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Opinion of the Advocate-General

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Case C-223/03

University of Huddersfield Higher Education Corporation

v

Commissioners of Customs and Excise

(Reference for a preliminary ruling from the Value Added Tax and Duties Tribunal, Manchester)

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Sixth VAT Directive

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Articles 2(1), 4(1), (2), 5(1), 6(1), 10(2) and 17

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Supply of goods and services

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Economic activity

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Abuse of rights

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Transactions having the sole aim of obtaining a tax advantage

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1. The VAT and Duties Tribunal (London) (hereinafter ‘the VAT and Duties Tribunal, London’), the High Court of Justice of England and Wales (Chancery Division) (hereinafter ‘the High Court’), and the VAT and Duties Tribunal (Manchester Tribunal Centre) (hereinafter ‘the VAT and Duties Tribunal, Manchester’) have, by three different orders, referred to the Court of Justice for a preliminary ruling several questions concerning the interpretation of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (hereinafter ‘Sixth Directive’), as amended. (2)

2. The three cases involve transactions entered into for the purpose of gaining a tax advantage in

terms of a right to deduct input VAT. In essence, the Court is asked, first, to determine whether transactions carried out with the sole purpose of enabling input tax to be recovered may constitute an ‘economic activity’ within the meaning of Article 4(2) of the Sixth Directive. Second, the Court is asked to consider the possible applicability of the doctrine of ‘abuse of rights’ in the field of value added tax as a result of which claims to deduct VAT incurred by a person in circumstances such as those of the present cases might be disallowed.

I – The Community legislation relevant to the three cases

3. By Article 2(1) of the Sixth Directive, VAT applies to ‘the supply of goods or services effected for consideration … by a taxable person acting as such’.

4. Article 4(1) provides that ‘“[t]axable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity’ and Article 4(2) provides that such economic activities ‘shall comprise all activities of producers, traders and persons supplying services …’.

5. According to Article 5(1) ‘“[s]upply of goods” shall mean the transfer of the right to dispose of tangible property as owner’ and Article 6(1) defines ‘[s]upply of services’ as ‘any transaction which does not constitute a supply of goods within the meaning of Article 5’.

6. Article 13A(1) exempts a number of activities from VAT including hospital and medical services by providing that:

‘Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

…

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature’.

7. Article 13B(b) provides, in terms identical to those of Article 13A(1), that ‘the leasing or letting of immovable property’ is exempt from VAT. Article 13B(d) sets out, also in terms identical to those of Article 13A(1), a number of activities in the financial services sector that the Member States are also to exempt from VAT.

8. With regard to deductions, Article 17(1) provides that ‘the right to deduct shall arise at the time when the deductible tax becomes chargeable’. Article 17(2) provides that ‘[i]n so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay … value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person.’ (3)

9. As regards goods and services to be used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible, the first subparagraph of Article 17(5) states that 'only such proportion of the value added tax shall be deductible as is attributable to the former transactions'. The second subparagraph of Article 17(5) provides that '[t]his proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person'.

10. Article 27(1) concerning simplification procedures,(4) provides that '[t]he Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage'.

II – The facts of the main proceedings, the questions referred to the Court and the Community and national legislation relevant to each case

A – Case C-255/02

11. Halifax is a banking company. Under Article 13B(d) of the Sixth Directive the vast majority of its supplies are exempt financial services. Halifax wished to construct 'call centres' for the purposes of its business at four different sites located in the United Kingdom on land leased or owned by Halifax. By virtue of the pro rata rule in Article 17(5), Halifax could have recovered some 5% of the VAT paid on the building works. However its tax advisers constructed a scheme by which Halifax was able to recover effectively the whole of the input VAT on the building works through a series of transactions involving different companies in the Halifax group.

12. The companies involved in the operation were all wholly owned subsidiaries of Halifax: Leeds Permanent Development Services (hereinafter 'LPDS') a 'special purpose company' that had in the past been engaged in managing development projects and did not belong to the Halifax VAT group; County Wide Property Investments (hereinafter 'CWPI') a development and investment company, and, finally, Halifax Property Investment Ltd (hereinafter 'HPIL') which, unlike the other companies mentioned above, was not registered for VAT.

13. The scheme concerns four different sites but the transactions followed the same pattern in relation to each site. First, Halifax contractually agreed to loan LPDS the money necessary for the purchase of the requisite interest in the site and for the construction work to be carried out. Concurrently, in a different contract, LPDS agreed to carry out construction work of small value at the site. Halifax paid LPDS about GBP 164 000 for that work at the four sites, including almost GBP 25 000 in VAT accounted for by LPDS and for which Halifax obtained input tax relief only for the small deductible proportion on a pro rata basis.

14. LPDS, for its part, entered into a development and funding agreement with CWPI under which CWPI was to carry out or procure the carrying out of the construction work on each site. This included the small-value work which LPDS agreed to carry out for Halifax. Using the advances made by under the terms of the loan agreement with LPDS, the latter company paid CWPI a large sum in advance for the works (a total of about GBP 48 million for the four sites, including more than GBP 7 million in VAT).

15. All those transactions took place on the same day, within LPDS's financial year, which ended on 31 March 2000. (5) During that year LPDS had made the standard rated supply of the small-value construction work and no exempt supplies. Consequently LPDS claimed repayment of VAT

of over GBP 7 million on its inputs made during that same year which corresponded to the sums charged by CWPI for carrying out the construction works on the sites. For its part, CWPI accounted for VAT on those supplies made to LPDS, but would, eventually, be entitled to deduct the VAT that the contractors and professionals to be engaged on the construction works would charge.

16. On 6 April 2000, Halifax leased each site to LPDS for a premium and LPDS entered into a further agreement to assign each of the leases to HPIL with completion of each assignment to take place on the first working day following completion of the construction works on that particular site. Still on the same day, HPIL contractually agreed to underlet the premises on each site to Halifax for a premium. Those transactions took place during LPDS's subsequent partial exemption year and, in accordance with Article 13B(b), were treated as exempt supplies for VAT purposes.

17. For its part, CWPI engaged independent contractors and professionals of various kinds in order to carry out the construction works on each site. Having been paid in advance by LPDS, CWPI paid the independent contractors as and when the works were carried out.

18. The Commissioners refused LPDS's claims for the repayment of VAT on its inputs and those of CWPI in relation to VAT charged to it by the independent contractors. According to the Commissioners, a transaction, regardless of its genuine character, entered into solely for the purposes of VAT avoidance is neither itself a 'supply' nor a step taken in the course of an 'economic activity' for VAT purposes. LPDS's undertakings to Halifax and CWPI's construction services to LPDS did not, therefore, qualify as 'supplies' within the meaning of the Sixth Directive. The Commissioners additionally submit that transactions entered into solely for the purposes of VAT avoidance amount to an 'abuse of rights' and should on that account be disregarded for VAT purposes. According to either the first or the second approach, it is clear that the only true supplies of construction services were provided by the independent contractors and were made directly to Halifax.

19. Halifax, LPDS and CWPI (hereinafter 'the Halifax applicants') challenged the Commissioners' refusals before the VAT and Duties Tribunal, London, which dismissed the appeals. The Halifax applicants then appealed to the High Court of Justice of England and Wales (Chancery Division) which quashed the judgment and remitted it back to the VAT and Duties Tribunal with a direction to determine, among other issues, whether the sole purpose of LPDS and CWPI in entering into the transactions at issue was VAT avoidance. That question was answered in the affirmative by the Tribunal, which, in addition, referred the following questions to the Court:

'(1) (a) In the relevant circumstances, do transactions:

(i) effected by each participator with the intention solely of obtaining a tax advantage and

(ii) which have no independent business purpose

qualify for VAT purposes as supplies made by or to the participators in the course of their economic activities?

(b) In the relevant circumstances, what factors should be considered in determining the identity of the recipients of the supplies made by the arm's-length builders?

(2) Does the doctrine of abuse of rights as developed by the Court operate to disallow the Appellants their claims for recovery of or relief for input tax arising from the implementation of the relevant transactions?'

B – Case C-419/02

20. BUPA Hospitals Ltd (hereinafter ‘BHL’) is part of the BUPA group of companies (hereinafter ‘the BUPA group’) and carries on the business of running private hospitals. Those supplies were considered to be zero-rated. This allowed BHL to recover input tax on its purchases of drugs and prostheses received from its suppliers without having to account for output tax on its supplies of such drugs and prostheses to its customers.

21. The United Kingdom Government announced its intention to bring in early legislation to exclude such supplies from zero-rating, which eventually entered into force on 1 January 1998. The effect of that change was to remove the supplies in question made by private suppliers from the zero-rating regime which the United Kingdom was permitted to apply by virtue of Article 28(2)(a) (6) of the Sixth Directive and to apply to them the normal regime of Article 13A according to which there would be exemption without recovery of input tax.

22. In the period between the Government’s announcement and the entry into force of the new legislation, the BUPA group devised and set up a series of transactions consisting of prepayment arrangements that forestalled the impact of the new legislation on BHL’s financial position. The idea was to pay in advance for a large quantity of unspecified drugs and prostheses, before the entry into force of the new legislation.

23. The prepayment arrangements that enable BHL to recover input tax on its purchases rely on Articles 10 and 17 of the Sixth Directive. Article 17(1) provides that ‘[t]he right to deduct shall arise at the time when the deductible tax becomes chargeable’. According to Article 17(2)(a) ‘[i]n so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay …value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person’.

24. Article 10 provides:

‘(1) (a) “Chargeable event” shall mean the occurrence by virtue of which the le gal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes “chargeable” when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

(2) The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire. …

However, where a payment is to be made on account before the goods are delivered or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.’ (7)

25. In the light of those provisions, the prepayment arrangements would achieve the result that, even if the specification and delivery of the goods took place after the abolition of the zero-rate regime, no VAT would be charged because the goods had been paid for while the right to recover input tax was still available.

26. To rule out the risks involved in making large prepayments to third party suppliers, the BUPA

group decided to use one of its subsidiaries outside the BUPA VAT group as supplier under the prepayment arrangement. The company chosen was a member of the Goldsborough Group. That group of companies had been recently purchased by the BUPA group, and also operated a small number of private hospitals. The subsidiary chosen was renamed BUPA Medical Supplies Ltd (hereinafter 'BMSL'). Its company objects were amended and it obtained a licence for the distribution of pharmaceutical products.

27. To avoid the cash flow problem resulting from having to pay to the Commissioners the amount corresponding to the output tax that BMSL would have to account for, another subsidiary company of the BUPA group, Goldsborough Developments Ltd (hereinafter 'GDL'), entered into mirror prepayment arrangements in the opposite direction, for the same amount and within a co-terminous accounting period, with a supplier belonging to the BUPA VAT Group. That supplier was also another company in the BUPA group, BUPA Gatwick Park Hospital Ltd (hereinafter 'Gatwick Park'), which likewise amended its company objects and obtained a licence to distribute pharmaceutical products.

28. On 5 September 1997 the prepayment agreements between BHL and BMSL and between GDL and Gatwick Park were signed. BHL agreed to pay BMSL the sum of GBP 100 million for the supply of unascertained drugs (GBP 60 million plus GBP 10.5 million VAT) and prostheses (GBP 40 million plus GBP 7 million VAT). On the same day BMSL issued the corresponding invoices to BHL. It appears that those amounts sufficed to satisfy BHL's needs for drugs and prostheses for a period of between five and eight years. Likewise on 5 September 1997, GDL agreed to pay Gatwick Park the sum of GBP 100 million for the supply of unascertained drugs (GBP 50 million plus GBP 8.75 million VAT) and prostheses (GBP 50 million plus 8.75 million VAT). On the same day Gatwick Park issued the corresponding invoices to GDL. With regard to these last prepayment agreements, it appears that the amounts agreed to be paid on account for the drugs and prostheses to be supplied were enough to cover GDL's needs of such goods for a period of between 50 and 100 years.

29. The outcome of the two sets of mirror prepayment arrangements described above was that no tax had to be paid over to the Commissioners at the end of the relevant accounting period. In effect, the BUPA VAT group owed GBP 17.5 million of output tax on Gatwick's Park supply, but set off that amount against a claim for recovery of input tax of GBP 17.5 million on BMSL's supply. At the same time, the Goldsborough VAT group owed GBP 17.5 million of output tax on BMSL's supply which was also set off against a claim for recovery of GBP 17.5 million on Gatwick Park's supply. Each of the two VAT groups was therefore able to offset a VAT liability of GBP 17.5 million against a right to recover the same amount in input tax. The funds necessary for the implementation of the operation were made available by BUPA Investments Ltd, another company within the BUPA Group, and transferred to the parties involved in the prepayment arrangements. In respect of BHL the new purchasing agreements were put into effect from September 1998. As regards the pre-payment arrangements between GDL and Gatwick Park, they were implemented in 2001.

30. The Commissioners refused to authorise the deduction of input tax for both BHL and GDL. The BUPA applicants appealed to the London VAT and Duties Tribunal against the decision of the Commissioners. The VAT and Duties Tribunal, London dismissed their appeals on the basis that BMSL and Gatwick Park had not been carrying on an economic activity or made supplies for VAT purposes. It dismissed, however, the Commissioners' contention that a general abuse of rights doctrine could apply. The applicants subsequently appealed to the Chancery Division of the High Court and the Commissioners cross-appealed.

31. The High Court decided to refer the following questions to the Court of Justice for a preliminary

ruling:

‘(1) Having regard to the relevant circumstances, the relevant transactions and the position of the vendor companies how is the expression “economic activity” within the meaning of Article 4(1) and (2) of Directive 77/388/EEC on VAT (the Directive) to be interpreted?

(2) Having regard to the relevant circumstances, relevant transactions, and the position of the vendor companies how is the expression “supply of goods” in Article 5(1) of the Directive to be interpreted?

(3) (a) Is there a principle of abuse of rights and/or abuse of the law which (independently of the interpretation given to the Directive) is capable of precluding the right to deduct input tax?

(b) If so, in what circumstances would it apply?

(c) Would it apply in circumstances such as those found by the Tribunal?

(4) Does it make any difference to the answers to questions 1 to 3 above if payment is made in respect of the relevant transactions at a time when any onward supply of the goods would have been an exempt supply with refund of VAT at the preceding stage as permitted by Article 28(2)(a) of the Directive?

(5) How is the Directive to be interpreted with particular reference to the following questions? In circumstances such as the relevant circumstances and with reference to transactions such as the relevant transactions:

(a) should supplies be treated as having been made by the outside suppliers to the purchasing companies with no supplies being made to or by the vendor companies?

or

(b) should supplies be treated as having been made by the outside suppliers to the vendor companies with no supplies being made by the vendor companies to the purchasing companies?

(6) In circumstances where each vendor company, in the course of an economic activity, makes supplies to a purchasing company and:

(a) the purchasing companies have entered into agreements with the vendor companies to be supplied with goods;

(b) the goods are invoiced and paid for in advance of delivery;

(c) VAT is charged on the advance payment in accordance with the second subparagraph of Article 10(2) of the Directive;

(d) the goods are to be used by the purchasing companies in making supplies which, if made at the time of the payment, would have been exempt supplies with a right to refund at the preceding stage, but

(e) each purchasing company intends to take delivery of the goods under the agreements only if the law changes in such a way that the purchasing company’s use of the goods will be a use in making exempt supplies without a right of refund

how are Article 17 of the Directive and the rules on deduction to be interpreted? (With reference to paragraph e), if the law does not change in the way described the purchasing companies are

entitled to terminate their contracts with the vendor companies and claim refunds of the prices paid. In the relevant transactions the contracts between the purchasing companies and the vendor companies contain provisions permitting such terminations.)

(7) The Tribunal found (at paragraph 89 of the Decision) that “none of the individuals in a position to take decisions for [BMSL and Gatwick Park] ... had any motive or purpose of substance other than to carry through the VAT avoidance scheme”. The Appellants have, in their Notice of Appeal to the High Court, challenged that finding of fact. If that finding of fact were to be set aside on appeal would it make any, and if so, what difference to the answers to questions 1 to 6 above inclusive?’

C – Case C-223/03

32. The University of Huddersfield (hereinafter ‘the University’) is a Higher Education Corporation that makes exempt supplies of education services. It wished to refurbish two buildings (West Mill and East Mill) in which it had bought a leasehold estate. The input VAT on the refurbishment costs would be limited to a recovery rate that amounted to 14.56 per cent in 1996 and which has since fallen to 6.04 per cent. Its tax advisers, however, put forward a number of possible schemes which enabled the University to recover the whole of the input VAT on the renovation works through a series of transactions involving separate legal persons.

33. For that purpose a discretionary trust (‘the Trust’) was established over which the University had the power of appointment and removal of trustees. With respect to East Mill, which is the building directly concerned in the main proceedings, the University opted to tax the lease of East Mill and granted it to the Trust on 22 November 1996. (8) The initial yearly rent reserved was the nominal amount of GBP 12.50. The Trust having itself opted to tax its supplies, granted, on the same day, an under-lease back to the University at an initial yearly nominal rent of GBP 13. Concurrently, The University of Huddersfield Properties Ltd (hereinafter ‘Huddersfield Properties’), a wholly-owned subsidiary of the University which was not part of the same VAT group, invoiced the University for GBP 3.5 million, plus VAT of GBP 612 500, for future construction services on East Mill. Shortly afterwards, Huddersfield Properties contracted with the University to refurbish East Mill and the University paid the amount on the invoice submitted by Huddersfield Properties. That company eventually engaged third party contractors at arm’s length to provide the necessary construction services on East Mill. The work on East Mill was completed in September 1998. Subsequently, the rents due under the lease and under-lease were increased to GBP 400 000 per annum and GBP 415 000 per annum, respectively.

34. That scheme enabled the University in its VAT return for the period 01/97 to invoke the right to deduct input VAT incurred by it on the construction work received since it was used for the purpose of an onward taxable supply of East Mill to the Trust. (9) On 26 January 2000, however, the Commissioners assessed the University to VAT of GBP 612 500 for the period 01/97 in respect of VAT on the construction services supplied by Huddersfield Properties in relation to East Mill and GBP 2.28 in respect of VAT on rent for East Mill charged by the Trust. The University brought an appeal before the VAT and Duties Tribunal, Manchester, against that VAT assessment.

35. The Commissioners basically contend that a transaction entered into solely or predominantly for the purposes of VAT avoidance is not a ‘supply’. Similarly, it is not a step taken in the course or furtherance of an ‘economic activity’. In the alternative, the Commissioners maintain that such a transaction should, in accordance with the general principle of law preventing ‘abuse of rights’, be disregarded and, instead, the terms of the Sixth Directive should be applied to the true nature of the transaction at issue. For its part, the University argued inter alia that the transactions in question were not ‘solely or predominantly for the purpose of tax avoidance’. Whilst it is true that the University’s interpretation of the facts produced a large ‘up front’ repayment of input VAT, the

same facts also gave rise to large payments of VAT on the rents over a period of time.

36. The referring Tribunal found that the sole purpose for the use of the Trust in relation to East Mill, for the lease by the University to the Trust and for the under-lease of East Mill by the Trust to the University, was that of obtaining a tax advantage. It considered moreover that it was the University's intention to obtain an absolute VAT saving by terminating the VAT arrangements in respect of East Mill some time after the commencement of the term of the lease (thereby also terminating payment of VAT on the rents). The referring tribunal, however, also found that all those transactions were genuine, not shams, in the sense that they resulted in supplies actually carried out.

37. In those circumstances the VAT and Duties Tribunal, Manchester, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where:

1. a university waives its right to exemptions from VAT in respect of any supplies of certain real property owned by it and leases the property to a trust set up and controlled by the university

2. the trust waives its right to exemption from VAT in respect of any supplies of the real property in question and grants to the university an underlease of the property

3. the lease and underlease were entered into and carried out by the University with the sole intention of obtaining a fiscal advantage and had no independent business purpose

4. the lease and leaseback amounted to, and was intended by the University and the trust to be, a deferral scheme (that is, a scheme for the deferral of payment of VAT) with a built-in feature that allowed an absolute tax saving at a later date

(a) are the lease and the underlease taxable supplies for the purposes of the Sixth VAT Directive?

(b) do they qualify as economic activities within the meaning of the second sentence of Article 4(2) of the Sixth VAT Directive?'

III – Assessment

38. Despite the differences in the tax planning schemes adopted, these cases pose identical legal problems. In essence the referring courts seek guidance on two questions. First, the Court is asked whether the transactions at issue qualify as economic activities within the meaning of Article 4(2) of the Sixth Directive and correspond to supplies 'of goods or services effected for consideration' by a 'taxable person acting as such' within the meaning of Article 2 of the directive. (10)

39. The second question asks whether the claims for recovery of or relief for input tax can be disallowed on the basis of the Community law doctrine of abuse of rights. (11)

A – The notion of supply made in the course of an economic activity

40. The deduction system in the Community common system of VAT is meant to relieve the trader entirely of the burden of VAT payable or paid in the course of all his economic activities. (12) It is common ground that the term 'economic activity' in Article 4(2) of the Sixth Directive has a wide scope and that it is objective in character. (13) As the Court stated in Rompelman , '[t]he common system of value-added tax … ensures that all economic activities, whatever their purpose or results … are taxed in a wholly neutral way'. (14) Accordingly, Article 4(1) of the directive

expressly refers to any activity ‘whatever the purpose or results of that activity’. In its judgment of 26 March 1987 in Commission v Netherlands the Court considered that, in order to determine whether an activity is an economic activity within the meaning of the common system of VAT, ‘the activity is considered per se and without regard to its purpose or results’. (15) It is therefore necessary to consider an activity objectively and per se to identify its characteristic features in order to decide whether or not its nature is that of an economic activity, rather than having regard to the eventual purpose of the transaction or motives of the parties. (16)

41. That rule is based on the requirement that the common system of VAT should be neutral, and on the principle of legal certainty, which requires that the application of Community legislation must be foreseeable by those subject to it. (17) That requirement of legal certainty must be observed even more strictly in the case of rules entailing financial consequences, so that those concerned may know precisely the extent of their rights and obligations. (18)

42. The United Kingdom Government, largely supported by the Governments of Ireland, the Netherlands and Italy, submits, however, that transactions such as those at issue in the present cases, carried out for the sole purpose of recovering input tax and therefore to avoid or defer VAT that would normally have to be paid, are not economic activities within the meaning of the common system of VAT and must not to be regarded as supplies within the meaning of the VAT legislation. It argues that, in so far as the only substantial intention of the participants in the transactions at issue was to render effective a tax avoidance scheme, such activities are wholly alien to the objectives of the Sixth Directive and should not therefore be classified as economic activities.

43. Three issues deserve to be addressed in analysing the arguments put forward by the United Kingdom Government in this respect. First, I will consider whether, as argued by the United Kingdom Government, the distinction between lawful and unlawful activities developed by the Court in determining the scope of the notion of economic activities is relevant to the present cases. Second, I will discuss the importance ascribed by the United Kingdom Government to the purpose for which the transactions have been entered into with a view to excluding them from the category of economic activities. Third, I will discuss the broader consequences of adopting the interpretation put forward by the United Kingdom Government which aims at preventing VAT avoidance schemes by limiting the scope of the VAT rules themselves.

1. The notion of economic activity and the distinction between lawful and unlawful activities

44. The United Kingdom Government’s reasoning, with which the applicants in the three cases and the Commission disagree, is based essentially on an analogy with a line of decisions of the Court of Justice in which certain unlawful activities were held to fall outside the scope of the VAT rules. (19) In my view that case-law does not provide support for the thesis put forward by the United Kingdom Government.

45. According to well established case-law, the principle of fiscal neutrality precludes a generalised differentiation between lawful and unlawful activities. (20) In principle even unlawful transactions fall within the scope of the Sixth Directive and are subject to VAT. (21) The only exception is when an activity falls completely outside the lawful economic sector. (22) But that exception relates only to trade in goods or services which are subject to a total prohibition in the Community and which, by their very nature and because of their special characteristics, cannot be fully marketed or introduced into economic channels. (23) For example, the supply of narcotic drugs or counterfeit currency falls outside the scope of the Sixth Directive. (24) That does not apply to the activities at issue in the present cases, which concern development and investment services, the supply of prostheses and drugs and the lease of immovable property. The transactions under consideration are therefore intrinsically lawful, regardless of whether they were carried out in order to avoid or defer the payment of tax. In the present cases the case-law concerning unlawful activities and the

scope of the Sixth Directive does not therefore have the relevance ascribed to it by the United Kingdom Government. (25)

2. The importance of purpose for the classification of an economic activity

46. The United Kingdom submits that, in order to identify the inherent nature of an activity, regard must be had to all the circumstances in which the relevant transaction takes place, (26) and that such circumstances should include the purpose for which the transaction has been entered into. (27)

47. In that regard it relies on cases such as Stockholm Lindöpark , Faaborg-Gelting and Sinclair Collis . In those cases, however, it was not in doubt that the activities under consideration were economic in nature. In Faaborg-Gelting Linien the question was whether restaurant transactions qualify as supplies of goods or as supplies of services under the Sixth Directive. (28) Stockholm Lindöpark concerned the question whether the activity of running a golf course should be classified as the letting of immovable property, or as the supply of services linked to the practice of sport or physical education, for the purposes of determining whether it may be considered exempt from VAT. (29) Sinclair Collis concerned the question whether the grant by an owner of premises to an owner of a cigarette vending machine of the right to install, operate and maintain the machine in the premises amounted to the letting of immovable property. (30) In each case the Court looked at the circumstances in which the economic activities took place in order to determine their correct classification under the Sixth Directive and not whether they fell within or outside the scope of the Sixth Directive. It cannot be inferred from any of those cases that an activity ceases to be an ‘economic activity’ when it is carried out for the purpose of avoiding or deferring the payment of VAT.

48. It is true that the transactions at issue in the present cases appear to be mere instruments or indirect dealings for the implementation of complex tax avoidance schemes. Tax avoidance, however, remains, in any case, an activity that is not inherently linked to the various business activities objectively carried out for consideration in each of the particular transactions at issue. The tax avoidance purpose is therefore an external circumstance that does not change the inherent and objective nature of each of those transactions. (31) Such transactions must be analysed individually in the light of the relevant objective circumstances in order to verify whether there is a transfer of goods or of services in return for economic consideration and, consequently, to identify their inherent and objective nature.

49. Similarly, the circumstance that the private activities of a taxable person remain outside the scope of the Sixth Directive likewise does not lend support to the United Kingdom Government's argument. In Wellcome Trust the Court analysed whether Wellcome was acting as a private investor or whether it was carrying on a business when managing its investment portfolio. The Court considered the circumstances of the case and concluded that Wellcome was to be treated as a final consumer and not as a 'taxable person acting as such' within the meaning of Article 2(1) of the Sixth Directive. In Enkler (32) the question was whether the hiring out of a motor caravan amounted to an exploitation of tangible property 'for the purpose of obtaining income therefrom on a continuing basis' within the meaning of Article 4(2) of the Sixth Directive. The Court considered that a motor caravan is 'by reason of its nature … capable of being used for both economic and private purposes'. (33) In order to determine whether the exploitation of such a property serves an economic purpose, the Court held that account must be taken of circumstances such as the nature of the goods, the length of the period for which the property was hired, the number of customers and the amount of the earnings. (34) It is not argued in the present cases, however, that the transactions at issue are carried out in a private capacity. The transactions are business activities, notwithstanding the fact that they are carried out as instruments of VAT avoidance schemes.

50. Also, contrary to what the United Kingdom Government suggests, it does not follow from the Court's position in Breitsohl (35) and INZO (36) that an activity is deprived of its economic nature when it is carried out with the sole intention of giving rise to a tax advantage. The issue addressed in those cases was the position of a person applying to deduct VAT who makes false declarations regarding his status as a taxable person. The Court held that '[i]n cases of fraud or abuse, in which, for example, the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations'. (37)

51. In the present cases it is not asserted that the applicants purport to recover input VAT on the basis of false declarations. Moreover, a distinction should be drawn between the intention to engage in economic activities, which is a requirement for acquiring the status of a taxable person, and the purpose of those activities, which, according to Article 4(1) of the Sixth Directive, is immaterial. The present cases, unlike Breitsohl and INZO , concern the purpose of the economic activities carried out by the applicants, rather than the question whether indeed they intended to carry out those activities as taxable persons. In fact, the services and goods were effectively transferred in return for consideration, albeit as part of an operation that had been carefully orchestrated in order to create a right to recover input tax.

52. According to the interpretation of the relevant provisions of the directive advocated by the United Kingdom Government, consideration of the intention of the parties to a transaction is of central importance for the characterisation of the supplies resulting therefrom as supplies made in the course of an economic activity by a taxable person within the meaning of the Sixth Directive. Such an interpretative approach runs counter to the objective character of the notion of 'economic activity', which constitutes a fundamental feature of the VAT system, imposed by the principle of legal certainty, and should not be left to depend on the intentions of the traders involved. (38)

3. Preventing VAT avoidance by limiting the scope of VAT rules

53. The aim pursued by the United Kingdom Government in suggesting that interpretative approach appears to be to combat VAT avoidance schemes by limiting the scope of the VAT system itself. In other words, whenever transactions aimed at avoiding or deferring the payment of VAT were identified, they would simply be left outside the scope of the VAT system. To my mind the Court should not uphold that approach since it is inconsistent with its case-law. Moreover, if

the Court envisages departing from its current approach and opting for the thesis submitted by the United Kingdom Government, it must fully consider the problems posed by that interpretative approach, which I will briefly describe in the following paragraphs. Finally, attention should be drawn to the existence of less drastic alternatives, more in consonance with the spirit and nature of the common system of VAT, to deal effectively with tax avoidance schemes. The matter will be discussed below under the heading ‘Abuse of rights’.

54. The United Kingdom’s view that relevance should be attached to consideration of the purpose of a transaction leads, in effect, to the paradox that such transactions would fall outside the scope of the Sixth Directive by virtue of the fact that the parties sought to avoid or defer the payment of VAT in the first place. As the Commission pointed out at the hearing, that interpretative approach could end up being used not only by the tax authorities for their benefit, as in the present cases, but also by the taxable persons. The latter would in principle also be able to claim that a particular output, in the light of the purpose of the relevant transaction, did not take place in the course of an economic activity, and consequently should fall outside the scope of the VAT system. That is conceivable, for example, in the Halifax case where a particular transactio n was entered into between Halifax and LPDS for the supply of construction services and actually involved the payment by Halifax of about GBP 164 000, including some GBP 25 000 VAT. That transaction, like the others, was also carried out with the sole intention of VAT avoidance. (39) Therefore, according to the approach suggested by the United Kingdom Government, that transaction should apparently be left outside the scope of the VAT system even though it actually entailed the payment of VAT. To my mind it is not entirely clear how that particular transaction should be dealt with under the purposive approach contended for by the United Kingdom Government, in order to leave it within the scope of the Sixth Directive. This is closely linked to another problem deriving from the interpretation advocated by the United Kingdom Government.

55. In reality, as the order for reference in Halifax reveals, when one disregards tax avoidance transactions by leaving them outside the scope of the VAT system, it will be necessary to reconstruct the chain of supplies to redefine the identity of the recipients of those supplies that remain subject to VAT. Most likely the recipients of such supplies will not be those designated by the contracts or invoices relating to the disregarded transactions. This reconstruction poses serious problems.

56. First, it assumes the existence of one normal way to carry on, for example, construction works in Halifax and Huddersfield, and to acquire drugs and prostheses in BUPA. A normal transaction of that kind would be the one falling within the VAT system, but there is a risk that it might be a mere product of the imagination, because there is in principle no single normal way to conduct an economic activity. There is nothing abnormal in itself, for example, in a banking company making use of interposed investment and development companies to carry on construction services, instead of contracting directly with construction companies. Neither of those ways of conducting business can be considered more normal than the other. The choice in favour of one to replace the transactions actually performed by the parties but disregarded for VAT will be purely arbitrary.

57. Secondly, it disregards genuine transfers of property, or supplies of services made in return for economic consideration, to focus instead on the overall result of the operation which is considered to be subject to VAT. That is incompatible with the typical feature of the common system of VAT set out in Article 2 of the First and Sixth Directives, according to which VAT is applied on a transaction-by-transaction basis by reference to each supply in the chain of transactions. (40)

58. Still another, and in my view unresolved, problem to which the interpretation suggested by the United Kingdom Government gives rise is the question whether the intention to obtain a tax advantage has to be commonly held by all the parties involved in the scheme in order for such

activities to be excluded from the scope of the Sixth Directive. In effect, as mentioned by the Commission at the hearing, there is a real danger that innocent bystanders might be affected when making or receiving supplies from the participants in transactions whose sole purpose is to obtain tax advantages. This problem can only be resolved in a satisfactory way, in my opinion, by an outright refusal to accept the interpretation of the notion of supply made in the course of economic activities by a taxable person proposed by the United Kingdom Government.

59. In the light of the foregoing considerations I am of the view that the Court's answer to the national courts should be that the terms 'economic activity' and 'supply' made by a 'taxable person acting as such' for the purposes of Article 2 and Article 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, should be interpreted as meaning that each of the transactions at issue must be considered objectively and per se. In that regard, the fact that a supply is made with the sole intention of obtaining a tax advantage is immaterial.

B – Abuse of rights

60. The national courts raise the issue of whether the notion of abuse of rights, previously recognised by the Court in other areas of Community law, is also applicable in the field of VAT. That doctrine would prevent taxable persons from obtaining a tax advantage resulting from transactions entered into and performed in pursuit of the sole purpose of securing that tax advantage.

61. The Court has had the opportunity in numerous cases to state its views on the issue of the so-called 'abuse of rights' or, more broadly, simply 'abuse'. The United Kingdom Government, supported by the Governments of Ireland, the Netherlands, France and the Commission, relies on that case-law to support the view that that doctrine is also applicable in the domain of VAT.

1. The notion of abuse in the case-law of the Court

62. An analysis of the case-law of the Court consistently reveals a number of converging elements as regards the notion of abuse in Community law. Beginning in the context of fundamental freedoms, the Court stated that the improper circumvention of a Member State's rules by the exploitation of such freedoms is not permissible. (41) That idea has also been recognised by the Court in other specific fields such as social security, where it has also held that benefits cannot be acquired by way of abuse or fraudulent conduct. (42) In other cases, in the domain of the common agricultural policy, the Court, by the same token, held that the application of the relevant legislation on export refunds 'must in no case be extended to cover abusive practices of an exporter'. (43) In another case in the latter domain, involving the payment of compensatory amounts on cheese imported into Germany from a non-member country, the Court stated that 'if it could be shown that the importation and re-exportation of the cheese were not realised as bona fide commercial transactions, but only in order wrongfully to benefit from the grant of monetary compensatory amounts' the payment would not be due. (44) In a different line of cases, in the field of company law, the Court also recognised that a shareholder should not be permitted to rely on a provision of Community law in order to obtain improper advantages manifestly contrary to the objectives pursued by the provision at issue. (45) More recently in Centros , a case in which an alleged abuse of the right of establishment was under discussion, the Court restated its position by holding that 'a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under the cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of the provisions of Community law'. (46)

63. The latter statement reflects the two main contexts in which the notion of abuse has been analysed by the Court. First, when Community law provisions are abusively invoked in order to evade national law. Second, when Community law provisions are abusively relied upon in order to gain advantages in a manner that conflicts with the purposes and aims of those same provisions. (47)

64. To my mind a general principle of Community law can certainly be considered to derive from this case-law. (48) The Court synthesised it by stating that 'Community law cannot be relied on for abusive or fraudulent ends'. (49) That principle, however, enunciated in that broad and rather circular way, is not, by itself, a useful instrument for assessing whether a right arising from a specific provision of Community law is being exploited abusively. A more detailed doctrine or test to determine when an abuse occurs is necessary to render it operative. (50)

65. In that regard, it follows from the previous case-law that the Court attempts to strike a cautious balance between leaving it to the national courts to assess the abuse in accordance with their own relevant national rules (51) and ensuring that that assessment does not prejudice the full effect and uniform application of the Community law provisions allegedly relied upon in an abusive manner. (52) As a consequence, the Court has developed the parameter according to which that assessment is to be made at national level. First, the assessment of the abuse must be based on objective evidence. Second, and most importantly, it must be made in conformity with the purpose and objectives of the provision of Community law allegedly relied upon in an abusive way. (53) In this regard, in so far as the determination of such a purpose is a matter of interpretation, the Court has in several cases expressly excluded the existence of an abuse. (54)

66. In Emsland Stärke , (55) however, the Court went a step further in formulating a more developed Community law doctrine of abuse. The Court was asked whether an exporter could be divested of its right to an export refund despite the fact that the formal conditions for the grant of the refund were met in accordance with the relevant provisions of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the systems of export refunds on agricultural products. (56) In essence, the goods at issue had been the subject of a U-turn scheme under which they were exported and released for home use in a third country but were immediately re-imported into the Community unaltered and by the same means of transport.

67. Consequently, the Court held that the Community law provisions at issue should be interpreted as meaning that the right to the refund should be forfeited in the case of abuse. A test was therefore presented by the Court to determine whether such abuse existed, consisting, first, of 'a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved' (57) and, second, of a 'subjective element consisting in the intention to obtain an advantage from Community rules by creating artificially the conditions laid down for obtaining it'. (58) It is basically this test that the United Kingdom Government submits should also be applied within the VAT common system irrespective of the absence of provisions expressly setting it out, either in the Sixth Directive or in national law.

68. In essence there is a consistent pattern in the abovementioned case-law on the notion of abuse (not always referred to as an abuse of rights) whereby the assessment of the abuse is based on whether the right claimed is consonant with the purposes of the rules that formally give rise to it. (59) The person claiming to have the right is barred from invoking it only to the extent to which the Community law provision formally conferring that right is relied upon for the achievement of 'an improper advantage, manifestly contrary to the objective of that provision'. (60) Conversely, when the exercise of the right takes place within the limits imposed by the aims and results

pursued by the Community law provision at issue, there is no abuse but merely a legitimate exercise of the right. (61)

69. I am of the opinion, therefore, that this notion of abuse operates as a principle governing the interpretation of Community law , as stated by the Commission in its written observations. (62) What appears to be a decisive factor in affirming the existence of an abuse is the teleological scope of the Community rules invoked, (63) which must be defined in order to establish whether the right claimed is, in effect, conferred by such provisions, to the extent to which it does not manifestly fall outside their scope. This explains why the Court often refers not to abuse of rights, but simply to abuse.

70. In this regard, what is referred to in Emsland as the subjective element of the abuse does not affect the interpretative nature of the Community law notion of abuse. (64) In Emsland the Court linked that subjective element to the finding that the situation giving rise to the application of a certain Community rule was purely artificial. In my view, that finding of artificiality should not be based on an assessment of the subjective intentions of those claiming the Community right. The artificial nature of certain events or transactions must certainly be determined on the basis of a set of objective circumstances verified in each individual case. This is, furthermore, in line with the Court's reference, again in Emsland , to the 'sole purpose' of an activity or behaviour as a central element supporting the conclusion that there has been an abuse of Community law. (65) When the Court takes the view that an abuse exists whenever the activity at issue cannot possibly have any other purpose or justification than to trigger the application of Community law provisions in a manner contrary to their purpose, that is tantamount, in my view, to adopting an objective criterion for the assessment of the abuse. It is true that those objective elements will reveal that the person or persons engaged in that activity had, most likely, the intention of abusing Community law. But it is not that intention that is decisive for the assessment of the abuse. It is instead the activity itself, objectively considered. In that regard, suffice it to imagine, by way of example, a case where A confines himself without further reflection to following the advice of B and to carrying out an activity for which there is no explanation other than securing a tax advantage for A. The fact that A did not have any subjective intention of abusing Community law will certainly not be material for the assessment of the abuse. What matters is not the actual state of mind of A, but the fact that the activity, objectively speaking, has no other explanation but to secure a tax advantage.

71. In my view it is not therefore a search for the elusive subjective intentions of the parties that ought to determine the existence of the subjective element mentioned in Emsland . Instead, the intentions of the parties to improperly obtain an advantage from Community law are merely inferable from the artificial character of the situation to be assessed in the light of a set of objective circumstances. Provided that those objective circumstances are found to exist one must conclude that a person who relies upon the literal meaning of a Community law provision to claim a right that runs counter to its purposes does not deserve to have that right upheld. In such circumstances, the legal provision at issue must be interpreted, contrary to its literal meaning, as actually not conferring the right. It is consideration of the objective purpose of the Community rules and of the activities carried out, and not the subjective intentions of individuals, which, in my view, lies at the heart of the Community law doctrine of abuse. I am of the view, therefore, that the use of the term 'abuse of rights' to describe what is, according to the case-law of the Court, in essence a principle of interpretation of Community law may actually be misleading. (66) I prefer therefore to use the term 'prohibition of abuse of Community law' and will speak of 'abuse of rights' only where simplicity so requires.

72. I shall now turn to the question, in the present cases, of the applicability of this Community law principle of interpretation in the specific domain of the harmonised common system of VAT and, if it is applicable, to the formulation of the criteria for its application here.

2. The applicability of the principle prohibiting abuse of Community law in the common system of VAT

73. As Advocate General Tesauro stated, ‘any legal order which aspires to achieve a minimum level of completion must contain self-protection measures, so to speak, to ensure that the rights it confers are not exercised in a manner which is abusive, excessive or distorted. This requirement is not at all alien to Community law’. (67) I am of the view that the common system of VAT is likewise not immune to the risk, inherent in every legal system, that actions may be taken which, despite formally complying with a legal provision, amount to abusive exploitation of the possibilities left open by that provision, contrary to its purposes and objectives.

74. It is difficult, therefore, to conceive the common system of VAT as a sort of abuse-free domain within the Community legal system where that principle would not have to be respected. There is no reason why such a general principle of Community law should have to depend, in this area, on an express statement by the legislature that the provisions of VAT directives also do not escape the rule, consistently upheld by the Court, that no provision of Community law can be formally relied upon to secure advantages manifestly contrary to its purposes and objectives. Such a rule, conceived as a principle of interpretation, constitutes an indispensable safety-valve for protecting the aims of all provisions of Community law against a formalistic application of them based solely on their plain meaning. (68) The idea that this notion is equally applicable in the sphere of VAT is entirely consistent with the position recently adopted by the Court in Gemeente Leusden, according to which ‘prevention of possible tax evasion, avoidance or abuse are objectives which are recognised and positively encouraged by the Sixth Directive’. (69)

75. To the extent to which that principle is conceived as a general principle of interpretation it does not require express legislative recognition by the Community legislature to render it applicable to the provisions of the Sixth Directive. From the mere absence of a provision in the Sixth Directive expressly setting out a principle of interpretation whereby abuses are proscribed – and the same could apply, for example, to the principles of legal certainty or the protection of legitimate expectations, as the Irish Government observed at the hearing – we cannot therefore draw the conclusion that the Community legislature intended to exclude that principle from the Sixth Directive. Conversely, even if there were a provision in the Sixth Directive expressly stating that principle, it could be regarded, as the Commission pointed out, as a mere declaration or codification of an existing general principle. (70)

76. For precisely the same reasons I cannot agree with the suggestion made by the applicants in the present cases that the application of a general principle prohibiting abuse in the context of the Sixth Directive must depend on the adoption by each Member State of appropriate national anti-avoidance provisions, in accordance with the procedure under Article 27 of the Sixth Directive. (71) If that view were accepted, the Common system of VAT would become a peculiar legal domain where virtually any opportunistic behaviour by taxable persons relying on the literal meaning of its provisions to improperly gain tax advantages against the tax authorities would have to be tolerated unless the Member States had previously adopted legislative measures forbidding such behaviour.

77. I see no reason, in short, why the VAT rules should not be interpreted in accordance with the general principle of the prohibition of abuse of Community law. It is true that tax law is frequently dominated by legitimate concerns about legal certainty, deriving, in particular, from the need to

guarantee the predictability of the financial burden imposed on taxpayers and the principle of no taxation without representation. However, a comparative analysis of the Member States' legal rules is sufficient to make it clear that such concerns do not exclude the use of certain general provisions and indeterminate concepts in the realm of tax law to prevent illegitimate tax avoidance. (72) Legal certainty must be balanced against other values of the legal system. Tax law should not become a sort of legal 'wild-west' in which virtually every sort of opportunistic behaviour has to be tolerated so long as it conforms with a strict formalistic interpretation of the relevant tax provisions and the legislature has not expressly taken measures to prevent such behaviour.

78. Article 27 of the Sixth Directive does not preclude the adoption of a doctrine of abuse for the interpretation of the common VAT rules. It is true that the Court has consistently held that Member States are bound to observe all the provisions of the Sixth Directive and may not rely, as against a taxable person, on a provision derogating from the scheme of the directive in so far as a derogation has not been established in accordance with Article 27. (73) The need to prevent tax evasion or avoidance cannot therefore justify the adoption of national measures derogating from the directive otherwise than under the procedure provided for in Article 27 thereof. (74) Moreover, only derogations that are proportionate and necessary to achieve the aims expressly mentioned in Article 27 are authorised. (75)

79. However, the prohibition of abuse of Community law, seen as a principle of interpretation, does not give rise to derogations from the provisions of the Sixth Directive. The result of its application is that the legal provision interpreted cannot be regarded as conferring the right at issue because the right claimed is manifestly beyond the aims and objectives pursued by the provision abusively relied upon. In this regard, and most importantly, the operation of this principle of interpretation does not entail the result that the economic activities carried on ought to be disregarded for VAT purposes or left outside the scope of the Sixth Directive. An interpretation of the Sixth Directive according to this principle cannot but have the most obvious consequence to be expected in the context of legal interpretation: that the right is not in fact conferred, contrary to the literal meaning of the legal provision. If this interpretation entails any kind of derogation, it will be only from the text of the rule, not from the rule itself, which comprises more than its literal element. Moreover, the application of this Community principle of interpretation fully respects the objective of uniform application of VAT rules in all Member States that underlies the procedural conditions and limits on the adoption of national measures designed to prevent certain types of tax evasion or avoidance imposed by Article 27.

80. There is, consequently, no conflict between the application of the Community law principle of interpretation prohibiting abuse in the VAT common system, and the procedure provided for by Article 27 for the introduction by Member States of special measures derogating from the Sixth Directive in order to prevent certain types of evasion or avoidance.

81. I do not agree either with the objection raised by some of the applicants according to which such a Community law principle of interpretation prohibiting abuse cannot operate in respect of the right to deduct input tax, because that right is conferred by the domestic provisions implementing the Sixth Directive. The right to deduct is conferred by the Sixth Directive. It is a Community right whose legal basis is Article 17 of the Sixth Directive and whose content does not, moreover, leave the Member States any discretion as regards its implementation. (76) Provided that those Community law provisions purport to achieve certain aims and results, the domestic rules implementing them must be interpreted and applied by national authorities in accordance with those purposes. (77) Therefore, in so far as this Community law principle of interpretation is aimed at ensuring that the pu rposes and objectives of Community law, in particular those of those provisions of the Sixth Directive establishing the right to deduct input tax, are not distorted, that interpretative approach must also be followed by national authorities when applying their domestic

rules concerning deduction of input tax. (78) I agree moreover with the Commission when it observes that the circumstance that a concept of abuse was developed by the Court for example in Emsland , in the context of a regulation and in a situation involving Community funds, and not in the context of the Sixth Directive, is immaterial. What is relevant is that VAT is governed by a uniform system and that its provisions ought to be uniformly interpreted. I should point out that in Gemeente Leusden the Court has already made an express reference to the notion of abuse enunciated in Emsland when considering the notion of abuse in the context of the Sixth Directive. (79)

82. The major difficulties and objections to the application of such a principle of interpretation to the Sixth Directive relate to the formulation of the criteria according to which it should operate in that specific domain. In this regard the principles of legal certainty and of the protection of legitimate expectations have to be taken into account.

3. The construction of the Community law notion of abuse, as applicable to the VAT system, in accordance with the principles of legal certainty and of the protection of legitimate expectations of taxpayers

83. The criteria for applying to the field of VAT the principle of interpretation prohibiting the abuse of Community law must be established in the light of the specific characteristics and principles of this harmonised system. The test for the assessment of the abuse enunciated in Emsland Stärke provides considerable guidance in that regard but the specificity of VAT as a tax of an objective character means that automatic transposition is not to be recommended. Moreover, the absence of a unitary test for the operation in every field of Community law of the principle of the prohibition of abuse must be regarded as perfectly natural in Community law, as it is in any national legal system. (80)

84. Definition of the scope of this Community law principle, as applicable to the common VAT system, is ultimately a problem of determining the limits applicable to the interpretation of the provisions of the VAT directives that confer certain rights on taxable persons. In this regard, the objective analysis of the prohibition of abuse has to be balanced against the principles of legal certainty and protection of legitimate expectations that also ‘form part of the Community legal system’ (81) and in the light of which the provisions of the Sixth Directive must be interpreted. (82) From those principles it follows that taxpayers must be entitled to know in advance what their tax position will be and, for that purpose, to rely on the plain meaning of the words of the VAT legislation. (83)

85. Furthermore, the Court has consistently held, in consonance with the position generally accepted by Member States in the tax domain, that taxpayers may choose to structure their business so as to limit their tax liability. In BLP Group, the Court ruled that ‘a trader’s choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system’. (84) There is no legal obligation to run a business in such a way as to maximise tax revenue for the State. The basic principle is that of the freedom to opt for the least taxed route to conduct business in order to minimise costs. (85) On the other hand, such freedom of choice exists only within the scope of the legal possibilities provided for by the VAT regime. The normative goal of the principle of prohibition of abuse within the VAT system is precisely that of defining the realm of choices that the common VAT rules have left open to taxable persons. Such a definition must take into account the principles of legal certainty and of the protection of taxpayers’ legitimate expectations.

86. By virtue of those principles, the scope of the Community law interpretative principle prohibiting abuse of the VAT rules must be defined in such a way as not to affect legitimate trade. Such potential negative impact is, however, prevented if the prohibition of abuse is construed as

meaning that the right claimed by a taxable person is excluded only when the relevant economic activity carried out has no other objective explanation than to create that claim against the tax authorities and recognition of the right would conflict with the purposes and results envisaged by the relevant provisions of the common system of VAT. Economic activity of that kind, even if not unlawful, deserves no protection from the Community law principles of legal certainty and protection of legitimate expectations because its only likely purpose is that of subverting the aims of the legal system itself.

87. I am of the view therefore that the Community law notion of abuse, applicable to the VAT system, operates on the basis of a test comprising two elements. Both elements must be present in order to establish the existence of an abuse of Community law in this area. The first corresponds to the subjective element mentioned by the Court in Emsland , but it is subjective only in so far as it aims at ascertaining the purpose of the activities in question. That purpose – which must not be confused with the subjective intention of the participants in those activities – is to be objectively determined on the basis of the absence of any other economic justification for the activity than that of creating a tax advantage. Accordingly, this element can be regarded as an element of autonomy . In fact, when applying it, the national authorities must determine whether the activity at issue has some autonomous basis which, if tax considerations are left aside, is capable of endowing it with some economic justification in the circumstances of the case.

88. The second element of the proposed test corresponds to the so-called objective element mentioned in Emsland . It is in fact a teleological element whereby the purpose and objectives of the Community rules allegedly being abused are compared with the purpose and results achieved by the activity at issue. This second element is important, not only because it provides the standard upon which the purpose and results of the activity in question are to be assessed. It also provides a safeguard for those instances where the sole purpose of the activity might be to diminish tax liability but where that purpose is actually a result of a choice between different tax regimes that the Community legislature intended to leave open. Therefore, where there is no contradiction between recognition of the claim made by the taxable person and the aims and results pursued by the legal provision invoked, no abuse can be asserted.

89. The prohibition of abuse, as a principle of interpretation, is no longer relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages against tax authorities. In such circumstances, to interpret a legal provision as not conferring such an advantage on the basis of an unwritten general principle would grant an excessively broad discretion to tax authorities in deciding which of the purposes of a given transaction ought to be considered predominant. It would introduce a high degree of uncertainty regarding legitimate choices made by economic operators and would affect economic activities which clearly deserve protection, provided that they are, at least to some extent, accounted for by ordinary business aims.

90. There can be little doubt that the possibility must be recognised that also in such cases, where activities are accounted for by a mixture of tax and non-tax considerations, further restrictions could be introduced for claims arising from activities which, to varying extents, predominantly seek to achieve tax advantages. This, however, will require the adoption of appropriate national legislative measures. Mere interpretation will not suffice. Such measures might include more general anti-abuse provisions of the kind adopted in some Member States, that are applicable inter alia to VAT, which may differ, either in their scope, modus operandi or effects, from the operation in the field of VAT of the interpretative Community law principle of the prohibition of abuse. (86) In any case, such legislation must comply with the Article 27 procedure and the limits laid down in that regard by the Court. (87)

91. On the basis of the foregoing analysis I am therefore of the opinion that there is a Community law principle of interpretation prohibiting the abuse of Community provisions, which is also applicable to the Sixth Directive. According to that principle, the provisions of the Sixth Directive must be interpreted as not conferring the rights that might appear to be available by virtue of their literal meaning, when two objective elements are found to be present. First, that the aims and results pursued by the legal provisions formally giving rise to the tax advantage invoked would be frustrated if that right were conferred. Second, that the right invoked derives from economic activities for which there is objectively no other explanation than the creation of the right claimed.

4. The purpose of the provisions of the Sixth Directive concerning the right of deduction and their interpretation in accordance with the principle of the prohibition of abuse of Community law

92. The present three cases involve an alleged abuse of the Community provisions conferring a right to deduction of input VAT. Under the abuse test described above, it is necessary to determine, in the first place, the purposes and objectives of the provisions of the Sixth Directive governing the right to deduction. The national courts will be then able to establish whether or not, in the cases before them, those purposes would be achieved if the right to deduct or recover input VAT were recognised as being available to the applicants, in the circumstances in which they claim it.

93. It is clear from Article 17(2) of the Sixth Directive, a contrario, that where a taxable person makes VAT exempted supplies he has no right to deduct the input VAT paid on goods or services used for those exempt supplies. (88) The Court has moreover held in this regard that ‘the goods or services in question must have a direct and immediate link with the taxable transactions’. (89) It is not sufficient for them to be merely indirectly linked to the taxable person’s taxable transactions, since that would require consideration of the ultimate aim pursued by the taxable person, and that must be irrelevant in this respect. (90) The right of a taxable person to deduct from the output VAT payable the input VAT incurred for making the taxable supplies constitutes a corollary of the principle of neutrality. (91) VAT is, in effect, an indirect general tax on consumption meant to be borne by the individual consumers. (92) Correspondingly the same principle requires that a taxable person must not be entitled to deduct or recover the input VAT paid on supplies received for its exempted transactions. As long as no VAT is charged on the goods or services provided by taxable persons, the Sixth Directive necessarily seeks to prevent them from recovering the corresponding input VAT. This entails the consequence emphasised by the Commission at the hearing that exemption from VAT within the meaning of the Sixth Directive does not mean that the Sixth Directive was intended to free the final consumer completely from every tax burden. (93)

94. In the three cases under consideration here, however, it appears from the orders for reference that, in practice, taxable persons who, according to the purposes of the VAT system of deduction just described, should not be able to deduct or recover input VAT except on a limited proportion of their inputs, have put into effect schemes that have enabled them to circumvent that result and recover input VAT in full. In the BUPA case, which is somewhat different, it appears that the scheme adopted enables BUPA, in reality, to continue to benefit from the zero-rate regime which ceased to be in force in the United Kingdom as from 1 January 1998, being replaced by the regime of exemption without any right of deduction. (94)

95. It must be, in any event, the responsibility of the national courts to establish whether recognition of the right to deduct or recover input VAT in favour of the taxable persons claiming it in the present cases is compatible with the purposes and objectives pursued by the relevant provisions of the Sixth Directive, as identified above. If the referring courts find that those purposes are only partially achieved – in so far as the exempted taxable persons are entitled to recover a certain proportion of input VAT incurred – then the provisions of the Sixth Directive governing

deduction must be interpreted as conferring the right to recover input VAT, on that proportion, on the taxable persons concerned. This seems to be the situation in the Halifax and Huddersfield cases, where both those two partially exempted entities could apparently recover input VAT although only at a limited rate on the applicable pro-rata basis.

96. With respect to the second interpretative element of the principle of the prohibition of abuse of Community law, it will also be for the national courts to determine whether, in the cases before them, the economic activities carried out by the taxable persons concerned are directed towards anything other than the creation of a tax advantage. In other words, the national courts will have to determine whether the activities at issue can be seen as having an autonomous economic justification unconnected with the mere purpose of avoiding or deferring the payment of VAT.

97. If in these cases the national courts find that those two elements are present, then it must be concluded that the relevant provisions of the Sixth Directive on the right to deduct or recover input VAT, properly interpreted in accordance with the principle prohibiting the abuse of Community law, do not confer that right or confer it only partially.

5. The interpretation of Article 10(2) of the Sixth Directive in so far as it is relevant to the BUPA case

98. To conclude my analysis I will address certain particular aspects of the BUPA case that, in my view, justify separate treatment in the light of the second subparagraph of Article 10(2) of the Sixth Directive.

99. In BUPA, the arrangements at issue facilitate, in practice, the recovery of input VAT on the acquisition of goods during a period when that right was no longer available. A central role is played by the prepayment agreements in ensuring the success of the VAT optimisation scheme adopted. In this regard, I would draw attention to the fact that, as is apparent from the order for reference, the prepayment agreements expressly refer to any of the ‘drugs [or prostheses] that BHL [or GDL] may wish to purchase’ from among those generically described in the lists annexed to the prepayment agreements. Not only are such drugs and prostheses to be specified in the future by BHL or GDL, but also either party may terminate the agreement unilaterally and that termination will trigger complete repayment of all of the pre-paid amounts that have not yet been used for the purchase of drugs or prostheses.

100. The text of the second subparagraph of Article 10(2) refers to situations where ‘a payment is to be made on account before the goods are delivered or the services are performed’. This second subparagraph of Article 10(2) properly construed requires, in my view, that in order for a payment on account for goods or services to be covered by this provision, those goods or services must be specifically identified when the payment on account takes place. A mere payment on account for goods generically indicated in a list, from which the buyer may choose in the future one or more items, or none at all, in circumstances in which the buyer is able to terminate the agreement unilaterally at any time and recover the unused balance of the pre-payment made, does not suffice to characterise that prepayment as a payment ‘on account’ within the meaning of the second subparagraph of Article 10(2) of the Sixth Directive. In those circumstances, to the extent to which prepayment agreements such as those at issue in the BUPA case can be characterised by the referring court, in substance, as agreements to purchase in the future in the sense described above, then they are not covered by the second subparagraph of Article 10(2) of the Sixth Directive.

101. If, however, the referring court considers that the facts in BUPA are incompatible with the interpretation suggested here for the second subparagraph of Article 10(2) of the Sixth Directive, it will still be possible to assess the abuse of the Community law provisions concerning the right to

deduct input VAT. In my view such an abuse exists if the prepayment arrangements put into effect in BUPA were entered into with no other explanation, in terms to be objectively assessed by the national court, but to achieve a practical result that frustrates the objectives pursued by the common VAT deduction regime applicable after the 1 January 1998, namely exemption without the right to deduct.

IV – Conclusion

102. In the light of the foregoing considerations I am of the view that the Court should answer to the questions submitted by the VAT and Duties Tribunal, London, the High Court and the VAT and Duties Tribunal, Manchester as follows:

– In cases C-255/02 and C-223/03:

(1) The terms ‘economic activity’ and ‘supply’ made by a ‘taxable person acting as such’ for the purposes of Article 2 and Article 4 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment should be interpreted as meaning that each of the transactions at issue must be considered objectively and per se. In that regard, the fact that a supply is made with the sole intention of obtaining a tax advantage is immaterial.

(2) The Sixth Directive should be interpreted as not conferring on a taxable person the right to deduct or recover input VAT, in accordance with the Community law principle of interpretation prohibiting the abuse of Community law provisions, if two objective elements are found to be present in terms to be assessed by the national courts. First, that the aims and results pursued by the legal provisions formally giving rise to the right would be frustrated if the right claimed were actually conferred. Second, that the right invoked derives from activities for which there is no other explanation than the creation of the right claimed.

– In case C-419/02:

(1) The terms ‘economic activity’ and ‘supply’ made by a ‘taxable person acting as such’ for the purposes of Article 2 and Article 4 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment should be interpreted as meaning that each of the transactions at issue must be considered objectively and per se. In that regard, the fact that a supply is made with the sole intention of obtaining a tax advantage is immaterial.

(2) Article 10(2) of the Sixth Directive should be interpreted as meaning that where a payment is made on account for unspecified goods generically indicated in a list from which the buyer may choose in the future one or more items, or none at all, in circumstances in which the buyer is in any case able to terminate the agreement unilaterally at any time and recover the balance of the payment made that has not yet been used for the purchase of goods indicated on the list and not specified by the buyer, such a payment should not be considered to have been made, within the meaning of the second subparagraph of Article 10(2), ‘on account before the goods are delivered or the services are performed’ and therefore must not render VAT ‘chargeable on receipt of the payment and on the amount received’.

(1) .

(2) – OJ 1977 L 145, p. 1.

(3) – As amended by Council Directive 95/7/CE of 10 April 1995 (OJ 1995 L 102 p. 18).

(4) – As in force before being amended by Council Directive 2004/7/EC of 20 January 2004 (OJ 2004 L 27, p. 44).

(5) – According to the second subparagraph of Article 19(1) of the Sixth Directive the deductible proportion of input tax is calculated on a yearly basis.

(6) – According to that article '[e]xemptions with refund of the tax paid at the preceding stage and reduced rates lower than the minimum rate laid down in Article 12(3) in respect of the reduced rates, which were in force on 1 January 1991 and which are in accordance with Community law and satisfy the conditions stated in the last indent of Article 17 of the second Council Directive of 11 April 1967, may be maintained.'

(7) – Section 6(4) of the VAT Act 1994 provides, similarly, that: '[i]f, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.' Moreover, according to section 10(2) of the VAT Act 1994 '[t]he chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. … However, where a payment is to be made on account before the goods are delivered or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.'

(8) – Article 13(C)(a) provides that 'Member States may allow taxpayers a right of option for taxation in cases of letting and leasing of immovable property'.

(9) – In conformity, therefore, with Article 17(2) of the Sixth Directive.

(10) – This is so despite the fact that the VAT and Duties Tribunal, Manchester does not address the questions in terms of the interpretation of the relevant provisions of the Sixth Directive, but more in terms of application of the law to the facts of the case, which is clearly a matter reserved for the national courts.

(11) – This question was not addressed by the VAT and Duties Tribunal, Manchester in Case C-223/03 (Huddersfield) because, according to the order for reference, it had been already addressed to the Court of Justice in Case C-255/02 (Halifax). The VAT and Duties Tribunal, Manchester therefore left it to the Court to deal with the matter and considered it unnecessary to make a reference concerning that issue in particular.

(12) – Case 268/83 Rompelman [1985] ECR 655, paragraph 19; Case 50/87 Commission v France [1988] ECR 4797, paragraph 15.

(13) – See, for example, Rompelman , paragraph 19; Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 8; Case C-186/89 Van Tiem [1990] ECR I-4363, paragraph 17; Case C-305/01 MKG-Kraftfahrzeuge-Factoring [2003] ECR I?6729, paragraph 42.

(14) – Rompelman , paragraph 19; Case 50/87 Commission v France , paragraph 15.

(15) – Commission v Netherlands , paragraph 8.

(16) – Case 235/85, paragraph 8. See also Case C-408/97 Commission v Netherlands [2000]

ECR I-6417, paragraph 25; Case C-260/98 Commission v Greece [2000] ECR I-6537, paragraph 26; Case C-359/97 Commission v United Kingdom [2000] ECR I-6355, paragraph 41; Case C?358/97 Commission v Ireland [2000] ECR I-6301, paragraph 29; Case C-276/97 Commission v France [2000] ECR I-6251, paragraph 31.

(17) – For example, Case 70/83 Kloppenburg [1984] ECR 1075, paragraph 11; Case 348/85 Denmark v Commission [1987] ECR 5225, paragraph 19; Case C-209/96 United Kingdom v Commission [1998] ECR I-5655, paragraph 35; Case C-301/97 Netherlands v Council [2001] ECR I-8853, paragraph 43; Case C-17/01 Sudholz [2004] ECR I-0000, paragraph 34.

(18) – See Case 325/85 Ireland v Commission [1987] ECR 5041, paragraph 18; Case 326/85 Netherlands v Commission v [1987] ECR 5091, paragraph 24, Sudholz , paragraph 34; Case C?169/80 Gondrand Frères and Garancini [1981] ECR 1931, paragraph 17.

(19) – In this regard the United Kingdom Government relies on Cases 269/86 Mol [1988] ECR 3627; Case 289/86 Happy Family [1988] ECR 3655; and Case C-283/95 Fischer [1998] ECR I-3369.

(20) – See, for example, Rompelman , paragraph 19; Fischer , paragraph 27. See point 12 of the Opinion of Advocate General Fennelly in Case C-158/98 Coffeshop Siberië [1999] ECR I-3971.

(21) – Case 294/82 Senta Einberger [1984] ECR 1177; Case C-111/92 Lange [1993] ECR I-4677, paragraph 16; Happy Family ,paragraph 20; Mol , paragraph 18; Case C-3/97 Goodwin and Unstead [1998] ECR I-3257, paragraph 9; Coffeshop Siberië , paragraphs 14 and 21; Case C-455/98 Salumets and Others [2000] ECR I-4993, paragraph 19.

(22) – Happy Family , paragraph 20; Mol , paragraph 18.

(23) – Coffeshop Siberië , paragraph 21; Case C-111/92 Lange [1993] ECR I-4677, paragraph 12; Fischer , paragraph 20; Salumets and Others , paragraphs 19 and 20.

(24) – Senta Einberger ; Happy Family , paragraph 23; Case C-343/89 Witzemann [1990] ECR I-4477, paragraph 20.

(25) – In any case the United Kingdom Government expressly recognises in its observations that, despite their tax avoidance purpose, the transactions at issue are not unlawful.

(26) – Case C-150/99 Stockholm Lindöpark [2001] ECR I-493; Case C-231/94 Faaborg?Gelting Linien [1996] ECR I-2395; Case C-275/01 Sinclair Collis [2003] ECR I?5965.

(27) – In this regard the United Kingdom refers to Case C-155/94 Wellcome Trust [1996] ECR I-3013, paragraphs 31 to 36 and to Case C-60/90 Polysar Investments [1991] ECR 3111, paragraph 13.

(28) – The Court held that restaurant transactions must be regarded as supplies of services, because they are characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate (Faaborg-Gelting Linien , paragraph 14).

(29) – The Court held that ‘the activity of running a golf course generally entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the service-provider, provision of other facilities and so forth’. Therefore, in the absence of quite exceptional circumstances letting out a golf course cannot constitute the main service supplied (Stockholm Lindöpark , paragraph

26).

(30) – The Court held that the grant of that right, in the light of all circumstances in which the transaction took place, did not amount to a letting of immovable property. The occupation of the space on the premises was merely the means of effecting the supply which was the subject-matter of the agreement, 'namely the guarantee of the exercise of the exclusive right to sell cigarettes at the premises by installing and operating automatic vending machines, in return for a percentage of the profits' (Sinclair Collis , paragraphs 30 and 31).

(31) – See, a fortiori the reasoning followed in Coffeshop Siberië , at paragraph 22. There the Court considered that even if criminal activities would make a renting transaction unlawful, that would not alter the character of the renting as an economic activity falling within the scope of the Sixth Directive.

(32) – Case C-230/94 Enkler [1996] ECR I-04517.

(33) – Enkler , paragraph 27.

(34) – Enkler , paragraph 27.

(35) – Case C-400/98 Breitsohl [2000] ECR I-4321.

(36) – Case C-110/94 INZO [1996] ECR I-857.

(37) – INZO , paragraph 24; Breitsohl , paragraph 39; Case C-110/98 Gabalfrisa [2000] ECR I-1577.

(38) – See also in this regard Case C-4/94 BLP Group [1995] ECR I-983, paragraph 24. The United Kingdom correctly submits that VAT must be applied in accordance with the actual economic situation and that appearance is not decisive. In that regard it relies on Case C-260/95 DFDS [1997] ECR I-1005 where a subsidiary company in the United Kingdom wholly owned by a Danish parent company, through which it supplied its services in the United Kingdom, was considered a fixed establishment of the Danish parent company in the United Kingdom, within the meaning of Article 9(1) of the Sixth Directive. Moreover, it was considered that that connecting point prevailed over the place where the supplier had established its business. It was in that context that, in view of the actual economic situation, the subsidiary company was found to be acting as a mere auxiliary organ of the Danish parent company. DFDS however in no way purported to leave outside the scope of the Sixth Directive activities which were objectively economic in nature by virtue of the mere fact that they were entered into and performed between a taxable person and other legal entities wholly under its control with VAT avoidance intentions. That case cannot be relied on to infer that transactions that are objectively economic in nature should be left outside the scope of the Sixth Directive.

(39) – It was, moreover, a central element of the tax avoidance scheme, in so far as it covered all of the supplies made by LPDS during the relevant tax year which entitled LPDS to claim recovery of the input VAT charged by CWPI, during that same period, for the construction services provided to LPDS.

(40) – See Case C-62/93 BP Supergas [1995] ECR I-1883, paragraphs 16 to 18; Case C?98/98 Midland Bank [2000] ECR I-4177, paragraph 29; Case C-16/00 Cibo Participations [2001] ECR I-6663, paragraph 30.

(41) – See for example Case 33/74 Van Binsbergen [1974] ECR 1299, paragraph 13; Case C-148/91 Veronica [1993] ECR I-487, paragraph 12; Case C-23/93 TV10 [1994] ECR I4795,

paragraph 21, regarding the freedom to supply services; Case 39/86 Lair [1988] ECR 3161, paragraph 43, concerning the free movement of workers; Case 229/83 Leclerc v Au blé vert [1985] ECR 1, paragraph 27 on the free movement of goods. Also in Case 115/78 Knoors [1979] ECR 399, paragraph 25, in the context of freedom of movement for persons and freedom of establishment, the Court expressly recognised the 'legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting to evade the application of their national legislation'. See also the subsequent restatement in Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14, and Case C-370/90 Singh [1992] ECR I-4265, paragraph 24.

(42) – Case C-206/94 Palletta [1996] ECR I-2357, paragraph 24.

(43) – Case 125/76 Cremer [1977] ECR 1593, paragraph 21.

(44) – Case C-8/92 General Milk Products [1993] ECR I-779, paragraph 21. See also, in relation to the common agricultural policy Case 250/80 Schumacher [1981] ECR 2465, paragraphs 16 and 18, where a typical teleological approach was adopted by the Court without any need to take account of an abuse-of-rights doctrine.

(45) – See Case C-367/96 Kefalas [1998] ECR I-2843, paragraphs 20 and 28, and Case C-373/97 Diamantis [2000] ECR I-1705, paragraph 33.

(46) – Case C-212/97 Centros [1999] ECR I-2357, paragraph 24. See subsequently, in the context of an alleged abuse of the right of establishment, Case C-167/01 Inspire Art [2003] ECR I-10155, paragraph 136, and also Case C-436/00 X and Y [2002] ECR I-10829, paragraphs 41 and 45.

(47) – The Court has also had to analyse, for example in Kefalas and Diamantis , the problem of the application of national abuse-of-rights rules by national courts so as to limit the exercise of rights conferred by Community law.

(48) – See the Opinion of Advocate General La Pergola in Centros , point 20.

(49) – See, inter alia, Diamantis, paragraph 33.

(50) – This is apparent for instance in paragraph 21 of Kefalas , where the Court recognises the necessity of rules 'for the purposes of assessing whether the exercise of a right arising from a provision of Community law is abusive'.

(51) – To that effect, see the Opinion of Advocate General Tesauro in Kefalas , at point 27, in which he stated that 'the Court has essentially allowed each national legal system to apply its own rules of ordinary law (whether sanctioning "fraudulent evasion of statutory law", "false representation", or, why not, even "abuse of rights") to withdraw the right to rely upon rules of Community law in well-defined cases.'

(52) – That approach is apparent, for example, in Palletta , paragraph 25, Kefalas paragraphs 21 and 22, Diamantis , paragraphs 34 and 35, and Centros , paragraphs 24 and 25.

(53) – In Centros , paragraph 25, the Court stated that 'national courts may, case by case, take account – on the basis of objective evidence – of abusive or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely. [However] they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.'

(54) – See, for instance, Kefalas , paragraph 24, 25 and 29, and Centros , paragraphs 26, 27 and 30.

(55) – Case C-110/99 [2000] ECR I-11569.

(56) – OJ 1979 L 317, p. 1.

(57) – Emsland , paragraph 52.

(58) – Emsland , paragraph 53.

(59) – See, to that effect, point 69 of Advocate General Alber's Opinion in Emsland Stärke : 'the yardstick for judging the lawfulness of individual import and export transactions is therefore the purpose of the rules in question'. See also paragraph 52 of the judgment. More recently Advocate General Tizzano, in his Opinion in Case C-200/02 Zhu and Chen [2004] ECR I-00000, at point 114, also stated that in order to conclude that there has been an abuse of a particular right 'it must be ascertained whether the person concerned, by invoking the Community provision which grants the right in question, is betraying its spirit and scope'. In point 115 of his Opinion he emphasised that the test for the abuse 'is therefore, essentially, whether or not there has been a distortion of the purposes and objectives of the Community provision which grants the right in question'.

(60) – Diamantis , paragraph 33; Case C-441/93 Pafitis [1996] ECR I-1347, paragraph 68; Kefalas , paragraph 22.

(61) – See in this regard Centros , paragraph 27, where the Court held that, in the light of the purpose for which the right of establishment is granted, the fact that a person sets up a company in a Member State to open a branch in another Member State in order to avoid the more stringent company law rules of the latter 'cannot in itself constitute an abuse of the right of establishment'. The delimitation of the scope of the right of establishment also took into account the previous interpretation given by the Court in that regard in Case C-79/85 Segers [1986] ECR 2375, paragraph 16.

(62) – See, to that effect, A. Kjellgren, 'On the Border of Abuse' in European Business Law Review , 2000, p. 192. Even in Emsland, where the notion of abuse was more fully developed, the Court followed the approach of interpreting the relevant legal provisions. It is symptomatic in this regard that in the operative part of the judgment the Court states that 'Regulation (EEC) No 2730/79 … must be interpreted as meaning that…' For the analysis of the cases at issue, it is in my view irrelevant whether or not the principle gradually acquires the status of a true free-standing general principle of Community law, as advocated by D. Simon and A. Rigaux, 'La technique de consécration d'un nouveau principe général du droit communautaire: l'exemple de l'abus de droit', in Mélanges en hommage à Guy Isaac, 50 ans de droit communautaire , Volume 2, Presse de l'Université des Sciences Sociales, Toulouse, 2004, p. 579.

(63) – As one commentator put it (Kjellgren, 'On the border of abuse', cited above, p. 193) '[t]he Court's doctrine on abuse largely falls back on interpretation of the Community provisions in question themselves: the question of abuse thereby becomes a matter of whether the purported abusive behaviour is inside or outside the scope of the provision.' See also, to that effect, the Opinion of Advocate General La Pergola in Centros , point 20.

(64) – The reference to the subjective element in Emsland is moreover, perfectly understandable in the light of the circumstances of that particular case, where the parties to the transaction intended, from the very outset, to have the merchandise re-enter the territory of the Community

and had no intention of exporting the merchandise to Switzerlan d for good. The U-turn procedure adopted was just a façade (although a real façade) that concealed a different reality, namely that the parties never intended the merchandise to leave Community territory for good. The operation in Emsland can therefore be regarded as a sham because all the parties involved had a common intention that documents used and the acts performed were not, in reality, intended to produce the legal consequences (rights and obligations) which they intended to give to third parties the appearance of creating.

(65) – See Emsland , paragraph 50, which describes the abuse at issue in that case as 'a purely formal dispatch from Community territory with the sole purpose of benefiting from export refunds'. The Court has on other occasions considered the 'sole purpose' of a certain activity or behaviour objectively as a criterion for assessing the existence of an abuse. See for instance Case Leclerc , paragraph 27, which states that Community law cannot be relied on where goods are 'exported for the sole purpose of re-importation in order to circumvent legislation of the type at issue', and Lair , paragraph 43 , according to which 'where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, it should be observed that such abuses are not covered by the Community provisions in question'.

(66) – I note in that regard that in the findings of the Court in Emsland, for instance, the expression 'abuse of rights' is not used. The Court used instead the expression 'abuse'. Similarly, and again referring simply to abuse, the Court has recently held in Case C-109/01 Hacene Akrich [2003] ECR I-9607, paragraph 57, that there will be an 'abuse' and therefore 'Article 10 of Regulation No 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States' (paragraph 2 of the operative part of the judgment). In that case it is clearly an interpretative principle of abuse that is involved. The application of the doctrine of abuse leads to the non-application of a Community law provision and, consequently, to the conclusion that the right is not conferred – there was no question of limiting the exercise of a right actually conferred by the Community law provision.

(67) – Opinion in Kefalas , point 24. See, to the same effect, D. Simon and A. Rigaux, 'La technique de consécration d'un nouveau principe', cited above, p. 568, where the authors state that 'le système juridique communautaire n'échappe pas au risque, qu'on retrouve dans tout ordre juridique, de pratiques qui se conforment formellement à la règle, mais en détournent abusivement l'application.'

(68) – It is common ground that every legal provision and every right carry with them the possibility of abuse and that the legal system must not tolerate this as matter of principle. See L. Cadiet and P. Tourneau, ' Abus de Droit ', in Recueil Dalloz (Droit Civil), 2002, p. 3 and 4, and Ghestin and Goubeaux, Traité de Droit civil , Introduction Générale, 3 ème édition, LGDJ, Paris, 1990, pp. 673 to 676 and p. 704, who refer to the case-law origins of doctrines such as the 'abuse of rights' (and the same can be said of 'evasion of the law'), originally developed by the courts to prevent the formal and mechanical application of legal rules from leading to unacceptable results with respect to the objectives of the legal system.

(69) – Joined Cases C-487/01 and C-7/02 Gemeente Leusden [2004] ECR I-0000, paragraph 76. See also, to the same effect, the Opinion of Advocate General Tizzano in the same cases, at points 98 and 99, and the case-law cited there.

(70) – See in this regard the view expressed in point 80 of Advocate General Alber's Opinion in Emsland that Article 4(3) of Regulation No 2988/95, concerning the protection of the European Communities' financial interests, 'does not create a new legal principle but merely codifies a

general legal principle already existing in Community law'. Therefore the application in the case at issue of such principle of prohibition of abuse did not depend on the subsequent entry into force of Regulation No 2988/95.

(71) – Ibid., point 10.

(72) – See, for example, in Germany Article 42 of the Abgabenordnung (see Kruse and Düren, in Tipke and Kruse, Abgabenordnung, Finanzordung , Otto Schmitdt, Köln, 2003, § 42), which embodies the concept of abuse of legal institutions ('Steuerumgehung durch Mi?brauch von Gestaltungsmöglichkeiten'); in Austria, Article 22 of the Bundesabgabenordnung (BGBl. Nr. 194/1961), as amended, which also incorporates a similar concept of abuse of civil law forms and legal structures ('Missbrauch von Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechts'); in Finland, Article 28 of the Laki verotusmenettelystä 1558/1995, which likewise applies a notion of abuse of civil law structures in tax law; in Luxembourg, Article 6(1) of the Loi d'adaptation fiscale, 1934, which again applies a similar concept of abuse. In Portugal, Article 38(2) of the Lei Geral Tributária (Decreto Lei 398/98 of 17 December), as amended by Lei No 100/99 of 27 June and subsequent legislation, contains a general anti-avoidance provision according to which 'legal acts essentially or mainly designed, by the use of artificial means … or by the abuse of legal forms', to reduce tax obligations may not produce effects in the tax domain. In Spain, Article 15 of the Ley General Tributaria (Ley 58/2003, of 17 December 2003) concerning conflicts in the application of tax law provisions ('Conflicto en la aplicación de la norma tributaria') relies on concepts such as that of manifestly artificial acts or transactions; in France, Article L. 64 of the Livre des procédures fiscales applies the notion of abuse of rights in tax law, comprising the abuse of rights by sham operations and abuse of rights by evasion of the law; in Ireland, section 811(2) of the Tax Consolidation Act 1997 contains a general anti-avoidance provision under the heading of transactions to avoid liability to tax, making use of notions such as that of transactions 'not undertaken or arranged primarily for purposes other than to give rise to a tax advantage' (see section 811(2)(c)(ii)); in Italy, Article 37bis of Decreto Legge 600/1973, introduced by the Decreto Legislativo No 358 of 8 October 1997 (Gazzetta Ufficiale n. 249 of 24 October 1997) contains a general anti-avoidance provision based on the notion of legal acts without legitimate economic justification ('atti privi di valide ragioni economiche'); in Sweden, Article 2 of the Lag om skatteflykt (1995:575) (Law on tax avoidance) contains a general anti-avoidance provision, referring to the notion of tax advantage as the main reason for a legal act. In the Netherlands, the courts frequently refer to the case-law concept of fraus legis in tax law, so that the question must be considered whether the sole or decisive aim underlying a transaction is to gain a tax advantage.

(73) – Case 5/84 Direct Cosmetics [1985] ECR 617, paragraph 37.

(74) – Case C-50/87 Commission v France , paragraph 22; Case C-97/90 Lennartz [1991] ECR I-3795, paragraph 35, and Case C-412/03 Hotel Skandic Gåsabäck AB [2005] ECR I-00000, paragraph 26.

(75) – Case 324/82 Commission v Belgium [1984] ECR 1861, paragraphs 31 and 32. Regarding in particular the prevention of tax avoidance, the Court added in Joined Cases 138/86 and 139/86 Direct Cosmetics [1988] ECR 3937, paragraphs 21 to 24, that a Member State may adopt measures derogating from provisions of the Sixth Directive in order to prevent tax avoidance, even if the economic activity of the taxable person is objectively conducted without an intention to obtain a tax advantage. It must be noted, however, that the notions of tax evasion, tax avoidance and abuse of tax law differ among Member States. With respect to the notion of tax avoidance in the United Kingdom, it is legal, unlike tax evasion, which is illegal. The absence in the United Kingdom of a general concept of abuse of tax law makes it impossible to draw a common distinction in other Member States between abusive tax planning (corresponding in France to ' évasion fiscale ')

which is unlawful, and simple tax planning (‘ habileté fiscale ’ in France) which, despite being certainly unpopular among tax authorities, is lawful. See in this regard S.N. Frommel, ‘United Kingdom tax law and abuse of rights’, Intertax 1991/2, pp. 54 to 81, at p. 57.

(76) – See BP Supergas , paragraph 35: ‘Article 17(1) and (2) specify the conditions giving rise to the right to deduct and the extent of that right. They do not leave the Member States any discretion as regards their implementation.’

(77) – See Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8: ‘in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter’. See to that effect P. Farmer, ‘VAT Planning: Assessing the “Abuse of Rights” Risk’, The Tax Journal , 27 May 2002, p. 16.

(78) – See Case C-62/00 Marks & Spencer [2002] ECR I-6325, paragraph 27: ‘the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures.’ See also Opinion of Advocate General Geelhoed, at point 42, where he states that ‘[b]oth the authority charged with implementation and the national courts are under an obligation to ensure that the result contemplated by the directive is secured’.

(79) – See Gemeente Leusden , paragraph 78.

(80) – Suffice it to mention the fact that such a principle may form part of the specific doctrines of ‘abuse of rights’ or ‘evasion of the law’ in private law in civil law systems, but, for example, in tax law, even though the names may be similar, the criteria according to which they operate differ significantly. For example, in France the concept of abuse of rights in tax law included in Article L.64 of the Livre des procédures fiscales, mentioned above in footnote 72, is twofold, covering ‘sham’ transactions and operations involving ‘evasion of the law’. Abuse of rights in French tax law does not therefore have the same meaning as in French property law or contract law. See M. Cozian, ‘La notion d’abus de droit en matière fiscale’ in Gazette du Palais, Doctrine , 1993, pp. 50 to 57, and for a comparative review as between France and the United Kingdom, S. Frommel, ‘United Kingdom tax law and abuse of rights’, cit., pp. 57 and 58.

(81) – See Gemeente Leusden , paragraph 57; Case C-381/97 Belgocodex [1998] ECR I?8153, paragraph 26; Case C-396/98 Schlo?stra?e [2000] ECR I-4279, paragraph 44; and Marks & Spencer , paragraph 44.

(82) – See Gemeente Leusden , paragraphs 58, 65 and 69.

(83) – See Joined Cases 92/87 and 93/87 Commission v France and United Kingdom [1989] ECR 405, paragraph 22, and Sudholz , paragraph 34. See also, to the same effect, footnote 18 above referring to case-law applicable by analogy to VAT.

(84) – Case BLP Group , paragraph 26; Case C-108/99 Cantor Fitzgerald [2001] ECR I-7257, paragraph 33; and also Gemeente Leusden , paragraph 79.

(85) – The payment of taxes is certainly a cost which an economic operator may, provided that he complies with the tax obligations imposed upon him, legitimately take into account when choosing between various options for running his business. Doubts may arise on the part of some people regarding the morality of that freedom, but certainly not its legality.

(86) – Some of the national anti-abuse provisions of a general nature adopted by a number of Member States (described in footnote 72) are also applicable, at least in principle, to VAT in those Member States. That is the case in France, Germany, Austria, Spain, Finland, Ireland, Luxembourg and Portugal.

(87) – See point 78 above. The Court has, moreover, in the context of Article 27, accepted that 'there is nothing to prevent a provision formulated in fairly general or abstract terms'. See Case C-63/96 Skripalle [1997] ECR I-2847, paragraph 29.

(88) – See BLP Group , paragraph 28; Case C-302/93 Debouche [1996] ECR I-4495, paragraph 16; Case C-291/92 Armbrecht [1995] ECR I-2775, paragraphs 27 and 28. See also B. Terra and J. Kajus, A Guide to VAT , p. 802 and P. Farmer and R. Lyal, EC Tax Law , pp. 190 and 191.

(89) – BLP Group , paragraph 19; Midland Bank , paragraphs 30 to 33; Cibo Participations , paragraphs 31 to 35. See also Armbrecht , paragraph 29.

(90) – BLP Group , paragraphs 19 and 24; Midland Bank , paragraph 20; and Cibo Participations , paragraph 29.

(91) – As held both in Case C-50/87 Commission v France , paragraph 17, and in Rompelman , paragraph 19: 'the deduction system is meant to relieve the trader entirely of the burden of VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures that all economic activities … provided that they are themselves subject to VAT , are taxed in a wholly neutral way'. (The emphasis is mine).

(92) – See B. Terra and J. Kajus, op cit., pp. 361 to 365.

(93) – Indeed a certain proportion of the non-deductible input VAT paid by taxable persons will be incorporated in the price to be paid by the final consumer.

(94) – There is a certain parallel between the activities in the present cases and the operation under analysis in Case C-296/95 EMU Tabac [1998] ECR I-1605, which, according to the description made by the national court, enabled UK residents without leaving the comfort of their armchairs, to obtain in the UK tobacco purchased in a shop in Luxembourg. The scheme in this case was based on the use of agents and enabled, in practice, individual customers to avoid the payment of the excise duty applicable in the United Kingdom which is heavier than that payable in Luxembourg. As Advocate General Ruiz-Jarabo Colomer, affirmed at point 89 of his opinion 'if it were necessary to do so as a last resort, the national court could decline to apply the rule contended for by the appellants (taxation at origin) on the basis that to apply it to the present case would clearly run counter to the spirit and purpose of the directive [92/12 EEC] and would be inimical to the effectiveness of other provisions of it. By so doing it would merely be applying the general legal principle prohibiting acts in fraud of the law.' The Court's answer was based on the interpretation of the relevant provisions of the directive, namely of Article 8, holding that they should be interpreted as not applying where the purchase and/or transportation of goods subject to duty is effected through an agent (see paragraph 37 of the judgment).