

OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 16 September 2015 (1)

Case C-419/14

WebMindLicenses Kft.

v

Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság

(Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi bíróság
(Administrative and Labour Court, Budapest, Hungary))

(Common system of value added tax — Supply of services — Economic reality of a know-how
licensing agreement — Compatibility of secret tax investigations with fundamental rights —
Obligation of the Member States' tax authorities to cooperate)

I – Introduction

1. While the present request for a preliminary ruling is another case in which the Court is asked to answer questions concerning the interpretation of the concept of abuse of rights in tax matters (in this instance, value added tax (VAT)), it also raises interesting questions concerning the interface between the powers of taxation exercised by the Member States and the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the right to respect for private and family life enshrined in Article 7 of the Charter and the right to the protection of personal data enshrined in Article 8 of the Charter.

II – Legal framework

A – EU law

2. Article 24 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2) ('the VAT Directive') provides:

'1. "Supply of services" shall mean any transaction which does not constitute a supply of goods.

2. "Telecommunications services" shall mean services relating to the transmission, emission or reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception, with the inclusion of the provision of access to global information networks.'

3. In the version of the VAT Directive in force from 24 July 2009 to 31 December 2009, Article 43 provided that ‘the place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied, or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides’.

4. In the version in force from 1 January 2010 to 31 December 2012, Article 45 of the VAT Directive provided that ‘the place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides’.

5. In the version of the VAT Directive in force from 24 July 2009 to 31 December 2009, Article 56 provided:

‘1. The place of supply of the following services to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

(k) electronically supplied services, such as those referred to in Annex II;

...’

6. Article 59 of the VAT Directive, in the version in force from 1 January 2010 to 31 December 2012, is worded as follows:

‘The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the [European Union], shall be the place where that person is established, has his permanent address or usually resides:

...

(k) electronically supplied services, in particular those referred to in Annex II.

...’

7. In both versions of the VAT Directive, Annex II comprised the following services:

‘(1) Website supply, web-hosting, distance maintenance of programmes and equipment;

(2) supply of software and updating thereof;

(3) supply of images, text and information and making available of databases;

(4) supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events;

(5) supply of distance teaching.’

8. Article 273 of the VAT Directive provides:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

9. Article 7 of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) (3) provides:

‘1. At the request of the requesting authority, the requested authority shall communicate the information referred to in Article 1, including any information relating to a specific case or cases.

2. For the purpose of forwarding the information referred to in paragraph 1, the requested authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information.

...’

B – *Hungarian law*

10. Paragraph 37 of Law No CXXVII of 2007 on value added tax (az általános forgalmi adóról szóló 2007. évi CXXVII. törvény) provides:

‘(1) In the case of supplies of services to a taxable person, the place of supply of services shall be the place where the customer is established for the purpose of engaging in an economic activity or, in the absence of such economic establishment, the place where he has his permanent address or usually resides.

(2) In the case of supplies of services to a non-taxable person, the place of supply of services shall be the place where the supplier is established for the purpose of engaging in an economic activity or, in the absence of such economic establishment, the place where he has his permanent address or usually resides.’

11. Paragraph 46 of that law provides:

‘(1) For the services referred to in this Paragraph, the place of supply of services shall be the place where, in this context, the non-taxable customer is established or, in the absence of establishment, the place where he has his permanent address or usually resides, provided that this is outside the territory of the Community.

(2) The services to which this Paragraph applies are as follows:

...

(i) telecommunication services;

(j) broadcasting and audiovisual media services;

(k) electronically supplied services.

(5) For the purposes of this Paragraph, 'electronically supplied services' shall mean in particular:

(a) making available of electronic storage space, web-hosting and website operation, distance maintenance of computer programs and equipment,

(b) making available and updating of software,

(c) making available of images, text and other information and allowing access to databases,

(d) making available of music, films and games, including games of chance, and the transmission or broadcasting of political, cultural, artistic, scientific, sporting or entertainment media services and events,

(e) supply of distance teaching,

provided that the service is supplied and used by means of a global information network. The fact that the service provider and the customer make, and remain in, contact over the network, including for the making and acceptance of the offer, shall not, however, of itself suffice to constitute an electronically supplied service.'

12. As set out in Paragraph 51 of Law No CXXII of 2010 on the National Tax and Customs Authority (a Nemzeti Adó- és Vámhivatalról szóló 2010. évi CXXII. törvény):

'(1) The Principal Directorate for Criminal Matters of [the National Tax and Customs Authority] and the intermediate-level services of the Principal Directorate for Criminal Matters ('the authorised services') may, within the framework laid down by this Law, secretly gather information for the purpose of averting, preventing, detecting or interrupting the commission of a criminal offence falling within the scope of the investigatory powers of [the Tax and Customs Authority] under the law on criminal procedure, of establishing the identity of the perpetrator, of arresting him, of locating his place of residence and of obtaining evidence, including for the purpose of protecting persons involved in the criminal procedure, persons belonging to the authority responsible for the procedure and persons cooperating with the judicial process.

(2) The measures taken on the basis of subparagraph 1 above and the data relating to natural persons, legal persons and organisations with no legal personality concerned by those measures shall not be disclosed.

(3) The authorised services and, so far as concerns the data obtained and the data gathering measure itself, the public prosecutor and the judge may be informed of the content of the data put on file, without special authorisation, in the course of the gathering of that information.'

13. Paragraph 97(4) and (6) of Law No XCII of 2003 on the taxation system (az adózás rendjéről szóló 2003. évi XCII. törvény) states:

'(4) In the course of the inspection, it shall be the duty of the tax authority to establish and prove the facts unless, by virtue of legislation, the burden of proof lies with the taxpayer.

...

(6) When establishing the facts, the tax authority shall have a duty also to seek facts favourable to the taxpayer. Except where estimates are made, an unproved fact or circumstance shall not be assessed to the taxpayer's disadvantage.'

III – The dispute in the main proceedings and the questions referred for a preliminary ruling

14. Mr Gattyán is the creator of know-how (4) which he transferred on 28 January 2008 to Prime Web Tech Stiftung, a Liechtenstein foundation created for inheritance-related reasons. He is also the sole shareholder and the manager of the applicant in the main proceedings, WebMindLicenses Kft. ('WebMindLicenses'), a commercial company which was registered in Hungary on 23 July 2009 and is part of the Docler group.

15. On 28 February 2008, the right to exploit the know-how at issue in the main proceedings was transferred by licence to the Portuguese company Lalib —Gaesto e Investiments Lda ('Lalib'), which belongs to a French national with extensive experience in the field of setting up and operating global online services.

16. On 1 October 2008, the Portuguese company Hypodest Patent Development Company, which also belongs to Mr Gattyán, acquired that know-how.

17. On 1 September 2009, Hypodest Patent Development Company transferred that know-how free of charge to WebMindLicenses, which had just been founded.

18. On the same date, WebMindLicenses signed a licensing agreement with Lalib for the exploitation of that know-how. It is on the basis of that agreement that Lalib has been able to continue exploiting the know-how.

19. Under the terms of the licensing agreement, WebMindLicenses was responsible for continuously updating and for developing the know-how, on the basis of a development contract signed with one of the companies in the Docler group.

20. Lalib exploited the know-how at issue on a number of websites (the most important of which was livejasmin.com) offering X-rated entertainment by 'performers' from all over the world. For VAT purposes, the service provided consists in the 'performers' chatting with customers or 'members' and presenting to them shows that are filmed live. To access the service, 'members', using a credit card or other electronic means of payment, purchase from Lalib, via the livejasmin.com website, credit packages that they are able to spend in order to chat with 'performers' or see the shows that they offer.

21. The 'performers' are bound by contract to the Seychelles company Leandra Entreprises Ltd, which is part of the Lalib group and was formed on account of the certification requirements applicable to the business sector in question. They are paid according to the value of the credits spent to obtain their services.

22. In 2012, Lalib sold its contracts relating to the exploitation of the know-how, its databases, its customer lists and its management know-how at the market price to a Luxembourg company belonging to the Docler group.

23. According to WebMindLicenses, the reason why Lalib became involved in 2008 in exploiting the know-how at issue is that its exploitation within the Docler group and the commercial growth of the online service had come up against the fact that the main Hungarian banks, which

processed the collection of bank card payments, did not at that time allow suppliers of X-rated services to join the bank card system. Other banks, which were prepared to conclude contracts with suppliers providing those services, did not have the technical capability necessary to process the collection of bank card payments taken via such websites. Furthermore, the Docler group possessed neither the network of relationships nor the skills necessary to operate websites on a global scale.

24. Following a tax inspection relating to part of 2009 and to 2010 and 2011, the first-tier tax authority (Nemzeti Adó- és Vámhivatal Kiemelt Adózók Igazgatósága), by notice of 8 October 2013, made various adjustments and instructed WebMindLicenses to pay a tax shortfall of 10 587 371 000 Hungarian forints (HUF), (5) including HUF 10 293 457 000 (6) by way of VAT, on the ground that, according to the evidence which it had gathered, the licensing agreement between WebMindLicenses and Lalib had not actually transferred the right to exploit the know-how to Lalib as that know-how was in fact exploited by WebMindLicenses and Mr Gattyán took all the decisions necessary to increase the turnover generated by the livejasmin.com website, with the result that the exploitation was to be regarded as actually having taken place in Hungary. It also fined WebMindLicenses HUF 7 940 528 000 (7) and charged it penalties for late payment in the amount of HUF 2 985 262 000. (8)

25. That notice was amended in part by the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám F?igazgatóság (National Tax and Customs Authority — Principal Directorate of Taxes and Customs for Major Taxpayers), which nevertheless also took the view that the know-how had not actually been exploited by and for Lalib and that accordingly, by concluding the licensing agreement, WebMindLicenses had committed an abuse of rights aimed at circumventing Hungarian tax law in order to benefit from a lower level of taxation in Portugal. (9) In support of that conclusion, it was noted in particular that WebMindLicenses had never intended Lalib to enjoy the profits from exploiting the know-how, that there were close personal ties between the proprietor of the know-how and the subcontractors actually operating the website, and that Lalib was irrationally managed, was deliberately run at a loss and had no operating capability of its own.

26. The Hungarian tax authorities based those notices on evidence obtained secretly by other Hungarian authorities.

27. More specifically, running parallel to the tax procedure was a criminal procedure conducted by the criminal investigation service of the National Tax and Customs Authority. In the context of that criminal procedure, the investigating authority, acting on the authorisation of an examining magistrate, had tapped the telephone conversations of a number of persons, including Mr Gattyán, WebMindLicenses' legal adviser, its accountant and the proprietor of Lalib, and had seized and stored emails of WebMindLicenses without judicial authorisation, as the first-tier tax authority and the Hungarian Government stated at the hearing.

28. At the hearing, WebMindLicenses stated that in August 2013, that is to say, before the notice of 8 October 2013 was issued, the first-tier tax authority had presented it with a record of infringement to which was annexed, by way of material forming part of the case file in the administrative procedure, the evidence obtained in the course of the criminal procedure, and that it had had the opportunity to be heard in relation to that evidence by the first-tier tax authority.

29. Those annexes included all the emails seized (71 in total) and the transcripts of 27 telephone conversations out of the 89 originally selected by the first-tier tax authority.

30. As the criminal procedure has not reached the judicial investigation stage, WebMindLicenses cannot yet inspect the criminal case file in its entirety.

31. WebMindLicenses brought an action against the notice issued by the National Tax and Customs Authority — Principal Directorate of Taxes and Customs for Major Taxpayers, in order to contest both the existence of abuse and the use of evidence obtained secretly in the course of the criminal procedure which was not open to it.

32. The Fővárosi Közigazgatási és Munkaügyi bíróság (Administrative and Labour Court, Budapest) raises the question of what circumstances must be taken into account, under the VAT Directive, in order to identify the service supplier and determine the place of supply in a situation such as that at issue in the main proceedings, where a particular type of service is offered in real time over the internet, is offered and accessible from anywhere in the world and its supply is subject, during the period under examination, to particular technical and legal constraints.

33. In the light of the judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544) and *Newey* (C-653/11, EU:C:2013:409), the referring court also raises the question of what construction is to be placed, in the context of the abuse of rights, on a contractual arrangement such as that at issue in the main proceedings from the point of view both of the VAT Directive and of freedom of establishment and the freedom to provide services.

34. The referring court is also uncertain whether it follows from the objectives of the VAT Directive and from the principle of effectiveness that the tax authorities must have at their disposal the procedural means necessary for the effective collection of tax, including methods for gathering data known only to the authorities that use those data, and may inspect evidence obtained in the context of a criminal procedure and use it as the basis for an administrative decision. In this connection, it asks in particular, with reference to the judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105), what limits the provisions of the Charter place on the institutional and procedural autonomy of the Member States.

35. Finally, the referring court considers that the main proceedings also raise the question of how the tax authorities of a Member State must proceed, in the context of cross-border administrative cooperation, in cases where VAT has already been paid in another Member State.

36. It was in those circumstances that the Fővárosi Közigazgatási és Munkaügyi bíróság (Administrative and Labour Court, Budapest) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Under Articles 2(1)(c), 24(1) and 43 of [the VAT Directive], in order to identify the person supplying the service for the purposes of VAT, when examining whether the transaction is fictitious, has no real financial or commercial content and is intended only to secure a tax advantage, is it relevant for the purposes of interpretation that, in the circumstances of the main proceedings, the manager and 100% owner of the commercial company which grants the licence is the natural person who created the know-how transferred by means of the licensing agreement?

(2) If the answer to question 1 is in the affirmative, when applying Articles 2(1)(c), 24(1) and 43 of the VAT Directive and assessing whether there is an abusive practice, is it relevant that this natural person exercises or may exercise influence informally over the running of the commercial company which acquired the licence and over the decisions of that company? For the purposes of that interpretation, might it be relevant that the creator of the know-how participates or may participate directly or indirectly, by advising professionally or offering advice on the development and exploitation of the know-how, in taking business decisions relating to the supply of the service based on that know-how?

(3) In the circumstances of the main proceedings and in the light of the considerations set out in

question 2, in order to identify the person supplying the service for the purposes of VAT is it relevant, in addition to the analysis of the underlying contractual transaction, that the creator of the know-how, as a natural person, exercises influence, or decisive influence, or issues directions regarding the way in which the service based on that know-how is supplied?

(4) If the answer to question 3 is in the affirmative, when determining the extent of that influence and those directions, what circumstances can be taken into account, or, more specifically, on the basis of what criteria may it be found that a decisive influence is exercised over the supply of the service and that the real financial content of the underlying transaction was for the benefit of the undertaking granting the licence?

(5) In the circumstances of the main proceedings, in considering whether a tax advantage has been gained, is it relevant when analysing the relations between the traders and the persons involved in the transaction that the taxable persons who took part in the contested contractual transaction, which is intended to avoid tax, are legal persons, when the tax authority of a Member State attributes the adoption of strategic and operational decisions on exploitation to a natural person? If so, must account be taken of the Member State in which that natural person took those decisions? In circumstances such as those obtaining in the present case, if it can be found that the contractual position of the parties is not decisive, is it relevant for the purpose of interpretation that subcontractors carry out the management of the technical instruments, staff and financial transactions necessary for the supply of the internet-based service at issue here?

(6) If it can be established that the terms of the licensing agreement do not reflect real financial content, do the reclassification of the contractual terms and the restoration of the situation which would have obtained if the transaction involving the abusive practice had not taken place imply that the tax authority of the Member State may make a different decision as to the Member State of supply and, therefore, the place where the tax is payable, even though the company which acquired the licence paid the tax payable in the Member State where it is established and in accordance with the legal requirements laid down in that Member State?

(7) Must Articles 49 TFEU and 56 TFEU be interpreted as meaning that a contractual arrangement such as that at issue in the main proceedings, under which a company which is a taxable person in a Member State makes available by means of a licensing agreement the know-how and operating right for the supply of services providing adult content through interactive internet-based communication technology to an undertaking which is a taxable person in another Member State, in circumstances where the burden of VAT of the Member State of residence of the company which acquired the licence is more advantageous as regards the service transferred, is contrary to those articles and may represent an abuse of freedom of establishment and the freedom to supply services?

(8) In circumstances such as those obtaining in the present case, what significance must be attached to the tax advantage which may be presumed to arise and to the commercial considerations taken into account by the company which grants the licence? In that connection and more specifically, is it relevant for the purposes of interpretation that the 100% owner and manager of the commercial company which grants the licence is the natural person who originally created the know-how?

(9) In analysing abusive conduct may circumstances such as those of the main proceedings, for instance the technical and infrastructure data relating to the setting up and performance of the service which is the subject of the transaction at issue and the preparation and staff available to the company which grants the licence to supply the service in question, be taken into account and, if so, what significance do they have?

(10) In the situation analysed in the present case, must Articles 2(1)(c), 24(1), 43 and 273 of the VAT Directive, in conjunction with Article 4(3) TEU and Article 325 TFEU, be interpreted as meaning that, in the interests of the proper observance of the obligation of the Member States of the European Union to collect the total amount of VAT effectively and exactly and prevent the loss to the public coffers entailed by tax evasion and avoidance across the borders of the Member States, in the case of a transaction for the supply of services and in order to identify the person supplying the service, the tax authority of the Member State, at the evidence-gathering stage of the administrative tax procedure and in order to clarify the facts, is entitled to admit data, information and evidence, and, therefore, records of intercepted communication, obtained without the knowledge of the taxable person by the investigating body of the tax authority in the context of a criminal procedure and to use them as a basis for its assessment of the tax implications, and that, for its part, the administrative court hearing the action brought against the administrative decision of the tax authority of the Member State is entitled to carry out an assessment of those matters as evidence, while examining the legality of that evidence?

(11) In the situation analysed in the present case, must Articles 2(1)(c), 24(1), 43 and 273 of the VAT Directive, in conjunction with Article 4(3) TFEU and Article 325 TFEU, be interpreted as meaning that, in the interests of the proper observance of the obligation of the Member States of the European Union to collect the total amount of VAT effectively and exactly and compliance with the obligation of the Member States to guarantee observance of the obligations imposed on the taxable person, the discretion with regard to the means available to the tax authority of the Member State includes the option for it to use evidence obtained initially for the purpose of criminal proceedings to prevent tax avoidance, including where national law itself does not allow the obtaining of information without the knowledge of the person concerned in the context of an administrative procedure to prevent tax avoidance, or subjects it in the context of criminal proceedings to guarantees which are not provided for in the administrative tax proceedings, recognising at the same time the right of the administrative authority to act in accordance with the principle of the freedom of evidence?

(12) Does Article 8(2) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (“the ECHR”)], in conjunction with Article 52(2) of the Charter, prevent recognition that the tax authority of the Member State has the authority described in questions 10 and 11, or, in the circumstances of the present case, can it be considered justified, in order to combat tax avoidance, to use in the context of an administrative tax procedure conclusions drawn from information obtained without the knowledge of the person concerned, with a view to the effective collection of tax and for the sake of the “financial well-being of the country”?

(13) If the answer to questions 10 to 12 is that the tax authority of the Member State may use such evidence in the administrative procedure, is the tax authority of the Member State required, in order to guarantee the effectiveness of the right to good administration and the rights of the defence pursuant to Articles 7, 8, 41 and 48 of the Charter, in conjunction with Article 51(1) of the Charter, to hear the taxable person in the course of the administrative procedure, to guarantee him access to the conclusions suggested by the information obtained without his knowledge and to respect the purpose for which the data appearing in the evidence were obtained, or, in that context, does the fact that the information collected without the knowledge of the person concerned is intended solely for an investigation of a criminal nature prevent from the outset the use of such evidence?

(14) In the event that evidence is obtained and used in breach of Articles 7, 8, 41 and 48 of the Charter, in conjunction with Article 47 of the Charter, is the right to an effective remedy satisfied by

national legislation under which the challenging in judicial proceedings of the procedural legality of decisions given in tax matters can succeed and result in the setting aside of the decision only if, according to the circumstances of the case, there is the possibility in practice that the contested decision would have been different if the procedural error had not occurred and if, moreover, that defect affected the substantive legal position of the applicant, or do the procedural errors made in that way have to be taken into account in a wider context, regardless of the influence that the procedural error which infringes the Charter has on the outcome of the proceedings?

(15) Does the effectiveness of Article 47 of the Charter require that, in a procedural situation such as the present, the administrative court hearing the action against the administrative decision of the tax authority of the Member State may review the legality of the obtaining of evidence collected for the purpose of criminal proceedings without the knowledge of the person concerned in the context of criminal proceedings, in particular when the taxable person against whom the criminal proceedings have been brought in parallel has not been able to have knowledge of that documentation or contest its legality before a court?

(16) Also having regard to question 6, must [Regulation No 904/2010], in the light, in particular, of recital 7 in its preamble, according to which, for the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed and, in order to do so, they must not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State, be interpreted as meaning that, in a situation where the facts are as in the present case, the tax authority of the Member State which discovers the tax debt must make a request to the tax authority of the Member State in which the taxable person was subject to a tax inspection and complied with its obligation to pay tax?

(17) If the answer to question 16 is in the affirmative and the decisions adopted by the tax authority of the Member State are challenged before a court and are found to be unlawful in procedural terms on that ground, in other words, on the basis of failure to obtain information and the absence of a request, what action should the court hearing the action against the administrative decisions adopted by the tax authority of the Member State take, having regard also to the considerations set out in question 14?’

IV – Procedure before the Court

37. The present request for a preliminary ruling was lodged at the Court Registry on 8 September 2014. Written observations have been submitted by WebMindLicenses, the Hungarian and Portuguese Governments and the European Commission.

38. On 13 July 2015 a hearing was held at which oral argument was presented by WebMindLicenses, the National Tax and Customs Authority — Principal Directorate of Taxes and Customs for Major Taxpayers, the Hungarian and Portuguese Governments and the Commission.

39. By letter of 17 August 2015, received at the Court on the same day, WebMindLicenses asked the Court to order the reopening of the oral procedure.

40. In support of that request, WebMindLicenses refers to two circumstances relied on by the National Tax and Customs Authority — Principal Directorate of Taxes and Customs for Major Taxpayers at the hearing in order to substantiate the existence of an abuse of rights on its part. First, the Portuguese company Hypodest Patent Development Company is said to have transferred the know-how at issue in the main proceedings to WebMindLicenses at the book value of EUR 104 000 000, even though it had itself acquired it at the market value of EUR 12 000 000.

Secondly, Lalib is said to have sustained a loss in the course of its cooperation with WebMindLicenses.

41. WebMindLicenses submits that the first circumstance has never been addressed either in the main proceedings or in the present proceedings before the Court. It contends that the second circumstance ‘has never been put forward as a circumstance such as to substantiate the artificiality of the transaction’ concluded between WebMindLicenses and Lalib, the latter’s activity having on the contrary, according to WebMindLicenses, enabled positive results to be achieved.

42. Article 82(2) of the Rules of Procedure provides that ‘the President shall declare the oral part of the procedure closed after the Advocate General has delivered his Opinion’.

43. It follows from that provision that a request based on Article 83 of the Rules of Procedure for the reopening of the oral part of the procedure may not be made until after its closure, which had not yet occurred when the request was made.

44. The request is therefore inadmissible.

45. In any event, neither of the two circumstances seems to me to be such as to have any bearing on the decision to be given by the Court, or to amount to an argument which has not been debated between the parties and on the basis of which the case ought to be decided.

V – Analysis

46. Although the referring court asks the Court 17 questions, these may nevertheless be reorganised to cover four different issues: abuse of rights in the light of the VAT Directive and Articles 49 TFEU and 56 TFEU (questions 1 to 5 and 7 to 9), the risk of double taxation (question 6), cooperation between the tax authorities of the Member States (questions 16 and 17) and the use of evidence obtained secretly in the context of a parallel criminal procedure, in the light of the general principles of EU law and the Charter (questions 10 to 15).

A – *Questions 1 to 5 and 7 to 9: abuse of rights in the light of the VAT Directive and Articles 49 TFEU and 56 TFEU*

47. By questions 1 to 5 and 7 to 9, the referring court asks the Court of Justice what are the relevant factors to be taken into consideration for the purposes of determining whether or not there has been VAT abuse. (10)

1. The principles applicable

48. It is appropriate to begin by recalling the relevant case-law of the Court in this regard.

49. In paragraphs 74 to 77 of the judgment in *Halifax and Others* (C-255/02, EU:C:2006:121), the Court held as follows:

‘74. ... 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 [VAT] 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.

75. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. ... The prohibition of abuse is not relevant where the economic activity carried out may have an explanation other than the mere

attainment of tax advantages.

76. It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined, whether action constituting such an abusive practice has taken place in the case before it ...

77. However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation ...' (11)

50. So far as concerns the first of those criteria, that is to say, that the transactions in question should seek to obtain a tax advantage the grant of which would be contrary to the purposes of the VAT Directive, the Court has held that 'to allow taxable persons to deduct all input VAT even though, in the context of their normal commercial operations, no transactions conforming with the deduction rules of the [VAT] Directive or of the national legislation transposing it would have enabled them to deduct such VAT, or would have allowed them to deduct only a part, would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of those rules'. (12)

51. As regards the second criterion, that is to say, that the essential aim of the transaction should be to obtain a tax advantage, the Court has held that 'the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved ..., those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations'. (13)

52. Furthermore, in the context of cross-border structures, which were not present in the cases giving rise to the judgments in *Halifax and Others* (C-255/02, EU:C:2006:121) and *Part Service* (C-425/06, EU:C:2008:108), the Court has held that 'the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage'. (14)

53. As the Court held in paragraph 65 of its judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), 'the taxation provided for by the legislation [on controlled foreign companies] must be excluded where, despite the existence of tax motives, the incorporation of a [controlled foreign company] reflects economic reality'.

54. According to the Court, the incorporation of a company reflects an economic reality, and as such excludes the existence of abuse, where it involves 'an actual establishment intended to carry on genuine economic activities in the host Member State'. (15)

2. Application to the present case

a) Classification of the supply at issue in the main proceedings in the light of the VAT Directive

55. It should be stated first of all that, as I have mentioned in point 20 of this Opinion, the supply subject to VAT which is at issue here consists in entertainment services supplied by electronic means, that is to say, the facility made available to 'members' of chatting with 'performers' on the livejasmin.com website, and of asking them to present shows that are filmed live, for consideration.

56. A supply of services within the meaning of Article 24(1) of the VAT Directive is therefore involved.

57. In order to determine the place of supply of the service, it must first be noted that this is an electronically supplied service (16) referred to in point 3 of Annex II to the VAT Directive ('supply of images, text and information and making available of databases').

58. Given that the service in question here is one supplied either to customers who are established within the European Union but are not taxable persons or to customers outside the European Union and that, in the period covered by the tax adjustment notice, the supplier, Lalib, was a company established in Portugal, it follows from Articles 43 and 56(1)(k) of the VAT Directive in the version in force from 24 July 2009 to 31 December 2009, and Articles 45 and 59(k) of the VAT Directive in the version in force from 1 January 2010 to 31 December 2012, that, as the Commission observes, VAT on those services to non-taxable persons established in the European Union was payable in Portugal, while the services supplied to non-taxable persons established outside the European Union were exempt from VAT.

59. As the Portuguese Government confirms in its written observations, Lalib complied with its VAT obligations in Portugal.

b) Abuse of rights

60. As the Court held in paragraphs 76 and 77 of the judgment in *Halifax and Others* (C-255/02, EU:C:2006:121), it is for the referring court to establish the existence of abuse, while the Court may provide it with some clarification to guide it in its interpretation. To that end, the Court must analyse the two criteria laid down in that judgment.

i) The criterion of obtaining a tax advantage the grant of which would be contrary to the purpose pursued by EU law

61. The referring court must first of all find that 'the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the [VAT] 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' (17) and take the following considerations into account.

62. The purpose of the provisions of the VAT Directive that are relevant in this case (namely Articles 43 and 56(1)(k) of the VAT Directive in the version in force from 24 July 2009 to 31 December 2009 and Articles 45 and 59(k) of the VAT Directive in the version in force from 1 January 2010 to 31 December 2012) is to make electronically supplied services subject to VAT in the place where the supplier has established his business, (18) in the case of non-taxable customers established in the European Union, and to exempt supplies of those services to non-taxable persons established outside the European Union.

63. It is clear that, in selecting the supplier's place of establishment as the place where VAT is payable, the EU legislature accepted the risk that suppliers of electronic services may establish themselves in Member States where VAT rates are lowest.

64. The truth of the foregoing statement is reinforced by the fact that the EU legislature recently amended the VAT Directive to make it impossible for suppliers of electronic services to make that choice. From 1 January 2015, Article 58 provides that 'the place of supply of [electronically supplied] services to a non-taxable person shall be the place where that person is established, has

his permanent address or usually resides’.

65. In my view, in order to be able to conclude that the signing of the licensing agreement with Lalib, which entailed the payment of VAT in Portugal, is contrary to the objectives pursued by the VAT Directive, the referring court would have to find that the licensing agreement is an artificial agreement entered into for the sole purpose of creating the impression that the services in question were supplied by Lalib, when they were in fact supplied by WebMindLicenses, or that the establishment in Portugal was devoid of all substance for the purposes of paragraphs 52 to 54 and 68 of the judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544).

66. As the Court held in paragraph 52 of its judgment in *RBS Deutschland Holdings* (C?277/09, EU:C:2010:810), ‘the fact that services were supplied to a company established in one Member State by a company established in another Member State, and that the terms of the transactions carried out were chosen on the basis of factors specific to the economic operators concerned, cannot be regarded as constituting an abuse of rights. ... The services at issue [were in fact provided] in the course of a genuine economic activity’.

67. In my view, the fact that a company such as WebMindLicenses chooses to use the services of an independent company such as Lalib which is established in a Member State where VAT rates are lower cannot *in itself* constitute an abuse of the freedom to provide services enshrined in Article 56 TFEU. (19)

68. In that respect, economic operators may exercise their fundamental freedoms in a manner that enables them to minimise their tax burden, provided that the freedom in question is being exercised genuinely, that is to say, through a supply of goods or of services, a movement of capital or an establishment for the purpose of actually pursuing economic or commercial activity.

69. That is why the Court has on several occasions held that ‘taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens’. (20)

70. That principle is very clearly expressed in the judgment in *Weald Leasing* (C?103/09, EU:C:2010:804), which also concerned the application of the prohibition on abuse in the field of VAT. In that case, the United Kingdom tax authorities claimed that a leasing transaction ought to have been regarded as a purchase transaction for VAT purposes. In paragraph 34 of its judgment, the Court held that ‘a taxable person cannot be criticised for choosing a leasing transaction which procures him an advantage consisting ... in spreading the payment of his tax liability, rather than a purchase transaction which does not procure him any such advantage, provided that the VAT on that leasing transaction is duly and fully paid’.

ii) The criterion of the existence of a tax advantage the obtaining of which is the essential aim of the transaction at issue in the main proceedings

71. The referring court must also verify, by reference to the criterion set out in paragraph 75 of the judgment in *Halifax and Others* (C?255/02, EU:C:2006:121), whether ‘the essential aim of the transactions concerned is to obtain a tax advantage’. In accordance with the Court’s case-law, the principle prohibiting the abuse of rights precludes only ‘wholly artificial arrangements which do not reflect economic reality and are set up with the *sole* aim of obtaining a tax advantage’. (21)

72. The referring court might find the following considerations useful in this regard.

73. Making reference to the judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544), the referring court states that ‘the case-law of the Court of Justice is unclear on the question ... of how, in a situation where the idea for a service was had by a natural person but its implementation depends on other factors ... and may take place in another Member State, [it] can analyse the relationship between the natural person who had the idea and who is presented as the creator of the know-how and the undertaking which, as a legal person, actually offers the service, to see whether there is an abusive practice’.

74. As the Portuguese Government submits, the tax advantage in the main proceedings consists in the difference between the respective rates of VAT applicable in Hungary and in Madeira (Portugal), where Lalib is established.

75. At the hearing, the parties to the main proceedings confirmed that, at the time when the first licensing agreement with Lalib was signed, namely in February 2008, (22) that difference was 4%, the VAT rate being 20% in Hungary and 16% in Madeira. I find this very low for a difference that would constitute the essential aim of the transaction at issue, particularly given that, in the case giving rise to the judgment in *Halifax and Others* (C?255/02, EU:C:2006:121), the arrangement used by the persons subject to VAT allowed the VAT to be deducted in full, whereas without the arrangement no deduction was possible.

76. Moreover, Lalib was a company independent of the Docler group and had not been created for the purpose of exploiting WebMindLicenses’ know-how. I would add that half of its turnover was generated by services which were supplied to customers outside the European Union and were therefore exempt from VAT, regardless of whether the supplier was established in Hungary or in Portugal.

77. In any event, WebMindLicenses states that it concluded the licensing agreement for reasons that had nothing to do with obtaining a tax advantage.

78. As I have explained in point 23 of this Opinion and as the referring court states, WebMindLicenses submits that Lalib became involved in 2008 in exploiting the know-how in question because its exploitation within the Docler group and the commercial growth of the online service had come up against the fact that the main Hungarian banks, which processed the collection of bank card payments, did not at that time allow suppliers of X-rated services to join the bank card system. Other banks, which were prepared to conclude contracts with suppliers providing those services, did not have the technical capability necessary to process the collection of bank card payments taken via such sites. Furthermore, the Docler group possessed neither the network of relationships nor the skills necessary to operate sites on a global scale.

79. Subject to verification by the referring court, the foregoing factors should be sufficient to rule out the proposition that the essential aim of signing the licensing agreement at issue was to obtain a tax advantage.

80. The fact that a transaction carried out for business reasons also brings tax advantages, even substantial ones, is not sufficient to establish that an undertaking is ‘*wrongfully* obtaining advantages provided for by [EU] law’. (23)

81. I refer in this regard to the case giving rise to the judgment in *RBS Deutschland Holdings* (C?277/09, EU:C:2010:810), concerning rental payments in connection with leasing transactions which had been structured in such a way as to escape VAT in both the United Kingdom and Germany. Since the transactions carried out under the leasing agreements in question were treated as supplies of services in United Kingdom law, the United Kingdom tax authorities

regarded them as having been carried out in Germany, that is to say, in the place where the supplier had its place of business. In Germany, since the transactions in question were treated as supplies of goods in German law, they were regarded as having been carried out in the United Kingdom, that is to say, in the place of supply of the goods. Accordingly, no VAT was collected on the rental payments at issue in that case in either the United Kingdom or Germany. However, VAT was subsequently levied in the United Kingdom on the proceeds from the sale of the cars.

82. The Court none the less ruled out the existence of abuse and held, in paragraph 55 of its judgment, that ‘the principle of prohibiting abusive practices does not preclude the right to deduct VAT, recognised in Article 17(3)(a) of the [VAT Directive], in circumstances such as those of the main proceedings, in which a company established in one Member State elects to have its subsidiary, established in another Member State, carry out transactions for the leasing of goods to a third company established in the first Member State, in order to avoid a situation in which VAT is payable on the sums paid as consideration for those transactions, the transactions having been categorised in the first Member State as supplies of rental services carried out in the second Member State, and in that second Member State as supplies of goods carried out in the first Member State’. (24)

83. Finally, as regards the existence of a wholly artificial arrangement within the meaning of the judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), (25) in which event ‘those contractual terms would have to be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting the abusive practice’, (26) it should be noted that the verification that an economic activity is actually being carried on ‘must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the [company in question] physically exists in terms of premises, staff and equipment’. (27)

84. The existence of a controlling relationship between Lalib and WebMindLicenses, including the possibility that the advice given to Lalib by Mr Gattyán was followed without exception, should not prevent Lalib from having a real presence in Portugal or from carrying on a real economic activity there.

85. In any event, the Hungarian tax authorities could have verified that Lalib was not a ‘front’ or ‘letterbox’ company (28) by using Article 7 of Regulation No 904/2010 in order to obtain the information required to settle the point from the Portuguese tax authorities, but they did not do so.

86. In this regard, the Portuguese Government notes in its written observations that Lalib has a permanent, appropriate and independent structure, in terms of both human and technical resources, and duly fulfils its tax obligations in Portugal, whereas, according to the National Tax and Customs Authority — Principal Directorate of Taxes and Customs for Major Taxpayers, WebMindLicenses employed only a manager, Mr Gattyán, and a part-time legal adviser.

87. I therefore propose that the answer to questions 1 to 5 and 7 to 9 should be that the conclusion of a licensing agreement such as that at issue in the main proceedings may be regarded as an abuse in the light of the VAT Directive only if its essential aim is to obtain a tax advantage the grant of which would be contrary to the purpose of the provisions of that directive, an issue which it is for the referring court to determine.

B – *Question 6: the risk of double taxation*

88. By question 6, the referring court wishes to ascertain whether, in the event that it finds that there has been an abuse of rights, the fact that Lalib fulfilled its VAT obligations in Portugal would prevent it from requiring WebMindLicenses to pay VAT in Hungary.

89. If the referring court were to conclude that there has been abuse, the risk of double taxation should not, in my view, prevent the Hungarian tax authorities from reclassifying the place of supply of the services at issue as actually being in Hungary.

90. It is true that, in paragraph 42 of the judgment in *Welmory* (C-605/12, EU:C:2014:2298), the Court held that ‘the object of the provisions determining the point of reference for tax purposes of supplies of services is to avoid, first, conflicts of jurisdiction which may result in double taxation and, secondly, non-taxation’. (29)

91. As the Commission observes, however, double taxation could be avoided only if EU law imposed on the tax authorities of the Member States an obligation on each of them to recognise the others’ decisions. Neither the VAT Directive nor Regulation No 904/2010 creates such an obligation.

92. On the contrary, as is clear from the judgment in *Halifax and Others* (C-255/02, EU:C:2006:121), ‘where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice’. (30)

93. As the Commission and the Hungarian Government submit, this means that, if abuse is found to exist, VAT must be imposed as if the abuse had not taken place. The fact that VAT has been imposed elsewhere makes no difference. (31)

94. I therefore propose that the answer to question 6 should be that the risk of double taxation does not prevent the tax authorities of a Member State from reclassifying the place of supply of a service as being in its territory.

C – Questions 16 and 17: cooperation between the tax authorities of the Member States

95. Questions 16 and 17 asked by the referring court are designed in essence to ascertain whether the tax authorities of a Member State which discover the existence of a VAT debt have an obligation under Regulation No 904/2010 to send a request to the tax authorities of the Member State in which the taxable person forming the subject of the tax inspection has already fulfilled his obligation to pay VAT and what conclusions are to be drawn from the failure to make such a request.

96. In my view, the answer to those questions is very simple: no such obligation exists.

97. It is true, as the referring court suggests, that the purpose of Regulation No 904/2010 is to regulate the arrangements for cooperation and assistance between the tax authorities of the Member States and to facilitate the exchange of information between them on the basis of requests which they may send each other in accordance with Articles 7 to 12 of that regulation.

98. As the Commission observes, however, in the context of the exchange of information on the basis of a request, the requesting authority is under no obligation to send such a request to another Member State. That regulation confers a right on the authority and does not impose an obligation on it.

99. Moreover, the regulation does not in any way affect the basic principle that the Member

States' tax authorities are required to combat tax avoidance and tax evasion. As the Commission submits, in the course of so doing the Hungarian tax authorities have a duty, laid down, moreover, in Paragraph 97(4) and (6) of Law No XCII of 2003 on the taxation system, to obtain the evidence necessary in order to substantiate and adopt a decision finding the existence of abuse, as well as to assess whether they are required to send a request to the tax authorities of another Member State.

100. Consequently, it is for the referring court to determine whether the evidence forming the basis of the Hungarian tax authorities' decision finding the existence of abuse is sufficient to support that finding.

101. The answer to questions 16 and 17 should therefore be that Regulation No 904/2010 must be interpreted as not imposing on the tax authorities of a Member State which discover the existence of a VAT debt an obligation to send a request to the tax authorities of the Member State in which the taxable person forming the subject of the tax inspection has already fulfilled his obligation to pay VAT. It is for the referring court to determine whether the evidence forming the basis of the Hungarian tax authorities' decision finding the existence of abuse is sufficient to support the existence of the tax debt.

D – Questions 10 to 15: the use of evidence obtained secretly in the context of a parallel criminal procedure, in the light of the general principles of EU law and the Charter

102. By questions 10 to 15, the referring court asks the Court whether the use by the tax authorities of evidence gathered secretly in the course of a parallel and ongoing criminal procedure, which has not been open to the company forming the subject of the tax adjustment and in the context of which that company has not been heard, and the use of that evidence by the court before which an action challenging the tax adjustment notice has been brought are consistent with fundamental rights, in particular Article 8(2) of the ECHR, Articles 7, 8, 41, 47, 48, 51(1) and 52(2) of the Charter and the rights of the defence and the right to good administration.

103. Obviously, these questions arise only if the referring court decides that there is an abuse of rights in that the essential aim of the conclusion of the licensing agreement between WebMindLicenses and Lalib was to obtain a tax advantage the grant of which would be contrary to the purpose of the VAT Directive.

104. It should first of all be pointed out that, according to the settled case-law of the Court, 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. On the other hand, if such legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures'. (32)

105. So far as concerns the VAT Directive, the Court has already held that 'Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests'. (33)

106. According to that case-law, 'given that the European Union's own resources include ... revenue from application of a uniform rate to the harmonised VAT assessment bases determined

according to EU rules, there is thus a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second'. (34)

107. Since the Court held in paragraphs 27 and 28 of its judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105) that tax penalties and criminal prosecutions for VAT evasion constitute implementation of the VAT Directive, in particular Article 273 thereof, and therefore of EU law for the purposes of Article 51(1) of the Charter, it must be concluded, as the Commission suggests, that the Charter is applicable here.

108. Given that the present case concerns the interception of WebMindLicenses' telephone calls, the seizure and storage of its emails and their use as evidence against it, the present case must first of all be examined from the point of view of Articles 7 (35) and 8 (36) of the Charter, which guarantee respect for private and family life and protection of personal data. Indeed, as the Court held in paragraph 47 of its judgment in *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662), '[Article 8 of the Charter] is closely connected with the right to respect of private life expressed in Article 7 of the Charter'.

109. In this connection, I would recall that 'the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual (see, in particular, European Court of Human Rights, *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II, and *Rotaru v. Romania* [GC], no. 28341/95, § 43, ECHR 2000-V) and the limitations which may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8 of the [ECHR]'. (37)

110. As Articles 7 and 8 of the Charter correspond to Article 8 of the ECHR, the case-law of the European Court of Human Rights on this subject could be useful in the case at issue, given that, 'in so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]' and that this 'shall not prevent Union law providing more extensive protection'. (38)

111. As regards, first of all, the scope *ratione personae* of Articles 7 and 8 of the Charter, it should be noted from the outset that, according to the case-law of both the Court (39) and the European Court of Human Rights, (40) the concept of private life must be interpreted as including the professional or business activities of legal persons.

112. Consequently, Articles 7 and 8 of the Charter and Article 8 of the ECHR concern both natural persons and legal persons.

113. So far as concerns the level of protection conferred by Articles 7 and 8 of the Charter and Article 8 of the ECHR, reference should be made to the case-law of the European Court of Human Rights.

114. According to that case-law, 'the searching and seizure of electronic data constitute interference with the right to respect for "private life" and "correspondence" within the meaning of [Article 8 of the ECHR]'. (41) Furthermore, '[t]he Court's case-law has, on numerous occasions, found that the covert taping of telephone conversations falls within the scope of Article 8 in both aspects of the right guaranteed, namely, respect for private life and correspondence'. (42)

115. Such interference fails to comply with Article 8 'unless, "in accordance with the law", it pursues one or more aims that are legitimate in the light of paragraph 2 [of that article] and is also

“necessary in a democratic society” in order to achieve them’. (43) Those conditions are also laid down in Article 52(1) of the Charter. (44)

116. As regards the first condition, it is for the referring court to verify whether the interference at issue is provided for by law, which, according to the referring court itself, seems to be the case.

117. As regards the second condition, it seems to me that the interference at issue, which took place in the context of combating tax abuse, evasion and avoidance, pursues a legitimate aim.

118. With regard to the third criterion, consisting in reality in application of the principle of proportionality, which falls within the jurisdiction of the referring court, the case-law of the European Court of Human Rights provides some useful guidance for the present case.

119. *Société Colas Est and Others v. France* and *Vinci Construction and GTM Génie Civil et Services v. France* were, like the present case, concerned with the implementation of EU law by a Member State, more specifically of competition law.

120. In *Société Colas Est and Others v. France*, following complaints from the National Union of Finishing Contractors (Syndicat national des entreprises de second oeuvre (SNSO)) that large construction firms were engaging in certain illegal practices, the central administrative authority concerned asked the national investigations office to carry out an extensive administrative investigation into the conduct of public works contractors. In the course of that investigation, 56 companies were the subject of simultaneous raids during which investigators seized several thousand documents pursuant to Ordinance No 45-1484 of 30 June 1945, under which judicial authorisation was not required.

121. The European Court of Human Rights considered that, ‘although the scale of the operations that were conducted ... in order to prevent the disappearance or concealment of evidence of anticompetitive practices justified the impugned interference with the applicant companies’ right to respect for their premises, the relevant legislation and practice should nevertheless have afforded adequate and effective safeguards against abuse’. (45)

122. On this occasion, the Court held ‘that that was not so in the instant case. At the material time ..., the relevant authorities had very wide powers which, pursuant to the 1945 ordinance, gave them exclusive competence to determine the expediency, number, length and scale of inspections. Moreover, the inspections in issue took place without any prior warrant being issued by a judge and without a senior police officer being present ... That being so, even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned ..., the Court considers, having regard to the manner of proceeding outlined above, that the impugned operations in the competition field cannot be regarded as strictly proportionate to the legitimate aims pursued’. (46)

123. It therefore held that ‘there [had] been a violation of Article 8 of the [ECHR]’. (47)

124. Like *Société Colas Est and Others v. France*, *Vinci Construction and GTM Génie Civil et Services v. France* concerned an investigation by the Directorate-General for Competition, Consumer Affairs and Fraud Prevention (Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF), which suspected that a restrictive practice prohibited by Article 101 TFEU had been engaged in in connection with the award of public contracts for the renovation of public hospitals.

125. In the course of the investigation, ordered this time by the judge dealing with matters of custody and release (juge des libertés et de la détention), officers from the DGCCRF seized a

large number of computer documents and files and all the emails of certain employees of the companies under investigation. The seizures were widespread and indiscriminate and comprised several thousand computer documents. Moreover, many of the documents seized bore no relation to the investigation or were covered by legal professional privilege.

126. With regard to the scale of the seizure, the European Court of Human Rights held that the fact that a sufficiently precise inventory, showing the names of the files, their extensions, their source and their digital fingerprints, had been made and provided, with copies of the documents seized, to the companies under investigation meant that the seizures could not be described as widespread and indiscriminate. The scale of the seizure was not therefore contrary to Article 8 of the ECHR. (48)

127. As regards the seizure of documents covered by legal professional privilege, on the other hand, the European Court of Human Rights stated first of all that, 'during the course of the raids at issue, the applicants had no opportunity to ascertain the contents of the documents seized or to discuss the appropriateness of their seizure. In the opinion of the Court, having been unable to prevent the seizure of documents unrelated to the subject-matter of the investigation and *a fortiori* those covered by legal professional privilege, the applicants ought to have been able to obtain a specific and effective retrospective review of the lawfulness of the seizure. An action such as that made available by Article L.450-4 of the Commercial Code (code de commerce) should have enabled them, where appropriate, to have the documents concerned returned to them or to be assured that they would be completely erased, in the case of copies of computer files'. (49)

128. To that effect, the European Court of Human Rights held that 'it [was] for the court, having been presented with reasoned allegations to the effect that precisely identified documents had been removed even though they bore no relation to the investigation or were covered by legal professional privilege, to rule on what was to be done with those documents after conducting a specific review of proportionality and, if appropriate, to order that they be returned. The Court finds that, in this particular case, while the applicants brought the action available to them in law before the [judge dealing with matters of custody and release], the latter, although envisaging the presence among the documents retained by the investigators of correspondence from a lawyer, confined himself to assessing the legality of the formal framework of the seizures at issue, without conducting the specific examination required'. (50)

129. On that basis, the European Court of Human Rights found that 'there [had] been a violation of Article 8 of the [ECHR]'. (51)

130. As to the application of those principles to the present case, it should be recalled that, at the hearing, the National Tax and Customs Authority — Principal Directorate of Taxes and Customs for Major Taxpayers and the Hungarian Government stated that the tapping of telephone conversations had been authorised by an examining magistrate (although it would seem that WebMindLicenses was unable either to verify or challenge the existence of that authorisation), while the emails had been obtained and stored by seizing computers on WebMindLicenses' premises without judicial authorisation.

131. It is apparent from the exchange of argument at the hearing before the Court that the Hungarian authorities gave WebMindLicenses access to the transcripts of the telephone conversations and the emails which they used as evidence in support of their tax adjustment notice, that WebMindLicenses had the opportunity to be heard by the Hungarian tax authorities in relation to the evidence in question before the notice of 8 October 2013 was issued and that WebMindLicenses had the opportunity to appeal against that notice.

132. Subject to verification by the referring court, it seems to me that a seizure of electronic mail

without judicial authorisation and the fact that WebMindLicenses was not able to verify and challenge the existence of such authorisation to intercept telephone communications are inconsistent with the principle of proportionality referred to in Article 52(1) of the Charter.

133. Furthermore, it may be asked whether all the information required for the purposes of combating VAT evasion and avoidance could not have been obtained by means of a simple inspection at WebMindLicenses' premises or a request to the Portuguese tax authorities for assistance in connection with Lalib. This is an issue for the referring court to determine.

134. If the referring court concludes that there has been an infringement of Articles 7 and 8 of the Charter, it will have to disregard the evidence unlawfully obtained or unlawfully used.

135. It will then have to verify whether the admissible evidence is sufficient to support the tax adjustment notice and, if necessary, annul that notice and order the reimbursement, with interest, of the VAT collected.

136. Finally, as regards the arguments put forward by WebMindLicenses on the basis of Article 41 of the Charter, headed 'Right to good administration', it should be noted that a divergence is apparent between the judgment in *N.* (C-604/12, EU:C:2014:302, paragraphs 49 and 50), on the one hand, and the judgments in *Cicala* (C-482/10, EU:C:2011:868, paragraph 28), *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67) and *Mukarubega* (C-166/13, EU:C:2014:2336, paragraphs 43 and 44), on the other.

137. While, in paragraphs 49 and 50 of its judgment in *N.* (C-604/12, EU:C:2014:302), the Fourth Chamber of the Court seems to accept that Article 41 of the Charter also applies to Member States where they implement EU law, the Third and Fifth Chambers rejected that idea in the other three judgments cited in point 136 of this Opinion.

138. Nevertheless, as the Court held in paragraph 68 of its judgment in *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081), 'the right to good administration, enshrined in [Article 41 of the Charter], reflects a general principle of EU law (judgment in [*N.*], C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in [these] cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union'. None the less, this does not prevent the Court from providing the referring court with clarification as to the interpretation and assessment of the general principle in question.

139. In any event, there does not appear to be any possibility of a finding that Article 41 of the Charter or the general principle has been infringed in the present case.

140. As I have explained in point 28 of this Opinion, WebMindLicenses acknowledged at the hearing that, in August 2013, that is to say, before the notice of 8 October 2013 was issued, the first-tier tax authority had presented it with a record of infringement to which the evidence obtained in the course of the criminal procedure was annexed and that it had had an opportunity to be heard in relation to that evidence by the first-tier tax authority.

141. The answer to questions 10 to 15 must therefore be that the gathering of evidence, in the course of a criminal procedure running parallel to the VAT adjustment procedure, by intercepting telephone conversations and seizing and storing emails is compatible with Articles 7 and 8 of the Charter only if it is provided for by law, pursues a legitimate purpose and is proportionate, an issue which it is for the referring court to assess.

VI – Conclusion

142. I therefore propose that the Court's answers to the questions referred for a preliminary ruling by the Fővárosi Közigazgatási és Munkaügyi bíróság (Administrative and Labour Court, Budapest) should be as follows:

- (1) The conclusion of a licensing agreement such as that at issue in the main proceedings may be regarded as an abuse in the light of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax only if its essential aim is to obtain a tax advantage the grant of which would be contrary to the purpose of the provisions of that directive, an issue which it is for the referring court to determine.
- (2) The risk of double taxation does not prevent the tax authorities of a Member State from reclassifying the place of supply of a service as being in its territory.
- (3) Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) must be interpreted as not imposing on the tax authorities of a Member State which discover the existence of a value added tax debt an obligation to send a request to the tax authorities of the Member State in which the taxable person forming the subject of the tax inspection has already fulfilled his obligation to pay value added tax. It is for the referring court to determine whether the evidence forming the basis of the Hungarian tax authorities' decision finding the existence of abuse is sufficient to support the existence of the tax debt.
- (4) The gathering of evidence, in the course of a criminal procedure running parallel to the procedure for the adjustment of value added tax, by intercepting telephone conversations and seizing and storing emails is compatible with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union only if it is provided for by law, pursues a legitimate purpose and is proportionate, an issue which it is for the referring court to assess.

1 – Original language: French.

2 – OJ 2006 L 347, p. 1.

3 – OJ 2010 L 268, p. 1.

4 – The know-how consists of an internet-based interactive communication system which includes a complex payment and billing system and allows X-rated entertainment to be broadcast in real time.

5 – Roughly EUR 33.8 million.

6 – Roughly EUR 32.9 million.

7 – Roughly EUR 25.4 million.

8 – Roughly EUR 9.5 million.

9 – During the period at issue, the rate of VAT was 15% in Portugal. It was 25% in Hungary, but was reduced to 20% from 1 July 2009.

10 – I shall not be taking a stance on whether or not the facts set out in points 16, 17 and 22 of this Opinion constitute abuse in relation to other taxes.

11 – See also, to that effect, judgments in *Part Service* (C-425/06, EU:C:2008:108, paragraph 42); *Weald Leasing* (C-103/09, EU:C:2010:804, paragraphs 29 and 30); *RBS Deutschland Holdings* (C-277/09, EU:C:2010:810, paragraph 49); *Tanoarch* (C-504/10, EU:C:2011:707, paragraph 52); and *Newey* (C-653/11, EU:C:2013:409, paragraph 46).

12 – Judgment in *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 80).

13 – Judgment in *Part Service* (C-425/06, EU:C:2008:108, paragraph 62).

14 – Judgment in *Newey* (C-653/11, EU:C:2013:409, paragraph 46). See also, to that effect, judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55) (on direct taxation); *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 28); and *Tanoarch* (C-504/10, EU:C:2011:707, paragraph 51) (both on VAT).

15 – Judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 66).

16 – See Article 56(1)(k) of the VAT Directive in the version in force from 24 July 2009 to 31 December 2009 and Article 59(k) of that directive in the version in force from 1 January 2010 to 31 December 2012.

17 – Judgment in *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 74).

18 – In so far as there is such a place and the service in question is supplied from it. See Article 43 of the VAT Directive in the version in force from 24 July 2009 to 31 December 2009 and Article 45 of that directive in the version in force from 1 January 2010 to 31 December 2012.

19 – See also, in the same vein, the judgment in *Centros* (C-212/97, EU:C:1999:126, paragraph 27), where the Court held that ‘the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty’. See also, in relation to direct taxation, paragraph 49 (‘any advantage resulting from the low taxation to which a subsidiary established in a Member State other than the one in which the parent company was incorporated is subject cannot by itself authorise that Member State to offset that advantage by less favourable tax treatment of the parent company’) and paragraph 50 (‘the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty’) of the judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544).

20 – Judgment in *RBS Deutschland Holdings* (C?277/09, EU:C:2010:810, paragraph 53). See also, to that effect, judgments in *Halifax and Others* (C?255/02, EU:C:2006:121, paragraph 73); *Part Service* (C?425/06, EU:C:2008:108, paragraph 47); and *Weald Leasing* (C?103/09, EU:C:2010:804, paragraph 27). On direct taxation, see, by analogy, judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544, paragraph 69).

21 – Judgment in *Ampliscientifica and Amplifin* (C?162/07, EU:C:2008:301, paragraph 28). Emphasis added. See also, to that effect, judgments in *RBS Deutschland Holdings* (C?277/09, EU:C:2010:810, paragraph 51); *Tanoarch* (C?504/10, EU:C:2011:707, paragraph 51); and *Newey* (C?653/11, EU:C:2013:409, paragraph 46).

22 – See point 15 of this Opinion.

23 – Judgment in *Halifax and Others* (C?255/02, EU:C:2006:121, paragraph 69). Emphasis added.

24 – I would add that, in the present case, VAT was paid in one of two the countries concerned by the supplies of services at issue.

25 – See paragraphs 63 to 71.

26 – Judgment in *Newey* (C?653/11, EU:C:2013:409, paragraph 50). See also, to that effect, judgment in *Halifax and Others* (C?255/02, EU:C:2006:121, paragraph 98).

27 – Judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544, paragraph 67).

28 – Ibid. (paragraph 68).

29 – See also, to that effect, judgment in *ADV Allround* (C?281/10, EU:C:2012:35, paragraph 27).

30 – Paragraph 98.

31 – I would point out that, while there may be double taxation, there may also be no taxation, as in the case that gave rise to the judgment in *RBS Deutschland Holdings* (C?277/09, EU:C:2010:810). In that event, a Member State cannot waive the application of its law in order to impose VAT on a transaction that is not normally subject to VAT in its system ‘solely on the ground that the output transactions have not given rise to the payment of VAT in the second Member State’ (ibid., paragraph 46).

32 – Judgment in *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 19). See also, to that effect, judgments in *ERT* (C?260/89, EU:C:1991:254, paragraph 42); *Kremzow* (C?299/95, EU:C:1997:254, paragraph 15); *Annibaldi* (C?309/96, EU:C:1997:631, paragraph 13); *Roquette Frères* (C?94/00, EU:C:2002:603, paragraph 25); *Sopropé* (C?349/07, EU:C:2008:746, paragraph 34); *Dereci and Others* (C?256/11, EU:C:2011:734, paragraph 72); and *Vinkov* (C?27/11, EU:C:2012:326, paragraph 58).

33 – Judgment in *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 26). See also, to that effect, judgment in *SGS Belgium and Others* (C?367/09, EU:C:2010:648, paragraphs 40 to 42).

34 – Judgment in *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 26). See also, to that effect, judgment in *Commission v Germany* (C?539/09, EU:C:2011:733, paragraph 72).

35 – ‘Everyone has the right to respect for his or her private and family life, home and communications.’

36 – Article 8(1) provides that ‘everyone has the right to the protection of personal data concerning him or her’.

37 – Judgment in *Volker und Markus Schecke and Eifert* (C?92/09 and C?93/09, EU:C:2010:662, paragraph 52). See also, to that effect, judgment in *Varec* (C?450/06, EU:C:2008:91, paragraph 48). Article 8 of the ECHR provides that ‘everyone has the right to respect for his or her private and family life, home and communications’.

38 – Article 52(3) of the Charter. See also, to that effect, paragraphs 51 and 52 of the judgment in *Volker und Markus Schecke and Eifert* (C?92/09 and C93/09, EU:C:2010:662).

39 – See judgments in *Roquette Frères* (C?94/00, EU:C:2002:603, paragraph 29) and *Varec* (C?450/06, EU:C:2008:91, paragraph 48). It is true that, in paragraph 53 of the judgment in *Volker und Markus Schecke and Eifert* (C?92/09 and C?93/09, EU:C:2010:662), the Court held that ‘legal persons can claim the protection of Articles 7 and 8 of the Charter in relation to ... identification [by the publication required by Article 44a of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1) and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) (OJ 2008 L 76, p. 28), implementing that article], only in so far as the official title of the legal person identifies one or more natural persons’. However, the case-law in this field has developed considerably, the Court now recognising that legal persons enjoy the protection of Articles 7 and 8 of the Charter. In paragraphs 32 to 37 of the judgment in *Digital Rights Ireland and Others* (C?293/12 and C?594/12, EU:C:2014:238), the Court did not limit the scope of those articles in relation to the first plaintiff, despite the fact that Digital Rights Ireland Ltd was a company under Irish law and was claiming the rights conferred on it by those articles (see paragraphs 17 and 18 of that judgment).

40 – See European Court of Human Rights, judgments in *Société Colas Est and Others v. France*, no. 37971/97, § 41, ECHR 2002-III, and *Buck v. Germany*, no. 41604/98, § 31, ECHR 2005-IV. See also, to that effect, judgments in *Sallinen and Others v. Finland*, no. 50882/99, § 70, 27 September 2005; *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 104, 14 March 2013; *Saint-Paul Luxembourg S.A. v. Luxembourg*, no. 26419/10, § 37, 18 April 2013; and *Ernst and Others v. Belgium*, no. 33400/96, § 109, 15 July 2003. Judgments not published in the *Reports of Judgments and Decisions* are available on the European Court of Human Rights’ website <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#>.

41 – European Court of Human Rights, judgment in *Vinci Construction and GTM Génie Civil et Services v. France*, nos. 63629/10 and 60567/10, § 63, 2 April 2015. See also, to that effect, European Court of Human Rights, judgments in *Sallinen and Others v. Finland*, no. 50882/99, § 71, 27 September 2005; *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 77, ECHR 2006-XI; *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, § 43, ECHR 2007-IV; and *Robathin v. Austria*, no. 30457/06, § 39, 3 July 2012.

42 – European Court of Human Rights, judgment in *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 59, 2001-IX.

43 – European Court of Human Rights, judgment in *Vinci Construction and GTM Génie Civil et Services v. France*,

nos. 63629/10 and 60567/10, § 64, 2 April 2015.

44 – See paragraph 65 of the judgment in *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662).

45 – European Court of Human Rights, judgment in *Société Colas Est and Others v. France*, no. 37971/97, § 48, ECHR 2002-III.

46 – Ibid. (§ 49).

47 – Ibid. (§ 50).

48 – European Court of Human Rights, judgment in *Vinci Construction and GTM Génie Civil et Services v. France*, nos. 63629/10 and 60567/10, § 76, 2 April 2015.

49 – Ibid. (§ 78).

50 – Ibid. (§ 79).

51 – Ibid. (§ 80).