



The anti-avoidance doctrine in EU VAT LAW

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Outline

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- The principle of prohibition of abusive practices in EU law
- The principle of prohibition of abusive practices in Sweden
- Recent case law from the Court of Justice of the European Union (CJEU)
- Recent developments in Sweden
- Concluding remarks



Introduction

Starting points

- The Swedish Anti-avoidance Act (*lagen mot skatteflykt*, 1995:575) does not apply on VAT
- Historical reasons: Not possible to get an advance ruling in the field of VAT when the first law was introduced
- The CJEU has developed “the principle of prohibition of abusive practices”, which applies on VAT

Starting points

Subject to VAT under the EU VAT Directive

- (a) the **supply of goods** for consideration within the territory of a Member State by a taxable person acting as such;
- (b) the **intra-Community acquisition of goods** for consideration within the territory of a Member State by:
 - (i) a taxable person acting as such,
 - (ii) in the case of new means of transport, a taxable person, or a non-taxable legal person
 - (iii) in the case of products subject to excise duty, where the excise duty a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1);
- (c) the **supply of services** for consideration within the territory of a Member State by a taxable person acting as such;
- (d) the **importation of goods**.

Starting points

Deduction, Article 168 of the VAT Directive

- When the goods and services are purchased for carrying taxable transactions
- Or
- Some non-taxable transactions for instance export, services supplied in other EU-member states or intra-community supply of goods with a corresponding intra-community acquisition in another member state

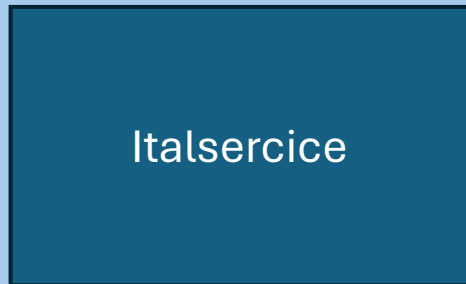
The background of the slide is a complex, three-dimensional maze made of white, rectangular blocks. The maze is composed of many interconnected paths and dead ends, creating a sense of depth and complexity. The lighting is soft, casting gentle shadows that emphasize the three-dimensional nature of the structure.

The principle of prohibition of abusive practices in EU law

C-425/06 Part service



Leasing – VAT
Low price



Financial service
VAT Exempt
High price

No or limited right to
deduct input VAT



A general principle of EU Law

- Justification ground in the context of the free movement (of persons for example)
- Where there are no explicit rules (GAARs or SAARs), for example in VAT
- EU GAARs – The Anti-tax-avoidance directive
- EU SAARs – Parent subsidiary directive, merger directive, interest – royalty directive

Is it the same principle? C-251/16 Cussens (AG)

“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**. 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.”



Gunnar Baldvinsson (2025)

<https://www.diva-portal.org/smash/get/diva2:1926169/FULLTEXT01.pdf>

Monist or pluralistic view

“While the concept of abuse can be considered somewhat pluralistic, as it depends on the specific context in which it is applied, the analysis performed here shows considerable similarities in the Court’s case law concerning what constitutes a deviation from economic reality. This indicates that the Court views tax laws based on relatively homogenous economic reality.”

The criteria (C-255/02) Halifax

1. **Tax Advantage Contrary to the Purpose of the VAT Directive**

The transactions must result in a tax advantage (such as deduction of input VAT or avoidance of output VAT) that is contrary to the objectives and purpose of the relevant VAT provisions.

2. **Essential Aim of Obtaining a Tax Advantage**

The essential aim of the arrangements must be to obtain that tax advantage. If the transactions have genuine economic substance or commercial justification beyond tax benefits, the principle does not apply.

The abusive transactions are redefined to re-establish the economic reality – principle of proportionality

C-425/06 Part service

Therefore, when it stated, in paragraph 82 of [Halifax], that in any event, the transactions at issue had the **sole purpose of obtaining a tax advantage**, it was **not** establishing that circumstance as **a condition for the existence of an abusive practice**, but simply pointing out that, in the matter before the referring court in that case, the minimum threshold for classifying a practice as abusive had been passed.

The reply to the first question therefore is that [...] there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the **principal aim** of the transaction or transactions at issue.

(There can also be economic objectives of the transaction)

Status and retroactivity (C-251/16 Cussens)

A general principle of EU Law

The principle that abusive practices are prohibited must be interpreted **as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly** in order to refuse to exempt from value added tax sales of immovable goods [...] carried out **before** the judgment of 21 February 2006, Halifax and Others (C-255/02, EU:C:2006:121), was delivered, and the **principles of legal certainty and of the protection of legitimate expectations do not preclude this.**

Marketing services

No right to deduct
input VAT



Financial
services
VAT Exempt



Clients

Paul Newey
UK

Marketing services – no
right to deduct input VAT

Financial services
VAT Exempt



Acquisition of
marketing
services

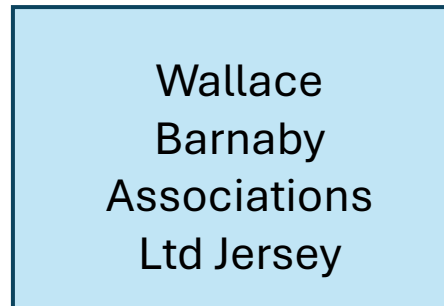


Advisory services

Consideration

Clients

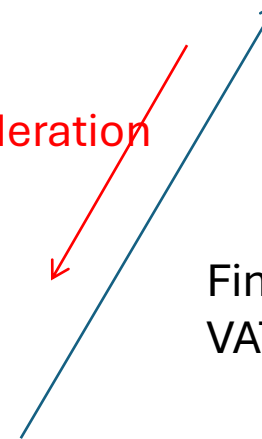
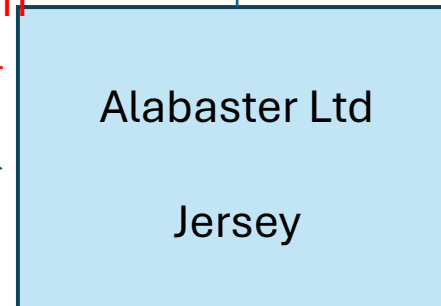
Financial services
VAT exempt



Consideration



Marketing



Tax exempt

Abuse according to the CJEU

- Taxable person supplying exempt transactions seeking to recover input VAT (C-255/02 Halifax)
- Seeking an exemption from or lowering VAT of outgoing transactions (C-251/16 Cussens, C-425/06 Part Service, C-131/13, C-163/13 och C-164/13, Schoenimport "Italmoda" Mariano Previti, C-171/23 UP CAFFE)
- Reducing the VAT on transactions by utilising divergences between VAT systems (C-653/11 Paul Newey, C-419/14 WebMindLicenses, C-276/18 KrakVet Marek Batko, C-277/09 RBS Deutschland Holdings)
- Lowering the VAT on a chain of supplies (C-410/17 A Oy)
- Subjecting a transaction to VAT to avoid another type of taxation (C-326/11 J.J. Komen)

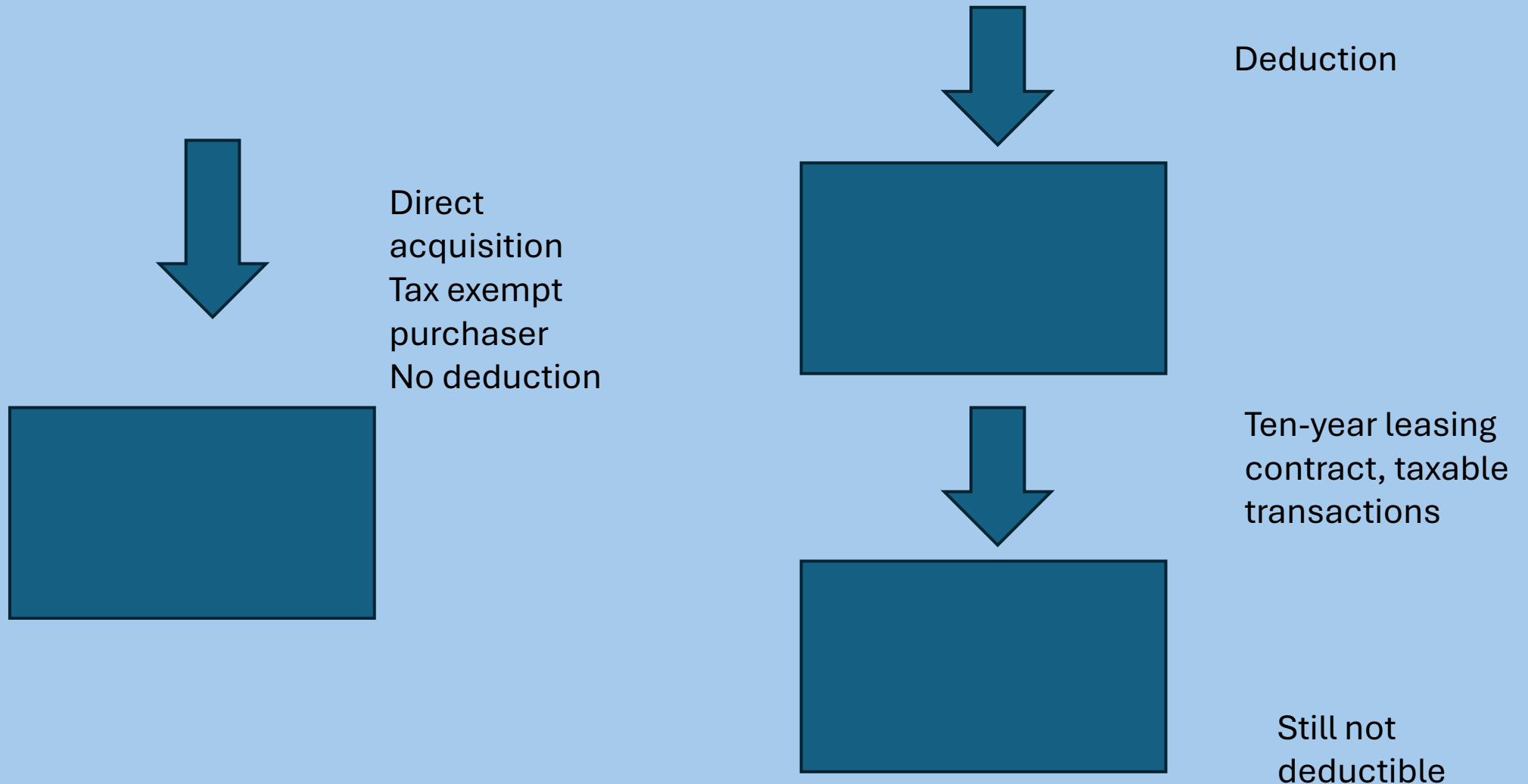
What is not abuse? (C-103/09 Weald leasing)

- The choice of a leasing transaction instead of purchasing the assets, where the purchaser has limited right of deduction
- Setting up a leasing company for that purpose
- The tax authority finances the VAT over time, but the VAT burden in total is the same
- No abusive practices because the tax advantage is not in conflict with the purpose of the relevant provisions of that directive and the national legislation transposing it

What is not abuse? (C-103/09 Weald leasing)

“ A taxable person **cannot be criticised** for choosing a leasing transaction which procures him **an advantage** consisting, as is apparent from the decision making the reference, **in spreading the payment of his tax liability, rather than a purchase transaction** which does not procure him any such advantage, provided that the VAT on that leasing transaction is duly and fully paid.”

What is not abuse? (C-103/09 Weald leasing)



The background of the slide is the Swedish flag, which consists of a blue field with a yellow Scandinavian cross. The cross is composed of a vertical bar and a horizontal bar that intersect in the center. The text is centered over this background.

The principle of abusive practices in Sweden

Högsta förvaltningsdomstolen (Swedish Supreme Administrative Court) HFD 2013 ref. 12)

- Missing trader case
- In the judgments of the Court of Justice of the European Union concerning value added tax mentioned here, the **Court has not stated that the application of the abuse principle would depend on any form of national implementation.** In several cases, such as in Halifax and others, **it appears to have been clear that there were no explicit national rules directly aimed at addressing abuse.**
- The principle applies without implementation into Swedish law, regardless of that the Swedish GAAR does not apply on VAT

The Swedish tax agency (*Skatteverket*)

The second condition described above means that the **Swedish Tax Agency** must be able to **demonstrate**, based on objective circumstances, that the transaction **has as its main purpose the achievement of a tax advantage**.

The starting point for the assessment should be the **economic and commercial reality**. When a transaction appears to be entirely artificial and the constructed transaction results in an unjustified tax advantage for someone, the condition is generally fulfilled.

According to the Swedish Tax Agency, a transaction is considered artificial when, **in view of the economic and commercial outcome**, the arrangement appears to be **an indirect route compared to the most straightforward procedure**. In assessing whether the transaction has as its main purpose the achievement of a tax advantage, various **legal, economic, and personal connections** between the parties involved in the transaction are also circumstances of relevance.



Recent case law from the Court of Justice of the European Union (CJEU)

C-331/23 Dranken Van Eetvelde (12 Dec. 2024)

- Joint liability for the payment of VAT
- In that context, it should be recalled that preventing **possible tax evasion, avoidance and abuse** is an objective recognised and encouraged by EU legislation on the common system of VAT and that the effect of the principle that the abuse of rights is prohibited is to **bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage.**

C-331/23 Dranken Van Eetvelde

The Court has thus ruled that Article 205 of the VAT Directive allows a Member State to hold a person **jointly and severally liable** for payment of VAT where, at the time of the supply to it, **that person knew or ought to have known that the tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid**, and to rely on presumptions in that regard, provided that such presumptions are not formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary, thereby creating a system of strict liability going beyond what is necessary to preserve the public exchequer's rights.

Traders who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain that is fraudulent or amounts to an abuse must be able to rely on the legality of those transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person

My analysis

- Equalizes fraud and abuse
- Ensure that their transactions **do not form part of** a chain that is fraudulent or amounts to **an abuse**
- Background: You lose your right to deduction if you know or should have known that the transaction form part of an abuse

C-241/23 Dyrektor Izby Administracji Skarbowej w Warszawie (8 May 2024)

- By its question, the referring court asks whether Article 73 of the VAT Directive must be interpreted as meaning that **the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter** must be determined in relation to **the nominal value of those shares** where those companies agreed that the consideration for that capital contribution was to be the issue value of those shares.

C-241/23 Dyrektor Izby Administracji Skarbowej w Warszawie

- That determination of the taxable amount for VAT does not, however, preclude [...] the referring court from being able to verify, taking into account all of the relevant circumstances, that the value on which the parties agreed actually reflects **economic and commercial reality**, and is **not the result of an abusive practice**.
- In the present case, however, there is **nothing in the documents before the Court to suggest that the issue value of the shares in question results from an abusive practice**.

The background of the slide is the Swedish flag, which consists of a blue field with a yellow Scandinavian cross. The cross is composed of a vertical bar and a horizontal bar that intersect in the center. The text is centered on the horizontal bar of the cross.

Recent developments in Sweden

No recent case law, and no case law since HFD 2013 ref. 12

Administrative court of appeal

KR 140-08

Company A carried out activities that included the rental of sports facilities as well as the sale of goods and food in connection with these facilities. The company rented premises from Property Company B and sublet them mainly to Sports Association C, which owned Company A. A significant part of Company A's revenue came from renting to Sports Association C, which had free access to the premises throughout the entire period. Company A **reported value added tax on the rental of premises** and the sale of goods/food, referring to the fact that the activity constituted taxable short-term rental of sports facilities and taxable sales.

No abusive practices but long-term rental = exempt and no deduction

No recent case law, and no case law since HFD 2013 ref. 12

Administrative court of appeal

KR 3232-15

Company A had purchased building materials at a below-market price from another company (Company B), which was later merged with Company A. The Swedish Tax Agency considered that the merger meant Company A would assume Company B's costs and that these should be included in the taxable amount.

No abusive practices.

“Although the preparatory works assumed that the methods were consistent, the Administrative Court clearly considers that the regulation regarding the taxable amount for self-supply of in-house services in Chapter 7, Section 5 of the Swedish VAT Act **deviates from the regulation in Article 77 of the VAT Directive** (cf. Eleonor Alhager; *Mervärdesskatt vid omstruktureringar* 2001, pp. 345–346). The implementation of the VAT Directive in this respect is therefore **deficient**. Since only Member States can be subject to obligations due to directives that have been poorly implemented or not implemented at all, **the EU law principle of abuse of law cannot, for this reason alone, be applied in the case** (cf. RÅ 1999 note 245, the CJEU judgment in Case C-255/02, *Halifax*, para. 74, and HFD 2013 ref. 12).”

Why is there not more case law in this field?

- VAT is an indirect tax – the taxable person is not the same as the one bearing the burden of tax. Normally no reason to do any tax-planning at all
- General trend in the society: Sustainable tax policies part of CSR
- The principles of the VAT system are simple
- The cases in national law seem to be dealt with by interpreting and applying the substantive rules
- For the most flagrant cases, specific anti-avoidance rules apply (under-prices transactions to persons without right of deduction)

Concluding remarks

- The principle of prohibition of abusive practices is a general principle of EU law directly applicable in the member states
- Tax Advantage Contrary to the Purpose of the VAT Directive
- Essential Aim of Obtaining a Tax Advantage
- Abusive transactions are redefined
- The principle of proportionality must be taken into regard
- Many cases from the CJEU on the principle of abusive practices
- Seems difficult to apply in the national Swedish context – maybe because abusive situations do not occur so easily in the Nordic context



Thanks for your attention

I am happy to receive your questions, comments and reflections!