ABUSE OF LAW IN EC PRIVATE LAW:

A (RE-)CONSTRUCTION FROM FRAGMENTS

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As with most other principles of Community law, the principle of abuse of law did not enter the scene in a private law setting. Rather, it was cases concerning fundamental freedoms, agricultural levies and later corporate and tax law that introduced the concept to EC law.[1] A similar narrative could be recounted for good faith, unjustified enrichment, interest for late payments, damages and other fundamental concepts of primary relevance for private law. They were all brought up for the first time before the ECJ in administrative law, in staff cases or agricultural policy cases or in the framework of Article 288 of the Treaty.[2] But even though introduced in areas which from a continental perspective would be classified as 'public law', some of them returned to their private law roots as principles of the later emerging European private law.[3] This paper tries to ascertain whether this is also the case for the doctrine of abuse of law. It starts by defining what is meant by

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[1] 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 *CML Rev* 395 et seq.

[2] See A Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (forthcoming Tübingen, 2009) 325 et seq.

[3] See eg the principle of 'good faith' which was introduced in an early public administration staff case (ECJ, 15.07.1960, cases 43/59, 45/59 and 48/59 *Lachmüller v Commission* [1960] ECR 463) but was later also used for the assessment of private agreements on jurisdiction under Art. 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, OJ L 299, 31.12.1972, 32 (ECJ, 14.12.1976, case 25/76 *Galeries Segoura v Société Rahim Bonakdarian* [1976] ECR 1851).

'European private law', 'general principle of law' and 'abuse of law' (I.) before considering three areas of EC private law, intellectual property, civil procedure and contracts (II.) and then summarising the results (III.).

I. Preliminary Definitions of the Concepts Used

1. What Is 'European Private Law'?

'European private law' for many lawyers still seems to be for good part *terra incognita*. The conceptual uncertainties start with the notion 'European' private law. For some, the true European private law is vested in the common traditions[4] or the common concepts to be found in today's national private law systems.[5] For others, only the EC private law consisting of directives and regulations in the fields of consumer contracts, company law, insurance law, intellectual property, jurisdiction and enforcement, private international law etc. and the case law handed down by the ECJ and CFI should be considered as the 'existing' European private law.[6] A third group combines the two approaches,[7] whereas again others conceptualise European private law as a multi-level system comprising EC law as well as the entire national systems both in their congruent and divergent parts.[8] Although it is true that the multi-level approach seems best suited to draw a comprehensive picture of today's European private law, the approach used here will be restricted to the EC private law in order to match the concept of the conference.[9]

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[4] See eg H Coing, *Europäisches Privatrecht* (München, 1985/1989) passim.

[5] This has been the approach of the influential 'Commission on European Contract Law', see O Lando/H Beale (eds.), *The Principles of European Contract Law, Parts I and II* (The Hague,1999), xxv.

[6] This is the approach followed by the 'Acquis-Group', see <www.acquis-group.org>.

[7] See eg J Basedow/U Blaurock/A Flessner/R Schulze/R Zimmermann, 'Editorial' (1993) *Zeitschrift für Europäisches Privatrecht* 1and E Hondius/M Storne, 'Editorial' (1993) *European Private Law Review* 1 et seq.

[8] See eg C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *European Law Journal* 378, 386 et seq.

[9] For a comparative law perspective see the contributions of *J Gordley* and *DJ Ibbetson* in this volume.

2. What Is a 'General Principle of Law'?

An even more difficult exercise is to define what is meant when talking about a 'general principle of law'. It cannot be the task of this paper to present a full-blown theory of the general principle of law.[10] But it seems nevertheless necessary to raise the curtain for a moment and to reveal what conception of 'general principle' has been used when drafting this paper.

a) A Procedural Definition of 'General Principle of Law'

For the 'purpose of this paper a very basic definition must suffice: A general principle of law is a legal standard that is derived from legal rules by way of inductive generalisation.[11] The sources for this process of induction may be taken from the same legal system. This is the case when the European courts infer general principles from specific rules of the acquis communautaire.[12] The same method is applied by the courts of civil law countries when using multiple rules of the civil codes to establish general principles.[13] It can also be found in common law courts when general principles are inferred from single instances in the case law.[14] But the sources for general principles may also be taken from other legal systems. The generalisation is then one over different legal systems. 'General' in this case refers to 'internationally accepted'.[15] This concept is at the core of the ECJ's method of deriving general principles from the Member States' legal systems.[16] On the basis of this definition, two types of principles of EC law can be distinguished, those inferred from EC

[10] See for more details on the following theoretical framework A Metzger, above note 2, 11-108.

[11] The definition is 'procedural' in the sense that it defines the general principle of law as the outcome of an inference from certain sources and not by any substantial criterion, see A Metzger, above note 2, 25-32.

[12] See eg the line of arguments in ECJ, 23.10.1974, case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063 (para. 15) on the right to be heard.

[13] See eg the argument used by the Austrian Oberster Gerichtshof for the justification of the principle that long-term contracts may be terminated under extraordinary circumstances, OGH, 31.3.1966, case 4 Ob 310/66 (1967) *Juristische Blätter* 209; OGH, 22.5.1962, case 8 Ob 162/62 *Handelsrechtliche Entscheidungen* no 3178; OGH, 25.1.1968, case 1 Ob 276/67 *Handelsrechtliche Entscheidungen* no 6474; OGH, 10.10.1974, case 7 Ob 196/74 *Handelsrechtliche Entscheidungen* no 9323.

[14] See eg the speech of *Lord Atkin* in *Donoghue v Stevenson* [1932] AC 562, 580 using several precedents to establish a general tort of negligence.

[15] This is the concept followed by Art. 38 of the Statute of the International Court of Justice of 26 June 1945, 33 U.N.T.S. 993 ('general principles of law recognized by civilized nations').

[16] See eg the line of arguments in ECJ, 18.05.1982, case 155/79 *AM & S v Commission* [1982] ECR 1575 on the legal privilege.

legislation and those inferred from the laws of the Member States.[17]

Recognising the inductive process of inferring principles from rules as the main characteristic of general principles of law does not mean that they can be derived from the underlying sources without making any policy choices. Legal theory has long since learned from epistemology that general principles can never be inferred from single instances without explaining *why* a certain class of cases should be treated equally according to a principle and why the instances should not be seen as mere exceptions.[18] But accepting this inherent weakness of inductive inferences does not mean that it is superfluous to ask for the support of a principle in the sources. The recognition of a principle is different from a 'free' policy choice exactly because it is supported – at least to a certain extent – by the sources.

b) 'Legal Principles'

As a matter of fact, not every general principle one might derive from the rules has to be qualified automatically as 'law'. Otherwise every speculation made by scholarship with some support in the rules could claim to be recognised as binding law, a vision close to a nightmare, especially for common lawyers. Therefore one should accept that a principle derived from rules can only be considered as a truly 'legal' principle if it is recognised in legal practice – such recognition being shown either by parties who conform their behaviour to the norm or courts who enforce the principle through their judgements.[19] Principles lacking any actual recognition may be thoughtful and reasonable suggestions by scholarship, but they have not (yet) entered the realm of law.

Taken together with the requirements from the definition, a standard should therefore be considered as a 'legal principle' of EC law under two conditions: firstly, if it can be derived from the rules of positive law by way of induction which implies

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[17] See also TC Hartley, *The Foundations of European Community Law* (Oxford, 5th ed. 2003) 133; JA Usher, *General Principles of EC Law* (London, 1998) 7 et seq.

[18] See A Metzger, above note 2, 52 et seq.

[19] See RM Dworkin, *Taking Rights Seriously* (Cambridge, 1977) 40 ('sense of appropriateness developed in the profession and the public over time'). See also J Basedow, 'Die UNIDROIT-Prinzipien der internationalen Handelsverträge und das deutsche Recht' in H Schack (ed.), *Gedächtnisschrift für Alexander Lüderitz* (München, 2000) 1, 5.

that it finds sufficient 'institutional support'[20] in the acquis communautaire or in the law of the Member States and, secondly, if it is recognised as a European principle by legal practice, especially by the ECJ and the CFI but also by the national courts applying EC law.

c) Functions of General Principles of Law

General principles of law typically fulfil auxiliary functions with regard to legislative rules or case law.[21] They serve *secundum legem* as criteria for interpreting the existing rules, they may be applied for gap-filling or other *praeter legem*-adjudication and, most controversial of all, they may serve as a yardstick for the correction of existing rules by overruling or by *contra legem*-decisions.[22] All three functions can be found in EC legal practice, especially in the ECJ case law. The court refers to principles to interpret the Treaties, Regulations and Directives.[23] They are invoked to fill the numerous gaps in the still very 'open texture' of the acquis communautaire.[24] And they serve as tools for the correction of EC and Member State legislation.[25]

Irrespective of whether they are used for interpretation, gap-filling or correction,

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[20] It is the dominant position in legal theory that only principles with some support in the sources can be qualified as 'legal' principles, see RM Dworkin, above note 19, 40; N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, 1978) 238; J Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, 848 f.; R Sartorius, 'Social Policy and Judicial Legislation' (1971) 8 *American Philosophical Quarterly* 151, 154 f. But see J Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen, 1956) 132 et seq. and 201.

[21] In the classical language of J Boulanger: 'Dans une législation codifiée, les principes sont l'apanage du législateur.' (J Boulanger, 'Principes généraux du droit' in *Le droit privé français au milieu du XX^e siècle – Études offertes à Georges Ripert* [Paris, 1950] 51, 63).

[22] The distinction of 'secundum, praeter, contra legem' is taken from French legal theory, see eg B Oppetit, 'Les "principes généraux" dans la jurisprudence de cassation' (1989) 5 *JCP Cahiers de droit de l'entreprise* 14, 15; F Terré, *Introduction générale au droit* (Paris, 6th ed. 2003) 272.

[23] See eg ECJ, 06.07.1982, case 61/81 C*ommission v United Kingdom* [1982] ECR 2601. See also J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford, 1993) 226, 255; A Bredimas, *Methods of Interpretation and Community Law* (Amsterdam, 1978) 126 et seq.; T Tridimas, *The General Principles of EU Law* (Oxford, 2nd ed. 2006) 29 et seq. and 51 et seq.

[24] See eg ECJ, 23.10.1974, case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063. See also J Bengoetxea, above note 23, 227; U Everling, 'Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft' (2000) *Juristenzeitung* 217 et seq.; M Herdegen, 'The Origins and Development of the General Principles of Law' in U Bernitz/J Nergelius (eds.), *General Principles of Community Law* (The Hague, 2000) 3, 17; T Tridimas, above note 23, 17 et seq.

[25] See eg ECJ, 21.11.2002, case C-473/00 *Cofidis v Fredout* [2002] ECRI-10875. See also RE Papadopoulou, *Principes généraux du droit et droit communautaire* (Bruxelles, 1996), 17; T Tridimas, above note 23, 31 et seq.; JA Usher, above note 17, 123 et seq.

general principles of law cannot be applied in an 'all-or-nothing'-fashion.[26] Principles always have to be balanced with other principles or arguments. They have a 'dimension of weight' as *Dworkin* has put it in his famous works on principles.[27] One can explain this feature of principles by the inductive method applied when deriving principles from rules.[28] The validity of rules for special cases cannot ensure that a generalised form of this standard has to be applied in all unprovided-for cases. This is another lesson the law should learn from epistemology when dealing with inductive inferences: one might observe a high number of swans all being white but one still cannot predict with certainty if the next swan to come along will also be white.[29]

3. What Constitutes 'Abuse of Law'?

It remains to be defined what conception of 'abuse of law' is used here. For the purpose of this paper it seems most appropriate to take the ECJ case law as a starting point not only because this will help to discover common strands between EC private law and other areas of EC law but also because the ECJ frequently uses general principles recognised in one area of law at a later moment in other areas.[30] Hence, one should expect that future references to abuse of law in EC private law will be justified by reference to the older cases on fundamental freedoms, agricultural policy, corporate or tax law.

The most elaborate and influential definition of the abuse of law-principle has been established in the decision *Emsland-Stärke* of 2000, an agricultural policy case in which the ECJ required two conditions for a finding of abuse of law:

> 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.

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[26] RM Dworkin, above note 19, 24 et seq.

[27] Id., 26 et seq.

[28] A Metzger, above note 2, 52.

[29] See A Metzger, above note 2, 36 et seq.

[30] See eg the line of arguments in ECJ, case C-295/04 et al. *Manfredi v Lloyd Adriatico* [2006] ECR I-6619 (paras. 95-97) where the court allowed the claim for compensation for loss of profits and for interest in a competition law case with reference to older administrative law cases.

> 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.[31]

The definition takes up in its first prong the central element of the continental doctrine according to which abuse of law requires the use of a legal position for a purpose contrary to the objective of the rule granting it. This objective concept has been introduced by *Josserand* in the modern French theory and has been influential in France and other continental countries.[32]

But the ECJ does not stop here. It combines this objective test with a more subjective element which is the 'intention to obtain an advantage (...) by creating artificially the conditions laid down.' The allusion to the French idea of 'intention de nuire' is obvious[33] but the court indicates that objective criteria may suffice as evidence for the required 'intention', especially the artificial nature of the parties conduct.

This pragmatic approach to the subjective element has only recently been underlined by the court's ruling in *Halifax* in 2006 in the field of tax law:[34]

> In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the 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.
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> 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. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages. (...)

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[31] ECJ, 14.12.2000, case 110/99 *Emsland-Stärke v Hauptzollamt Hamburg-Jonas* [2000] ECR I-1569 (paras. 52 et seq.)

[32] See L Josserand, *De l'esprit des droits et de leur rélativité* (Paris, 1927) 368 et seq. A comprehensive survey of the current French practice and theory is provided by L Cadiet/P Tourneau, 'Abus de droit' in *Encyclopédie Dalloz, Droit civil* (Paris, 2002). For Germany see the influential study of W Siebert, *Verwirkung und Unzulässigkeit der Rechtsausübung* (Marburg, 1934) 68 et seq. and more recently HP Haferkamp, *Die heutige Rechtsmißbrauchslehre - Ergebnis nationalsozialistischen Rechtsdenkens?* (Berlin, 1995) 152 et seq.

[33] See L Cadiet/P Tourneau, above note 32, N° 24 ; F Terré, above note 22, N° 395.

[34] On the subjective element of the test see also R de la Feria, above note 1, 395, 410 and 423; K Engsig Sørensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?'(2006) 43 *CML Rev* 423, 451 and 456 et seq.

> As regards the second element, whereby the transactions concerned must essentially seek to obtain a tax advantage, it must be borne in mind that it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden (see, to that effect, Emsland Stärke, paragraph 58).[35]

According to *Halifax* it is not a specific intention that has to be proved but the aim of the behaviour, and this can be done by objective factors such as the purely artificial nature of the actions taken.

Admittedly, *Emsland-Stärke* and *Halifax* concerned cases from agricultural and tax law and not EC private law. Nevertheless they established an abuse of law-test of an overarching nature that may also be useful as a yardstick for other areas of law if isolated from its agricultural and tax law setting.

II. Abuse of Law and EC Private Law: Three Sketches

Having defined the essential concepts used the stage appears to be set to for consideration of the paper's main subject. This will be done by offering three sketches from specific fields of European private law, those being intellectual property, international civil procedure and contract law. For each field it will be analysed whether there is institutional support in the EC legislation for the principle of abuse of law and whether the principle has been recognised by European and national courts. It will not be the task of this paper to analyse systemically whether such principle could also be founded on the common traditions of most or at least of some Member States since other contributions to the present volume are devoted to this subject. Therefore, the method used should neither be seen as exhaustive nor should it be understood as a plea for pure 'acquis principles' and against a comparative approach.

[35] ECJ, 21.02.2006, case C-255/02 *Halifax v Commissioners of Custom* [2006] ECR I-7995 (paras. 74, 75 and 81).

1. Abuse of Law in EC Intellectual Property Law

The classical area of application for the principle of abuse of law in civil law countries is property law.[36] Looking to Community law, one might doubt at first glance whether there are any cases or rules in the acquis communautaire concerning property rights because harmonisation of national private laws has, at least so far, ignored the differences in the national property regimes of the EC member states. But this is only true with regard to property in movables and real property.[37] For intellectual property there is a remarkable body of EC legislation and case law.[38] And it is of little surprise that both the EC legislator and the courts – although so far only national courts – have used the principle of abuse of law to prevent abusive practices with regard to the harmonised aspects of intellectual property.

a) Abusive Registration of Trade Marks

The first reference to abuse of intellectual property rights in Community law appears to have been Article 3 paragraph 2 lit. d) of the Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks,[39] which allows Member states to refuse the registration of a trade mark if 'the application for registration of the trade mark was made in bad faith by the applicant'. The Community legislator has again asserted the concept of bad faith again in Article 51 paragraph 1 lit. b) of the Regulation 40/94 on the Community trade mark.[40] Although bad faith should not be equated with abuse of law,[41] some of the cases classified under the concept of bad faith in the Trade Mark Directive could be

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[36] See for a French perspective L Cadiet/P Tourneau, above note 32, N° 45 et seq.; G Marty/P Raynaud, *Droit civil: Introduction générale à l'étude du droit* (Paris, 2nd ed. 1972) N° 170. For Germany see H Fleischer, 'Der Rechtsmißbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht' (2003) *Juristenzeitung* 865.

[37] But see Art. 4 of the Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 08.08.2000, 35.

[38] See eg the survey given by A Metzger/W Wurmnest, 'Auf dem Weg zu einem Europäischen Sanktionenrecht des geistigen Eigentums?' (2003) *Zeitschrift für Urheber- und Medienrecht* 922 et seq.

[39] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40 , 11.02.1989, 1.

[40] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 11, 14.01.1994, 1.

[41] See from a comparative perspective R Zimmermann/S Whittaker, *Good Faith in European Contract Law* (Cambridge, 2000) 694 et seq.

qualified as abuse of law under the ECJ's definition of the principle. Hence, as often with general principles of law, the deviation in terminology should not prevent recognition of the common concept.

Unfortunately, neither the Directive nor the Regulation specifies what exactly bad faith means. In addition, there is no ECJ or CFI case law on the notion of "bad faith" in European trade mark law. However, a considerable number of cases of the Member States' courts have explored the concept and have developed a list of arguable grounds of 'bad faith', some of which bear strong resemblance with typical abuse of law cases. Two examples may highlight this special area of application of the principle.[42]

According to German legal practice, the 'blocking' of trade marks is held to be abusive and can be prevented under the bad faith provisions of the Trade Mark Directive. Blocking means the practice of registering a trade mark which the applicant does not intend to use himself in his business but which is supposed to prevent another from filing a similar trade mark or using the sign in the market-place. The German Bundesgerichtshof has explicitly endorsed the principle of abuse of law prior to the implementation of the Trade Mark Directive[43] and has upheld the doctrine after its implementation in the *Classe E*-case as a specific category of bad faith registration.[44]

The second example is provided by the practice of the UK Trade Marks Registry, which holds a trade mark registration to be in bad faith if evidence shows that the applicant makes use of the registered sign in a manner other than as registered. In the case *Betty's Kitchen Coronation Street* it was clear from the facts that the applicant had no

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[42] See also D Füllkrug, 'Gedanken zur markenrechtlichen Einordnung der Spekulations- oder Sperrmarke' (2006) *Wettbewerb in Recht und Praxis* 664; P Lange, *Marken- und Kennzeichenrecht* (München, 2006) 223 et seq.; S Middlemiss/J Phillips, 'Bad Faith in European Trade Mark Law and Practice' (2003) *European Intellectual Property Review* 397 et seq.

[43] BGH, 24.02.1961, case I ZR 15/60 *Dolex* (1961) *Gewerblicher Rechtsschutz und Urheberrecht*, 413; BGH, 23.03.1966, case Ib ZR 120/63 *Modess* (1967) *Gewerblicher Rechtsschutz und Urheberrecht* 298 = BGHZ 46, 130.

[44] BGH, 23.11.2000, case I ZR 93/98 *Classe E* (2001) *Gewerblicher Rechtsschutz und Urheberrecht* 242. See also BGH, 09.10.1997, case I ZR 95/95 *Analgin* (1998) *Gewerblicher Rechtsschutz und Urheberrecht* 412. The concept also seems to be recognised in the United Kingdom, see S Middlemiss/J Phillips, above note 42, 399.

intention to use the sign as registered but that his plan was only to use the words 'Betty's Kitchen' and 'Coronation Street' separately. As concerns 'Coronation Street', the registry would never have granted a trade mark, since 'Coronation Street' is a well-known soap opera. Therefore the application was found to be a bad faith application.[45]

In both cases the formal requirements for a trade mark registration were met but the grant of the trade mark would have been contrary to the purpose of the Trade Mark Directive. In addition, one could argue that evidence had shown that the conditions for the registration of a trade mark had been fulfilled 'artificially' since the applicant did not have the intention to use the sign as registered. Thus both requirements from the abuse of law-test of *Emsland-Stärke* and *Halifax* had been met.[46] Seen from the continental doctrine of abuse of law, the two cases could be classified as cases of abusive acquisition of property rights.[47] Thus, one could argue that there is some 'institutional support' for this subdivision of the abuse of law-principle in the current EC legislation on trade marks. One could also argue that the principle is applied by the national authorities in European trade mark law settings and therefore recognised in legal practice, even though the ECJ and the CFI have not yet referred to the principle in trade mark cases.

b) Abusive Enforcement of Intellectual Property Rights

Having a specific doctrine in trade mark law since the late 1980's, it was eventually in 2004 when the European legislator decided to expand the area of application of the abuse of law-principle to all intellectual property rights through Directive 2004/48/EC on the enforcement of intellectual property rights.[48] According to Article 2 paragraph 1, the Enforcement Directive applies to 'any infringement of intellectual property rights as provided for by Community law and/or by the national

[45] Trade Marks Registry, 14.10.1999, Reports of Patent, Designs and Trade Mark Cases 117 (2000) 825 et seq.

[46] See above notes 31 and 35.

[47] See eg J Staudinger-D Looschelders/D Olzen, *Kommentar zum Bürgerlichen Gesetzbuch* (Berlin, 2005) § 242 N° 240 et seq.

[48] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195, 02.06.2004, 16.

law of the Member State concerned.' Hence, the Directive is not only applicable to unitary Community rights (such as the Community trade mark) and to harmonised national rights but also to non-harmonised national intellectual property rights such as patents.[49] It provides rules on remedies for infringement of intellectual property rights, especially on damages and injunctions. In addition, it offers a comprehensive set of procedural instruments, e.g. on the taking and preserving of evidence, on provisional and protective measures.

Article 3 states for all kinds of remedies and procedural measures a "general obligation":

> Article 3 General Obligation
>
> 1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. (...)
>
> 2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

The clause at the end of paragraph 2 is taken from Article 41 TRIPS-Agreement.[50] Due to the broad area of application of the Directive, the abuse of law-principle codified at the end of paragraph 2 is applicable to almost all remedies and procedural measures in European intellectual property law. It will be interesting to see in the coming years how the national and European courts will interpret the very open wording of the rule. Since most Member States have not yet implemented the Directive, there is currently no reported case law on Article 3. Nevertheless, one should consider abuse of law to be established as a general principle of EC intellectual property law as far as remedies are concerned.

2. Abuse of Law in EC Civil Procedure

In civil law countries the area of civil procedure has, in addition to property law,

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[49] Patent law has been mostly spared by Community law with the exception of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30.07.1998, 13.

[50] Art. 41 para. 1 phrase 2 TRIPS: 'These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

always been one of the typical fields of application for the abuse of law-principle.[51] Therefore, it is by no means surprising that the European legislator and the ECJ rely on the principle when dealing with procedural law. In recent decades, the centre of interest of European civil procedure has been the Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters[52] which has been transformed into the 'Brussels-I-Regulation' in 2001.[53] The texts of the Convention and the Regulation and the interpretation given by the ECJ make several references to the abuse of law-principle.[54]

a) Abuse of Derived Jurisdiction under Article 6 Nr. 2 Brussels-I-Regulation

Article 6 Nr. 2 of the Brussels Convention and of the Brussels-I-Regulation provides the clearest legislative affirmation of the abuse of law-principle in the Brussels system. According to Article 6 Nr. 2, initial proceedings against one party may be extended to join a third party in case of actions on warranty or guarantee. The typical case for the provision is the case of a defendant in an action for warranty seeking redress from his supplier and joining the claim against his supplier with the claim of his customer for breach of warranty. In this case, jurisdiction over the third party is granted at the forum of the initial proceedings even if there would be no jurisdiction over the third party under the general rules. However, Article 6 Nr. 2 provides a reservation from this approach for cases in which the initial proceedings 'were instituted solely with the object of removing him [the third party] from the jurisdiction of the court which would be competent in the case.' Hence, using the specific jurisdiction rule of Article 6 Nr. 2 to bypass the general jurisdiction rules of the Brussels-I-Regulation is deemed abuse of law and is prohibited by the

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[51] See L Cadiet/P Tourneau, above note 32, N° 113 et seq.; H Fleischer, above note 36, 865, 866. See also K Engsig Sørensen, above note 34, 423, 435 (referring to misuse of the procedure of Art. 230 EC according to ECJ, 11.03.1980, case 104/79 *Foglia v Novello* [1980] ECR 745).

[52] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27.09.1968, OJ L 299, 31.12.1972, 32.

[53] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001, 1.

[54] See also the contributions of *A Briggs* and *G Cuniberti* in this volume and A Nuyts, 'The Enforcement of Jurisdiction Agreements Further to 'Gasser' and the Community Principle of Abuse of Rights' in P de Vareilles-Sommières (ed.), *Forum Shopping in the European Judicial Area* (Oxford, 2007) 55 et seq.

Regulation.[55] In this scenario, the two elements of the abuse of law-test from *Emsland-Stärke* and *Halifax* are met.[56] The specific jurisdiction rule is being used against the purpose of the provision; the court for the initial proceedings is chosen artificially to remove the third party from the forum of his general jurisdiction. Seen from this perspective, Article 6 Nr. 2 may be read as providing clear legislative support for the abuse of law-principle in EC civil procedure.

b) Artificial Place of Performance and Article 5 Nr. 1 Brussels-I-Regulation

A second area of application for the abuse of law-principle may be found in the field of special jurisdiction for contractual obligations under Article 5 Nr. 1 lit. a) of the Brussels-I-Regulation. Under this provision, a person may be sued in matters relating to a contract 'in the courts for the place of performance of the obligation in question.' Although it is generally admitted that the parties to a contract may specify the place of performance in their contract and that this choice must also be respected with regard to jurisdiction, the ECJ has decided in 1997 in the case *Mainschiffahrts-Genossenschaft* that the parties may not choose a wholly artificial place without actual connection with the real subject-matter of the contract which was never meant to be the place of performance but which was only intended to determine the place of jurisdiction.[57] In such case, the agreement has to comply with the specific requirements of choice of court agreements of Article 23 of the Regulation:

> Thus, where there is such an agreement, there is not only no direct connection between the dispute and the courts called upon to determine it, but there is also circumvention of Article 17 [Article 23 of the Regulation], which, whilst providing for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated [...], requires, for that very reason, compliance with the strict requirements as to form which it sets out.[58]

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[55] See U Magnus/P Mankowski-H Muir Watt, *Brussels I Regulation* (München, 2007) Art. 6 N° 37; T Rauscher-S Leible, *Europäisches Zivilprozessrecht* (München, 2nd ed. 2006) Art. 6 N° 21. According to the recent decision of the ECJ, 11.10.2007, case C-98/06 *Freeport v Arnoldsson* [2007] ECR I-8319 (paras 51-54), the abuse-proviso of Article 6 Nr. 2 is not applicable under Article 6 Nr. 1. This could have been understood differently under the rulings of ECJ, 27.09.1988, case 189/87 *Kalfelis v Schröder* [1988] ECR 5565 (paras. 8, 9) and ECJ, 13.07.2006, case C-103/05 *Reisch v Kiesel* [2006] ECR I-6827 (para. 32). In this sense *Nuyts*, above note 54, 65.

[56] See above notes 31 and 35.

[57] ECJ, 20.02.1997, case C-106/95 *Mainschiffahrts-Genossenschaft (MSG) v Les Gravières Rhénanes* [1997] ECR I-911.

[58] Id., para. 34.

Although the court emphasised that allowing such agreements would amount to a circumvention of Article 23 of the Regulation, the case could also be construed as an abuse of Article 5 Nr. 1 lit. a). The right to determine the place of performance is being abused to evade the specific requirements of Article 23.[59] Again, both elements of the *Emsland-Stärke* and *Halifax*-test[60] are fulfilled so that *Mainschiffahrts-Genossenschaft* may be construed as recognising the abuse of law-principle in EC civil procedure.

c) Abuse of Exclusive Jurisdiction under Article 22 Nr. 5 Brussels-I-Regulation

Another example for the recognition of the abuse of law-principle in EC civil procedure is provided by the decision of the ECJ in *AS Autoteile/Malhé*.[61] In that case the question arose whether the defendant in an enforcement procedure under Article 22 Nr. 5 Brussels-I-Regulation may plead set-off with a claim over which the court could not independently assert jurisdiction. The court denied such a defence, relying explicitly on the abuse of law-principle:

> It follows from the specificity of the connection required by Article 16 [Article 22 of the Regulation] that a party cannot make use of the jurisdiction conferred by Article 16 Nr. 5 [Article 22 Nr. 5 of the Regulation] on the courts of the place of enforcement in order to bring before those courts a dispute which falls within the jurisdiction of the courts of another contracting state under Article 2. The use for such a purpose of the application to oppose enforcement is contrary to the division of jurisdiction which the Convention intended to establish between the court of the defendant's domicile and the court of the place of enforcement.
>
> In this case, since the German courts have already held that they have no jurisdiction over the claim relied on as a set-off, the use of that claim in order to oppose the enforcement of an order for the costs incurred in the same proceedings amounts to a clear abuse of the process of the part of the plaintiff for the purpose of obtaining indirectly from the German courts a decision regarding a claim over which those courts have no jurisdiction under the Convention.[62]

Once again the doctrine of abuse of law was used to restrict the exercise of a procedural right granted under the Convention that would contradict the purpose of

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[59] See T Rauscher-S Leible, *Europäisches Zivilprozessrecht* (München, 2nd ed. 2006) Art. 5 N° 44a; A Nuyts, above note 54, 66. But see A Briggs/P Rees, *Civil Jurisdiction and Judgements* (London, 4th ed. 2005) 171 (note 804).

[60] See above notes 31 and 35.

[61] ECJ, 04.07.1985, case 220/84 *AS Autoteile v Malhé* [1985] ECR 2267. See also A Nuyts, above note 54, 66.

[62] Id., paras. 17 et seq.

this right.

d) Abuse of Procedure and the Principle of 'Mutual Trust'

However, it is not in every instance that opportunistic behaviour amounts to abuse of law under the Brussels-I-Regulation. Countervailing principles and arguments may justify a different assessment of behaviour that might at first blush appear as abusive. This has been demonstrated by the ECJ judgments in *Gasser* and *Turner v. Grovit* which both invoked the principle of 'mutual trust' underlying the Brussels Convention and rejected to find an abuse of law.

In *Gasser*[63] one party filed suit before a court of a Member State (Italy) it knew to proceed slower than the courts of the Member State the other side intended to select for the same cause of action (Austria). The question arose whether an exception from the *lis pendens* rule of Article 27 of the Regulation should be made in cases in which the sole intention of the first proceedings was to block proceedings before the faster working courts second seised. The United Kingdom had submitted exactly that position to the ECJ,[64] but the court did not follow the argument, holding that the principle of mutual trust did not allow any exceptions from the *lis pendens* rule even if the proceedings before the court first seised took excessively long.[65]

A similar argument was used with regard to anti-suit injunctions in the case of *Turner v. Grovit,* decided by the ECJ in 2004.[66] In that case, a British employee had filed suit against his former employer, a Spanish company, before an English court. After this suit was brought, the employer started proceedings on the same cause of action before a Spanish court. The employee asked the English courts to issue an injunction against the employer restraining him from pursuing the proceedings commenced in Spain. Such an 'anti-suit injunction' was granted. The employer appealed to the House of Lords claiming that the English courts did not have the power to issue

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[63] ECJ, 09.12.2003, case C-116/02 *Gasser v MISAT* [2003] ECR I-14693.

[64] Id., paras. 61-64

[65] Id., paras. 70-73

[66] ECJ, 27.04.2004, case C-159/02 *Turner v Grovit* [2004] ECR I-3565. See also A Dutta/C Heinze, 'Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht' (2005) *Zeitschrift für Europäisches Privatrecht* 428; C Hare, 'A Lack of Restraint in Europe' (2004) 63 *CLJ* 570 .

restraining orders preventing the pursuit of proceedings in other EC Member States. The House of Lords referred the case to the ECJ where the employee and the United Kingdom submitted that such an injunction would not interfere with the Brussels-I-Regulation since it would only prevent an abuse of procedure. The ECJ again took the opposite view holding that the principle of mutual trust would not allow the courts of one Member State to review the jurisdiction of another Member State.

In both in *Gasser* and in *Turner v. Grovit* opportunistic behaviour was not assessed as abusive because of the countervailing argument that courts should in no case decide on the jurisdiction of other courts under the Brussels-I-Convention. This makes it very clear that abuse of law in procedural matters is not an 'all-or-nothing' rule but has to be balanced with other legal principles.[67]

3. Abuse of Law in EC Contract Law (and EC Law of Obligations)

Having some support for the abuse of law-principle in the fields of intellectual property and procedural law, one might expect a similar picture in EC contract law. The European legislator has been very active in this area since the 1980's, especially in the field of consumer contracts, and one could well imagine cases in which the use of contractual remedies such as the consumer's right to withdraw from the contract could be seen as abusive. But the principle has until now found little support in EC legislation and has only rarely been invoked in European and national courts with regard to contractual rights and remedies rooted in the acquis communautaire. Moreover, the rare examples do for most part fail to match the concept of abuse of law as it has emerged in the ECJ case law in other areas of law.

a) Abuse of Law and the Unfair Terms Directive

When talking about abuse of law in EC contract law, one misconception should be avoided from the outset. 'Unfair terms' under the Directive 93/13/EEC on unfair terms in consumer contracts[68] do not present a case of abuse of law even though the

[67] For a similar line of argument in ECJ corporate and tax law cases see R de la Feria, above note 1, 395, 405 et seq. and 423 et seq. ('legitimate circumvention' or 'planning without abuse') and K Engsig Sørensen, above note 34, 423, 436 et seq.

[68] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95,

French language version reads "clause abusive" and the German version 'missbräuchliche Klauseln'. The aim of the Directive is to protect consumers from the unfair behaviour of professionals using standard terms. These professionals are not abusing a legal position – apart from their contractual freedom – but rather the factual setting of non-negotiated and lengthy standard terms used against consumers who typically do not read a single word of what they accept as the terms of the contract. The behaviour of the professional using standard terms may indeed conflict with the provisions of the Directive and the more general concept of good faith in contractual dealings.[69] It does not however fall under the concept of abuse of law *stricto sensu* as it has been established in the ECJ's decisions of *Emsland-Stärke* and *Halifax*.[70]

b) Consumers Disguised as Businessmen: Abuse of EC Consumer Protection

But what about abuse of consumer protection rights guaranteed by EC legislation? Although there seems to be no case law of the ECJ applying the abuse of law-principle to consumer contract rules, the German Bundesgerichtshof has nonetheless entered the arena and restricted consumer protection in case of abusive practices of the consumer.

In the landmark decision from December 2004,[71] the court had to rule whether a consumer may rely on the specific remedies of the Directive 1999/44/EC on the sale of consumer goods[72] if he has pretended to be a professional when negotiating the sales contract. In that case, the seller had made clear that he would only sell the used car, a Fiat Barchetta, to a professional because he wanted to exclude any warranty in his standard terms. The buyer pretended to be a businessman and bought the car

21.04.1993, 29.

[69] In France unfair terms are seen as a sub-category of abuse of law, see eg L Cadiet/P Tourneau, above note 32, N° 9 et seq. and 37 et seq. The reason for this broad concept seems to be that good faith as a general principle is traditionally less developed in France than in other countries, eg Germany. Therefore French law is using a broader concept of abuse of law to cover cases that would fall under the principle of good faith elsewhere, see R Zimmermann/S Whittaker, above note 41, 695.

[70] See above notes 31 and 35. In Germany unfair terms are not put under the conceptual umbrella of abuse of law, see eg H Fleischer, above note 36, 865, 871; K Rebmann/FJ Säcker/R Rixecker-GH Roth, *Münchener Kommentar zum BGB* (München, 5th ed. 2007) § 242 N° 211 et seq.

[71] BGH, 22.12.2004, case VIII ZR 91/04 (2005) *Neue Juristische Wochenschrift* 1045.

[72] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 07.07.1999, 12.

under the terms of the seller. Later he discovered that the car had a technical defect and asked for rescission of the contract, pleading for invalidity of the exclusion of warranty under the consumer protection rules of Article 475 of German Civil Code which is the transposition of Article 7 of the Directive.

The court denied rescission. Without addressing the general question whether the 'consumer' had to be qualified according to an objective or a subjective test, the court stated that it would be against the principle of good faith to grant consumer protection to a buyer who pretends to be professional during the negotiations. Protecting the consumer would be against the doctrine of 'venire contra factum proprium', a doctrine which is seen in Germany as a subdivision of the abuse of law-principle.[73] But the court did not content itself with the application of the German principle of good faith or abuse of law. It went on to conclude that the principle of good faith is also part of EC law and that under the European standard no different result could be reached.[74]

Although the court explicitly emphasised the abusive character of the consumer's behaviour, the case is not squarely covered by the concept of abuse presented by *Emsland-Stärke* and *Halifax*.[75] One might consider the consumer's conduct as against the purpose of consumer protection law. Yet one could hardly say that the consumer had artificially fulfilled the statutory requirements to obtain the advantages of EC consumer law since the case was not about the abusive *acquisition* of a legal status but about the abusive *exercise* of it. In this respect, the case has more resemblance to ECJ abuse of law cases like *Van Binsbergen*[76] or the *Broadcasting* cases.[77]

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[73] See egJ Staudinger-D Looschelders/D Olzen, above note 47, N° 286 et seq.; K Remann/FJ Säcker/R Rixecker-GH Roth, above note 70, § 242, N° 255 et seq.

[74] The Bundesgerichtshof was on the right track with regard to EC consumer law as shown by the decision of the ECJ, 20.01.2005, case C-464/01 *Gruber v Bay Wa AG* [2005] ECR I-439, which was decided only four weeks later and which used the same line of arguments for the denial of consumer protection under the rules of Articles 13 to 15 of the Brussels Convention on Jurisdiction and Enforcement.

[75] See above notes 31 and 35.

[76] See ECJ, 03.12.1971, case 33/74 *Van Binsbergen* [1974] ECR 1299.

[77] See eg ECJ, 03.02.1993, case C-148/91 *Veronica Omroep* [1993] ECR I-487.

c) Abusive Assignment of an Insolvent Debtor

Even though the ECJ has not yet applied the abuse of law-principle to EC consumer protection legislation, there are cases in which the ECJ has made use of it in the law of obligations at large. One example is provided by the *DEKA* case decided in 1983.[78]

In *DEKA*, the Community was sued for damages under Article 288 (ex Article 215) of the EC-Treaty and wanted to set-off a claim for recovery of unlawfully paid subsidies which it had against the plaintiff. Before the suit was filed, the insolvent plaintiff had assigned the claim against the Community to another company which, after informing the Community as to the assignment, pleaded that the Community could not set-off its claim for recovery against the assignee. The Court dismissed the argument by applying the principle of abuse of law:

> In the case of an insolvent trader, the assignment of the trader's claim against the community authorities to a third party may, depending on the circumstances, amount to an abusive transaction of such a nature that it must be regarded as invalid as against those authorities. According to a general principle of law common to the laws of the Member States, certain acts of a debtor to the detriment of the interests of creditors and, in particular, those which are of a fraudulent nature vis-a-vis creditors, either cannot be pleaded against the creditors or may be set aside under procedures specifically prescribed for that purpose.[79]

As a result, the right to assign claims – which are governed by community law – was restricted by reference to the principle of abuse of law, according to which the assignment of a claim may not be pleaded against the creditors if it was executed to the detriment of the creditors. But the concept of abuse of law referred to in *DEKA*, once again, does not match the concept established by *Emsland-Stärke* and *Halifax*. It is hard to see any statutory or contractual right acquired or exercised by formal observance of the conditions laid down by the rules of EC law but which is against the purpose of those rules. The only 'right' that may have been abused in *DEKA* seems to be the (unwritten) right to assign claims under Community law. But such explanation would appear as rather far-fetched. It is more likely that the court wanted

[78] See ECJ, 01.03.1983, case 250/78 *DEKA v ECC* [1983] ECR 421.

[79] Id., summary para. 2.

to refer to a broader concept of good faith and wanted to prevent the debtor from taking advantage of his assignment in bad faith. Therefore *DEKA* does not provide very compelling support for the concept of abuse of law in EC contract law.

d) Abuse of Law and Fixed-term Employment Contracts

Another admittedly marginal anchor for the abuse of law-principle in EC contract law can be found in the Directive 1999/70/EC concerning the framework agreement on fixed-term work. In Article 5 paragraph 1 of the annexed 'framework agreement on fixed-term work', the Directive provides rules on the prevention of abuse of fixed-term employment contracts:

> To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
>
> (a) objective reasons justifying the renewal of such contracts or relationships;
>
> (b) the maximum total duration of successive fixed-term employment contracts or relationships;
>
> (c) the number of renewals of such contracts or relationships.[80]

The abuse of fixed-term employment contracts is at the crossraods of the abuse of a mere factual position (i.e. the dominance of the employer enabling him to keep the employee in successive fixed-term contracts) and a legal position (i.e. the right of the employer to proceed with fixed-term contracts without having the duties of a contract of indefinite duration). Only if seen from the second perspective can the abuse of fixed-term employment contracts be conceptualised as a specific affirmation of the abuse of law-principle.[81]

e) Abuse of Law in the 'Acquis Principles'

In view of the weak support of the abuse of law-principle in EC legislation and case

[80] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.07.1999, 43.

[81] On the interpretation of Article 5 see ECJ, 04.07.2006, case C-212/04 *Adeneler v ELOG* [2006] ECR I-6057.

law in respect of contracts, it is somewhat surprising to find a fairly clear affirmation of the principle in Article 7:102 of the 'Principles of the Existing EC Contract Law' or 'Acquis Principles':

> Good faith in the exercise of rights
>
> The creditor must exercise its rights to performance and remedies for non-performance in accordance with good faith.[82]

The principle in Article 7:102 is not on good faith in contract formation. Good faith in contract formation is dealt with in Article 2:101 of the 'Acquis Principles' and has to be distinguished from abuse of law. In the former case, the question is about fairness and reasonableness of the parties when negotiating contracts, whereas in the case of abuse of law, the question is whether somebody makes use of a right or remedy in a way that contradicts the purpose of that right or remedy. Article 7:102 points to such a bad faith exercise of rights and remedies and the comments on the 'Acquis Principles' state explicitly that Article 7:102 should be understood as a general rule preventing any abuse of law.[83]

However, the sources cited by the comments do not provide sufficient support for the existence of such a principle in EC contract law. Article 3 paragraph 1 of the Unfair Terms Directive 93/13 deals – as has been mentioned earlier – with unfairness in contract formation,[84] and Article 4 of the Commercial Agent Directive 86/653 concerns the duty of the principal to provide information to the agent.[85] The cited ECJ case law is dealing with EC administrative law cases in which the court invoked the principle of good faith in order to avoid arbitrary decisions of the Community authorities against its staff,[86] for the recovery of unlawfully paid state aids in cases in which the national authority was responsible for the illegality of the

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[82] See Research Group on the Existing EC Private Law, *Principles of the Existing EC Private Law – Contract I* (München, 2007) 261.

[83] Id., 264.

[84] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95 , 21.04.1993, 29.

[85] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 382, 31.12.1986, 17.

[86] See ECJ, 15.07.1960, cases 43/59, 45/59 and 48/59 *Lachmüller v Commission* [1960] ECR 463.

aid decision[87] or the recipient was acting in good faith.[88] Admittedly, all sources and cases deal with good faith in a broader sense, but they do not support the existence of an abuse of law-principle for the exercise of contractual rights and remedies as suggested by Article 7:102 of the 'Acquis Principles'.[89]

III. Conclusion: The Current Status of the Abuse of Law-Principle in EC Private Law

What then is the current status of the abuse of law-principle in EC private law? The paper has examined three areas of EC private law and has yielded mixed findings. In EC intellectual property law there is strong legislative support for the principle of abuse of law in Article 3 of the Enforcement Directive and in trade mark law. It has been applied by national courts when interpreting the European trade mark rules; however, the ECJ has not yet recognised the principle explicitly in this area. In EC civil procedure, the legislative support provided by the Brussels Convention and the Brussels-I-Regulation – albeit Article 6 Nr. 2 – is not as significant as in EC intellectual property, but here the ECJ has referred to abuse of law more frequently. Viewing the picture as a whole, one , can convincingly argue that abuse of law has been established as a general principle of law in both areas although not with the same clarity and insistence as in corporate or tax law or in the application of fundamental freedoms. And the finding would be even stronger if the comparative law materials from the Member States' were taken into account. But this second basis of justifying legal principles of EC law has been deliberately omitted from this paper and left to the other contributions to this volume. [90]

Abuse of law is used in EC intellectual property and civil procedure as a correction tool for counteracting the use of rights and remedies in a manner that would contradict the purpose of the legal rules granting those rights and remedies. The principle is not merely used as a tool of interpretation but as a self-standing principle

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[87] See ECJ, 20.03.1997, case C-24/95 *Rheinland-Pfalz v Alcan* [1997] ECR I-1591.

[88] See ECJ, 19.09.2002, case C-336/00 *Österreich v Huber* [2002] ECR I-7699; ECJ, 15.03.2005, case C-209/03 *The Queen v London Borough of Ealing* [2005] ECR I-2119.

[89] See the detailed critique of the 'Acquis Principles' by N Jansen/R Zimmermann, 'Grundregeln des bestehenden Gemeinschaftsprivatrechts?' (2007) *Juristenzeitung* 1113 et seq.

[90] See the contributions of *J Gordley* and *DJ Ibbetson*.

that can lead to results which run counter to the literal meaning of the rules at hand. From this perspective, abuse of law in EC intellectual property and procedural law has strong similarities to the principle as established by the ECJ in other areas of Community law. But the establishment as a general principle of law does not mean that abuse of law can be applied as a hard and fast rule. Rather, the ECJ case law indicates that countervailing principles and arguments may justify opportunistic behaviour that would otherwise appear abusive.

For EC contract law the result seems to be different. Abuse of law is neither supported by EC legislation nor is it recognised by the ECJ case law. Although it is true that concept appears in some minor statements in specific Directives and in single instances within the ECJ case law, these fragments do not amount to the recognition of a general principle of law. Therefore Article 7:102 of the 'Acquis Principles' is more of a prophecy than an accurate statement of the 'existing' EC contract law. But there are arguments suggesting this prophecy will come true in the future. One argument might be that in the continental civil law systems as well the principle of abuse of law was first established in property and procedure before entering the less obvious area of contracts.[91] Another more policy-oriented argument might be that it is hardly conceivable for any legal order to provide parties with rights and remedies without providing at the same time the limits of these rights and remedies.[92] This may be done by the legislator if a detailed style of legislation is preferred. If the written law does not provide such safeguards, this task falls to the courts. And here the principle of abuse of law is a natural candidate for EC private law to fulfil this limiting function.

[91] See H Fleischer, above note 36, 865.

[92] See S Grundmann, *Europäisches Schuldvertragsrecht* (Berlin, 1998) 135 et seq.