Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 7 September 2017 [1]

Case C-251/16

Edward Cussens,
John Jennings,
Vincent Kingston
v
T.G. Brosnan

(Request for a preliminary ruling from the Supreme Court (Ireland))

(VAT — Tax avoidance — Direct applicability of the principle of prohibition of abuse of rights recognised in *Halifax and Others* (C-255/02))

I. Introduction

1. Tax authorities do not fall in love easily. There is (arguably at least) one notable exception to this rule: the 2006 judgment in *Halifax*,[2] in which this Court confirmed the existence of the principle of prohibition of abusive practices in the area of value added tax (VAT) law. That judgment appears to have been embraced with a passion by tax authorities across the Member States.

2. However, as is often the case, the true nature of the object of one's suddenly formed emotional attachments is likely to remain somewhat hazy and unexplored for some time.[3] The same is true of the prohibition of abusive practices, also referred to as the prohibition of abuse of law, in the area of VAT. Although it was explicitly confirmed more than a decade ago, and has been since then the object of extensive scholarly discussion and analysis, the detailed operation of that principle, including the precise test to be applied for ascertaining abuse, may be said to be still somewhat underdeveloped.

3. The present reference invites the Court to elaborate on the conditions of application and practical effects of that principle in the context of a reference made by the Supreme Court (Ireland).

4. Messrs Edward Cussens, John Jennings and Vincent Kingston ('the Appellants') built 15 holiday homes on a site in Cork, Ireland. They granted a lease on the properties of 20 years and 1 month to a related undertaking. Under Irish law, the 20-year lease was treated as a first disposal of immovable property. VAT was charged on the capitalised value of the lease. That agreement was cancelled a month later and the properties were sold by the Appellants to third parties. No VAT was payable on those sales under Irish law, because VAT was only due on the original first disposal, that is on the

1 Original language: English.

2 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121).

3 A cynic (or a realist, depending on one's point of view) might add that the latter is even a precondition for the continual existence of the former.

long-term lease. Subsequently, the Irish tax authority held that the first disposal, the long-term lease, was an artificial construct and abuse of rights. That lease should therefore be ignored for VAT purposes and VAT should be charged on the subsequent sale to third parties, as if it had been the first disposal. That would result in the Appellants paying significantly more VAT.

5. The tax authority's decision was appealed against and the case eventually came before the Supreme Court of Ireland. The Supreme Court puts eight questions to the Court. Questions 1 and 2 ask whether the EU law principle of prohibition of abuse of rights is directly effective and trumps the principles of legal certainty and legitimate expectations. Assuming the principle of prohibition of abuse of rights is directly effective, questions 4 and 7 seek clarification on its conditions of application. If those conditions are fulfilled in this case, question 3 asks how the transactions can be reinterpreted and reassessed for VAT purposes. Questions 5, 6 and 8 query the consequences of incompatibility of a specific provision of national law with the Sixth VAT Directive 77/388/EEC.[4]

II. Legal framework

A. EU law

1. Directive 77/388 ('the Sixth VAT Directive')

6. Under Article 2(1) of the Sixth VAT Directive,[5] 'the supply of goods or services affected for consideration within the territory of the country by a taxable person acting as such' is subject to VAT.

7. Article 4(3) states that:

'Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to activities referred to in paragraph 2 and in particular one of the following:

(a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; ... Member States may determine the conditions of application of this criterion to transformations of buildings and land on which they stand.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply or the period elapsing between the date of first occupation and the date of subsequent supply, provided that these periods do not exceed five years and two years respectively.

A building shall be taken to mean any structure fixed to or on the ground;

(b) the supply of building land.

"Building land" shall mean any unimproved or improved land defined as such by the Member States.'

8. Article 5 entitled 'Supply of goods' provides that

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

4 Sixth Council Directive 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 (OJ 1977 L 145, p. 1).

5 Now replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347, p. 1.

…

3. Member States may consider the following to be tangible property:

(a) certain interest in immovable property;

(b) rights in rem giving the holder thereof a right of user over immovable property;

(c) shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.'

9. Article 13 of the Sixth VAT Directive, headed 'Exemptions within the territory of the country' states as follows:

'…

B. Other exemptionsWithout 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 the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a).'

B. Irish law

10. Pursuant to section 4 of the VAT Act 1972, as it stood at the relevant time:'(1) (a) This section applies to immovable goods —

(i) which have been developed by or on behalf of the person supplying them …

(b) In this section "interest", in relation to immovable goods, means an estate or interest therein which, when it was created, was for a period of at least ten years … and a reference to the disposal of an interest includes a reference to the creation of an interest …

(2) … a supply of immovable goods shall be deemed, for the purposes of this Act, to take place if, but only if, a person having an interest in immovable goods to which this section applies disposes (including by way of surrender or by way of assignment), as regards the whole or any part of those goods, of that interest or of an interest which derives therefrom.

…

(4) Where a person having an interest in immovable goods to which this section applies disposes, as regards the whole or any part of those goods, of an interest which derives from that interest in such circumstances that he retains the reversion on the interest disposed of, he shall, in relation to the reversion so retained, be deemed, for the purposes of section 3(1)(f), to have made an appropriation of the goods or of the part thereof, as the case may be, for a purpose other than the purpose of his business.

…

(6) Notwithstanding anything in this section or in section 2 tax shall not be charged on the supply of immovable goods —

(a) in relation to which a right in favour of the person making the supply to a deduction under section 12 in respect of any tax borne or paid on the supply or development of the goods did not arise and would not, apart from section 3(5)(b)(iii), have arisen, or

(b) which had been occupied before the specified day and had not been developed between that date and the date of the supply other than a supply of immovable goods to which the provisions of subsection (5) apply.

…

(9) Where a disposal of an interest in immovable goods is chargeable to tax and where those goods have not been developed since the date of the disposal of that interest (hereinafter referred to in this subsection as "the taxable interest") any disposal of an interest in those goods after that date by a person other than the person who acquired the taxable interest shall, for the purposes of this Act, be deemed to be a supply of immovable goods to which subsection (6) applies.'

11. Under section 10(9) of the Act (in the version applicable in 2002):

'(a) On the supply of immovable goods and on the supply of services consisting of the development of immovable goods, the value of any interest in the goods disposed of in connection with the supply shall be included in the consideration.

(b) The value of any interest in immovable goods shall be the open market price of such interest. Provided that where a surrender or an assignment of an interest in immovable goods is a supply of immovable goods which is chargeable to tax, the open market price of such interest shall be determined as if the person who surrendered or assigned that interest were disposing of an interest in those goods which that person had created for the period between the date of the surrender or assignment and the date on which that surrendered or assigned interest would, but for its surrender or assignment, have expired.'

12. Additional rules regarding the valuation for VAT purposes of transactions in immovable property were contained in Regulation 19 of the Value Added Tax Regulations 1979 (S.I. No 63 of 1979), as amended, according to which:'(2) Where a person having an interest in immovable goods (in this paragraph referred to as "the disponor") disposes as regards the whole or any part of those goods of an interest which derives from that interest in such circumstances that he retains the reversion on the interest disposed of (in this paragraph referred to as the reversionary interest), the following provisions shall apply:

(a) the value of the reversionary interest shall be ascertained by deducting the value of the interest disposed of from the value of the full interest which the disponor had in the goods or the part thereof disposed of at the time the disposition was made, and

(b) if under the terms of the disposition, the interest disposed of is for a period of twenty years or more, or is deemed to be for a period of twenty years or more, the value of the reversionary interest shall be disregarded.'

III. Facts, procedure and questions referred

13. The Appellants were co-owners of a plot of land in Cork on which they constructed 15 holiday homes ('the properties'). As stated by the referring court, in order to reduce the amount of VAT that would be paid on the sale of the properties, they concluded a number of preliminary transactions with a related company, Shamrock Estates Limited ('SEL') ('the pre-sales transactions').

14. On 8 March 2002, the Appellants entered into a long-term lease for the properties with SEL lasting 20 years and 1 month ('Long-Term Lease'). The properties were leased back to the Appellants for two years ('Short-Term Lease').

15. On 3 April 2002, both leases were mutually surrendered by the parties and full ownership of the properties reverted back to the Appellants. In May 2002, the Appellants sold the properties to third party buyers.

16. As a basic rule, first supplies of immovable property in Ireland are subject to VAT. Subsequent supplies are exempt. In case of supplies in the form of a sale of a freehold interest, VAT is charged on the sales price. Leases of over 20 years in duration in Ireland are treated as supplies of immovable property.[6] In such cases VAT is charged on their capitalised value.

17. Had the properties been sold directly by the Appellants (namely without the pre-sales transactions), VAT in the sum of EUR 125 746 would have been due on that sale. However, the Appellants declared VAT to the value of EUR 40 000 on the Long-Term Lease, being the first supply of the properties, with the Short-Term Lease, the reversion following renunciation of the leases, and the subsequent sale of the properties in May 2002 all being exempt from VAT.

18. The Irish tax authority considered that the pre-sales transactions were an artificial construction and should be ignored for the purposes of VAT assessment. The amount of VAT due was therefore EUR 125 746 on the sale of the properties (minus the EUR 40 000 already paid).

19. The Appellants challenged that assessment and the case was eventually brought before the Supreme Court of Ireland, which decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the principle of abuse of rights, as recognised in the judgment of the Court in *Halifax* as being applicable in the sphere of VAT, directly effective against an individual in the absence of a national measure, whether legislative or judicial, giving effect to that principle, in circumstances where, as here, the redefining of the pre-sale transactions and the purchaser sales transactions (collectively referred to as the appellants' transactions) as advocated by the Commissioners, would give rise to a liability on the part of the appellants to VAT where such liability, on the proper application of the provisions of national legislation in force at the relevant time to the appellants' transactions did not arise?

(2) If the answer to question (1) is that the principle of abuse of rights is directly effective against an individual, even in the absence of a national measure whether legislative or judicial giving effect to that principle was the principle sufficiently clear and precise to be applied to the appellants' transactions, which were completed before the judgment of the Court in *Halifax* was delivered and in particular having regard to the principles of legal certainty and the protection of the appellants' legitimate expectations?

6 More accurately, leases of over 10 years are treated as supplies of immovable property subject to VAT. However, if they run for less than 20 years, VAT is also charged on the reversionary interest.

(3) If the principle of abuse of rights applies to the appellants' transactions so that they are to be redefined —

(a) what is the legal mechanism by means of which the VAT due on the appellants' transactions is assessed and is collected since no VAT is due assessable or collectable in accordance with national law and

(b) how are the national courts to impose such liability?

(4) In determining whether the essential aim of the appellants' transactions was to obtain a tax advantage should the national court consider the pre-sale transactions (which it has been found were effected solely for tax reasons) in isolation or must the aim of the appellants' transactions as a whole be considered?

(5) Is s. 4(9) of the VAT Act to be treated as national legislation implementing the Sixth Directive notwithstanding that it is incompatible with the legislative provision envisaged in Article 4(3) of the Sixth Directive on the proper application of which the appellants in relation to the supply before first occupation of the properties, would be treated as taxable persons notwithstanding that there had been a previous disposal which was chargeable to tax?

(6) If s. 4(9) is incompatible with the Sixth Directive are the appellants by relying on that subsection engaged in an abuse of rights contrary to the principles recognised in the judgment of the Court in *Halifax*?

(7) In the alternative if s. 4(9) is not incompatible with the Sixth Directive have the appellants achieved a tax advantage which is contrary to the purpose of the directive and/or s. 4?

(8) Even if s. 4(9) is not to be treated as implementing the Sixth Directive, does the principle of abuse of rights as established by the judgment of the Court in *Halifax* nevertheless apply to the transactions in issue by reference to the criteria laid down by the Court in *Halifax*?'

20. Written observations have been submitted by the Appellants, jointly by the Irish Government and Irish tax authority representative (the latter referred to as 'the Respondent'), the Italian Government and the Commission. The interested parties participating in the written stage, with the exception of the Italian Government, presented oral argument at the hearing held on 27 April 2017.

IV. Assessment

21. The referring court's eight questions can be grouped into four different themes:

– whether the principle of the prohibition of abuse of rights applies in this case (questions 1 and 2) (see Section B below);

– the conditions of application of the principle, namely: how to identify the essential aim of the transaction (question 4) and the purpose of the Sixth VAT Directive and national transposing legislation (question 7) (see Section C below);

– the consequences of abuse in terms of redefining and reassessing the transactions (question 3) (see Section D below);

– the consequences of section 4(9) of the VAT Act being considered incompatible with or not implementing the directive (questions 5, 6 and 8) (see Section E below).

22. I shall examine each of these themes in turn. However, before embarking on a detailed analysis, two introductory remarks on terminology are called for.

A. Terminological note

23. In its order for reference, the national court uses the term 'abuse of rights'. Those words are indeed often used by the Court, both in the area of VAT and in other substantive areas. However, seen globally, the Court in practice employs in its case-law a wide range of expressions to refer to similar or identical phenomena. Those include references to the 'principle that abusive practices are prohibited',[7] that 'EU law may not be relied on for abusive or fraudulent ends' or 'extended to cover abusive practices'.[8] Alternative vocabulary including, for example 'circumvention',[9] 'avoidance',[10] 'wholly artificial arrangements' is also common.[11]

24. The term 'abuse of rights' is, in my view, more appropriate in situations involving relationships between private individuals, where a party is seen to exercise, for example, existing property rights or rights arising under a contract, in an *unreasonable, ill-intentioned or harmful* way. There is thus no doubt that a party is the bearer of those rights (in the sense of legal entitlements); what may be problematic is the manner in which that party exercises them.

25. That situation contrasts with the type of alleged abuse being discussed in the present case, where there is effectively an argument about *the scope of application* of EU legal provisions, and whether they are being invoked in an 'artificial' way, which fails to fulfil legislative purpose.[12]

26. In other words, in the area of public law, the more pertinent notion for capturing what is really aimed at is 'circumvention', not the essentially private law notion of 'abuse of rights'. However, since the term 'abuse' is now widely used in EU case-law and discourse, I shall stick to it. However, I prefer and will use in this Opinion the expression 'abuse of law', which at least hints slightly more at the public law context of the notion.

27. Next, the absence of standardised terminology betrays a deeper diversity of approach to and application of the prohibition of abuse in the Court's case-law. It reveals in fact a more fundamental question: is there one general principle of the prohibition of abuse of law, or are there rather area-specific principles?

28. For example, in the area of VAT, the 'artificial' nature of transactions is a key condition. Indeed, the basic position of the Commission in this case — albeit expressed in a somewhat veiled way — is basically that artificiality of transactions *equals* abuse if it reduces VAT liability. By contrast, for example, in the area of free movement, less (and sometimes virtually no) importance is given to artificiality.[13]

7 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 35).

8 See, inter alia, judgments of 21 February 2006, *University of Huddersfield* (C-223/03, EU:C:2006:124, paragraph 52); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 68 and 69 and the case-law cited); of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804, paragraph 25); of 13 March 2014, *SICES and Others* (C-155/13, EU:C:2014:145, paragraphs 29 and 30); and of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 32). See also judgment of 22 December 2010, *RBS Deutschland Holdings* (C-277/09, EU:C:2010:810, paragraph 47).

9 Judgment of 10 January 1985, *Association des Centres distributeurs Leclerc and Thouars Distribution* (229/83, EU:C:1985:1, paragraph 27).

10 Judgments of 3 December 1974, *van Binsbergen* (33/74, EU:C:1974:131, paragraph 13), and of 5 October 1994, TV10 (C-23/93, EU:C:1994:362, paragraph 21).

11 On this terminological menagerie, see, for example, Cerioni, L., 'The Abuse of Rights in EU Company Law and EU Tax Law: A Re-reading of the ECJ Case-Law and the Quest for a Unitary Notion', Vol. 21, *European Business Law Review*, 2010, p. 783 to 813.

12 For a more extensive taxonomy of abuses and discussion on the distinctions between abuse of law and abuse of rights, see Saydé, A., *Abuse of EU Law and Regulation of the Internal Market*, Hart Publishing, Oxford, 2014, pp. 16 to 31.

13 See, for example, judgments of 23 September 2003, *Akrich* (C-109/01, EU:C:2003:491), and of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088). On that point see also de la Feria, R., 'Prohibition of Abuse of (Community) Law: the Creation of a New General Principle of EC law through Tax', Vol. 45, *Common Market Law Review*, 2008, p. 395 and p. 429.

29. I consider that it is fair to acknowledge the existence of that diversity and not to claim that there is a monolithic EU principle of prohibition of abuse of law.[14] Does that then mean that there still is one single principle of prohibition of abuse of law that is applied differently in different areas? Or does it rather mean that there are multiple area-specific principles?

30. Intriguing as that question is, I do not consider it necessary to address it in detail here. In practical terms, answering it is essentially a question of definition and the correlating level of abstraction to be chosen for that purpose. At a high level of abstraction, there might indeed be one unifying proto-idea of the principle of abuse, its blurry shadow flickering somewhere on the wall of Plato's allegorical cave. However, once one seeks to gain a sharper picture, and looks in particular into the individual conditions of abuse in the specific areas of law, then considerable diversity becomes apparent.

31. For these reasons, in this Opinion, which is indeed not concerned with the conception of new grand principles but with mundane questions of practical detail, I shall refer to the 'principle of prohibition of abuse of law in VAT', discussing the conditions and their application in the specific area of VAT.

B. First and second questions: applicability of the principle of prohibition of abuse of law in VAT

32. The referring court's first and second questions in substance relate to the *degree of precision* of the EU law principle prohibiting abuse of law in VAT and its *temporal application*. At the time of the facts in the main case, were the principle and its conditions of application sufficiently precise to be practically capable of application in this case?

33. That is a wholly legitimate query, in particular given that the judgment in *Halifax*, which specified the conditions of and applied the principle prohibiting abuse of law in VAT for the first time, postdates the facts of the main case. However, the referring court's questions are couched in terms of direct effect, absence of implementing measures and the possibility of a general principle of law being directly effective against an individual. As I will explain in this section, the issue of direct effect is, technically speaking, not relevant in relation to Court's case-law, including case-law confirming the existence of a general principle of law.

34. This section is structured as follows: first, I shall address, in general, the nature and the absence of (legislative) implementation of the case-law of the Court and the general principles of EU law established thereby (1); second, I will look into potential temporal limitations of decisions of the Court (2); finally, I will bring those two streams together and apply them to the present case (3).

1. Implementation and temporal effects of case-law and general principles

35. First, as regards the temporal application of the Court's case-law, the general rule is that of *incidental retrospectivity:* the Court provides interpretation of provisions of EU law *ex tunc*, which then becomes immediately applicable to all ongoing (and exceptionally even closed[15]) cases applying the same provision. Case-law clarifies and defines the meaning and scope of rules of EU law as they must be or ought to have been understood and applied from the time of its entry into force. It follows that those rules as interpreted may be applied even to legal relationships which arose and were established before the relevant Court judgment(s).[16]

14 For the confirmation of considerable differences existing in the various areas of EU law, see, for example, de la Feria, R., and Vogenauer, S., (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford, 2011.

15 See, to that effect, judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 28), or that of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 63).

16 Judgment of 6 March 2007, *Meilicke and Others* (C-292/04, EU:C:2007:132, paragraph 34).

36. With regard to the potential implementation of the case-law of the Court, the Court's interpretations of legal provisions 'graft themselves' onto those provisions. In accordance with the separation [17] or 'horizontal and vertical allocation' of powers, [18] the Court's mission is to find the law, not to create it. [19]

37. For those reasons, EU case-law does not need to be 'implemented' in order to have effects. Sometimes, the case-law may well be (partially) codified. On other occasions, that case-law will be taken into account when new versions of the relevant legislation are being enacted or amendments made. That is all possible; but it is certainly not a precondition for the applicability of that case-law. Case-law does not need to be legislatively implemented in order to take effect.

38. Second, as regards general principles, it could certainly be mooted that, since they are *general* and they are *principles*, they apply without any temporal limitations once their existence has been 'discovered'. As such, they are independent of any legislation giving rise or even effects to them and of that legislation's own temporal limitations.

39. However, I do not think such a total absence of temporal limitations on the application of general principles to be a very sensible proposition, on a number of levels. Leaving aside all of the theoretical and ontological questions, there are also a number of practical concerns. One in particular stands out: if the existence of a general principle of EU law will only be authoritatively confirmed by a decision of the Court, whose temporal effects are themselves limited, could the general principle itself established by the same decision enjoy not only the same *incidental retrospectivity*, but essentially *full retroactive application* beyond the rules normally applicable to case-law of the Court?

40. For all practical purposes therefore, a general principle of EU law the existence of which has been confirmed by a decision of the Court, will *share* with regard to the two key elements addressed here, the same characteristics as the case-law of the Court: it will also apply to ongoing cases and it will not require specific implementation in order to take effect.

41. For the above reasons, 'direct effect', and specific transposition are not preconditions for the application of the general principles of EU law. [20] In assessing transactions, the EU rules on VAT and national rules transposing them must be applied in the light of and conformity with the general principles developed by case-law, including the principle of prohibition of abuse of law in VAT. That is, moreover, the case for transactions that took place before the judgment in *Halifax*, but the assessment of which was still ongoing at the time that that judgment was handed down.

17 See, for example, Steiner, E., 'Comparing the Prospective Effect of Judicial Rulings across Jurisdictions', Springer International Publishing, Switzerland, 2015, pp. 12 to 13; and Lang, M., 'Limitation of temporal effects of CJEU judgments: Mission impossible for the governments of EU Member States', in Popelier, P., et al. (eds) *The Effects of Judicial Decisions in Time*, Intersentia, Cambridge, 2014, p. 245.

18 Lenaerts, K., and Gutiérrez-Fons, J.A., 'The Constitutional Allocation of Powers and General Principles of EU law', Vol. 47, *Common Market Law Review*, 2010, p. 1629 and pp. 1645 to 1649.

19 From this point of view firmly rooted in the perception of the role of higher instance judicial decisions of its Member States — see, for example, the general comparative reports in MacCormick, D.N., and Summers, R.S., (eds), *Interpreting Precedents: A Comparative Study*, Ashgate Publishing, Dartmouth, 1997. By contrast, where, in the individual case, the finding of the law stops and its creation begins is a different but certainly not novel discussion. As early as in 1934, Arthur Goodhart referred to it as something that has been dominating English and American legal thought for centuries (Goodhart, A.L., *Precedent in English and Continental Law*, Stevens and Sons, London, 1934, p. 14). See also Cross, R., and Harris, J.W., *Precedent in English Law*, 4th Ed., Clarendon Press, Oxford, 1991, pp. 27 to 34.

20 See, in that sense in relation to abuse of law in VAT, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 54 to 60).

2. Temporal limitations

42. The Court has on certain occasions limited the effects of its judgments temporally. Such limitations are exceptional.[21] The Court will only do so for mandatory reasons of legal certainty,[22] and subject to two conditions, namely that 'those concerned should have acted in good faith and that there should be a risk of serious difficulties [due to the judgment]'.[23] Further, if there is already case-law on the matter, then the Court will not impose such limitations.[24]

43. There is a common theme to all of these conditions and their applications: foreseeability. That is also why, for example, the Court might exceptionally impose temporal limitations only in the first case that provided certain interpretation of the law, but not in subsequent decisions confirming the same approach. On the other hand, it ought also to be acknowledged that in general, the further the Court develops the law beyond the specific wording of the interpreted provisions, the more difficult it arguably becomes to maintain the rule of full *ex tunc* application of those judicial pronouncements.[25]

3. Application to the present case

44. The general propositions raised under Sections 1 and 2 above serve as a basis for answering the referring court's first and second questions.

45. Since the *Halifax* case, the principle of prohibition of abuse of law in VAT (subject to fulfilment of the 'objective' and 'subjective' conditions) became applicable to all ongoing cases where it was relevant, without the need for Member States to adopt specific measures implementing that principle.

46. In concrete terms, for the purposes of assessing transactions, Member State tax authorities must interpret and apply the Sixth VAT Directive and national measures transposing that directive in the light of that principle. Such is the case also in relation to assessments ongoing at the time of the Court's judgment in *Halifax* but relating to transactions predating that judgment.

47. I understand the concerns of the referring court that such an approach, even if fully compliant with the general rules concerning the temporal effects of the case-law of the Court outlined above, could raise issues of legal certainty. However, in my view, this is clearly not an exceptional case of the type that would potentially justify limiting the temporal effects of *Halifax*. I wish to stress five points in particular in that regard.

48. First, the prohibition of 'abusive practices' or 'abuse of rights' has been applied by the Court since the 1970s in a wide range of substantive areas and in terms not specific to those areas.[26] That broad use of the notion serves to confirm its 'general, comprehensive character which is naturally inherent in general principles of law'.[27]

21 See, for example, judgments of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 72), and of 28 September 1994, *Vroege* (C-57/93, EU:C:1994:352, paragraph 21).

22 Judgments of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 74), and of 28 September 1994, *Vroege* (C-57/93, EU:C:1994:352, paragraph 21).

23 Judgment of 28 September 1994, *Vroege* (C-57/93, EU:C:1994:352, paragraph 21). See also judgment of 12 October 2000, *Cooke* (C-372/98, EU:C:2000:558, paragraph 42). In general see, for example, Düsterhaus, D., '*Eppur Si Muove!* The Past, Present and (possible) Future of Temporal Limitations in the Preliminary Ruling Procedure', *Yearbook of European Law*, 2016.

24 Judgment of 23 May 2000, *Buchner and Others* (C-104/98, EU:C:2000:276, paragraph 40).

25 It might be added that the problem is certainly not new and certainly not limited to the EU legal order. For a comparative overview see, for example, Steiner, E., op. cit. sup., in footnote 17, or Popelier, P., et al., op. cit. sup., in footnote 17.

26 For a list of examples see footnote 41 of Opinion of Advocate General Poiares Maduro in *Halifax and Others* (C-255/02, EU:C:2005:200); or the individual substantive chapters in de la Feria, R., and Vogenauer, S., (op. cit. sup., in footnote 14). As stated by Schammo, P., 'the case-law on abuse of rights now cuts across the entire spectrum of EC law' (Schammo, P, 'Arbitrage and Abuse of Rights in EC Legal System', Vol. 14, *European Law Journal*, 2008, p. 359). Or, more tweetably, although perhaps not entirely optimistically: 'abuse is everywhere in Union law' (Saydé, A., op. cit. sup., in footnote 12 at p. 13).

27 Judgment of 15 October 2009, *Audiolux and Others* (C-101/08, EU:C:2009:626, paragraph 50).

49. Second, a number of provisions in the Sixth VAT Directive, including Article 13B, have contained explicit references to prevention of abuse since 1977.[28] Thus, just reading through the provisions of the Sixth VAT Directive, the fact that there is a prohibition of avoidance and abuse inherent in the system of that directive would hardly come as a surprise. More generally, the prohibition of abuse of law was also explicitly endorsed by the legislature over two decades ago in Regulation No 2988/95 as a requirement for the protection of the EU's financial interests.[29]

50. Third, the prohibition in the aforementioned regulation laid down two conditions for finding abuse: an objective condition (whether legislative purpose is fulfilled) and a subjective condition (artificial nature of the transactions).[30] In 2000 (that is before the facts in the main case) the Court had already identified in its judgment in *Emsland-Stärke* precisely the same conditions as those underlying the general prohibition of abuse of law. When the Court confirmed, in 2006 in the *Halifax* case, that those conditions also applied in the field of VAT, it did not modify them.[31]

51. As already acknowledged,[32] there are differences in the specific application of the principle of prohibition of abuse of law in different areas. The Court's judgment in *Halifax* was indeed the first explicit confirmation of the conditions and application of the principle in the field of VAT. Nonetheless, given all the points just discussed, it was certainly not a surprising or revolutionary interpretation of the principle departing from extant case-law. It was also coherent with references to preventing abuse already appearing in the Sixth VAT Directive and the regulation on the protection of the EU's financial interest.

52. Fourth, limiting the effects of a judgment in time already poses challenges in terms of objectivity of the law.[33] Any decision to limit the temporal effects of a judgment should therefore only be taken in the judgment itself. Since such a limitation was not imposed in the *Halifax* case itself, it is difficult to see why, apart from in truly exceptional circumstances, it should be imposed a decade later and in relation to a different case.

53. Fifth, as mentioned above,[34] one of the preconditions to limiting the temporal effects of a judgment is that the parties seeking to benefit from that limitation acted in good faith.It is true that 'bad faith' is not a separate condition for a finding of abuse (and indeed there is no implication that the Appellants acted in bad faith). However, to the extent that the objective and subjective conditions for a finding of abuse are fulfilled, it seems somewhat incoherent to conclude that the taxpayer nonetheless acted completely in good faith so as to justify the exceptional step of limiting the temporal effects of a Court judgment.

54. Finally, as already confirmed by the Court, in cases where the conditions of abuse are fulfilled, the taxpayer cannot then seek to rely on legal certainty or legitimate expectations to somehow legitimise such abuse.[35]

28 See also Articles 13A, 14 and 15 referring to 'evasion, avoidance and abuse'. Articles 13, 14, 15 and 27, Article 28c and Article 28k also refer to 'avoidance' (in the version applicable at the material time).

29 See Article 4(3) of Council Regulation (EC, Euratomn) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

30 Article 4(3) of Regulation No 2988/95 provides that: '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.'

31 Judgment of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695).

32 Above, point 29 of this Opinion.

33 Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 71).

34 Point 42 of this Opinion.

35 See judgments of 8 June 2000, *Breitsohl* (C-400/98, EU:C:2000:304, paragraph 38), and of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 60), reflecting the Latin maxim *nemo propriam turpitudinem allegare potest*.

55. I therefore see no reason to limit the temporal effects of the judgment in *Halifax* in relation to the present case.

4. Conclusion

56. In the light of the foregoing, I propose that the Court respond to the referring court's first and second questions as follows:

The provisions of the Sixth VAT Directive and national measures transposing that directive must be interpreted in the light of the general EU law principle of prohibition of abuse of law in the field of VAT. That is also the case:

– in the absence of any national measures, whether legislative or judicial, 'giving effect' to that principle;

– in cases such as the one before the referring court, where relevant transactions were completed before the Court's judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121).

C. Fourth and seventh questions: conditions of application of the principle of abuse of law in VAT

57. By its fourth and seventh questions, the referring court seeks guidance on the conditions for finding an abuse of law. Whilst it is ultimately for the national court to establish the fulfilment of those conditions,[36] the Court can assist by offering clarification on how those conditions should be interpreted and applied.

1. The two conditions for finding abuse of law in VAT cases

58. In order for it to be found that an abusive practice exists, the tax authority of a Member State bears the burden of proving that two conditions are fulfilled.

59. First, it must be apparent 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' ('the *objective condition*'). 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' ('the *subjective condition*').[37]

60. Those two conditions are separate, distinct and cumulative. That is to my mind obvious from the way they are generally set out in the Court's case-law and interpreted in the light of specific factual situations. The 'objective' condition relates to legal purpose of the legislature and whether that has been fulfilled. The 'subjective' condition relates to practical purpose of the transactions undertaken. I shall consider each of them in turn below.

36 Judgments of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 54), and of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 76).

37 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 86).

2. Objective condition: is the tax advantage contrary to the purpose of the 'relevant provisions'?

61. Question 7 asks whether the Appellants have achieved a tax advantage contrary to the purpose of the national legislation and the directive. This Court is only competent to respond to that question in so far as it relates to the purpose of the directive.

62. By way of preliminary remark, it might be tempting for a tax authority to say that the purpose of the Sixth VAT Directive is to transfer money from taxpayers to the State. Any decrease in fiscal receipts, and so any 'tax optimisation', would therefore be contrary to such an overall purpose of tax legislation.

63. Such a proposition is clearly incorrect. The Court has confirmed on several occasions 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 … taxpayers may choose to structure their business so as to limit their tax liability'. [38]

64. In other words, there is no legal obligation to pay the maximum tax possible. Therefore, the 'purpose' aimed at within the objective condition of the *Halifax* test cannot be simply the *overall* purpose of all tax legislation: to raise tax. What then might be the *specific* 'purpose' in this context?

(a) Case-law on the purpose of 'relevant provisions'

65. I will begin by making a basic observation about the phrasing of the question, which is fundamental to the reasoning that follows, namely: case-law does not refer to failure to fulfil the purpose of 'the Directive' in general terms, but rather the 'relevant provisions' thereof. [39] That is amply confirmed in the practical application of the condition by the Court. [40] Therefore, a finding that the objective condition is fulfilled in principle requires (i) the identification of 'relevant provisions', (ii) the purpose thereof, and (iii) a demonstration that that purpose has not been met. [41]

66. A closer analysis of the case-law reveals that the above test of purpose is handled in slightly different ways. In order to illustrate this and to prepare the ground for the assessment of purpose in the relevant provisions in the present case, I set out below three examples from the field of VAT: *Halifax*, *Part Service* and *WebMindLicences*. [42]

38 See, for example, judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 73), and of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804, paragraph 27).

39 See, for example, judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 74), and of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804, paragraph 29); although there are some limited exceptions in other areas of application of the principle of prohibition of abuse of law (see, for example, judgment of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 33), which refers to 'rules' rather than 'relevant provisions').

40 See, for example, in relation to VAT, judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 79 and 80) (Article 17 of the Sixth VAT Directive); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 60) (Article 11(A)(1)(a) of the Sixth VAT Directive); and of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraphs 38 and 41) (Article 43 and Article 56(1)(k) of Directive 2006/112, replaced by Article 45 and Article 59(k), as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11) (Directive 2006/11 replaced the Sixth VAT Directive). That fact is also arguably reflected in the history of the 'objective condition', in so far as hindsight allows us to reconstruct that history. Thus, in cases involving alleged abuse, already before the two-pronged test was articulated in *Emsland-Stärke* and, later in the field of VAT, in *Halifax*, the Court considered whether the objective of *specific provisions* had been met (see, for example, judgments of 12 May 1998, *Kefalas and Others* (C-367/96, EU:C:1998:222, paragraph 23), and of 23 March 2000, *Diamantis* (C-373/97, EU:C:2000:150, paragraphs 33 and 34)), both relating to Article 25(1) of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1).

41 I note that in *Emsland-Stärke*, the case at the origin of this condition, the Court did not look at this condition, but simply stated that 'the Bundesfinanzhof considers that the facts described in the first question referred for a preliminary ruling establish that the objective of the Community rules has not been achieved'. Judgment of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 55).

42 Judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108); and of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832).

67. In *Halifax*, the concern of abuse essentially arose from the structuring of transactions in such a way that companies in the Halifax group were able to maintain exempt status with regard to output tax and yet deduct all input tax in relation to those transactions. The Court interpreted Article 17(2), (3) and (5) of the Sixth VAT Directive as meaning that the right of deduction of input tax read in the light of the principle of fiscal neutrality requires a link between an input and an output transaction.[43] It would be contrary to the purpose of those rules to allow a taxable person who normally engages in *no* transactions conforming with the deduction rules to fully deduct all input VAT.[44]

68. In the *Part Service* case,[45] the companies involved had split the contracts for leasing of vehicles into discrete parts (including insurance, financing, brokerage and rental). The Court relied on the rule that, where there are several formally separate transactions, they must nonetheless be assessed together where 'in the course of a purely objective analysis, it is found that there is a single supply'.[46] In such cases, separate VAT treatment of the supplies would be 'contrary to the objective of Article 11(A)(1)(a) of the Sixth Directive, namely the taxation of everything which constitutes consideration received or to be received from the customer'.[47]

69. In *WebMindLicences*,[48] the companies involved had entered into a series of transactions such that, on the face of it, relevant licences were being supplied from Portugal and not Hungary (the latter having a much higher rate of VAT for those types of transactions). In its judgment in that case, the Court focused on the purpose of the specific provisions in Directive 2006/112 defining the place of supply of services.[49] It held that there would be no abuse if the services were in fact supplied from Portugal. However, 'the position [would be] different if the services are in fact supplied in [Hungary]'.

70. Thus, in all the above cases, it is clear that the purpose of specific provisions of the applicable directive was considered and indeed must be taken into account in order to be able to determine whether the 'objective condition' is met.

(b) The Commission's proposed conflation of the two conditions

71. None of the written pleadings clearly and explicitly indicate what the 'relevant provisions' are for the purposes of identifying a potential abuse in this case.

72. In the oral hearing, the Commission referred to the collection or set of VAT provisions relevant to this case and cited Article 2(1), Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive. The Commission further stated at the hearing that the purpose of those provisions is to ensure the 'proper application' or 'normal tax treatment' of the transactions.

73. I agree that those are the applicable provisions.[50] But I do not find that to be a convincing statement of purpose. The Commission's argument is simply circular.

43 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 79).

44 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 80). However, see the judgments in *Weald Leasing* and *RBS*, which appear to take a somewhat different approach: judgments of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804), and of 22 December 2010, *RBS Deutschland Holdings* (C-277/09, EU:C:2010:810, paragraphs 44 to 45).

45 Judgment of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108).

46 Judgment of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 52).

47 Judgment of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 60).

48 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832).

49 Initially Article 43 and Article 56(1)(k) of Directive 2006/112 and subsequently Article 45 and Article 59(k) following amendment by Directive 2008/8.

50 Although Article 2(1) adds little and could potentially be quoted as relevant in any case involving the supply of goods (it could have been referred to, for example, in the judgments in *Halifax* or *Part Service* discussed above, but was not).

74. It is obviously desirable that all the provisions of the Sixth VAT Directive are properly applied in such a way that transactions receive normal tax treatment. But the question here is precisely: what is a correct assessment? In this case, the whole issue arises from the fact that there is a 'technically' correct assessment. In the words of *Halifax* there has been 'formal application of the conditions laid down by the relevant provisions of the Sixth Directive'[51] to all the transactions.

75. When pressed on that point at the oral hearing, the Commission clarified that what it meant was that the *purpose of the relevant provisions is the taxation of the real, substantive operation*. Since the Long-Term and Short-Term Leases were not real but contrived, they should be ignored.

76. I will assume for the moment that the Commission is correct and the purpose of those provisions is the taxation of the 'real, substantive transactions'. If that is so then, in practice, the focus shifts entirely to the second 'artificiality' or 'subjective' condition of the test for abuse laid down in *Emsland-Stärke* and *Halifax*. Thus, if that condition is met and a transaction is indeed artificial (not 'real' or 'substantive') then, a fortiori application of the VAT rules to those transactions *cannot fulfil their purpose*.[52]

77. The question of which transactions are 'real' or 'substantive' and which are, by contrast, 'artificial' or 'contrived' becomes completely determinative. The two conditions collapse into one.

78. There are, in my view, a number of significant problems with that approach. I will highlight four of them.

79. First, it effectively does away with the first prong of the *Halifax* test. I do not consider that to be the correct approach, but if it is, then it is important to state so explicitly. As confirmed, for example, in *Halifax*, 'as the Court has held on numerous occasions, Community legislation must be certain and its application foreseeable by those subject to it … That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them'.[53]

80. There is no disguising the fact that the principle of prohibition of abuse of law is in tension with the principle of legality and legal certainty. It is therefore important that its conditions are as clear as possible.[54] I also note that the reasoning above justifying the immediate application of *Halifax* to ongoing cases was partly premised on the understanding that the conditions for finding abuse were clear at least from 2000, that is the date of the judgment in *Emsland-Stärke*.[55] If the two conditions enunciated in that case now collapse into one, that premise in my view no longer holds.

51 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 74).

52 That proposition comes extremely close to what was suggested by the Commission as a solution to the question in the *Emsland-Stärke* case, but which was not followed by the Court. Thus the Commission had proposed that there should be a finding of abuse where 'the commercial operations at issue were for the purpose of obtaining an advantage which is incompatible with the objectives of the applicable Community rules *in that* the conditions for obtaining that advantage were created artificially' (see judgment of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 43)) (emphasis added).

53 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 72).

54 If they were not, it could be suggested that as to its practical effects, the prohibition of abuse of law in public law is at odds with the principle of legality. The positivist dream of predictability of the law combined with the constitutional principle of legality of all public action mean that when an individual is facing the public administration, including of course tax administration, he should be able to predict, on the basis of valid law, whether his actions will be either allowed (legal) or not allowed (illegal). Further, within that dichotomy, all that is not expressly prohibited is allowed. To this classic dichotomy, the prohibition of abuse of law, certainly one with unclear conditions, arguably adds a third, grey zone, which might be, for a more traditionally minded positivistic lawyer, deeply disquieting. It effectively means that there is a third set of transactions, which, in spite of being *ex ante formally* allowed, may be *ex post* re-evaluated as *materially* illegal. With tongue in cheek, any such grey zone with unclear conditions could effectively be called 'Schrödinger's legality': it is only by later opening the box that one will find out whether the transaction inside the box was legal or not.

55 Above, point 50 of this Opinion.

81. Second, even if it were maintained that the two conditions technically continue to apply,[56] albeit with 'artificiality' being the determining factor in both, I consider that such an approach at the very least sits uneasily with the approach taken in previous case-law such as *Halifax*, *Parts Service* and *WebMindLicences*,[57] which more clearly identified the provisions at issue and their purpose.

82. Third, the two conditions were first stated in *Emsland-Stärke*. In that case, and in their most common form in subsequent cases, they are effectively a 'copy paste' of the conditions of the anti-avoidance provision in Regulation No 2988/95 on protection of the EU's financial interests (Article 4(3)).[58] It might only be speculation but it is perhaps fair to assume that that provision would have applied in *Emsland-Stärke* had the regulation been applicable *ratione temporis*.[59] Indeed, Article 4(3) of Regulation No 2988/95 and the two conditions of abuse have since been treated by the Court as substitutable.[60] In an already overly complex area, evolution of the test for abuse along the lines suggested by the Commission — implying conflation of the objective and subjective conditions — would raise difficult questions about how the regulation and principle are to interact in future.

83. Finally, application of the conditions of the principle of prohibition of abuse of law in VAT inevitably has to be modulated to some extent in the different fields to which it applies. However, in my view it becomes even more difficult (perhaps even impossible) to reconcile the notion of abuse as redefined in the way suggested (a test of artificiality) with the notion of abuse as applied in other cases. Thus, in free movement and citizenship cases, the issue of artificiality has on a number of occasions not only been considered non-determinant, it has in practice been treated as almost irrelevant.[61]

(c) Assessing respect for the 'purpose' in the present case

84. In the light of the foregoing, I propose rejecting the approach suggested by the Commission and rather maintaining an approach that more accurately reflects the Court's existing case-law.

85. In the present case, the alleged abuse consists in the artificial fulfilment of the conditions for (i) a first supply of the properties, and (ii) the exemption of subsequent supplies (which are in fact two sides of the same coin).

86. It is therefore necessary to consider the purpose of the imposition of VAT on supplies 'before first occupation' and their subsequent exemption, as reflected in Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive.

87. The basic approach to imposition of VAT on transfers of properties can be summarised in crude terms as: tax the first sale, exempt the rest. The purpose behind this is clarified in the original Commission proposal and case-law of the Court.

56 Which would, in my view, be a rather 'contrived' reading.

57 As discussed above, points 66 to 69 of this Opinion.

58 See also above in points 49 to 51. It is worth adding that in *Emsland-Stärke*, Advocate General Alber presented the matter the other way round, stating that Article 4(3) 'does not create a new legal principle but merely codifies a general legal principle already existing in Community law' (Opinion of Advocate General Alber in *Emsland-Stärke* (C-110/99, EU:C:2000:252, point 80)).

59 In subsequent cases, where both the principle of abuse of law and Article 4(3) of Regulation No 2988/95 the Court has applied the general principle in the first instance (see judgment of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255)).

60 And done so rather explicitly in the judgment of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 52). See also judgment of 9 July 2015, *Cimmino and Others* (C-607/13, EU:C:2015:448).

61 Above, point 28 of this Opinion.

88. The explanatory memorandum attached to the Commission's original proposal stated 'that the construction and marketing of new buildings must be subject to the tax, in whatever capacity the vendor may be acting. To resolve difficulties in distinguishing between new buildings and old, the notion of first occupation has been used to determine the moment at which the building leaves the production process and becomes a subject of consumption, that is to say when the building begins to be used by its owner or a tenant'. The explanatory memorandum goes on to refer to properties being 'consumed' by virtue of the first occupation thereof and the possibility that a property 're-enters the commercial circuit' or is 're-commercialis[ed]'. [62]

89. That wording indicates that the notion of 'first occupation' is assimilated with the property 'leaving the production process', 'becoming the subject of consumption' or 'entering the commercial circuit'.

90. In its judgment in *Goed Wonen I*, the Court conceived of the exemption in similar terms stating that 'like sales of new buildings *following their first supply to a final consumer, which marks the end of the production process*, the leasing of immovable property must therefore in principle be exempt from taxation' (emphasis added). [63]

91. Thus, the purpose of the combined application of Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive can be rephrased as the application of VAT when immovable property enters the commercial circuit for the first time.

92. In my view, a transfer of the type described in the main case does not respect that purpose.

93. A combination of factors leads to that conclusion, in particular the following (based on my understanding of the reference): (i) the fact that the Long-Term Lease was concluded with an entity that was controlled by the appellants; (ii) the fact that the Long-Term Lease was renounced within a very short time after its signature compared with its total duration; and (iii) the fact that during that short period, a lease-back was in place in the form of the Short-Term Lease, with the net result that control over the properties was effectively never given up by the Appellants such that, taking into account all those circumstances, they appear not to have left the production process.

94. In the light of the above, and subject to final assessment by the national court, in cases such as these in the main proceedings, treatment of a long-term lease between connected parties, which is renounced very shortly after its conclusion and without any use being made of the property, as a 'supply before first occupation' would be contrary to the purpose of Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive.

3. Subjective condition: was the essential aim to obtain a tax advantage?

95. In relation to the 'subjective condition', the fourth question of the referring court asks essentially whether, in identifying that essential aim, the pre-sale transactions should be considered in isolation or as part of the transactions 'as a whole'.

96. It is useful to start by giving closer consideration to the meaning of 'essential aim'.

62 Proposal for a sixth Council Directive on the harmonisation of Member States concerning turnover taxes, Common system of value added tax: Uniform basis of assessment (COM(73) 950, 20 June 1973, *Bulletin of the European Communities*, supplement 11/73, at p. 9).

63 Judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506, paragraph 52). I note the apparent assimilation here by the Court of the notion of 'first supply' and 'first occupation'. See also judgment of 12 July 2012, *J.J. Komen en Zonen Beheer Heerhugowaard* (C-326/11, EU:C:2012:461, paragraph 21) which uses the term 'old buildings'.

97. The subjective test is presented in a range of different ways in the case-law. In addition to 'essential aim',[64] some judgments refer to the 'sole aim'[65] or 'sole purpose'[66] being the attainment of a '[wrongful]tax advantage'.[67] Others mix the two: 'essential aim … solely to obtain' a tax advantage.[68] Yet others refer to the commercial operations as not being 'normal'.[69]

98. All these different expressions of the subjective test have a common theme. They all ask: is there *any* economic reason for doing this *other than* reducing tax? The bar is set at different heights.

99. In *Part Service*, the Court held that there can be an abuse if the 'principal' aim is a tax advantage.[70] This implies a potentially very broad notion of abuse. In stark contrast, in *Halifax* and *Weald Leasing* it was held that there would be no abuse 'where the economic activity carried out *may* have some explanation other than the mere attainment of tax advantages' (emphasis added).[71] In *Malvi*, abuse required that the transactions be 'devoid of any economic and commercial justification'.[72]

100. The latter judgments, effectively taking a more restrictive approach to the notion of abuse, are more predominant. They also reflect the more commonly used wording 'essential aim', 'sole aim', or 'wholly artificial' arrangements.

101. In my view, the subjective test must be applied restrictively in line with the approach in cases such as *Halifax* and *RBS*. If the transactions at issue *may* have some economic justification other than a tax advantage, then the test is not fulfilled. That approach not only reflects the predominant case-law, it is also in line with the principle of legality,[73] which 'must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them'.[74]

102. With that approach to 'essential aim' in mind, I turn now to the specific point raised in the referring court's fourth question, namely: the essential aim of *which transactions* precisely?

103. The referring court proposes two alternatives: either (i) the pre-sales transactions, or (ii) the pre-sales transactions and the final sale taken together.

104. In my opinion, the latter is in any event the wrong frame of reference. It appears clear to me that, except in cases of tax fraud (which is not alleged here), if the net is cast widely enough, so as to include the whole construction process as well as the subsequent life of the property, some economic rationale going beyond a 'mere' tax advantage could always be found. Such an approach would effectively prevent the subjective condition from ever being fulfilled.

64 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 75 and 86).

65 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 35).

66 Judgment of 21 February 2006, *University of Huddersfield* (C-223/03, EU:C:2006:124, paragraph 51).

67 Judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 69 and 70), and of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804, paragraph 25).

68 Judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 75), and of 22 December 2010, *RBS Deutschland Holdings* (C-277/09, EU:C:2010:810, paragraph 49).

69 Judgment of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 32).

70 Judgment of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 45).

71 Judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 75), and of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804, paragraph 30).

72 Judgment of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 47).

73 For the potential dangers resulting from disregarding it, see again above, footnote 54.

74 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 72).

105. Thus, in the context of the present case, one or more of the pre-sales transactions is likely to be the relevant transaction in the present case. Beyond that general observation, I consider that it is ultimately up to the referring court to determine the transaction or set of transactions in relation to which an 'essential aim' should be sought and what that essential aim is.

106. In doing so the referring court must nonetheless take into account all the facts and circumstances of the case. That may include preceding or subsequent transactions.[75] In other words, in order to fully appreciate the 'essential aim' of the pre-sales transactions themselves, the referring court must consider the factual context more broadly.

107. Indeed, in the present case, if one were to completely abstract the pre-sales transactions from their broader context, there would be no tax advantage at all but rather a tax burden (since the advantage is a relative one and only arises because of the subsequent sale to third parties).

4. Conclusion

108. In the light of the foregoing, I propose that the Court answer the fourth and seventh questions as follows:

Question four

In a case such as that in the main proceedings, 'essential aim' should not be sought in relation to the pre-sales transactions and final sale taken together. It is for the referring court to determine the specific pre-sales transaction(s) in relation to which it is most appropriate to evaluate the 'essential aim' for the purposes of identifying a potential abuse of law in VAT.

Question seven

In cases such as those in the main proceedings where:

– a long-term lease is concluded between a taxable person and another, related taxable person;

– that lease is renounced within a very short time after its signature compared with its total duration; and

– during that short period, a lease-back was in place, with the net result that control over the leased properties was effectively never given up by the taxable person granting the long-term lease;

it would be contrary to the purpose of Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive to treat the long-term lease as a 'supply before first occupation' within the meaning of Article 4(3)(a) of that directive.

D. Third question: redefinition and reassessment of transactions

109. By its third question, the referring court essentially asks how the relevant transactions are to be redefined if the principle of prohibition of abuse of law applies in this case?

75 Judgment of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 35).

110. Where a breach of the principle of prohibition of abuse of law 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 abuse.[76] However, redefinition must go no further than is necessary for the correct charging of the VAT and the prevention of tax evasion.[77]

111. In the first place, it is therefore for the referring court to determine, on the basis of the guidance provided in reply to the first, second, fourth and seventh questions, whether certain elements of the transactions at issue in the main proceedings constituted an abusive practice.

112. If that is indeed the case, it would, secondly, be for that court to redefine those transactions so as to re-establish the situation that would have prevailed in the absence of the elements constituting the abusive practice.

113. Thus, if the national court concluded, for example, that the pre-sales transactions constituted a violation of the prohibition of the principle of abuse of law, those transactions should be disregarded for the purposes of assessing the Appellants' liability for VAT.

114. On the basis of the facts as set out in the referring court's request and subject to a final assessment by that court, the subsequent sale of the properties would then be deemed to constitute a first supply thereof. That sale should be assessed for VAT in accordance with applicable national rules, read in the light of EU law, in particular Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive.

115. As far as the institutional dimension of the referring court's third question is concerned, it can only be reiterated that it is up to national law to determine the institution competent to redefine and reassess the relevant transactions, in accordance with the principle of national procedural autonomy, subject to the principles of equivalence and effectiveness.

116. In the light of the foregoing, I propose that the Court answer the third question as follows:

– Where a breach of the principle of prohibition of abusive of law 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 abuse.

– In circumstances such as those in the main case, to the extent that the pre-sales transactions are disregarded in application of the principle of prohibition of abuse of law, and subsequent sales of the properties are thus deemed to constitute a first supply thereof, those sales should be assessed for VAT in accordance with applicable national rules, read in the light of EU law, in particular Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive.

E. Fifth, sixth and eighth questions: compatibility of section 4(9) of the VAT Act with the Sixth VAT Directive

117. The referring court's fifth, sixth and eighth questions are premised on the assumption that section 4(9) of the VAT Act is incompatible with and (therefore) does not implement the Sixth VAT Directive.

118. However, the source of the incompatibility or nature of the failure to implement the directive is not clear from the order for reference or the written and oral pleadings before the Court.

76 Judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 98); of 20 June 2013, *Newey*, (C-653/11, EU:C:2013:409, paragraph 50); and of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 52).

77 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 92).

119. In the case of absolute failure to transpose a directive, the legal situation is in some ways relatively clear. There are no implementing measures and therefore national law is incompatible with that directive. By contrast, in the present case Ireland did adopt measures to implement the Sixth Directive. Moreover, it has not been argued that in every practical scenario without exception the application of section 4(9) of the VAT Act fails to 'achieve the result' intended by that directive (to use the vocabulary of Article 288 TFEU). It is therefore not possible to say as a general and unqualified statement that (partial) incompatibility can be equated with an absence of implementing measures.

120. To go in further detail into those questions would in my view require better understanding of the nature of the purported incompatibility of section 4(9) of the VAT Act.

121. During the oral hearing, the Appellants stated that, in their view, the main incompatibility arose from section 4(6) of the VAT Act. That latter provision *exempts all first supplies of immovable property where no input tax is recoverable*. The Appellants consider that such an exemption is incompatible with Article 4(3)(a) and Article 13B(g) of the Sixth VAT Directive, to the extent that those EU provisions *require* the taxation of *all* first supplies of immovable property. Further, because section 4(9) of the VAT Act refers to section 4(6) of the VAT Act, the incompatibility of the latter with the Sixth VAT Directive also renders the former incompatible.

122. The Respondent and Irish Government dispute that reading of the legislation. They set out in their written submissions their own reading of the provision and the reasons for its adoption.

123. Thus, with regard to questions five, six, and eight, the Court finds itself in a position in which it is difficult to understand from the reference made by the national court what exactly the incompatibility of section 4(9) of the VAT Act with the Sixth VAT Directive would consist of; any such hypothetical incompatibility is sharply contested by the Irish Government. Even the Appellants have difficulties explaining what specific problem there would be in relation to section 4(9), apart from the fact that it refers to section 4(6) of the VAT Act. Furthermore, even if one were to accept the Appellants' explanation of the incompatibility, I struggle to see its relevance to the present case, since, as was confirmed at the oral hearing, input tax was recoverable in this case.

124. It is not the task of this Court to interpret national law. It is even less its task to arbitrate between different parties' interpretation thereof in cases where the existence and nature of the alleged incompatibility and/or failure to implement is not obvious and is clearly disputed.

125. As a result, and in the light of the foregoing, I consider that the Court lacks the necessary factual details to provide a useful answer, one that is not based on hypothesis and speculation, about the nature of the postulated incompatibility of section 4(9) of the VAT Act with the Sixth VAT Directive.

126. I therefore propose that the fifth, sixth and eighth questions should be rejected as inadmissible.

V. Conclusion

127. In the light of the above, I propose that the Court respond to the questions posed by the Supreme Court of Ireland as follows:

Questions 1 and 2

The provisions 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 and national measures transposing that directive must be interpreted in the light of the general EU law principle of prohibition of abuse of law. That is also the case:

– in the absence of any national measures, whether legislative or judicial, 'giving effect' to that principle;

– in cases such as the one before the referring court, where relevant transactions were completed before the Court's judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121).

Question 3

Where a breach of the principle of prohibition of abuse of law 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 abuse.

In circumstances such as those in the main case, to the extent that the pre-sales transactions are disregarded in application of the principle of prohibition of abuse of law, and subsequent sales of the properties are thus deemed to constitute a first supply thereof, those sales should be assessed for VAT in accordance with applicable national rules, read in the light of EU law, in particular Article 4(3)(a) and Article 13B(g) of the Sixth Council Directive.

Question 4

In a case such as that in the main proceedings, 'essential aim' should not be sought in relation to the pre-sales transactions and final sale taken together. It is for the referring court to determine the specific pre-sales transaction(s) in relation to which it is most appropriate to evaluate the 'essential aim' for the purposes of identifying a potential abuse of law in VAT.

Question 7

In cases such as those in the main proceedings where:

– a long-term lease is concluded between a taxable person and another, related taxable person;

– that lease is renounced within a very short time after its signature compared with its total duration; and

– during that short period, a lease-back was in place, with the net result that control over the leased properties was effectively never given up by the taxable person granting the long-term lease;

it would be contrary to the purpose of Article 4(3)(a) and Article 13B(g) of the Sixth Council Directive to treat the long-term lease as a 'supply before first occupation' within the meaning of Article 4(3)(a) of that directive.

Questions 5, 6 and 8

The fifth, sixth and eighth questions are rejected as inadmissible.