COURT OF JUSTICE
OF THE EUROPEAN UNION

Abuse of rights in EU law

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"[a]*ny 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*."

Opinion of AG Tesauro *in Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, Case C-367/96, para 24.

The notion of abuse has been analyzed by the Court in two main contexts:

First, when EU law provisions are relied on in order to evade national law.

- Judgment of the Court of 3 December 1974, *Van Binsbergen*, Case 33-74.

- Judgment of the Court of 9 March 1999, *Centros Ltd*, Case C-212/97.

Second, when EU law provisions are relied upon in order to gain advantages in a manner that conflicts with the purposes and aims of those same provisions.

- Judgment of the Court (First Chamber) of 28 July 2016, *Kratzer*, Case C-423/15.

The concept in secondary EU law

- Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, Article 4, paragraph 3

"Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal".

- Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States […], Article 15, paragraph 1

"A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1:

(a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives […]"

Directive 2004/38

Article 35 of Directive 2004/38

"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

Recital 28 of the Directive 2004/38

„To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

In the case-law of the Court

- **Judgment of the Court of 3 December 1974**, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid,* Case 33/74.

- **Judgment of the Court of 14 December 2000**, *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, Case C-110/99.

The Emsland-Stärke test

- *First, there must be a combination of **objective circumstances**, which show that the purpose of a certain provision has not been achieved even though an individual can prove the formal respect of the conditions laid down by the provision.*
- *Second, there must be a **subjective element**, consisting in the intention to obtain an advantage from an EU rule by creating artificially the conditions laid down for obtaining it.*

Judgment of the Court of 14 December 2000, *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, Case C-110/99, paras 52-54.

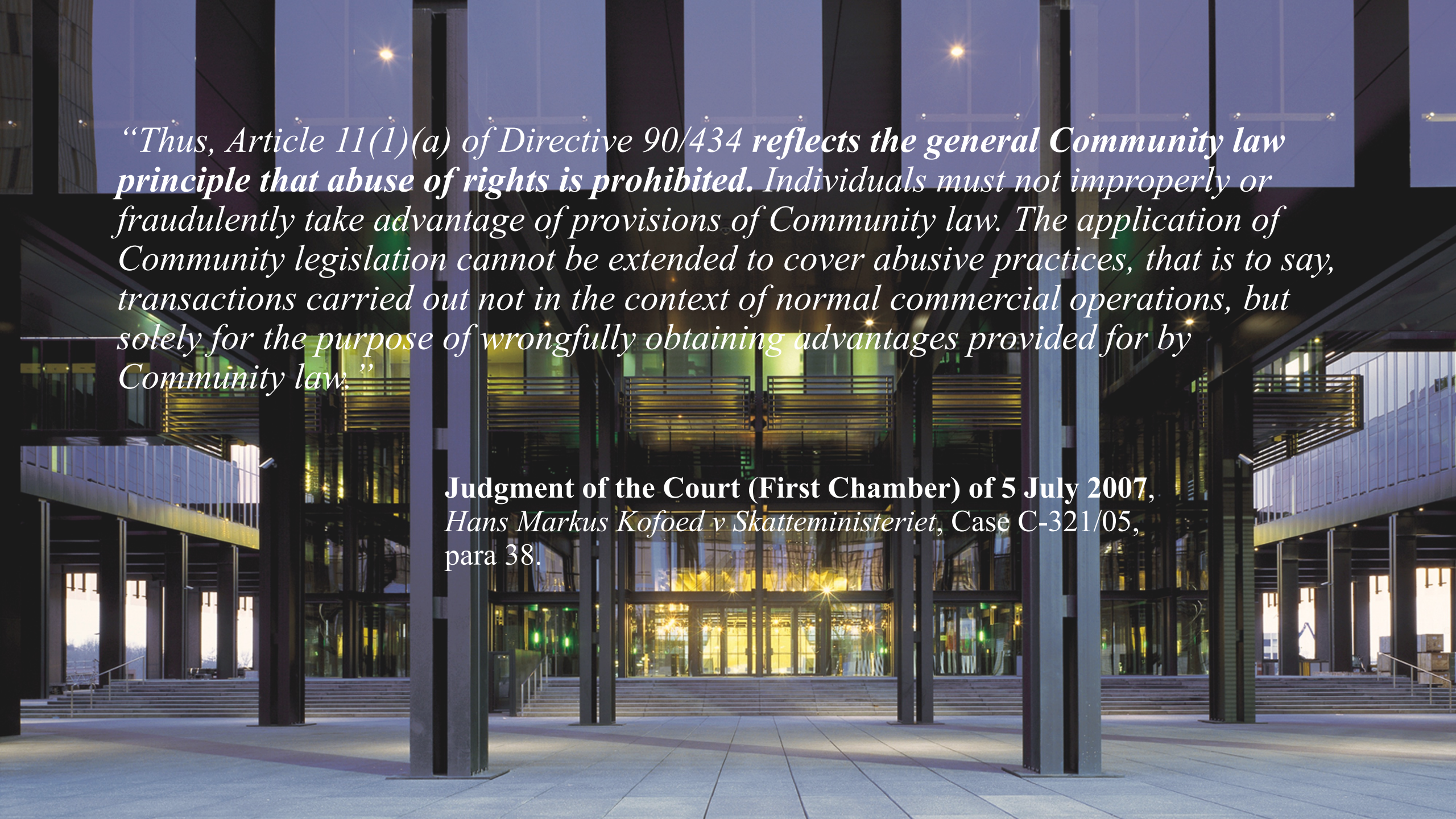
Two approaches to prevention of abuse

1. The **first approach is to consider that the "abusive" behavior is not covered by a provision of EU** law at all.
2. The **second approach is to acknowledge that the behavior in question *is* within the scope** of the right and then still consider, at the level of balancing, that the use of the right has not been proportionate to the objective of the right or the public interest, and can thus be restricted.

Abuse of rights – a general principle of EU law?

"A general principle of Community law can certainly be considered to derive from this line of case law."

Opinion of AG Maduro in *Halifax,* Case C-255/02, para 64.



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

Judgment of the Court (First Chamber) of 5 July 2007, *Hans Markus Kofoed v Skatteministeriet*, Case C-321/05, para 38.

Article 54 of the EU Charter of Fundamental Rights

"Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."

Sodba Splošnega sodišča (veliki senat) z dne 27. julija 2022, *RT France proti Svetu Evropske unije,* Zadeva T-125/22

Abuse of rights in the context of the rule of law crisis

Conclusion

First approach

"*The freedom of movement does not cover a situation where 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.*"

Judgment of the Court of 21 June 1988, *Sylvie Lair v Universität Hannover*, Case C-39/86, para 43.

Second approach

„The Treaty provisions on freedom to provide services cannot therefore be interpreted as precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to avoid the rules adopted by the first Member State as part of a cultural policy intended to establish a pluralist and non-commercial radio and television broadcasting system.“

Judgment of the Court (Fifth Chamber) of 5 October 1994, *TV10 SA v Commissariaat voor de Media*, Case C-23/93, para 21.