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The *Emsland-Stärke* abuse of law test in the law of agriculture and free movement of goods

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I. Introduction

The law of agriculture and free movement of goods provides an interesting context within which to examine the application and development of the principle of abuse of law:¹ on the one hand, the latter featured in the relevant case-law as early as the 1970s; on the other hand, it was within this area that the Court responded to various calls about formalising the criteria for the application of the abuse of law principle and articulated the *Emsland-Stärke* test.²

This analysis in this chapter is structured as follows. First, the application of the principle of abuse in the period preceding the *Emsland-Stärke* test will be outlined. Second, the *Emsland-Stärke* test, its strands, and implications will be analysed. Third, the subsequent application of this test and, in particular, the role of national courts will be assessed.

II. Setting out the scene

It was in the area of agriculture where the Court dealt with the notion of abusive practices quite early on. In *Cremer*, it dealt with Community rules on refunds for exports of compound animal feeding-stuffs.³ Such refunds were determined on the basis of whether the exported compounds contained any ingredients covered by specific EC rules on the cereal market. The question which arose was whether an

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¹ For the genesis and development of the principle, see R. de la Feria, 'Prohibition of Abuse of (Community) Law: The Creation of A New General Principle of EC Law Through Tax', (2008) 45 CMLRev 395.

² Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569.

³ Case 125/76 *Peter Cremer v Bundesanstalt für landwirtschaftliche Marktordnung* [1977] ECR 1593.

exporter would be entitled to a refund even if the compound feeding-stuff in question contains a very small proportion of one of these products.

It is a relief to this author that the Court should have acknowledged that the secondary rules in question ‘were difficult to understand from the point of view of their wording and context’.⁴ Nonetheless, the Court felt confident to rule that ‘the scope of [the secondary measures in question] must in no case be extended to cover abusive practices of an exporter in taking advantage of the flat-rate assessment in calculating the refunds especially as at the time it was not a question of adopting a comprehensive set of rules but only of creating a framework within which the national authorities were to regulate the market for the products in question at their own discretion’.⁵

The above conclusion was based on the Court’s assessment of the objectives of the refund system as set out in secondary legislation, namely to compensate for the effect on the prices of the compound feeding-stuffs of the rules applicable to the ingredients used. It was for that reason that the refunds should be proportionate to the amount of the basic products covered by the EC cereal rules in the composition of the exported product. In practical terms, that meant that the grant of a refund presupposed the actual presence in the compound feeding-stuff, in significant proportions, of the basic products. The Court, then, pointed out that, as the relevant EC rules did not provide any guidance as to which compound feeding-stuffs should give rise to an entitlement to the grant of refunds, ‘it is for the competent national authorities to judge the facts with a view to preventing undue payment of refunds as a result of manipulation by the producers of the proportion of the ingredients of compound animal feeding-stuffs’.⁶ However, it did offer some guidance: a trader would not be entitled to a refund for the export of a compound feeding-stuff which contained only one product covered by the EC cereal rules and that in insignificant proportions.

In *General Milk Products*,⁷ the Court dealt with export refunds for cheddar cheese imported from New Zealand into Germany and then exported to other Member States. Whilst, under an arrangement between the EC and New Zealand, imports of cheddar

⁴ Ibid, para. 13.

⁵ Ibid, para. 21.

⁶ Ibid, para. 14.

⁷ Case C-8/92 *General Milk Products GmbH v Hauptzollamt Hamburg-Jonas* [1993] ECR I-779.

from New Zealand into Germany did not make the trader entitled to compensatory arrangements, re-exportation to other Member States did on the basis of specific EC rules aiming to tackle the wide currency fluctuations of certain Member States. Following an amendment of the EC-New Zealand arrangement, the question which arose was whether re-exportation should still give rise to such an entitlement. The Court answered this question in the affirmative. However, it pointed out that ‘the position would be different only if it could be shown that the importation and re-exportation of that cheese were not realised as bona fide commercial transactions but only in order wrongfully to benefit from the grant of monetary compensatory amounts’ and noted that ‘[t]he bona fide nature of those transactions is a question of fact to be decided by the national courts’.⁸

The above judgments have the hallmarks of the abuse of law test which would follow in *Emsland-Stärke*: the artificial nature of transactions, the objectives of secondary rules not realised, the discretion of national courts to ascertain whether abuse has actually occurred, even the discretion of national authorities to make substantive judgments as to the application of secondary EC rules. These will be analysed below.

Another context in which the question of abuse of law arose was about transactions carried out in order to deviate from the application of domestic rules. In *Leclerc*, the Court dealt with a reference about the compatibility with EC law of French law requiring all retailers to abide by the selling prices for books fixed by the publisher or the importer.⁹ The relevant rules provided that, in cases of books published in France but imported from another state, the retail price should be no lower than that fixed by the publisher. The Court held that such a provision, whilst making no distinction between domestic and imported books, ‘discourages the marketing of re-imported books by preventing the importer from passing on in the retail price an advantage resulting from a lower price obtained in the exporting Member State’.¹⁰ However, the conclusion that it would violate Article 28 EC would not apply ‘where it is established that the books in question were exported for the sole purpose of re-importation in

⁸ Ibid, para. 21.

⁹ Case 229/83 *Association des Centres distributeurs Edouard Leclerc and others v SARL ‘Au blé vert’ and others* [1985] ECR 1.

¹⁰ Ibid, para. 26.

order to circumvent legislation of the type at issue'.¹¹ The Court went on to rule that the French provision on the price of re-imported books was not justifiable under Article 30 EC, as the latter did not provide the grounds of justification put forward by the French Government, namely consumer protection. This conclusion was repeated in subsequent judgments on book price fixing¹² as well as national competition law.¹³

This seems to be the only context in relation to Article 28 EC where the abuse of law principle has arisen. However, the conclusion reached by the Court is not unproblematic, as the abuse of law principle applies to a trader who seeks to escape from the application of a national rule which is not only inconsistent in principle with the rule of free movement, but also unjustified. In other words, rather than ensuring the application of EC law in a way which meet its objectives, the abuse of law principle appears to be used in order to sanction an illegal and unjustified restriction on free movement.¹⁴ On the other hand, the abusive behaviour would entail bringing within the scope of EC law an activity which would otherwise be subject to national law, as there would be no intra-Community dimension.¹⁵ In tackling trade in medicinal products in *DocMorris*, the Court ruled that no abuse of the free movement provision could be found if the exporter was not involved in their reimportation.¹⁶ This develops a thread which brings together the case-law on Article 28 EC with that on agriculture which is discussed in this chapter.

There may appear to be a parallel between the process of examining the objectives of EC rules and ascertaining whether they are met by *bona fide* commercial transactions and that of examining whether the objectives of Article 30 EC are being manipulated by national authorities in order to introduce disguised restrictions on free movement.

¹¹ Ibid. para. 27.

¹² Case 299/83 *SA Saint-Herblain distribution, centre distributeur Leclerc and Others v Syndicat des librairies de Loire-Océan* [1985] ECR 2515 and Case 95/84 *Boriello v Alain Darras and Dominique Tostain* [1986] ECR 2253. In his very brief Opinion in the latter case, AG Slynn pointed out that the possibility of abuse did not seem to arise in the case before the referring court.

¹³ Case 137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paras 114-6.

¹⁴ In another context, AG Tesauo argued that '[c]ertainly, it seems difficult even to envisage the existence of a general rule of Community law capable of negating a right conferred by a Community provision, especially in a harmonised field such as the company law field involved here, in confrontation with a domestic provision infringing that right' (Case C-367/96 *Kefalas* [1998] ECR I-2843, para. 18).

¹⁵ Thanks to Cathryn Costello for discussing this point.

¹⁶ Case C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV, Jacques Waterval* [2003] ECR I-14887 at para. 130.

In Case 34/79 *Henn and Darby*, the Court refers to ‘the proper purpose’ of the interests laid down in the first sentence of Article 30 EC, the protection of which is the function of the second sentence of that provision which is to prevent diversions from it in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products’.¹⁷ This point was also made in Joined Cases C-1/90 and C-176/90 *Aragonesa*¹⁸ and Case C-405/98 *Gourmet*,¹⁹ while in Case C-40/82 *Commission v UK*, the Court set out in quite some detail the grounds on which reliance upon Article 30 EC was, in fact, protectionist and constituted a disguised restriction on intra-Community trade.²⁰

The above pronouncements raise questions as to the process of identifying the intention of national authorities²¹ which are similar to those raised by the subjective strand of the *Emsland-Stärke* test (and which will be analysed below). However, this process is really underpinned by an objective consideration, that is whether national measures are protectionist, in which case reliance upon the public interests set out in Article 30 EC would not make them justified.

III. The *Emsland-Stärke* test

The main test was formulated by the Court in Case C-110/99 *Emsland-Stärke*.²² This was a reference from the *Bundesfinanzhof* (Federal Finance Court) on the application of EC legislation on export refunds on agricultural products.²³ According to the relevant rules, a trader would be entitled to export refunds if the product has left the geographical territory of the Community unaltered within 60 days from the day of completion of the customs export formalities. In cases where there is serious doubt as to the true destination of the product, or where it is possible that the exported product may be reintroduced into the Community due to the difference between the rate of refund on it and the amount of the import duties applicable to an identical product on

¹⁷ [1979] ECR 3795, para. 21.

¹⁸ [1991] I-4151, para. 20.

¹⁹ [2001] ECR I-1795, para. 32.

²⁰ [1982] ECR 2793.

²¹ See P. Oliver, *Free Movement of Goods in the European Community* (Sweet and Maxwell 2003, 4th ed), 225-6.

²² [2000] ECR I-11569.

²³ Commission Reg. 2730/79 [1979] OJ L 317/1 as amended by Commission Reg. 568/85 [1985] OJ L 65/5.

the day when customs export formalities are completed, additional requirements are imposed: the payment of refund would be conditional on the product's having been imported into a non-member state. Furthermore, additional proof may be required by the competent authorities of the Member States which would show, to their satisfaction, that the product on which an export refund is requested has actually been placed on the market in the non-member state of import in an unaltered state.

In *Emsland-Stärke*, the subject-matter of the reference from the *Bundesfinanzhof* was two export transactions carried out by the plaintiff. The first consisted of several consignments of a product based on potato starch to Switzerland which, however, their recipients arranged to have transported back to Germany unaltered and by the same means of transport; once import duties were paid in Germany, they were released for home use. The second export transaction consisted of several consignments of a wheat starch-based product to Switzerland which their recipients arranged to have forwarded unaltered and by the same means of transport to Italy where, once the relevant import duties were paid, they were released for home use.

The plaintiff in the main proceedings was the exporter to Switzerland who challenged before the German courts the decision of the German Customs Office to demand repayment of the export refunds.

At this juncture, it is worth-noting that the requirements imposed on the circumstances under which export refunds are granted aim to prevent exporters from benefiting from differences between the amount of the export refund and that of the production refund. For instance, in the case under discussion, in the starch sector, the former was approximately twice the amount of the latter. Considered against the very low import duties, this explains why exporters may be tempted to manipulate the system in order to gain financial benefit.

A. The judgment

In its judgment, having observed that all the formal conditions for the grant of export refunds as laid down in secondary law had been fulfilled, the Court pointed out that 'the scope of Community regulations must in no case be extended to cover abuses on

the part of a trader'.²⁴ It then explained why, in that context, Community law objected to this specific practice: 'the fact that importation and re-exportation operations were not realised as *bona fide* commercial transactions but only in order wrongfully to benefit from the grant of monetary compensatory amounts, may preclude the application of positive monetary compensatory amounts'.²⁵

The Court went on to formulate the test of abuse of law:²⁶

A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.

It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, *inter alia*, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.

It was for the national court to assess whether the above conditions were met on the basis of evidence adduced in accordance with the rules of national law. However, there was a qualification to this function: the effectiveness of Community law should not be undermined.²⁷

The Court, then, dealt with two objections put forward by the exporter. The first was legal in nature and was about the alleged incompatibility between a requirement that he repay refunds and the principle of lawfulness. The Court dismissed this by pointing out that 'the obligation to repay is not a penalty for which a clear and unambiguous legal basis would be necessary, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the Community rules were created artificially, thereby rendering the refunds granted undue payments and thus justifying the obligation to repay them'.²⁸

²⁴ Para. 51.

²⁵ Ibid.

²⁶ Paras 52-53.

²⁷ Para. 54.

²⁸ Para. 56.

The second objection was pragmatic in nature: the exporter argued that it was not he who had re-imported the goods. This was also dismissed by the Court which observed that it was he who ‘enjoyed the undue advantage of the grant of export refunds when he carried out an artificial operation in order to benefit from that advantage’.²⁹

B. Comment on the *Emsland-Stärke* test

The articulation of a test of what constitutes abuse in *Emsland-Stärke* should be viewed in its proper context. On the one hand, there had been a number of instances where the Court had referred to abuse of law in a variety of other contexts too, most notably in services³⁰ and establishment.³¹ On the other hand, the Commission in its submissions put forward very elaborate suggestions, almost urging the Court not to deal with the specific reference as yet another specific case of abuse but to set out the parameters which would determine the conditions under which an abuse of law would be deemed to have occurred.

There is a third factor which may explain why the Court chose to articulate the abuse of law test in this specific legal context. The reference in *Emsland-Stärke*, as well as those in *Cremer* and *General Milk Products* previously, touched upon the financial interests of the Community which ought to be protected. The significance of this dimension is illustrated by the express provision in secondary law: Article 4(3) of Council Regulation 2988/95 on the protection of the European Communities’ financial interests provides that ‘[a]cts 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

²⁹ Para. 57.

³⁰ See for instance, Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, Case C-211/91 *Commission v Belgium* [1992] ECR I6773, Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, Case C-23/93 *TV 10 SA v Commissariaat voor de Media* [1994] ECR I-4795. For an analysis of the relevant case-law, see the chapters by Andenas and Doukas in this volume.

³¹ See, for instance, Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459, delivered approximately a year and a half previously. For an analysis of the relevant case law, see V Edwards and P Farmer, ‘The Concept of Abuse in the Freedom of Establishment of Companies: a Case of Double Standards?’ in A Arnall, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford OUP, 2008, 205; see also the chapter by Ringe in this volume.

advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal'.³² This provision was referred to by the Commission in its submissions, but not the Court, in *Emsland-Stärke*.³³

In this respect, a parallel has been drawn with the public finances of the Member States and the justification afforded by EC law to measures aiming to protect them.³⁴ For instance, in the area of health care, the Court has consistently accepted that the right of the Member States to organise their social security systems covers their right to protect the financial stability of their health care insurance schemes.³⁵ However, there is a distinction to be drawn: in the case of the latter case-law, the Court protects the right of the Member States to organise and manage their social security system which would enable them to carry out their fundamental obligations to their citizens; in the case of agriculture law and free movement of goods, the question is whether an EC right granted to a trader under specific circumstances for specific reasons should have been granted at all.

Viewed against prior case-law, the *Emsland-Stärke* test may appear to provide clarity in the application of a principle which had been applied rather incrementally. It may also appear to assist national courts in their task of assessing whether an abuse of law is substantiated by the facts in the dispute before them. Viewed in the wider free movement of goods context, the *Emsland-Stärke* test might even appear to assume the function which the *Keck* formula was perceived to assume in the context of the definition of measures of equivalent effect to a quantitative restriction.³⁶ One characteristic which it shares with the latter definition is its generality, as the criteria articulated by the Court are quite broad. In fact, they are so broad that their

³² [1995] OJ L 312/1. Abuse is expressly prohibited in other areas of law, too: see, for instance, Art. 11(1) Dir. 1990/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [1990] OJ L 225/1 as amended by Dir. 2005/19/EC [2005] OJ L 58/19.

³³ However, the Court referred to it in the judgments analysed below.

³⁴ See D. Triantafyllou, 'L'interdiction des abus de droit en tant que principe général du droit communautaire', (2002) 38 CDE 633, 628-9.

³⁵ See, for instance, Case 238/82 *Duphar* [1984] ECR 523 at para. 16. For an analysis of the health care case-law from that angle, see P. Koutrakos, 'Healthcare as an Economic Service under EC Law' in M. Dougan and E. Spaventa (eds), *Social Welfare and EU Law* (Oxford: Hart Publishing 2005) 105.

³⁶ Joined Cases C-267-8/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097. Of the voluminous literature on Keck, see the analysis of the clarity issue in S Weatherill, 'After Keck: Some Thoughts on how to Clarify the Clarification', (1996) 33 CMLRev 885 and Koutrakos, P., "'On groceries, alcohol and olive oil: more on free movement of goods after Keck'", (2001) 26 ELRev 391.

significance may only be assessed in relation to a specific set of factual circumstances. It is in the light of this that, in a subsequent case, Advocate General Sharpston pointed out that the Court has developed ‘a broad, and pragmatic, concept of abusive practice’.³⁷ However, this raises the question to what extent is this test more helpful than the approach previously articulated by the Court. In other words, to what extent can this test facilitate the role which national courts are called upon to assume in the area?

This question becomes more pertinent in the light of the reference to the subjective part of the test. This is problematic not so much due the specific characteristics of legal persons and their distinction from natural persons,³⁸ but rather the inherently indeterminate nature of any test to assess whether this criterion is met. In another context, Advocate General La Pergola argued that ‘[s]o long as [the] right [of establishment] is exercised in accordance with the Treaty, the motives, calculations and particular personal interests underlying the choice do not come into consideration and are consequently not open to judgment’.³⁹ In fact, even the formulation of the subjective criterion in *Emsland-Stärke* itself suggests its relative role. The Court refers, by way of example, to evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the third state as a case where the subjective criterion of the test would be met. However, it would be more accurate to refer to this as objective circumstances which suggest that the purpose of the relevant Community rules has not been achieved. In other words, as Advocate General Maduro pointed out, ‘it is not th[e] intention [of abusing Community law] that is decisive for the assessment of the abuse’ but ‘the activity itself, objectively considered’.⁴⁰

³⁷ Case C-279/05 *Vonk Dairy Products*, para. 56 of her Opinion.

³⁸ This had been relied upon by AG Lenz in his criticism of a subjective criterion for assessing abuse of law even prior to the articulation of the *Emsland-Stärke* test: in his Opinion in Case C-23/93 *TV10 SA v Commissariaat voor de Media* [1994] ECR I-4795, he argued that ‘a legal person as such is not in a position to exhibit subjective attitudes’ and noticed the absence of a ‘uniform manner of imputing acts of natural persons to the sphere of responsibility of a legal person which was valid in Community law for all Member states’ (para. 61). Therefore, he deemed the reliance upon subjective criteria in order to assess the legally relevant conduct of a legal person as ‘problematic’ and suggested that ‘the avoidance of legal provisions by a legal person should be able to be determined using objective criteria’

³⁹ Case C-212/97 *Centros* [1999] ECR I-1459, para. 20.

⁴⁰ Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd v Commissioners of Customs and Excise* [2006] ECR I-1609, Case C-419/02 *BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs and Excise* [2006] ECR I-1685, Case C-223/03 *University of Huddersfield Higher Education Corporation v Commissioners of Customs and Excise*

Be that as it may, the broad test set out in *Emsland-Stärke* and the unclear manner in which it develops the previous strands of the Court's case-law on abuse suggest that at the very centre of its application lies the Court itself. This is further illustrated by the entire line of reasoning put forward in the judgment which is underpinned by a clear focus on the objective of the EC rules reliance upon which is alleged to amount to abuse of law. The Court refers to the need to establish that 'the purpose of those rules has not been achieved'⁴¹ because a company 'creat[es] artificially the conditions laid down for obtaining 'an advantage from them]'.⁴² Therefore, the definition of the objective of the relevant EC rules is the starting point for any analysis of the abuse issue. As this definition is a matter entirely for the Court of Justice, the teleological interpretation upon which the assessment of abuse relies ensures the central role of the Community judiciary in the application of this principle. In effect, the approach of the Court stresses the duty of national courts to rely upon Article 234 EC in order to get an authoritative reading of the EC rules invoked before them. This is quite significant in the light of the role for national courts carved out by the Court in relation to the application of the abuse test.

Whilst its role is quite pronounced, the Court of Justice leaves it to national courts to decide whether an abuse of law has actually occurred in accordance with the rules of national law. The only qualification which it imposes is that, in doing so, the effectiveness of Community law is not undermined. Therefore, the role of national courts in the application of the abuse test is central. It should be pointed out that the Court's pronouncement should be examined within its proper context. In accordance with 'the distinct separation of functions between national courts ... and the Court of Justice'⁴³ which underpins the preliminary reference procedure, it is for the former to apply the interpretation of EC rules given by the latter to the facts of the case before

[2006] ECR I-1751, para. 70. He went on to observe that 'it is not ... a search for the elusive subjective intentions of the parties that ought to determine the existence of the subjective elements mentioned in *Emsland*. Instead, the intentions of the parties to improperly obtain an advantage from Community law are merely inferable from the artificial character of the situation to be assessed in the light of a set of objective circumstances. ... In such circumstances, the legal provision at issue must be interpreted, contrary to its literal meaning, as actually not conferring a right. It is consideration of the objective purpose of the Community rules and of the activities carried out, and not the subjective intentions of individuals, which, in my view, lies at the heart of the Community doctrine of abuse' (para. 71).

⁴¹ Para. 52 of the judgment.

⁴² Para. 53 of the judgment.

⁴³ Case 35/76 *Simmenthal v Ministero delle Finanze* [1976] ECR 1871, para. 4.

them. In effect, this is what the Court requires that they do in order to assess whether one of the parties in the dispute before them has created artificially the conditions laid down in EC rules in order to obtain an advantage from them.

However, the limit imposed on national courts in assessing whether an abuse has occurred and the pivotal position that the definition of the objectives of the EC rules in question has for that assessment have led commentators to suggest that the power with which the national courts are endowed lacks substance.⁴⁴ In other words, it has been argued that, in effect, the power which the Court appears to offer national courts in relation to the application of the abuse of law test is, in effect, taken back because of the provisos attached to it. It is recalled that this argument had already been advanced in order to explain the approach of the Court to its relationship with national courts in the context of the preliminary reference procedure and, in particular, the latter's Court-given power not to refer, even at last instance.⁴⁵

This position may appear to suggest the following two propositions: that the approach underpinning the *Emsland-Stärke* test imposes too heavy a duty on national courts by circumscribing their function, and that it would be intellectually more honest if the Court applied the abuse of law test itself. It is suggested that both such propositions are misplaced. First, whilst tasked with the application of EC rules to the facts of a case before them, national courts carry out an EC law task – they give effect to the decentralised judicial system set out in EC primary law and are required to act in accordance with the duty of cooperation as laid down in Article 5 EC. The articulation of the limits within which the national courts are required to act in carrying out this function is neither surprising nor suspect, as, in any case, their objective, namely to ensure that the effectiveness of EC law is not undermined, would be a *conditio sine qua non* of their task even if not articulated by the Court of Justice expressly.

Second, the role of national courts become all the more central in specific context of the application of the abuse of law principle, as it is mainly focused on the nature of

⁴⁴ A. Kjellgren, 'On the Border of Abuse', (2000) 11 EBLR 179, 191-2.

⁴⁵ See the *acte claire* doctrine set out in Case 182/81 *Sri CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 and the criticism of it in Rasmussen, 'The European Court's *acte claire* strategy in *CILFIT*', (1984) 9 ELRev 242. For the opposite view, see A.M. Arnulf, 'The use and abuse of Article 177 EEC', (1989) 52 MLR 622.

the commercial activity which has given rise to a dispute: to ascertain whether that is abusive is a matter of fact and, as such, intrinsically linked to the function with which national courts are traditionally endowed in the context of the preliminary reference procedure. Third, whilst it is true that it has not shied away from making substantive judgments about the application of EC rules to the facts of a case pertaining to a reference by a national court,⁴⁶ it is within the function of national courts as allocated in the symbiotic relationship established under Article 234 EC, to apply the authoritative interpretation of EC rules to the facts of the case.

While the criticism *Emsland-Stärke* test for effectively undermining the role of national courts was viewed above as misplaced, another issue arises, namely that of ensuring the effectiveness of Community law.⁴⁷ It would be a worrying phenomenon if national courts proved to be too keen to determine abuse of law - this would not only raise questions about compliance with the principle of legal certainty but it might also undermine the effectiveness of the relevant substantive EC law provisions in so far as EC rights bestowed in order to meet specific objectives would not be enforced. Is it not risky to endow national courts with a power which would enable them not to apply Community law? Would this power not be too tempting for national judges to ignore? These questions need to be addressed against the context of specific examples of how national courts have handled the application of the abuse of law test. This is what the following section will examine.

III. The application of the test and the response by national courts

Four and a half years after the Court articulated the *Emsland-Stärke* test, it was asked to apply it in Case C-515/03 *Eichsfelder Schlachtbetrieb*.⁴⁸ This was a reference from

⁴⁶ See, for instance, the application of the principle of proportionality in Cases C-306/88, 304/90 and 169/91 *Stoke-on-Trent CC v B. & Q plc* [1992] ECR I-6457, Case C-312/89 *Conforama* [1991] ECR I-997, Case C-332/89 *Marchandise* [1991] ECR I-1027 and the analysis in M. Jarvis, *The Application of EC Law by National Courts* (OUP 1998) 223-5 and 269-272. On the other hand, the Court did not rule on this issue in Case C-405/98 *Gourmet* [2001] ECR I-1795, ignoring the advice of AG Jacobs (for criticism of the Court's approach in this case, see A. Biondi, 'Advertising alcohol and the free movement principle: the *Gourmet* decision', (2001) 26 ELRev 616). See also the application of the principle of State liability in Case C-392/93 *R v HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631.

⁴⁷ See P. Schammo, 'Arbitrage and Abuse of Rights in the EC Legal System', (2008) 14 ELJ 351 at 361 *et seq.*

⁴⁸ [2005] ECR I-7355.

the *Finanzgericht* Hamburg about refunds regarding exports of beef to Poland. In Poland, the goods were used to make cooked meat roulades and then, under a contract concluded between the producer of these roulades and the buyer, they were exported back to Germany with the Polish customs duties being reimbursed.

When confronted with an order to repay the export refunds, the plaintiff in the main proceedings argued that the goods for which the export refund had been paid had undergone substantial working in Poland. The question referred by the *Finanzgericht* Hamburg was whether, under secondary legislation, the fact that, following its release into free circulation in Poland, the product in question underwent substantial processing or working suggested that it had met the conditions set out in secondary law requiring that it be imported in the third country.

The Court pointed out a number of factors which suggested that the goods had been genuinely imported into Poland: import duties having been paid, a substantial working or processing of the goods within the meaning of the Customs Code had led to the creation of a new product, hence suggesting that those goods had been put to use in the third country and had actually been put on the market there, being released for consumption. All this ‘eliminates the risk – [which secondary legislation] seeks to obviate – of abusive reimportation of the initial goods into the Community, in breach of the aim pursued by the refund system’.⁴⁹

The Court also dealt with the argument put forward by the Commission and the referring court that, given that import duties had been reimbursed, the exporter had no right to an export refund. The Court rejected it by making the following distinction: in cases where the customs formalities for release for consumption in the non-member state have been completed and import duties paid, a subsequent reimbursement of those duties to an economic operator other than the exporter cannot retroactively render the export refunds unduly paid. If that was the case, ‘the exporter would be placed in a position of uncertainty, arguably in breach of the principle of legal

⁴⁹ Para. 33.

certainty, and his right to a refund would depend on events or commercial conduct outside his control'.⁵⁰

On the other hand, the above would not apply in cases where the exporter himself has participated in an abusive practice. In order to substantiate this conclusion, the Court refers to Regulation 2988/95 on the protection of the European Communities' financial interests which states that '[a]cts 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'.⁵¹ Having repeated the *Emsland-Stärke* test, the Court went on to conclude that it was for the national court to determine whether these conditions had been met.

In its judgment following the Court's ruling, the referring court, the *Finanzgericht Hamburg*, applied the two-fold test first articulated in *Emsland-Stärke*.⁵² In doing so, it showed considerable restraint. In relation to the objective part of the test, it pointed out that the purpose of the relevant EC rules would not have been achieved had the product not reached the market in Poland. However, it held that that was not the case as, after all, customs formalities had been met, and the product was marketed by being turned into roulades.

In terms of the subjective part of the test, the national court pointed out that the crux of the matter was whether a normal transaction with economic objectives had been carried out or whether a transaction was carried out with the sole objective of achieving the grant of export refunds. The national court adds that the fact that what motivated the exporter was the grant of export refunds did not meet the subjective condition of the test; neither did the existence of artificial transactions between the importer and third parties. On the facts of the case, there was no evidence that the exporter was involved, participated in or had any influence on the importer's conduct. The court went on to rule that even knowledge on behalf of the exporter of the

⁵⁰ Para. 36.

⁵¹ [1995] OJ L 312/1, Art. 4(3), mentioned verbatim in para. 38 of the judgment.

⁵² IV 106/05, judgment of 26 January 2006.

importer's conduct would be irrelevant in legal terms. The reason for this is that knowledge of abusive behaviour does not constitute abuse in itself and, therefore, does not meet the subjective criterion of the *Emsland-Stärke* test. The court added that, on the facts of the case, it was not clear whether the importer had engaged in artificial transactions. However, this was doubtful as its operations were clearly aiming to benefit from lower Polish costs in preparing roulades.

The above suggests a degree of caution in the approach adopted by the national court. In ascertaining whether the conditions for the abuse of law test are met in general, and in setting a high threshold for the subjective element of abuse in particular, the national court appears as mindful of the possibility of abuse pursuant to the *Emsland-Stärke* test as it is of the requirement for legal certainty. This, in itself, is not a departure from the Court's articulation of the principle. After all, the judgment in *Eichsfelder Schlachtbetrieb* did refer to 'participation' by the exporter himself.⁵³

Another case where the abuse of law test was applied was Case C-279/05 *Vonk Dairy*.⁵⁴ This was a reference from the *College van beroep voor het bedrijfsleven* (Administrative Court for Trade and Industry the Administrative Court for Trade and Industry, The Netherlands) about the export of consignments of Italian pecorino cheese to the United States during a six-year long period. Following investigations by the Netherlands authorities and the US Customs, it was revealed that a number of the above consignments (75 out of a total of 2100) were almost immediately re-exported to Canada by an intermediary of the exporter with the active involvement of the latter who was aware that the cheese was forwarded to Canada and was involved in the sale of those consignments in that country. The subject-matter of the reference was the request that the exporter, who was the applicant in the administrative proceedings, repay the export refunds it had received.

Having pointed out that all the formal requirements for the grant of export refunds had been met, the Court ruled that the national courts would have to assess whether there was evidence of abuse on the part of the exporter pursuant to the *Emsland-Stärke* test.

⁵³ Para. 37.

⁵⁴ Case C-279/05 *Vonk Dairy Products BV v Productieschap Zuivel* [2007] ECR I-239.

The referring court enquired whether, under the specific circumstances, a continuous or repeated irregularity had occurred. This question was made in the context of Regulation 2988/95 which set out a more liberal limitation period for proceedings against traders. The Court pointed out that the fact that the irregularity related to a relatively small proportion of all the transactions carried out in a given period and that the transactions in which the irregularity had been detected always concerned different consignments was immaterial. Instead, a continuous or repeated irregularity occurs ‘where it is committed by a Community operator who derives economic advantages from a body of similar transactions which infringe the same provision of Community law’.⁵⁵ Again, it was for the national court to ascertain whether action constituting such an irregularity had taken place in the main proceedings. In doing so, it would have to act in accordance with the rule of evidence of national law, provided that the effectiveness of Community law is not undermined.

When the case was sent back to the referring court, the latter, responding to the argument of the Dairy Products Board that the investigation reports included sufficient points of references substantiating abuse, pointed out that these were not mentioned in detail in the relevant decision. It also added that it was not for that court to go through the main dossiers, of which there were many, and which contain data about the dispute in order to find out whether there has been an abuse in accordance with the test set out by the Court of Justice. Therefore, it concluded that there were no grounds on which the legal outcome of the contested decision should stand.

Rather than indicating restraint or even caution, the approach of the national court may appear to be short on reasoning and suggesting unwillingness to engage in a thorough examination of whether the conditions of the *Emsland-Stärke* test were met. However, the specific circumstances under which the reference was made suggests that the referring court had already made it clear that the order for repayment upheld in the contested decision was not based on abuse on the part of the appellant.⁵⁶ In addition, Advocate General Sharpston pointed out that the contested decision was ‘at least to some extent, ambiguous’.⁵⁷ Therefore, what seems to underpin the referring

⁵⁵ Para. 41.

⁵⁶ AG Opinion, para. 62.

⁵⁷ AG Opinion, para. 63.

court's final decision is an issue of national procedural law: is the assessment of whether the conditions for the abuse of law test are met a matter for the national authority responsible for the examining refund papers or the national court reviewing the legality of that authority's decision?⁵⁸ As Advocate General Sharpston observes, this is a matter for national law.⁵⁹

As was the case in *Eichsfelder Schlachtbetrieb*, the application of the *Emsland-Stärke* test by the referring court in *Vonk Dairy* does not justify the alarm which the acknowledgment by the Court of their central role in determining abuse of law raised. In fact, a degree of caution seems to emerge from this sample of national reactions. Rather than applying the abuse of law test mechanically, national judges are prepared to engage in a detailed assessment of both their role as set out under national law and the facts of the case upon which they are asked to adjudicate. In relation to the latter, clear evidence of the abusive nature of the commercial activity in question is required.

While the number of national judicial decisions examined in this section is, admittedly, very limited, it is in precisely the same area in which the Court of Justice articulated the abuse of law test. In any case, the role of national courts in the application of the abuse of law test ought to be viewed in the context of the preliminary reference procedure under which the abuse of law cases arise. Given the heavily factual dimension which underpins the test, as articulated in *Emsland-Stärke*, and the function of national courts in the preliminary reference procedure as defined by the Court of Justice, namely to apply the Court's interpretation of EC law to the facts of the case before them, it would be difficult to see a task more suitable for national courts in this context than that articulated in *Emsland-Stärke*.

As for the uncertainty to which the application of the abuse of law test may give rise, a degree of uncertainty is inherent in the preliminary reference procedure. In fact, it is the direct corollary of the central position which national courts enjoy in the constitutional architecture of the Community legal order in general and the decentralised system of enforcement set out in Article 234 EC. This is a given which has been acknowledged and built upon by the Court of Justice in its development and

⁵⁸ See AG Opinion at para. 64.

⁵⁹ Para. 65.

management of the Article 234 EC procedure. This is suggested by the role it has carved out for national courts in the application of the constitutionalising principles of EC law⁶⁰ such as the duty of interpretation of national legislation in the light of a directive⁶¹ and State liability for a violation of EC law.⁶² It is also suggested by the central role it has granted them in the determination of substantive law issues such as the application of the principle of proportionality in free movement cases, as mentioned above in this Chapter. To argue that the involvement of national courts in the above contexts is an essential part of the success of the multilayered system of the Community legal order as developed over the years is to state the obvious. In the context of the present analysis, it is noteworthy that this system, with the vital position at its core granted to national courts and the inherent uncertainty which the latter's performance may raise, has not produced such considerable problems which its decentralised character, the evolving interpretation of EC law and the exercise of the Court's jurisdiction have not succeeded in addressing.⁶³ This point is illustrated in the broader context of the law of free movement of goods in general, and the application of the principle of proportionality by national courts in particular, a parallel with which some authors have drawn:⁶⁴ after all, in areas where national courts felt unclear as to how to apply it, their channel of communication with the Court of Justice proved efficient,⁶⁵ whereas in cases where national courts were required to apply new principles of EC law, the Court of Justice assisted them of its own motion.⁶⁶

⁶⁰ See G.F.Mancini, 'The Making of a Constitution for Europe' in *Democracy and Constitutionalism in the European Union – Collected Essays b Judge G.F.Mancini* (Oxford, Hart Publishing 2000) 1 and C Timmermans, 'The Constitutionalisation of the European Union', (2002) 21 YEL 1.

⁶¹ See, for instance, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891 and Case C-106/89 *Marleasing* [1990] ECR I-4135.

⁶² See, for instance, Joined Cases C-46/93 and 48/93 *Brasserie du Pecheur SA v Germany and R v Secretary for Transport, ex parte Factortame Ltd and Others [Factortame III]* [1996] ECR I-1029:

⁶³ In relation to the application of the *Francovich* principle in particular, see M.-P.F. Granger, 'National applications of *Francovich* and the construction of a European administrative *jus commune*', (2007) 32 ELRev 157.

⁶⁴ See, for instance, L.N. Brown, 'Is there a General Principle of Abuse of Rights in European Community Law?' in D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration - Essays in Honour of Henry G. Schermers* Vol. II (The Hague, Martinus Nijhoff, 1994) 511 at 520. However, this parallel is not very helpful, in so far as the principle of proportionality is about the exercise of a right conferred by or acknowledged by EC law, whereas the abuse of law principle is about a right which is exercised in circumstances where it does not arise.

⁶⁵ See the *Sunday Trading* line of cases.

⁶⁶ See, for instance, Case C-392/93 *R v HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631.

Put differently, completely certainty in the application of Community law principles is elusive in the constitutionally idiosyncratic EU legal order, a fact which has not necessarily been proved to be detrimental to the process of European integration. What this section suggests is that there is no evidence of abuse of the abuse of law test by national courts.

V. Conclusion

The analysis of the precursor to the *Emsland-Stärke* test, as well as the latter's application by national courts in the area of agriculture, suggests the existence of a number of common strands. These include the definition of the objective of the EC rules which a trader is alleged to contravene, the role of the national court to ascertain whether the transaction in question meets the criteria of the abuse of law test with due regard to the totality of circumstances, the extent to which the confines within which national courts ought to act are onerous, and, ultimately, the constitutional function of the Court in this process which is based, mainly, on its symbiotic relationship with the national judiciary.

There is a question which seems to underpin these strands, namely whether the abuse of law test, as articulated in *Emsland-Stärke*, constitutes a useful step which clarifies the legal position of the individual, and facilitates the role which national courts are expected to assume, and, ultimately, their interaction with the European Court of Justice. Whilst the *Emsland-Stärke* test clarifies the position of abuse of law as a general principle, this clarity is superficial, for its effect may only be determined by the content of its substantive provisions and the processes pursuant to which it is to be applied. Viewed from this angle, it is difficult to see what is the contribution of the *Emsland-Stärke* test other than to raise the profile of the abuse of law as a distinct, albeit limited,⁶⁷ possibility in the Community legal order and, therefore, to make it

⁶⁷ In his Opinion in *Kefalas*, AG Tesouro pointed out that 'I consider that the risk of there being a gap in the system - which is, after all, what the abuse of rights principle, like all other so-called catch-all provisions, seeks to avoid - is minor, or non-existent, in a legal order like that of the Community which, through judicial interpretation and case-law in general, is more promptly amenable to adaptation to the needs of society' (para. 23). In this Opinion, as well as in the one in Case C-441/93 *Pafitis* [1996] ECR I-1347, he argued against the existence of abuse of law as a general principle of EC law. See also K.E. Sørensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?', (2006) 43 CMLRev 423 who argues that the principle is of a narrow scope.

even clearer that there are limits on the scope of rights granted under EC law. The ambiguous position of the subjective part of the test and its reliance upon objective considerations, the definition of the objective of the relevant EC rules by the Court of Justice, the central position of national courts within the context of the preliminary reference procedure, the requirement that the latter courts rule in compliance with the effectiveness of the applicable EC rules, all point towards the direction of applying standard principles of interpretation with which both the Court of Justice and national courts are familiar.

Finally, the analysis in this Chapter suggested that there is no evidence of abuse of the abuse of law test by the national courts in the law of agriculture and free movement of goods. Therefore, the role of the abuse of law test, as articulated in *Emsland-Stärke*, should not be overestimated, neither should its implications for national courts and, ultimately, the effectiveness of the integration process be exaggerated.