law?*, op. cit., pp. 359 notes that Collins was cited as an example of the conduct of an individual who would constitute an abuse of the right of movement on the grounds that an economically inactive citizen had made unjustified demands for a financial subsidy from the host state's welfare resources. However, Collins is only one of the judgments that enter into a substantial jurisprudence (see judgments C-184/99, Grzelczyk of 20 September 2001, op. cit., C-456/02, Trojani of 7 September 2004, C-209/03, Bidar of 15 March 2005, C-158/07, Förster of 18 November 2008, ECLI:EU:C:2008:630, I-08507, C-224/98, D'Hoop v. Office National d'emploi of 11 July 2002, ECLI:EU:C:2002:432, I-06191) which deals with such problems. For more details see: N. ROGERS, R. SCANNELL, J. WALSH, *Free movement of persons in the enlarged European Union*, Sweet & Maxwell, London, 2012. E. GUILD, S. PEERS, J. TOMKIN, *The European Union citizenship directive. A commentary*, Oxford University Press, Oxford, 2014. P. LOUTRAKOS, M. NIC SHUIBHNE, P. SYRPIS, *Exceptions from European Union free movement law. Derogation justification and proportionality*, Hart Publishing, Oxford & Oregon, Portland, 2016.

In C-39/86, *Lair v. Universität Hannover* case of 21 June 1988¹¹¹, then, CJEU took care of the thin border line between the figure of the worker who, as such, has the right to receive the benefits expected in the host state, and that of the student who created a situation to make it appear as a worker, for the sole purpose of accessing those advantages, such as a scholarship. Here too CJEU adopts the same *modus operandi*, delimiting *ex ante* the perimeter of the provisions of the treaties and referring to the "very short period of work" to exclude the application of Union law¹¹². The same concept of the exercise of the work activity only for a short period, as such not suitable for framing the individual in the category of worker of the Union, has been resumed, after many years, in C-413/01, *Franca Ninni-Orasche* sentence of 6 November 2003¹¹³.

¹¹¹ECLI:EU:C:1988:322, I-03161, par. 43. C-115/78, *Knoors v. Staatssecretaris van Economische Zaken* of 7 February 1979, ECLI:EU:C:1979:31, I-00399, par. 25. For more analysis and details see: L.J. CONANT, *Justice contained: Law and politics in the European Union*, Cornell University Press, U.S, 2018, pp. 46ss. C. JANSSENS, *The principle of mutual recognition in European Union law*, Oxford University Press, Oxford, 2013, pp. 63ss. T. STOREY, A. PIMOR, *Unlocking European Union law*, ed. Routledge, London & New York, 2018, pp. 296ss.

¹¹²The EC observed that the condition of habitual residence could constitute indirect discrimination, justifiable as it was aimed at avoiding "social tourism" and thus preventing possible abuses by people who are falsely seeking work, to be excluded, however, in the present case, because the authenticity of the search for an occupation of Mr. Collins was not disputed. Even AG Colomer, according to par. 75 of his Opinion submitted on 10 July 2003, noted that the imposition of a condition relating to residence could be justified on the basis of the need to avoid the phenomenon of so-called 'social tourism', practiced by those persons moving from one State to another for the purpose of benefiting from non-contributory benefits and, therefore, in order to prevent abuse, concluding that "In so far as the application of this condition is accompanied by an examination of the situation particular of the applicant in each specific case, it does not seem to me that such a measure goes beyond what is necessary in order to achieve the objective pursued".

¹¹³ECLI:EU:C:2003:600, I-13817. See paragraph 69. The CJEU reiterates the *D'Hoop* judgment (*D'Hoop v. Office National d'emploi* of 11 July 2002, *op. cit.*, par. 38), in which it had already ruled that it is legitimate for the national

C-138/02, Collins case of 23 March 2004, with which, according to a part of the commentators, CJEU invoking the necessity to verify the effectiveness and the reality of the connection, would have clearly wanted to social tourism. In this sense, they would point to the need to avoid abuse by both the EC and the AG Colomer. In particular, CJEU considered it acceptable that the unemployment allowance provided for nationals is granted to the national of another member state in search of first employment only after it has been possible to ascertain the existence of a real link between those seeking labor and the labor

legislature to be sure of the existence of a real link between those requiring compensation which has the character of an advantage social security pursuant to art. 7, n. 2, of the regulation n. 1612/68 and the geographic market of the concerned work. Specifies here that the existence of such a link could be verified, in particular, by ascertaining that the person in question actually sought employment in the Member State in question for a reasonable period of time. See in argument: M. DOUGAN, *The bubble that burst*, in M. ADAMS (a cura di), *Judging Europe's Judges*, Oxford University Press, Oxford, 2013, pp. 127ss. J. HUNT, C. J. WALLACE, *The high water point of free movement of persons: Ending benefit tourism and rescuing welfare*, op. cit., According to the author with Collins it can be said that the free movement of people has entered a mature phase (as was the case with the free movement of goods, with the Keck and Mithouard ruling (joined cases C-267/91 and C-268/91, Keck and Mithouard of 24 November 1993, ECLI:EU:C:1993:905, I-06097). Such statements are also found in the judgment of 4 June 2009 in joined cases C-22/08 and C-23/08, Vatsouras and Koupatantze of 4 June 2009, ECLI:EU:C:2009:344, I-04585. The CJEU stated that, although taking into account the establishment of European citizenship, it can no longer be excluded from the scope of Article 39, n. 2 EC, a benefit of a financial nature intended to facilitate access to employment on the labor market of a Member State is in any case "legitimate for a Member State to award such a benefit only after having established that there is a real link between is looking for a job and the labor market of the same State (...)", specifying how" the existence of such a link could be verified, in particular, by ascertaining that the person in question actually and concretely looked for a job in the State Member State concerned for a period of a reasonable duration [emphasis added] (...)" (parr. 38-39). see also in argument: U. LIEBERT, A. GATTIG, *Democratizing the European Union law below? Citizenship, civil society and the public sphere*, ed. Routledge, London & New York, 2016.

market of that state¹¹⁴. In these terms, it was highlighted how the ruling opted for a reductive reading of the right to social benefits, "saving" the national legislation that introduced indirect discrimination¹¹⁵.

Some of the indirect discriminations admitted as a pre-trial were then resumed in Directive 2004/38/EC and transformed into real regulatory exceptions to the principle of equal treatment. Here reference is made, in particular, to the hypotheses contemplated in art. 24, par. 2, by way of derogation from par. 1, concerning jobseekers and students, which was the subject of

¹¹⁴Decision of the case C-158/07, Förster of 18 November 2008, ECLI:EU:C:2008:630, I-08507. The CJEU, having to judge the national legislation that provided a condition of residence to students in order to benefit from a series of subsidies, found that it was legitimate for a Member State to grant aid to cover student maintenance costs only to those who have proved to be a certain degree of integration into the society of that State, admitting the compatibility of the five-year residency condition. See, S. DE LA ROSA, *La citoyenneté européenne à la mesure des intérêts nationaux. A propos de l'arrêt Förster* (aff. C-158/07 du 18 novembre 2008), in *Cahiers de Droit Européen*, 45, 2009, D. MARTIN, *Comments on Förster* (case C-158/07 of 18 November 2008), *Metock and others* (case C-127/08 of 25 July 2008) and *Huber* (case C-524/06 of 16 December 2008), in *European Journal of Migration and Law*, 11, 2009, pp. 95ss.

¹¹⁵In his conclusions presented on 10 July 2008, AG Mazák noted that "the decisive element is whether the person has actually carried out a specific work activity, that is, an effective and real work activity and not merely marginal or accessory in the sense of the concept of "worker". If it is shown that a person fulfills these conditions objectively, the fact that he must simultaneously be considered as a student does not deprive him of the status of worker and the rights deriving from it "(paragraph 81). he then adds that "there is no evidence of abuse in this case. In particular, given that Ms Förster had been employed for more than three years before terminating her, it can not be said that she entered another Member State solely for the purpose of using the student benefit scheme. Furthermore, at the hearing it emerged that Ms Förster went and started working and studying in the Netherlands because of her personal relationship with a Dutch national. This circumstance could serve as an indication that it did not enter that State solely for the purpose of using the system of student subsidies (...)" (parr. 86 to 87).

attention already in the Förster case¹¹⁶, although the Directive was not applicable to the present case. Indeed, CJEU reminds that, pursuant to art. 24, n. 2 of Directive 2004/38/EC, a host member state is not required to grant aid for the maintenance of studies, including for professional training, in the form of scholarships or loans to students who have not acquired a right to permanent living room. Also this relief could have determined the more restrictive attitude followed in C-158/07, Förster case of 18 November 2008 compared to the previous C-209/03, Bidar case of 15 March 2005 where instead the condition of the residence had been considered a indirect discrimination. CJEU, in other words, seems to have reformulated its own jurisprudence to adapt to the Directive. The restrictive tendency of CJEU, which refers to secondary legislation to limit the rights of non-active citizens, has reached its peak in C-333/13, Dano case of 11 November 2014. CJEU, in this case, has reinterpreted the community legislation, giving central importance to the conditions of "economic self-sufficiency" provided for in art. 7 of Directive 2004/38/EC, which is subject to the right of residence of the inactive European citizen.

More in detail, CJEU first reads the principle of non-discrimination pursuant to art. 18 TFEU in the light of article 24 of Directive 2004/38/EC and art. 4 of Regulation n. 883/2004, both relevant in this case. In this way, he comes to affirm that, as can be seen from art. 24, par. 1, a citizen of the Union, as regards access to social benefits such as those at issue in the main proceedings, "may request equal treatment with respect to nationals of the host member state only if his stay on the territory of the host member state respects the requirements of Directive 2004/38/EC (...)"¹¹⁷.

¹¹⁶Although the CJEU does not follow the lawyer either with regard to the continued effect of the status of worker or with regard to the disproportion of five years, he follows it in excluding the relevance of the grounds and therefore the abuse (paragraph 44: For this purpose, the fact that Ms Förster came to the Netherlands mainly for reasons of study is irrelevant.

¹¹⁷Paragraph 74. "76 It must therefore be noted that Article 7, par. 1, lett. b) of Directive 2004/38/EC aims at preventing economically inactive Union citizens

However, the stay of more than three months but less than five years is subject to the conditions set forth in art. 7, par. 1. These include the obligation for the economically inactive Union citizen to have sufficient financial resources for himself and his family members. Hence it is inferred that "recognizing that people who do not benefit from a right of residence under Directive 2004/38/EC can claim the right to social benefits under the same conditions as those applicable to nationals would run counter to an objective of that Directive, set out in its recital 10, which is to prevent citizens of other member states from becoming an excessive burden on the social assistance system of the host member state"¹¹⁸. Precisely art. 7, therefore, according to CJEU, to establish the possibility for the member state to refuse to grant social benefits to economically inactive Union citizens who exercise freedom of movement with the sole aim of obtaining the benefit of social assistance from another member state, even if they do not have sufficient resources to be able to claim the right of residence. Otherwise, it would lead to the paradoxical consequence, detected by CJEU, as well as from the AG that people who do not have sufficient resources to meet their needs when they enter the territory of another member state would automatically to dispose of it, thanks to the granting of a special non-contributory cash benefit, whose objective is to provide for the beneficiary's existence.

From these passages the role that the restrictive interpretation can play in excluding any kind of abuse can be very well understood: an interpretation of the Directive as described above, in fact, necessarily leads to the exclusion of the possibility of any subsidy for non-nationals citizens that could have an abstract right. On the other hand, the answer given to the national court leaves no doubt that the motivation of the person involved is irrelevant for the attribution of the right of residence and equal

from using the social protection system of the host Member State to finance their livelihoods (...)".

¹¹⁸C-333/13, Dano of 11 November 2014, ECLI:EU:C:2014:2358.

treatment. Basically, the benefits deriving from the Directive, according to CJEU, were not invoked by Mrs Dano when she did not have sufficient resources, not because of her abusive intentions: Mrs Dano could not apply for social benefits, regardless of the fact that his behavior could (or not) be qualified as abusive¹¹⁹.

It is therefore clear that with this ruling two different citizenship statuses are reintroduced, profoundly different from each other: on the one hand, that of economically active subjects, which are fully recognized as having access to the social protection systems of member states, on the basis of their contribution to the economic development of the host country; on the other hand, that of citizens who, not exercising an economic freedom, are in contrast excluded, in principle, from the possibility of cross-border access to the national social solidarity circuits.

Wanting to draw the thread of what has been said, it can be seen how the jurisprudence that looks at real and effective activity, as well as sufficient integration in the host country, to determine the right to social benefits assured there, at first sight, may prefer to use of the notion of abuse, the test of which offers few indications in this context. By linking integration and solidarity, on the other hand, CJEU grasps the nature of the underlying social status relationship, so as to effectively prevent social tourism¹²⁰. Indeed, unlike in the hypothesis referred to in the paragraph concerning U-shaped operations, it is not a question of favoring one state (that of nationality) over another, since the whole construction is focused on establishing a link with the host state, whose legislation want to take advantage of. The level of integration in the state seems a good parameter. The case is

¹¹⁹As pointed out in the Opinion of AG Póitres Maduro on 7 April 2005 in the case C-255/02, Halifax and others of 21 February 2006, *op. cit.*, with regard to the solution of restrictive interpretation, the prohibition of abuse of rights represents a less drastic solution, more suited to the spirit and nature of the common VAT system (par. 53).

¹²⁰CJEU, C-340/14, *Trijber* of 16 July 2014, ECLI:EU:C:2015:505, published in the electronic Reports of the cases.

different in CJEU, as in *Dano*, regardless of integration in the host country, of which true trace is not found in the reasoning followed, interpret the primary law and in particular the principle of equal treatment in light of the provisions of the Directive, specifically excluding those who do not benefit from a right of residence under the same, can claim the right to social benefits under the same conditions applicable to nationals. And indeed it cannot fail to notice how the reasoning carried forward, however justified on the basis of an allegedly teleological interpretation of the Directive, although certainly effective in safeguarding the social assistance system of the host member state, proves to be excessively restrictive in some respects: who requires social benefits such as those discussed in *Dano*, in fact, by force of things does not have sufficient economic resources for their livelihood and, consequently, cannot be considered legally resident, at least before the five years required to trigger the right of permanent residence. In this way, an necessarily rigid interpretation of real integration is accepted, making it in fact coincide with the aforementioned term.

14. SOME BACKGROUND OBSERVATIONS. IS RESTRICTIVE INTERPRETATION AN EFFECTIVE TECHNIQUE? A COMPARISON WITH C-456/04, AGIP PETROLI SENTENCE OF 6 APRIL 2006

In the cases just analyzed, CJEU has avoided the danger of abuse by opting for the interpretative tool, which allows to find within the norm the limits beyond which the abuse is configured. More specifically, CJEU refers here to the objective pursued by the community provision to exclude from its scope artificially constructed operations which, even if they comply with the letter of the standard, have as their sole purpose to benefit from the advantages attributed by the standard itself.

Here it is worth highlighting once again that there has been no question of conscious choice: indeed, CJEU has explicitly taken into consideration, as in *Akrich*, or implicitly, as in *C-311/06*, *National Council of Engineers* case of 29 January 2009, the

possibility of invoking the prohibition of abuse, discarding it and instead favoring a restrictive interpretation.

In this regard, it cannot be discounted that the option adopted by the EU judicature is exactly the same as the one chosen in the hypothesis of fraud on EU law, where, on the other hand, CJEU following certain rulings based on on restrictive interpretation, he finally proposed for the use of the ban. Suffice it to say here that, in C-255/02 Halifax and others case of 21 February 2006 (leading case concerning the abuse of rights), the national court itself proposed, with the questions referred, the alternative between restrictive interpretation of the application field of the sixth Directive and use of the prohibition of abuse of rights. The same thing happened in the famous pronouncement in C-321/05, Kofoed v. Skateministeriet case of 5 July 2007¹²¹.

This is evidently two distinct plans¹²². Indeed, the consequences arising from the use of one or the other technique are not insignificant: to sanction the abuse through the interpretative tool ignores the consolidated presence of the subjective element in the abuse test, according to which, in addition to establishing that the application of a particular rule to the present case would be contrary to its purpose, we must also prove the *animus fraudandi*. Although to be demonstrated on the basis of "objective elements", the necessity of the subjective element is

¹²¹ECLI:EU:C:2007:408, I-05795.

¹²²See the conclusions presented by AG Mazak in the case: C-277/09, RBS Deutschland Holdings GmbH of 30 September 2010, ECLI:EU:C:2010:566, I-13805, where it is stated that the interpretation of the Sixth Directive and the relevance, in this case, of the prohibition of abuse of rights are issues "conceptually distinct and should, therefore, to be dealt with one after the other rather than jointly "and that" only if the conditions laid down by the relevant provisions of the Sixth Directive for obtaining the deduction in question are met, at least formally, it will be necessary to consider, as a second if the taxable person concerned intends, in the circumstances of the case, to make use of the aforementioned provisions for fraudulent or abusive purposes, that is to say if the activities in question are, in the light of the subjective and objective criteria which the CJEU has made in this regard in its case-law, to be considered equivalent to abusive behavior (...)" (parr. 29 and 31).

constant in CJEU jurisprudence and involves the consequence, not indifferent, that the decision not to apply a rule based on the prohibition of abuse of law requires more rigorous assessments compared to those inherent in the process of interpretation of the rule itself.

If certainly this technique allows CJEU, as already mentioned, to maintain the monopoly in the definition of abusive situations, without risking to leave to the national authorities an excessively wide maneuvering space¹²³, it does not seem the motivations that bring the AG Tesouro in C- 367/96, Kefalas and others case of 12 May 1998 to advance reservations about the possible existence of the prohibition of abuse as an autonomous principle in EU law. The AG in fact, after discarding the possibility of a general definition of the category of abuse, due, among other things, to a difficult conceptualization even at national level, does

¹²³ECLI:EU:C:1998:41, I-02843, par. 25ss. From this point of view, as we have seen, the Akrich saga is instructive. See also the restrictive interpretation adopted in O and B, already analyzed in the previous chapter. It is recalled here that the CJEU adopts an interpretation of the directive which would preclude that short stays, although accumulated, may be included in its art. 7 and thus assign a derived right of residence. In other words, it requires sufficient effectiveness to enable the European Union citizen to develop or consolidate family life in the host State. E. SPAVENTA, Family rights for circular migrants and frontier workers: O and B, and S and G, in the Common Market Law Review, 52, 2015, pp. 763, 776ss, notes how the Judge of the Union, thus ruling, has tried to limit the benefits of circular migration (U-shaped construction) and that, although this may constitute a reasonable intention, there are problems regarding the way in which the CJEU realizes it. THERE. however, notes the critical issues in this approach: in particular, to pp. 769-770, observes as the CJEU, insisting that, in order to benefit from the rights in question, it is not sufficient to have resided legally in the host State, perhaps even for a considerable period of time, but rather, the citizen of the Union must have satisfied the conditions laid down by Directive 2004/38/EC throughout its stay, even when the host State had granted more generous conditions to the migrant citizen, also calling into question the rights of workers in search of employment, such as the applicants, who they have a hybrid status in EU law, in the sense that, although they may remain beyond the first three months if they show a good chance of finding a job, they are not however resident in accordance with art. 7, par. 1, but rather "present" pursuant to art. 14 (4) (b).

not hesitate to affirm that the issue of abuse is always resolved. The use of a mere instrument of interpretation proves to be entirely acceptable, since, from the practical point of view, the technique of interpretation can involve various problems, already emerging in the specific treatment of the causes. In fact, in addition to limiting the areas of private autonomy¹²⁴, precisely the absence of verification as to the subjective element, determines a gap between interpretation and the fight against abuse: this is because, on the one hand, the interpretation looks to the rule abstractly considered; on the other hand, the abuse must necessarily be reconstructed in concrete terms. In other words, faced with these situations, the Achilles' heel of restrictive interpretation is found precisely in its "rigidity" and immutability in the face of individual situations.

This gives the national authorities a weapon that allows them to deny the protection given by EU law without having to worry about looking at the individual case, with all the problems that also derive from it in terms of division of powers between the member states¹²⁵.

If this is one of the side effects deriving from an imprudent use of restrictive interpretation, one could even hypothesize cases in which it is not in the sole definition, by CJEU, of the intrinsic limits of the subjective juridical positions attributed by EU law the possibility of denying its invoking is therefore

¹²⁴CJEU, C-456/04, Agip Petroli of 6 April 2006, ECLI:EU:C:2006:241, I-0241.

¹²⁵Council Regulation (EEC) of 7 December 1992, n. 3577, concerning the application of the principle of freedom to provide services to maritime transport between Member States (maritime cabotage), in OJ, L 364, p. 7. The art. 3 of the regulation provides: 1. For vessels carrying out continental cabotage and cruise ships, all matters relating to the crew are the responsibility of the State in which the vessel is registered (flag State); 2. In the case of vessels which carry out island cabotage, all matters relating to the crew are the responsibility of the State in which the vessel is engaged in a maritime transport service (Host State). 3. However, as from 1 January 1999, for cargo ships of more than 650 gross tonnage carrying out island cabotage, when the trip in question follows or precedes a journey from or to another State, all matters relating to the crew are the responsibility of the State in which the vessel is registered (flag State).

allowed only when it is shown that those limits have been exceeded. Since CJEU essentially "gives the national court the possibility of penalizing a distorted or excessive use of Union law only where the objectives pursued are not jeopardized (...), the question of the abuse is based on the provisions of national law and ends up resolving, when a legal situation assigned by EU law is at stake, in a question of interpretation of the community law in question "(paragraph 25).

In order better to make such a statement, C-456/04, *Agip Petroli* sentence of 6 April 2006¹²⁶ may be cited. The case, which concerned the interpretation of art. 3 of the Regulation on maritime cabotage, saw the *Agip Petroli* company as opposed to the Port Authority of Syracuse regarding a decision by which the harbor master's office had refused to permit a vessel, flying the Greek flag, to carry out an insular cabotage, without load, between Magnisi and Gela. *Agip Petroli* appealed against this decision, invoking art. 3, n. 3 of Regulation, which provides for the application of the law of the flag state. National authority, on the other hand, narrowly interpreting art. 3, n. 3, claimed that the provision could not be invoked in the present case, since the vessel had made a ballast prior to the insular cabotage voyage, which could not therefore have been included in the "journey which follows or precedes a journey coming from or going to another state", referred to in 3. This led the referring court, who claimed the necessity to avoid that, by means of fake consecutive cabotage, the provisions of art. 3, n. 2, to request clarification on the notion of "journey that follows or precedes"¹²⁷ the cabotage voyage referred to in article 3, no. 3; that is, if it included only the journey with cargo on board or if it could be extended to the hypothesis of a journey in ballast.

¹²⁶The authorization had been refused because they were part of the crew of seafarers of Filipino nationality and this was prohibited by Italian law, which according to the national authority should have been applied under Article. 3 n. 2.

¹²⁷CJEU, C-456/04, *Agip Petroli* of 6 April 2006, op. cit.

CJEU replies that, since the Regulation does not contain any definition of the concept of "journey", nor does any element suggest that EU legislature intended to allow for additional criteria to be taken into account, such as the need for a cargo on board or the existence of a functional and commercial autonomy of the international voyage, this notion must be understood as comprising, in principle, any journey regardless of the presence of a cargo on board, an interpretation also supported by practice in maritime transport, in which it is usual that sometimes ballast trips¹²⁸ are carried out.

CJEU adds, however, that "despite this finding, ballast journeys undertaken abusively for the purpose of circumventing the provisions of art. 3 of the Regulation and the objective of the Regulation itself"¹²⁹. Hence CJEU admits that national courts can take account of the abusive behavior of the person concerned in order to deny him the possibility of benefiting from the provisions of Union law invoked.

The sentence is certainly singular in its specificity. The application of the prohibition of abuse should therefore not be surprising, as shown in par. 20 of the sentence, where c) judgments: C-125/76 are cited as above, *Peter Cremer v. Bundesanstalt für landwirtschaftliche Marktordnung* of 11 October

¹²⁸The CJEU recalls at point 23 that the assessment of an abusive practice of this kind requires, on the one hand, that the international voyage in ballast, despite the formal application of the conditions set out in Article 3, n. 3 of the regulation, has the result that the shipowner, for all matters relating to the crew, is responsible for the application of the flag State rules in disregard of the objective of the art. 3, n. 2 of the regulation, which consists in allowing the application of the rules of the host State to all matters relating to the crew in the case of insular cabotage (objective element). On the other hand, it must also result from a set of objective elements that the essential purpose of this international ballast voyage is to avoid the application of art. 3, n. 2 of the regulation, for the benefit of that of no. 3 of the same article (see, to that effect in case C-255/02, *Halifax and others* of 21 February 2006, op. cit., par. 86) (subjective element).

¹²⁹CJEU, C-456/04, *Agip Petroli* of 6 April 2006, op. cit.

1977¹³⁰, C-8/92, *General Milk Products v. Hauptzollamt Hamburg-Jonas* of 3 March 1993¹³¹ and C-255/02, *Halifax and others* of 21 February 2006, state that the circumvention of rules laid down by Union law is not permitted. At the basis of the reasoning of CJEU, well highlighted when it comes to applying the abuse test, which considers the objective of art. 3 of the Regulation, as well as the desire to apply a provision of the Regulation in place of another, CJEU seems to refer not to the circumvention of national legislation, but to fraud EU law, which takes the form of an artificial construction, in order to be applied a given rule of conflict in place of another, which allows the application of the most favorable national law. In other words, CJEU, in the presence of a Regulation indicating the conditions for application of a specific national law, respectively that of the host or flag state, considers that the prohibition of abuse can be applied, setting it entirely on the community conflict law, whose circumvention necessarily involves the circumvention of national law.

What interests us here to highlight, beyond the specificity of the sentence, is how CJEU, in this case, could not make use of the technique of restrictive interpretation, simply because such a choice would have led to a *de facto* repeal of the Regulation provision subject to attention. As pointed out by the AG Kokott, in fact, to require that a cargo be transported on international travel would have considerably limited the possibilities

¹³⁰ECLI:EU:C:1977:148, I-01593. The question referred concerns the interpretation of Council Regulation of 30 October 1964, n. 166, concerning the regime to be applied to certain categories of compound feedingstuffs (OJ, p. 277) and of the Commission Regulation of 30 October 1964, n. 171 which establishes, on the basis of the previous regulation, the conditions for granting export refunds in third countries for certain categories of compound feedingstuffs.

¹³¹ECLI:EU:C:1993:82, I-00779. See also: T. LYONS, *European Union customs*, Oxford University Press, Oxford, 2018.

of cabotage, almost to the exclusion of it with reference to some sectors, such as that of oil¹³².

Therefore, the technique of restrictive interpretation is not always feasible; on the contrary, where there is a text of secondary law which provides for well-defined rules of conflict, so as to indicate the national legislation that applies to one case rather than to another, the prohibition of abuse seems a viable path, in how elusive design is clearly visible even at the level of EU system.

The referring court also made it clear that this would have made most of the insular cabotage in the oil sector in Italian islands impossible.

15. CONCLUDING REMARKS

Referring to the conclusions of the individual sections for a more in-depth analysis of the characteristics and the limits of the protection techniques of the legal system taken into consideration in this paragraph, it can be stated here, in summary, how the cases object of attention have confirmed that "community" jurisprudence, in the presence of a triangulation between legal systems, has largely solved the problem of abusive demonstrations of individuals using techniques other than the prohibition of abuse.

In the face of "U" operations carried out using the freedoms of circulation to circumvent national legislation and move into a more favorable national system, CJEU, in the absence of any form of harmonization, has consented, under conditions defined, to the invocation by the member state of the fight against abuse as an overriding reason of public interest.

On the other hand, in the presence of "U-shaped" constructions aimed at applying Union law in place of national law, the jurisprudence has shown itself inclined to interpret the scope

¹³²R. IONESCU, Abus de droit en droit de l'Union européenne: nouvelles applications, notamment en matière de transport, in *Journal de Droit Européen*, 221 (1), 2015, pp. 100ss.

of the rights conferred by EU law in such a way as to exclude the root situations that were outside the objectives of the legislation.

It has indeed been pointed out that in all sectors, the concept, albeit different, has a constant characteristic: the teleological criterion, which consists in the failure to respect the objectives pursued by the relevant EU law provision. If this element unites the three techniques, this cannot lead to affirm that they can be included under the umbrella of prohibition of abuse intended as an autonomous concept. As already highlighted, in fact, the first technique differs from the abuse of law as it focuses on the suitability and proportionality of the national anti-abuse legislation and not on the abusive behavior considered in itself, which translates into requiring the legislation considered to be just consider constructions of pure artifice already in the abstract. As for the technique of restrictive interpretation, it must be reiterated that the plans for the prohibition of abuse and interpretation are not perfectly coinciding: in order for the prohibition in question to apply, in fact, not only does the fact not fall within the purpose of law, but must also be a creation without economic justification, indicating the desire to obtain an abusive advantage.

More generally, it was observed that CJEU, in essence, to combat the most obvious manifestations of abuse, claims to use techniques that focus on legislation, general and abstract, when the same badly fit the concrete case. This applies to the imperative reasons, as well as to the restrictive interpretation. In the first case, in fact, through a very strict proportionality test, we end up allowing the national authority to apply the legislation only if it is aimed at opposing specific constructions outlined *ex ante* with extreme precision. Among other things, the most nourished jurisprudence with reference to the fight against abuse is found in the field of tax avoidance, which has undeniable particularities compared to other hypotheses of circumvention that have been analyzed: in these cases, in fact, it is not so much a connecting element with another national order to be created fictitiously, but the operation itself. One might ask, therefore, if the same principles can be valid in other cases of circumvention, including

first of all the pseudo-foreign corporations, in which the element of artificiality is very difficult to trace according to the parameters set by jurisprudence, without taking into consideration the nationality of the private individual. Even the teleological interpretation, on the other hand, is inevitably not very flexible, insofar as it pertains to the letter of the law.

This last section, which unites restrictive interpretation and imperative reasons, together with other problematic aspects already highlighted during the course of the discussion in this paragraph, first of all the risk of excessively affecting the division of powers between the state of origin and that of destination, leads to believe that CJEU is "ill-equipped" in the difficult task of answering the questions that are submitted, where it is to verify an abuse or otherwise to provide the national court with the coordinates to do so, considering the relative lack of experience on the subject, outside the realm of the law.

The described attitude of CJEU is at the origin of a series of problems, which also affect the relationships between negative and positive harmonization. In this regard, it cannot be overlooked that the abuse involving several jurisdictions finds its *raison d'être* in regulatory competition. If, in fact, the introduction of the principle of mutual recognition has allowed resources, companies and individuals to travel to states which offer them more advantageous conditions, specularly, member states have had the opportunity to offer economic actors an advantageous regulation in order to attract investment¹³³. Where member states are free to define the content of their national provisions that do not influence circulation, an arbitrage opportunity for individuals is created.

Apart from considerations related to the risk of a leveling down national protection standards, what we would like to highlight is how the difference between territorial unity and

¹³³N. BERNARD, Flexibility in the European Single Market, in C. BARNARD, J. SCOTT, The law of the single European market, Unpacking the premises, Hart Publishing, Oxford & Oregon, Portland, 2002, pp. 101ss.

regulatory diversity favors the emergence of abusive practices aimed at choosing the most favorable order; which are distinguished from simple arbitrage due to the high artificiality component that characterizes the latter.

On the contrary, harmonization eliminates the possibility of comparison between national laws and ipso facto of abuse involving multiple jurisdictions, as evidently no choice of applicable law can be made in the presence of a single legal regime.

Thus, legislative institutions could be better equipped to combat large-scale abuses, also taking into account that member states, which are the first to request the application of the abuse ban, would ultimately be responsible for the consequences, desirable or less, descendants of legislative choices. In this regard, the link that can exist between the difficulties faced by CJEU in sanctioning the abuse and the harmonization reflected by the legislators of member states must not be underestimated¹³⁴. They also have a certain interest in the anti-abuse provisions introduced by EU legislator in several texts of secondary legislation, called anti-abuse clauses, and their mechanisms of functioning, as well as the role that can be played by EC in presence of a text of secondary law that imposes certain rules in order to limit law shopping. These are issues that deserve further study, the subject of the subsequent and final paragraph.

¹³⁴C. BARNARD, J. SCOTT, *The law of the single European market, Unpacking the premises*, op. cit.