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ABUSE OF RIGHTS

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WHAT IS ABUSE OF RIGHTS?

The doctrine of abuse of rights is founded upon the notion that an individual may have a right and yet exercise it in such an "abusive" way as to forfeit the right to rely upon it.

It has its origins in private law (notably in France), where the paradigm cases concern the unreasonable use of property with consequent harm to another (*Clement-Baynard,* 1915: erection of 16m spiked fence to prevent neighbour's use of airships).

In the past 10 years the doctrine has undergone two mutations of particular significance to ALBA members:

(1) It has been adopted into Community law.

(2) In that context, it has been used to prohibit reliance (in cases deemed undeserving) upon rights and freedoms possessed by individuals against the State.

It has thus become a concept with which UK courts (including the Administrative Court) will have to grapple, at least in cases involving EU law.

Whether abuse of rights follows the path taken by principles such as proportionality and legitimate expectations from continental (particularly German) legal traditions via EU law into English law is quite another matter.

ABUSE OF RIGHTS IN OTHER LEGAL SYSTEMS

Roman Law

The concept was known but its scope uncertain. Competing maxims denied judgment to those who acted in *fraus legis* and stated that no one can commit a wrong by exercising his right (*neminem laedit qui suo jure utitur*).

Public international law

Opinions have varied[1] as to whether abuse of rights falls within the category of general principles of law recognised by civilised nations (Statute of the Permanent Court of International Justice, Art 38).

Laws of Continental Europe

The principle is widely recognised but diverse in its theory and in its application.

Some of the main points of distinction are as follows:

Source of the principle

- Some Civil Codes contain a general provision that "the manifest abuse of a right is not protected by the law" (Art 2, Swiss Civil Code); there are said to be similar provisions in the Civil Codes of Germany (Art 226), Italy (Art 833), Austria (Art 1295.2), Spain (Art 281), Greece (Art 281) and Luxembourg (Art 6.1).

- Elsewhere (France), abuse of right is essentially a creation of the case-law.

Fields in which the principle operates

- In some countries it seems that the principle is of limited practical importance (Germany?) or operates only in the field of property law (e.g. Italy, according to Tesauro AG in *Kefalas*).

- In a number of countries it has a specific operation in the field of tax avoidance (e.g. France Art L 64, providing that acts "which disguise either the generation or the transfer of profits and income" are "ineffective against the tax administration".) For examples from most other Member States (inc. Ireland) see C-255/02 *Halifax*, Opinion of Maduro AG (7 April 2005) at fn 72.

- In some countries, e.g. France, other rights may also be abused e.g. a contractual right or the right to strike.

What constitutes abuse?

- The Cour de Cassation in France has concluded that rights can be abused in cases of intention to harm (*intention de nuire*), fraudulent fault (*faute dolosive*), bad faith (*mauvaise foi*), *légèreté blamable* and arguably in certain cases, less subjectively, whether the defendant's conduct was different from that of a reasonable man.
- Intention to harm others is always required in Italy (per Tesauro AG in Case C-367/96 *Kefalas*, fn 25).

- In Germany, Belgium, Luxembourg, the Netherlands, Greece, Spain and Portugal, the determination of an abusive exercise of rights is based solely on objective elements (*ibid.*)

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[1] Contrast Rousseau, *Principles généraux du droit international public*, Paris 1944 and Kiss, *L'abus de droit en droit international*, Paris 1953.

What is the remedy?

- In France, an abuse of right (e.g. by erecting spikes or growing giant ferns in one's garden, or by unreasonably exercising a right under a contract or the right to strike) has been held by the courts to be a "fault" under Art 1382 Civil Code,[2] entitling a claimant to damages or reparation.

- In some other systems and contexts, abuse of right is a shield rather than a sword: the remedy is to disqualify the person asserting the right from the ability to rely upon it. That is the route taken by EU law (though see *Halifax*, below).

European Convention of Human Rights

Article 17 ("Prohibition of abuse of rights") states:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The case-law makes limited reference to abuse of the right of petition in Art 35(1) e.g. by deceitful or fraudulent conduct.

Common law parallels

It is hardly surprising that abuse of right is not a concept widely acknowledged in the common law, bearing in mind the traditional reluctance of English law to think in terms of rights at all.[3]

Nonetheless, there are some parallels.

- **Equity:** "the principles of Equity were developed largely for the specific purpose of preventing the abusive exercise of common law rights": Lasok, 2006.

- **Abuse of Process**, extending not only to fraudulent conduct but to improper use of the court's procedures

- **Use of land *in aemulationem vicini* (Scotland):** delict committed by landowner who uses his land intentionally to harm his neighbour

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2 Article 1382 is the central provision of French tort law. It provides: "Any act whatever of any man, which causes damage to another, obliges the one by whose fault it occurred to compensate him." Together with Art 1383 (which deals with omissions), this general and concise rule applies to all areas of liability, e.g, negligence, nuisance and deceit, each of which is the subject of a separate tort in English law. See C. van Dam, *European Tort Law*, Oxford 2006, pp. 46-49.

3 Thus, civilian commentators have been struck (van Dam *supra* at p. 130) that the House of Lords should have chosen to implement the Art 8 right to respect for private life not by developing a right to privacy in English law but by re-interpreting the equitable wrong of breach of confidence: *Campbell v MGN Ltd.* [2004] UKHL 22.

- **Law of defamation / contempt of court:** though not conventionally so expressed, what is this other than an an actionable abuse of the right to (or freedom of) expression?

- **Tax avoidance**: No general anti-avoidance provision but see the many specific anti-avoidance provisions,and the acknowledgment in *Ramsay v IRC* [1982] AC 300 and *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] 3 WLR 1383 that the interpretation of taxing statutes is no longer "*some island of literal interpretation*" but should be considered with regard to the context, scheme and purpose of the statute as a whole. Even so, the UK remains the Member State with the most vigorous tradition of tax planning: see Frommel (1991/2) and Cordara (2006).

- **"Fraud unravels everything"**

ABUSE OF RIGHTS IN EUROPEAN UNION LAW

Early illustrations

The ECJ has for many years had to consider cases in which provisions of Community law are said to have been "abusively" invoked:

- in order to avoid the application of national law; or

- in order to gain subsidies, refunds etc. under Community schemes.

Typical of the situations in which the issue has arisen are the following:

- A company seeks to avoid national regulation in state X by moving to state Y and then providing services exclusively to state X (*TV 10*)

- An exporter claims an export refund but then immediately re-imports the goods to EU territory, without infringing the letter of the regulation (*Emsland-Stärke*).

- A Chinese woman, wishing to obtain long-term residence rights in the UK, moves to Northern Ireland when pregnant for the sole purpose of ensuring that the child she gives birth to there has Irish nationality and can thus stay indefinitely in the UK, along with she herself as primary carer (Case C-200/02 *Chen*)

There is general agreement that:

> "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 are abusive, excessive or distorted."

- Tesauro AG, Opinion in Case C-367/96 *Kefalas* [1998] ECR I-2843, para 24.

There are however three conceptually distinct ways of achieving this objective. The first two are (to the common lawyer) orthodox exercises in interpretation. The third is the doctrine of "abuse of rights".

The first way is to interpret the relevant Community provision so as to cover only "normal" transactions and place "abusive" behaviour outside its scope altogether.

> "if a worker enters a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance scheme in that State … such abuses are not covered by the Community provisions in question."
>
> - Case 39/86 *Lair* [1988] ECR 3161, para 43.

In such a case, there is no requirement for the public authority to justify the refusal of the right: the conduct in question simply falls outside its scope.

Cf. the interpretation of a regulation as excluding entitlement to payment on an intra-Community transaction where immediate re-export to a third country means that its objective is not attained: Case 250/80 *Schumacher* [1981] ECR 2165.

The second way (available in the case of qualified rights such as the fundamental freedoms: free movement of goods, services, establishment, capital) is to interpret the right broadly but to permit Member States to derogate from the right (for example by the enactment of proportionate domestic anti-avoidance provisions).

> "a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State."
>
> - Case C-23/93 *TV 10* [1994] ECR I-4795, para 20.

This is the route taken in some of the recent direct taxation cases (mostly from the UK), in which corporate groups route profits artificially through subsidiaries in low-tax jurisdictions and then rely upon the "right of establishment" (or other economic freedoms) to defeat domestic anti-avoidance provisions. The prevention of "wholly artificial arrangements intended to avoid the payment of tax" is an acknowledged ground for derogating from the fundamental freedoms and there is a recent suggestion from the Court that the *Ramsay v IRC* principle ([1982] AC 300) is compliant with it: Case C-196/04 *Cadbury Schweppes*, Opinion of 2 May 2006, per Léger AG at fn 68.[4]

The third way is to acknowledge the existence of the right and then to find that there has been an abuse of it.

The adoption by the ECJ of a Communtiy principle of "abuse of rights" was advocated for many years by Darmon AG (French) but viewed with caution by some

[4] Léger AG noted that "the same conclusion is also arrived at by referring once again to the case-law of the Court on the doctrine of 'abuse of rights'": para 118.

others: see, e.g., the Opinion of Tesauro AG in Case C-367/96 *Kefalas* [1998] ECR I-2843, paras 21-23:

> "I do not believe that .. the conditions have been fulfilled for 'consecrating' in the Community legal order a general principle pursuant to which one could refuse to recognise as abusive the exercise of a right conferred by a Community provision.
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> More than one reason leads me to this conclusion. Firstly, I believe that under present circumstances a common definition, drawn from national legal practice, of abuse of rights is not possible. A survey, even approximate, of the way in which this principle is laid down and works in the various Member States only serves to confirm this point. Although it is true that the majority of the Member States recognises the concept of abuse of rights, it is also true that in certain States the legal concept, far from having the value of a general principle of law, is confined to regulating very specific cases provided for by law. Further, the tenor and application of such a 'principle' vary significantly from one State to another.
> …
> [Furthermore] I consider that the very characteristics and raison d'être of a principle relevant to abuse of rights demonstrate that it is a legal concept which certainly has a home, or at least a foundation, in well-established legal systems, but much less so in a legal order like that of the Community, whose evolution towards integration is far from capable of being considered to be complete. More generally, I consider that the risk of there being a gap in the system – which is, after all, what the abuse of rights principle, like all other so-called catch-all provisions, seeks to avoid – is minor, or non-existent, in a legal order like that of the Community which, through judicial interpretation and case-law in general, is more promptly amenable to adaptation to the needs of society."

In Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, however, the existence of the principle was confirmed in Community law. A company claimed export refunds to which it was entitled, under the applicable regulation, on proof of export to Switzerland. The goods had been released on to the Swiss market but immediately re-imported to Germany.

The facts were similar to *Schumacher* (above), in which the ECJ deneid the benefit to the company on a straightforward interpretation of the right in the Regulation. However in *Emsland-Stärke* the company failed on the basis that there had been what the Commission described as "abuse of right". The test for abuse was formulated as follows by the Court (paras 52-54):

> "A finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.
>
> It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, *inter alia*, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.

> It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined."

Later cases have played down the "subjective" nature of the test, suggesting that intention should be inferred from objective circumstances:

> "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 inferrable 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."
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> - Case C-255/02 *Halifax*, Opinion of Maduro AG of 7 April 2005.

> "For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage."
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> - Case C-255/02 *Halifax*, Judgment of 21 February 2006.

Viewed in those terms, it may legitimately be questioned whether "abuse of rights" in Community law is distinguishable, in any meaningful way, from the more orthodox process of interpretation that characterises the first and second approaches (above).

> "[T]he famous statement of the French authority on civil law, Planiol, that 'law ceases where abuse begins' (*le droit cesse là où l'abuse commence*) still holds good and shows very clearly that the problem of abuse is resolved in the last analysis by defining the material content of the particular situation and thus the scope of the right conferred on the individual concerned. In other words, it is claimed that to determine whether or not a right is actually being exercised in an abusive manner is simply to define the material scope of the right in question."
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> - Case C-212/97 *Centros* [1999] ECR I-1459, Opinion of La Pergola AG at para 20.

> "I am of the opinion, therefore, that the notion of abuse operates as a *principle governing the interpretation of Community law*, as stated by the Commission in its written observations. What appears to be a decisive factor in affirming the existence of an abuse is the teleological scope of the Community rules invoked, 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.
> …
> 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. I prefer therefore to use the term 'prohibition of abuse of Community law' and will speak of 'abuse or rights' only where simplicity so requires."
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> - Case C-255/02 *Halifax*, Opinion of Maduro AG at paras 69 and 71 (original emphasis). The Court preferred the terminology "abusive practice".

This seems a classically "European" solution. The British mistrust the strange continental concept of "abuse of rights", foisted on them by Europe (see articles in tax journals, *passim*). Do the French, conversely, lament that the ECJ, while paying lip service to abuse of rights, has emasculated the concept by dispensing in all but name with the "subjective" test that is central to their own version of it?

A DOCTRINE RIPE FOR RECEPTION INTO ENGLISH LAW?

Application of EC law

It seems that English courts must decide:

- (in e.g. free movement / direct taxation cases) whether domestic anti-avoidance rules are proportionate responses to the objective of preventing wholly artificial transactions intended to avoid national rules; and

- (in e.g. subsidy and VAT cases) whether and if so how Community rules can be interpreted so as to exclude "abusive practices", objectively defined.

A subjective, French-style analysis does not however seem to be required.

Where an "abusive practice" or an "abuse" is found, the normal remedy is to prohibit reliance on the Community right in question.

Halifax throws up a difficult twist however:

> "where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice."
>
> (Judgment, para 98).

That will be for the VAT and Duties Tribunal to resolve. Maduro AG (para 55) may have been right to predict "serious problems", not least because this solution (which he had rejected) "assumes the existence of one normal way to carry on".

Law of tort

It has been suggested (by reference to *Bradford v Pickles* [1895] AC 987) that the English law of tort would benefit from a French-style provision that the use of property deliberately to harm a neighbour constitutes an abuse of right: Markesinis and Deakin, *Tort Law* (Oxford, 4th edn 1999, p. 435), citing Lord Denning;[5] Cordara 2006. But English law has the means to reach the same result via the tort of nuisance (a tort unknown to French law).[6]

More generally, there is a cultural difficulty in transplanting the principle of abuse (at least in its Community formulation, with its emphasis on whether the purpose of the right has been achieved) into a legal culture which still tends to think not in terms of "rights" "granted" for any particular "purpose", but in terms of freedoms that simply exist.

Law of contract

The idea (familiar from French and other continental systems) that the unreasonable exercise of a contractual right can constitute an abuse of right finds little echo in English law and is deprecated by those who prize the certainty of English contract law and the business that it brings to London.

See however the dissenting judgment of Lord Denning MR in *Chapman v Honig* [1963] 2 QB 502: (landlord served notice to quit for vindictive reasons, the tenant having given evidence against him):

> "It is true that when a person exercises a contractual right, it is nearly always lawful, no matter that he might be actuated by spite or malevolence .. But circumstances may arise when it is unlawful. And we have, I believe, such a case before us today."[7]

Existing and possible future proposals for the harmonisation of European contract law may put this issue back on the table: see the European Commission's CFR (Common Framework of Reference) programme.

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5 *S/S Employment v ASLEF (No. 2)* [1972] 2 All ER 949, 967: "There are many branches of our law when an act which would otherwise be lawful is rendered unlawful by the motive or object with which it is done."

6 A defendant's malice may render an interference with the claimant's enjoyment of land unreasonable and thus an actionable nuisance: *Hollywood Silver Fox Farm Ltd. v Emmett* [1936] 2 KB 468. In *Hunter v Canary Wharf* [1997] 2 WLR 684 at 722, Lord Cooke did "not think .. that the view that malice is irrelevant would have wide acceptance today". The giant fern case could also have been resolved in the same way in England, since the law of nuisance protects the free passage of light if it is registered as an easement: *Colls v Home and Colonial Stores Ltd.* [1904] AC 179.

7 See further Lord Denning's comment, addressed in argument to the landlord appearing in person: "I am afraid the whole question whether there is a right of action for an abuse of a legal right is raised. You have got a leading case for us."

Public law

It seems unthinkable that a public authority could have a cause of action agaisnt an individual on the basis that the individual (without committing any recognised and actionable tort) abused a public law right.

Conceptually possible (because analogous with the free movement cases in EU law) might be an application of the doctrine in such a way as to disentitle an individual from relying upon his public law rights.

Is this realistic, outside the field of tax?

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