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THE NOTION OF *ABUS DE DROIT* AND ITS POTENTIAL APPLICATION IN FISCAL MATTERS WITHIN THE EU LEGAL ORDER

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The law of the European Union has been constructed on fundamental principles considered common to the laws of the Member States.

The decision of the London Tribunal Centre in the case of *Halifax plc et al v The Commissioners of Customs & Excise* demonstrates that Customs & Excise are seeking to use, or to extend a notion of Community Law, that of *abus,* seeking to describe it as *abus de droit*, and then clarifying it amongst the fundamental principles of Community Law. These concepts are derived from, but is not necessarily identical to, concepts and principles inherent in, and common to the laws of Member States.

The source of this particular notion would undoubtedly be France. The notion of *abus de droit* is found there in all aspects of public, civil and commercial matters and subsumes, both by statute and by jurisprudence, a concept of *abus de droit* in fiscal matters.

Given the interest in the decision of the London Tribunal Centre in the *Halifax* judgment released 1st March 2001, and that the issue has been appealed, and that it is likely that the High Court will make a reference to the European Court of Justice, an analysis of the concept used by the French tax administration in its attempts to regulate tax matters, and the procedural constraints to which it is subjected, is useful and even essential for the British adviser. An analysis and a comparison also needs to be made with the concept adopted by the European Union and analysed and applied by the European Court of Justice in other areas. I can only comment on the French domestic position, and will leave questions of German law, and those of other Member States, to those more competent in them.

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In the *Halifax* decision, Stephen Oliver QC refused to consider the questions raised by Customs relating to the notion of abuse of rights and its applicability to the case before him, basing his decision solely on the *'construction that the expressions "supply" and "in the course or furtherance of a business" in the United Kingdom legislation and "supply" and economic activities in EC Law. The appellants gained no rights from the scheme adopted as the Halifax's solution. Consequently they had no rights to abuse. For that reason the Commissioners' second argument that the transactions comprised in the scheme should, in accordance with the EC "abuse of rights" principle, be disregarded does not arise'*. However, does his wording infer that the principle could be invoked in another set of circumstances to which it may be hypothetically applied?

This article is based on one previously published in Taxation and has been developed to take into account two further articles on the subject by Robert Venables QC (ECTJ 4\3 [2000] 153) and Jonathan Peacock QC (ECTJ 4\3 [2000] 141), being the Counsel for Customs in *Halifax*.

The extent to which the concept of *abus de droit* can bite under British law through the application of purported principles of European Law is less extensive than that proposed by Jonathan Peacock QC. Its employment by Customs risks changing the nature of VAT as a tax having a formalised structure requiring a higher degree of certainty than in the field of direct taxation, into a highly subjective and uncertain minefield. The extent to which civil law concepts may be imported into British law is limited, and these cannot serve as a means to extend the existing British concepts of sham and requalification, without implementing legislation and good cause.

The procedural questions relating to fraud, evasion and avoidance have been left, for the moment, to the domestic legal, statutory and regulatory rules present in the tax system of each Member State without any form of specific substantive definition on an EU level of the meaning of these concepts. Why? Because the legal and economic systems in each Member State are so different as to render a similar structure and facts legitimate under one Member State's law, and illicit under another system. It is therefore necessary to enable Member States to apply for derogations, and to employ a degree of discretion in the manner in which the Sixth Directive and the common system of VAT are implemented. Until the notions of commercial law are not only harmonised or approximated, but definitively rendered identical in each Member State, I do not believe it possible for procedural and investigatory matters and questions of illicit operations or sham to be rendered identical, without legitimate concerns for the rights of the taxpayer to equivalent treatment. It is impossible to construct a generalised principle of community law in an area such as procedural investigation and domestic anti-avoidance legislation, where such notions bear significant differences of interpretation and of substantive

content in each of the Member States. Were it otherwise, this Herculean labour would have been undertaken in the Sixth Directive or in a modification. Until a legislative river is diverted through these particular stables, I would suggest that a mere attempt to cleanse them by a trickle of comparative procedure would be inoperative.

In my opinion, *abus de droit* as proposed by Customs and Excise, is a procedural question, and has to be specifically provided for under the Treaties, and in this case under the Sixth Directive, to have any hope of passing into law by virtue of s.2(1) of the European Communities Act 1972 as amended.

Taking this argument further to analyse the differences between the definitions of tax fraud, evasion and avoidance in matters of income and corporation tax in other Member States would be beyond the scope of this article.

The concepts of *abus* in the Community legal order and that of *abus de droit* in the French domestic order need to be carefully defined and distinguished before any useful discussion of assimilation as a part of the Community legal order, or, for that matter, the common system of VAT can be considered.

Abus de droit in French tax law

First and foremost, the notion of *abus de droit* is a central part of the French constitutional position of the individual or legal person in relation to others and the organs of the State and the administration. All these are subject to a generic principle, even a legal rule, that rights and duties are, or should be exercised in a civic manner, and not abusively or fraudulently, and within and by reference to the context in which they are applicable. In other words, the notion is almost part of the constitutional relationship that each of these entities or individuals has to the others. It is not a creature of tax law. The concept is foreign to the self-regulating British culture, where there is no written constitution, defining the rights of the individual or company in relation to the State, and requiring a set of principles regulating the use and abuse of rights.

Apart from its impact in all areas of French law, whether it be in contract, public law; private law or property law; the notion of *abus de droit* is one of the main arms of the French tax administration. Why is this? Following general principles of law, the administration is faced with a presumption that firstly, agreements are reputed to be real and secondly, that when such transactions are reciprocal or multi-party, they are thereby deemed to be economically balanced. In effect the question of *abus de droit* in tax law has to be seen in an evidential context, as much as anything else.

Are these presumptions applicable at all in English law? If they are, to what extent ?

In addition to its general powers of control, and ability to recalculate the value of fiscal elements, subject to the control of the tax judge, the *abus de droit* procedure might otherwise suggest that a taxpayer may not use a legal right in a manner for which the administration, in its discretion, considers it may not have been designed. Taking the situation in France as an example, no more, the status of the notion of *abus de droit* in tax matters can be resumed as follows:

There are two aspects of *abus de droit*, which now have become merged :

1. The statutory notion defined under the procedural Article 64 of the *Livres des procédures fiscales*, which enables the administration to attack agreements freely intended and concluded by the parties, and, in addition to requalifying their nature, reconstituting the reality of the operations and reassessing the tax due, and late payment of interest (0.75% per month), to fix a penalty of 80% of the amount of the reassessed tax. The concept is such that the administration may be forced to take the advice of a consultative committee constituted under Article 64; if it alleges an *abus de droit*, and does not consult the consultative committee, or refuses to follow its position, it retains the burden of proof. The *abus* referred to in the text is commonly referred to as the *abus par simulation*, i.e. cloaking a transaction in another form with a view to avoiding taxation, which is the only case expressly aimed at by Article 64. In effect, the administration is not bound to respect contracts which dissimulate the real effect of an agreement or a convention with the aid of clauses which a) give rise to a reduction in stamp duty payable; b) disguise the realisation or a transfer of profit or income; or c) which enable the avoidance, either in whole or in part, of the payment of VAT corresponding to operations carried out in the execution of a contact or a convention. The *procédure d'abus de droit* is not to be confused with other procedures such as that vitiating an abnormal act of management; the requalification of fact (whether the services have actually been provided or not); and the reinterpretation of fictitious contracts. None of these procedures involve either a fictitious deed (notarised *acte*) or a legal structure whose sole object and intention is to elude tax; and

2. The other, more generalised, *abus de droit* by *fraus legis*, which is based on jurisprudence, perhaps best loosely described as a mixture of case law and academic and administrative doctrine. In effect, this more generic concept corresponds more to the Community law concept of a fraudulent or abusive use of a community right. It is here that Jonathan Peacock's argument that

the French Conseil d'Etat's extension of the interpretation of the scope of Article 64 can be taken to justify an extension of the existing Community law position needs to be qualified. In my opinion, the thesis adopted by Jonathan Peacock QC is not sustainable.

The statutory concept of *abus de droit par simulation* may be described as attempting to present to the administration a legal situation which does not correspond to the real situation with a view to reducing the tax liability, either partially or completely. Generally, it attacks what could be described as a structure of fictive legal transactions, or shams. The question really is what is a sham in a heavily formalised civil law system such as France. The answer is very different in its perceived mischief to that of an English sham. To this extent, do Customs and Excise really need an extension of their powers of requalification? The French administration had to be given a formal procedural and taxing definition to be able to counter what they saw as abuse. It was not an automatic right available to the French administration.

An example of an *abus de droit* may be taken from a judgment of the Conseil d'Etat of 25th March 1983.

To avoid paying VAT, a taxpayer set up an SCI, a form of unlimited property company to own unfurnished commercial property, as well as a Sarl, or private limited company, composed of the same members as the SCI, which rented out the furniture. The Conseil d'Etat decided that the fictive nature of the separation between the leases of the unfurnished property and the rental of the furnishings was evidenced by the fact that :

- the two companies had the same members and the same managers;
- they had exactly the same clients; and that
- the leases and the furniture rental agreements had exactly the same term and were signed on the same date.

The aim of the transaction was to charge VAT merely on the rental of the furniture and not on the rental of the furnished premises. This position, has been overtaken by the course of time, and in recent years, the Conseil d'Etat has not extended the somewhat fundamentalist interpretation of what is a sham much further, and has rather reduced it, to the extent that there is a legitimate legal or commercial reason for the structure or entities or relationships involved. To what extent would this be considered a sham under the present United Kingdom legislation?

I am tempted to parry the attempt to introduce such a doctrine on a community law basis by riposting that the Sixth Directive has in fact left the procedural matters of enforcement of such principles entirely to the Members States' own domestic law and practice, as the Directive has merely approximated and harmonised the legislation of the Member States to the extent necessary to bring the common system of VAT into effect. Were Jonathan Peacock QC to be arguing that an administration can choose another jurisdiction's practice and procedures when it suits it, without statutory or other regulatory implementation on a domestic or a European basis, I would suggest that this is wrong and clearly *hors piste*.

The second arm may be described loosely as *fraus legis* or fraud on the law. This concept is closer to the notion dealt with by the ECJ within the European context. The ECJ has developed principles defining the manner and the extent to which Member States, Institutions, or persons within the Union may or may not use principles of Community Law to avoid principles or rules of domestic legislation to which they may otherwise be subject.

The Conseil d'Etat, however, introduced this wider concept into Article L 64, in the judgment of principle of 10th June 1981, effectively extending the interpretation of this Article to include the second arm of *fraus juris*, enabling the prohibition of transactions which had no other motivation than what I can only translate as the eluding or attenuation (lessening) of tax charges otherwise normally owed, having regard to the situation and the real activities of the taxpayer. However, in the case concerned, the administration was unable to show that the transactions concerned were fictitious, as the structures concerned were not only formally valid, but fulfilled their economic purpose in other respects.

The difficulty in importing this concept into British practice is that the French administration employ the procedure in circumstances which would be considered normal practice in Britain. Why? Because the French law and practice simply attaches a degree of importance to formal rather than to substantive questions which is not followed under the letter or the spirit of English law.

The French administration's attitude towards the *abus de droit* procedure, has been sharpened by several recent contrary decisions. In effect, it frequently attempts to evoke the possibility of using the procedure to intimidate a taxpayer into accepting a reassessment, by in effect offering to forgo the 80% penalty. There is no 80% penalty applied to a sham in the United Kingdom, the comparison is therefore of two different procedural notions, and should not be introduced into the United Kingdom without some degree of conceptual analysis. The French concept is almost penal in nature, as it goes against the very structure of the highly principled civil law, and it is clear that the French term *fraude* has a far wider breadth than the English term

fraud, as the French term includes matters which are not even dishonest. The French system is a dogmatic and mandatory one and a departure from the norm is always open to challenge. This is certainly not the case in the United Kingdom, and elsewhere in the Community.

In addition, the Cour de Cassation has a tendency now to refuse to apply the notion of *abus de droit* where there are economic, legal, or financial motivations for the transaction. For example, the Court decided that the transformation of an Sarl, a *société de personnes*, into a *Société Anonyme* followed by a sale of the resulting SA's shares was not an *abus de droit*, despite the reduction of capital duty from 4.8% of value to a minor fixed amount.

The French administrative tribunals seem to have become more reticent in accepting the views of the administration. This has even been taken to the point where the economic justification for a transaction has been accepted, even though the subsidiary involved was a treasury subsidiary in Luxembourg. Indeed, the application of the 80% penalty has also been refused, the tribunal basing themselves on the fact that a reassessment itself had already been a sufficient penalty.

The general notion of *abus de droit* is a part of the French system designed to ensure equality of treatment in relation to the whole. It therefore provides both a protection to the taxpayer against the administration, and at the same time, a protection of the Revenue against tax evasion and illegitimate avoidance. The necessary question is whether its more specific application in France is to be transcribed as of right into a different legal system where it may have equivalence, but no identity of concept and for that matter, of sanction.

The Community Law Position

Whilst it has been said that the concept itself has no sway in English Law, as it is of civil law origin, the fact that the ECJ has recognised a general concept of *abus* in its decisions as being applicable within the Communities, has led to an attempt by Customs and Excise to apply a principle out of its legal context in their interpretation of the VAT Directives, and may ultimately lead to similar attacks by the Inland Revenue in matters of direct taxation, and stamp duty.

However, I would argue that the general approach of the ECJ is entirely different in substance to that alleged. The questions before the ECJ in the legal domain have rather been aimed at protecting community rights irrespective of whether their use may be considered abusive or not under the laws of the Member State concerned or even under European Law. In the ECJ's decisions, the mere fact of using a legal

structure or a structure of contracts is insufficient of itself to refuse the benefit of a Community right, whether it be a right of deduction or otherwise.

The ECJ appears to leave the question of *fraude* and *abus*, to the Member States' own legislation, rather than seek to endorse any common notion of *abus de droit* as a community tax principle. There is no mention of the specific concept of *abus de droit* in the subordinate EU tax legislation, and only occasionally in the Sixth Directive. However, the term *abus* does appear, but not as a particularised and specific term.

Indeed, it only appears once separately from notions of *évasion* or avoidance. The following analysis shows in what context the term *abus* is and, significantly, is not used, in the following articles of subordinate legislation. The English text is also given to demonstrate the differences in application of the various terms employed in the general anti-avoidance, fraud and evasion context:

Text	**Article**	**Scope**	***Term employed***
Sixth VAT Directive	13A and B	Exemptions: Services	*.....prévenir toute fraude, évasion et abus éventuels* / preventing any possible evasion, avoidance or abuse
	14	Exemptions Importation	*idem*
	15	Exemptions Exportation	*idem*
	22.8	Taxpayer's Obligations	*.....assurer l'exacte perception..... et prévenir la fraude* / ensure correct collection of the tax and for the prevention of evasion
	27.1	Derogations	*.....d'éviter certaines fraudes ou évasions fiscales* / to prevent certain types of tax evasion or avoidance
	28.C.A	Intra Community supplies	*.....prévenir toute fraude, évasion et abus éventuels* / preventing any evasion, avoidance or abuse

Text	Article	Scope	*Term employed*
	28.K.5	Duty Free	*.....prévenir toute fraude, évasion et abus éventuels* / prevent any evasion, avoidance or abuse
Directive 23.7.90	11.1	Mergers: withdrawal of régime	*.....objectif principaux la fraude ou l'évasion fiscale* / one of its principal objectives tax avoidance or evasion
Directive 23/7/90 (90/435/ CEE)	1.2.	Intra Community Distributions of profits	*.....dispositions nationales ou conventionelles afin d'éviter les fraudes et abus* / domestic or agreement-based provisions required for the prevention of fraud or abuse

The most significant non-appearance of the term is in Article 22.8, relating to taxpayer's obligations, which only mentions *fraude* not *abus*: also translated significantly by the term 'evasion', not by the term 'avoidance'. Was *Halifax* evasion? It was legitimate, and not fraudulent in the English sense of the term. Again, this is in itself sufficient to reveal Jonathan Peacock's arguments on purported fundamental principles of Community law, as being a covert and undeclared importation of foreign procedures unauthorised by Parliament or a competent European Institution. It is very necessary to bear in mind at this juncture that the word *fraude*, in French has little semantic substance in common with the English term. It would be almost as crasse and false to associate the two as, for example, to translate the French term *usufruit* by the term life interest, or vice versa. It is impossible to make a satisfactory assimilation of the civil law concept into an equivalent term of English law despite attempts by ill-informed foreign legal translators to do this.

What is clear is that the Directives themselves in both direct and indirect taxation matters, use the French term *abus*, but only in limited circumstances. In addition there is no use of the full and more specific term *abus de droit*. The general term *abus* is used in particular in relation to the freedom of movement of services and goods, and in the area of exemptions under Article 13, but it is not employed in Article 22, relating to taxpayer's obligations (surely the main issue here) or in Article 27, which enable Member States to derogate in certain areas. A further difficulty lies in deciding whether the notion of *abus de droit* can be assimilated into the notions of *fraude* and *évasion*, or whether the full term has to be employed in order to enable the concept to be used. In my opinion, the term *abus de droit* is so

specific in its nature to render any attempt to assert that it is subsumed in the general term *abus*, a *non sequitur*.

Here the contrast between the French fiscal statutory power, and the overall notion has its full force. Customs & Excise arguably appear to be attempting to legislate by the back door and attempting to cloak this by reference to a general, and fundamental principle of Community Law of no specific application in the area concerned.

The formal structure of VAT within the Communities is however coming under regular attack from purposive interpretation, rather than structural application. Jonathan Peacock QC cites *Marleasing* [ECJ] 1990 I - 4135 in support of this attitude. Certainly this case is authority for the purposive interpretation of a concept of community law intended to be of uniform application, contained within a directive relating to company law within the Community, but it is certainly not authority for the unauthorised importation of foreign procedural principles to a jurisdiction where the notion of 'sham' already suffices. The Sixth Directive has left matters of combating fraud etc. and procedural matters to the legislation and practice of the Members States. It is a directive, not a regulation. There is no uniform notion of *abus*, fraud or sham or evasion contained in the Sixth Directive simply because the methods in which the tax is administered and enforced within the EU differ widely.

Strangely enough, to the writer's knowledge, the ECJ has yet to squarely address the issue of the exact meaning and scope of the notion of *abus* in the tax context, neither has the Court been specifically asked to deal with the question of *fraude* or *abus de droit* by a taxpayer in the French fiscal sense of the term, in matters of VAT, and the notion itself does not figure in cases involving this European tax brought before the ECJ. The judgments appear to limit themselves to questions of avoidance and evasion, in the general sense, rather than this specific concept of *abus de droit.*

To this extent the authorities cited by Jonathan Peacock QC must be treated with caution.

It is surprising that few cases have been brought in the ECJ, as the concept is used freely by the French administration both in indirect and in direct taxation investigations. There again, the French administration may not wish its powers in the field of direct and indirect taxation to be subjected to this supranational jurisdiction within the scope of VAT.

Let us review some of the recent decisions of the ECJ, to see to what extent the European Rule either defends taxpayer's rights or rather subjects them to potentially wider scrutiny and action by tax administrations within the Union.

The cases under discussion which deal with the general notions and principles governing *abus de droit* in relation to Treaty and subordinate provisions of Community law are set out for the readers convenience as follows:

Name of Case & Area of Law	**Case reference**	**Year Printed in ECJ reports**	**Pages where concept evoked**
Brennet v Paletta *social security*	C-206/94	96p	**I** 2391 judgment **I** 2373 AG conclusion
Alexandre Kephalas & others Elinikio Dimisio & OAE *Freedom of movement and establishment, and abuse of a right arising from Community law by individuals*	C-367/96	98p	**I** 2869 judgment **I** 2854 AG conclusion
Centros Ltd v Erhvervs-og Selskabsstyrelsen *Right of establishment*	C-212/97	99p	**I** 1492s judgment **I** 1476s AG conclusion

In *Brennet*'s second case, the first being simply on the interpretation of Article 18 of Regulation No 1408/71, the issue of *abus* was again dealt with in relation to the objectives and aims of the Community right or obligation. Here the ECJ reiterated the principle that although National Courts may take account of objective evidence of abusive or fraudulent behaviour in order where appropriate to deny the employee the benefit of the provisions of Community law on which he seeks to rely, they must nonetheless assess such conduct in the light of the objectives pursued by these provisions. This case is important for a thorough grasp of the policy behind the ECJ's jurisprudence and interpretation, as it actually limits the scope of the powers of the administration or, in this case the employer, to allege *abus* and to justify the withdrawal of a right given by Community Law as a consequence. The requirement of providing proof by an employee of illness in another jurisdiction was too onerous and disproportionate, and would hamper the exercise of the Community right concerned.

In other words, in tax matters, the objectives of the Sixth Directive and other community law provisions still have to be viewed in the light of their objectives. The question of whether the provision itself is being abused is therefore a matter of

community law, and not merely national law. This is of particular interest in cross-border situations, although it also has significant implications for purely domestic transactions.

In the *Kephalas* case, a Greek company had had its capital increased by the OAE, a Government public company who intervened, by law in the capital of a company on the verge of liquidation to increase its capital without passing by a resolution of shareholders under Article 25(1) of the Second Council Directive 77/91/EEC. Certain shareholders, rather than exercising an option under the Greek legislation to take up capital rights, chose to attack the decision on the basis of Article 25 (1), and the question arose as to whether they were in effect, abusing a community right in so doing. The Athens Court asked for a preliminary ruling. Article 281 of the Greek Civil Code prohibits the exercise of a right "where it manifestly exceeds the bounds of good faith or morality or the economic or social purpose of that right".

The ECJ formulated the question raised by the Athens Court as follows:

1. May a National Court apply a provision of domestic law to decide whether the exercise of a right arising from a provision of Community law is abusive, or, alternatively, whether this evaluation must be made on the basis of Community law; and

2. Whether in the light of the facts, the right arising from Article 25(1) must be regarded as having been exercised in an abusive manner.

The ECJ reiterated its previous case law that Community law cannot be relied on for abusive or fraudulent ends, and that in consequence, the application of domestic rules such as Article 281 for the purpose of assessing whether the right was exercised in an abusive manner cannot be regarded as contrary to the Community legal order.

However, the ECJ was at pains to point out that the application of such a national rule must not prejudice the full and uniform interpretation of Community Law in the Member States. In particular, it is not open to national courts when assessing the exercise of a right arising from a Community provision, to alter the scope of that provision or to compromise the objectives pursued by it. In the present case, the uniform application and full effect of Community law would be prejudiced if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing his rights on the ground that the increase in capital resolved the financial difficulties threatening the existence of the company concerned and clearly enured to his economic benefit. However, following a detailed analysis of the company law implications of following the Greek State's proposal, the Court felt that to subject the shareholder's rights of control to direct modification by a provision on national

law, would be altering the scope of the Directive and the provision of Community law.

This would confirm that a national court may have regard to its own legislation or law in determining whether behaviour is abusive or fraudulent . However, were the position to be transposed to a provision of the Sixth Directive, it is also clear from this logic that a national administration should not erode, and a national court must not tolerate the erosion or modification of a Community right by a mere allegation that its exercise is an *abus de droit*, for example on the mere basis that the taxpayer has otherwise obtained an advantage, and is seeking to extend it merely by exercising a community right within its scope. The fact that the shareholder was contesting the manner in which the increase in capital was made showed that he was exercising the Community right, and were he not to have done so, he would have acquiesced in the breach of the Community law provision, albeit not necessarily to his economic detriment. In my opinion, this flaws the basis of Jonathan Peacock's superficially attractive arguments.

In the *Centros* case, the Danish administration attempted to refuse the registration of a Branch in Denmark of a Limited Company registered within the United Kingdom on the grounds that the United Kingdom company had no real substance in the United Kingdom, that its activity was entirely to be carried out in the Danish Branch, and that, given the minimum subscribed capital of the Company in relation to that of its Danish equivalents, it was an attempt to subvert the Danish rules on the protection of creditors. The two shareholders were Danish nationals and both Danish residents.

Again, the Court upheld the fundamental Community right of establishment of a Branch, and did not allow this fundamental right to be qualified. It did however state that it was possible for the administration to take appropriate, and doubtless proportionate, action in relation to the United Kingdom authorities, or the company or its shareholders with a view to ensuring that there was no fraud perpetrated on Danish creditors of the Company.

In particular, the fact that the United Kingdom company carried out no business from its United Kingdom office did not of itself prove the existence of abuse or fraudulent conduct, as per *Segers*, in other words, the use of the right of establishment was not in itself abusive.

The comment of Stephen Oliver QC in his conclusions in the *Halifax* case, released 1st March 2001, to the effect that "... it would be unnecessary, inconsistent and potentially misleading if we were to express views on the hypothetical application of that principle to the present circumstances" is entirely correct. The Sixth Directive contains ample procedural protection for the collection of taxes, without

the introduction of further procedures, which themselves, in their country of origin, are subject to strict procedural and evidential constraints. In addition, the jurisprudence of the ECJ does not support the introduction of a procedural administrative remedy of the type which Customs is seeking to infer. If anything, it can be read as supporting the use of Community rights, rather than their erosion.

The Court appears to have preferred to leave questions of fraud, abuse and other matters to the jurisdiction of the local courts within the specific field of their own domestic procedures and concepts. If this is the case, Customs and Excise's attempts to import a concept from a foreign jurisdiction may be questionable, and even counterproductive in international matters.

Let us now review some of the authorities cited by Jonathan Peacock QC to support his thesis, to the effect that the ECJ analyses the underlying nature of the transaction in order to determine its treatment, and that this assists in the introduction of a general concept of *abus de droit* into VAT.

Firstly let us note that these cases were cited by Stephen Oliver QC in his judgment in relation to the construction of the terms "supply" and "in the course of business" in the United Kingdom legislation, and the notion of "supply" and "economic activities" in EU Law. He did not address them in his dismissal of the arguments in support of the use of the concept of *abus de droit*, which took him one paragraph.

Reed Personal Services [1995] STC 588 and *Eastbourne Taxi Radio Cars* [1998] STC 669 to the effect that whether there is a supply or not is to be determined by examining the 'commercial reality', and by identifying the result which is most consistent with the overall scheme of VAT. Insofar as this supports the manner of the interpretation of a community concept this is hardly to be queried. However, to the extent that it is used to support an introduction of a foreign procedural concept which is not itself expressly set out as part of the overall structure of VAT, its authority is more than questionable.

Glawe [1994] STC 543, which is used to support the notion of the right of recharacterisation and thus requalification of transactions. The decision concerns the manner in which a provision of the Directive should be interpreted in a situation, relating as to how the particular behaviour of the proprietor of a gaming machine should be taxed has little to do with the question of recharacterisation of a transaction between two parties having an alleged view to avoidance, or of a fraud on the law. This was not a question of fraud, rather a question of the interpretation and application of a general concept to a situation in which it was difficult, for both the taxpayer and the administration to see how the concept was intended to apply in practice.

Fischer [1998] STC 708 deals with the question of whether a Member State can charge the proceeds of unlawful roulette games to VAT when it exempts licensed games. It is a question of equality of treatment of the same transactions rather than a requalification of the nature of the transaction. Again, hardly authority for the decimation of a taxpayer's structural ingenuity on the basis of alleged *abus de droit*.

First National Bank of Chicago STC 850 dealing with the deductibility of VAT in relation to certain currency exchange transactions otherwise exempt from VAT, and whether these were supplies of goods or of services. The question of an *abus de droit* is not in issue in this case.

Whilst it is clear that the ECJ will research the fundamental nature of an activity or of a transaction to determine what is its correct treatment and analysis under EU principles, this is not authority for the national administrations to set aside transactions which they consider to be tainted at will, for example because they give rise to a formal right to a deduction or exemption, which within that administration's preferred legal or contractual structure would not.

What is at issue is the certainty of treatment of legal transactions under the structure of VAT, and whether foreign administrative practice can be transposed directly into English law and practice, without specific authority from the Sixth Directive, or Parliament, which is the context in which Customs' arguments should be analysed. The latter is perhaps the most worrying, as it in effect means that the administration can set its own standards outside what is permitted by Parliament.

There is no authority in the Sixth Directive which enables Customs to import French practice by the back door, and the Community legislation and principles on which this proposed unilateral extension of the notion of *abus* is apparently based are destined rather to protect the individual citizen or undertaking of the European Union, and not the Member State, its revenue or its VAT contribution to the EU.

Fundamentally, the issue is whether Customs can adopt legal anti-avoidance principles developed in one Member State where it has a specific legal context coupled with built in evidential and procedural safeguards, and then seek to apply it in an entirely different context where the limitations inherent in the concept, and the safeguards will be absent.

In my opinion, to quote Lear, "that way madness lies".