Provisional text

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 10 February 2022 (1)

Case C?596/20

DuoDecad Kft.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

(Request for a preliminary ruling from the F?városi Törvényszék (Budapest High Court, Hungary))

(Request for a preliminary ruling – Tax law – Value added tax (VAT) – Directive 2006/112/EC – Place of supply of services – Determination of the recipient of the supply – Influence that a possible abusive arrangement between the recipient of the supply and a third party has on the place of supply – Principle of neutrality – Avoidance of double taxation – Duty of cooperation incumbent on the tax authorities of the Member States)

I. Introduction

1. This preliminary-ruling procedure demonstrates the limits of the harmonisation of law in the EU. Even though all Member States have correctly transposed the underlying directive, its application to a cross-border supply of services nevertheless leads to different outcomes. Both the Portuguese Republic and Hungary consider the place of supply of a service to be in their territory and lay claim to the right to levy VAT on it. This gives rise to genuine double taxation of one and the same transaction despite full harmonisation of the law.

2. This is particularly problematic, since, according to the concept underlying Council Directive 2006/112/EC of 28 November on the common system of value added tax (OJ 2006 L 347, p. 1), the undertakings involved are not the actual taxpayers, but only – in the words of the Court (2) – tax collectors on behalf of the State. VAT is in fact supposed to be neutral for the undertaking that merely collects that tax. This is possible only if the tax is levied only once. That presupposes, in turn, that the place of supply of the service is only in one Member State. This is, in principle, also provided for in Directive 2006/112. However, at the same time, it is necessary to rule out the possibility of legally binding decisions in the two Member States establishing that the place of supply is both in the one Member State and in the other. In other words, there must be no conflicts of qualification.

3. In addition, this request for a preliminary ruling raises the question as to the determination of the relevant recipient of the supply in the case where it is alleged that that recipient and a third party have created an abusive arrangement. This has significance for the correct determination of the place of supply in the present case. This is because, even if that allegation is true, the question that arises is whether an allegation of an abuse of rights in the relationship between the third party and the recipient of the supply can have an impact as regards the supplier, that is to say, as regards the place of supply of the latter.

II. **Legal framework**

A. **European Union law**

1. ***The VAT Directive***

4. The legal framework is formed by Directive 2006/112 (3) in the version applicable to the years at issue, 2009 (4) and 2011. (5)

5. Article 2(1)(c) provides:

‘The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such’.

6. Article 24(1) of that directive is worded as follows:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

7. Article 28 of the directive provides:

‘Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.’

8. The provisions on the place of supply for services were amended with effect from 1 January 2010, (6) with the result that different provisions on the place of supply applied to the two years at issue.

9. With respect to 2009, the first of the two years at issue, Article 43 of the directive contains the following wording:

‘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.’

10. With respect to that year at issue, 2009, that place-of-supply rule was supplemented by Article 56(1)(k) of the VAT Directive:

‘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’.

11. The abovementioned Annex II (‘Indicative list of the electronically supplied services referred to in point (k) of Article 56(1)’) lists, inter alia, ‘website supply, web-hosting, distance maintenance of programmes and equipment’ and ‘supply of images, text and information and making available of databases’.

12. With respect to that year at issue, 2009, Article 196 of the directive regulated the transfer of the tax liability to the recipient of the supply in the case of a service provided by a taxable person established abroad as follows:

‘VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied or by any person identified for VAT purposes in the Member State in which the tax is due to whom the services referred to in Articles 44, 47, 50, 53, 54 and 55 are supplied, if the services are supplied by a taxable person not established in that Member State.’

13. However, with respect to the second year at issue, 2011, Article 44 of the directive determines the place of supply of services to a taxable person as follows:

‘The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person 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 a place of establishment or fixed establishment, the place of supply of services is the place where the taxable person who receives such services has his permanent address or usually resides.’

14. Accordingly, with respect to that year at issue, 2011, Article 196 of the directive (transfer of tax liability to the recipient of the supply) reads as follows:

‘VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.’

2. ***Regulation No 904/2010***

15. Furthermore, administrative cooperation between the Member States in the field of VAT is regulated by Regulation (EU) No 904/2010. (7)

16. Recital 7 of Regulation No 904/2010 states:

‘For the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore 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.’

17. Article 1(1) of Regulation No 904/2010 reads as follows:

‘This Regulation lays down the conditions under which the competent authorities in the Member

States responsible for the application of the laws on VAT are to cooperate with each other and with the Commission to ensure compliance with those laws.

To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud. In particular, it lays down rules and procedures for Member States to collect and exchange such information by electronic means.'

B. **Hungarian law**

18. The VAT Directive was transposed by Az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax).

III. **Main proceedings**

A. **Background to the present request for a preliminary ruling**

19. The background to the present request for a preliminary ruling is formed by the divergent decisions of the Portuguese and Hungarian tax authorities on the place of supply of IT support services provided by a Hungarian undertaking (DuoDecad Kft.; 'the applicant') to a Portuguese undertaking (Lalib Gestão e Investimentos LDA; 'Lalib').

20. Those divergent decisions are ultimately the continuation of a dispute, which has clearly not been resolved to this day, over the recognition for tax purposes of a licence granted by another Hungarian undertaking, WebMindLicenses ('WML'), to the same Portuguese undertaking (Lalib). The dispute concerns a licence agreement for the making available of know-how enabling the operation of a website via which interactive audiovisual services were provided. The dispute was previously the subject of a preliminary-ruling procedure before the Court a number of years ago. (8)

21. In those earlier proceedings, a Hungarian court asked the Court, in essence, whether that licence agreement between WML and Lalib is to be regarded as an abuse of rights, and, if so, what the relevant criteria are in that regard. Furthermore, the Court was asked whether Regulation No 904/2010 must be interpreted as meaning that the tax authorities of a Member State which are examining whether supplies of services that have already been subject to VAT in other Member States are also taxable in their Member State are required to send a request for cooperation to the tax authorities of those other Member States.

22. The Court answered that question by stating, inter alia, that it is incumbent upon the referring court to analyse all the circumstances of the main proceedings in order to determine whether that agreement constituted a wholly artificial arrangement concealing the fact that the services at issue were not actually supplied by the company acquiring the licence, but were in fact supplied by the company granting it. In so doing, it must examine in particular whether the establishment of the place of business or fixed establishment of the company acquiring the licence was not genuine, whether that company, for the purpose of engaging in the economic activity concerned, did not possess an appropriate structure in terms of premises and human and technical resources and whether it did not engage in that economic activity in its own name and on its own behalf, under its own responsibility and at its own risk. In addition, it is necessary to send a request for information to the tax authorities of those other Member States when such a request is useful, or even essential, for determining that VAT is chargeable in the first Member State.

23. Such information has since been obtained from the Portuguese authorities in the proceedings between WML and the Hungarian tax authorities. According to the applicant, that

information proceeds on the assumption that the Portuguese undertaking is in fact established in Portugal. However, the Hungarian tax authorities clearly continue to take the view that the conclusion of the contract between WML and the Portuguese undertaking constituted an abuse of rights. Therefore, according to those authorities, the website is operated solely by WML and the transactions generated by it are carried out by WML in Hungary. The ‘logical consequence’ is that all the IT support services related to the operation of the website were likewise not provided to the Portuguese undertaking, but only to WML in Hungary.

B. **Dispute in the main proceedings**

24. The applicant is an undertaking which provides IT support services to website operators. It was incorporated on 8 October 2007. It appears to have a certain connection to WML, but this is not sufficiently clear from the request for a preliminary ruling. According to the referring court’s second question, the owner of WML is also the manager and/or owner of the applicant.

25. The applicant employs professionals with many years of experience and, owing to its stable technical background, is considered to be the market leader in the transmission of multimedia content over the internet. Its main customer was the Portuguese company Lalib, to which it issued invoices for the provision of support, maintenance and construction services amounting in total to EUR 8 086 829.40 between July and December 2009 and for the whole of 2011.

26. The Portuguese company Lalib was incorporated under Portuguese law on 16 February 1998 and, during the period under examination, its principal activity was the provision of electronic entertainment services.

27. The applicant was subjected to a tax inspection by the Hungarian Tax and Customs Administration. That inspection was concerned with value added tax (VAT) and related to the second half of 2009 and the whole of the 2011 financial year. As a result of the inspection, the tax administration, by order of 10 February 2020, established a tax difference of 458 438 000 forint (HUF) (approximately EUR 1.25 million) to the detriment of the applicant, and further imposed on the applicant a tax fine of HUF 343 823 000 (approximately EUR 1 million) plus default interest of HUF 129 263 000 (approximately EUR 350 000). The applicant lodged an appeal against that order, which was dismissed by decision of 6 April 2020.

28. The orders of the defendant tax administration were based on a finding that the actual recipient of the services provided to Lalib by the applicant was not Lalib but WML. On the basis of new proceedings brought by WML, it was established that the services provided via the website were not supplied by Lalib in Portugal, but by WML in Hungary. It was also held that the licence agreement in question between Lalib and WML was fictitious.

29. The applicant brought an action against that decision. It takes the view that, in common with many other partner undertakings, it supplied support services directly to Lalib and not to WML. As regards the contracts concluded with Lalib, neither WML nor the majority shareholder of WML were involved. Rather, in the course of the proceedings brought against WML, the Nemzeti Adó- és Vámhivatal Kiemelt Adózók Adóigazgatósága (Tax Directorate for Major Taxpayers of the National Tax and Customs Administration, Hungary) asked the Portuguese authorities to clarify the facts. In their response to that international request, the Portuguese authorities have – in the eyes of the applicant – clearly stated that Lalib was established in Portugal, that, during the period under consideration, it actually performed an economic activity on its own account and at its own risk and that it had all the technical and human resources necessary to exploit the knowledge acquired at international level.

30. Since, despite the preliminary-ruling procedure already conducted, the place of the

transactions carried out (by Lalib or WML) by means of the website could be assessed differently by the Portuguese and Hungarian tax authorities and this could have an impact on the place of supply of the applicant's transactions, the court seised of the action considers that a new request for a preliminary ruling is necessary.

IV. **The request for a preliminary ruling and the procedure before the Court**

31. Against that background, the F?városi Törvényszék (Budapest High Court, Hungary) stayed the proceedings and referred the following two – very long – questions to the Court:

'(1) Must Articles 2(1)(c), 24(1) and 43 of Council Directive 2006/112 be interpreted as meaning that, since the acquirer of a know-how licence – a company established in a Member State of the European Union (in the case of the dispute in the main proceedings, Portugal) – does not provide the services available on a website to end users, it cannot be the recipient of the service of technical support for that know-how that is provided by a taxable person established in another Member State (in the case of the dispute in the main proceedings, Hungary) as a subcontractor, that service being provided, rather, by the taxable person to the grantor of the know-how licence established in the latter Member State, in circumstances in which the acquirer of the licence:

(a) had rented offices in the first Member State, IT and other office infrastructure, its own staff and extensive experience in the field of e-commerce, as well as an owner with extensive international connections and a qualified e-commerce manager;

(b) had obtained know-how reflecting the processes for operating the websites and making updates to them, and issued opinions on, suggested modifications to, and approved those processes;

(c) was the recipient of the service that the taxable person provided on the basis of that know-how;

(d) regularly received reports on the services provided by the subcontractors (in particular, on website traffic and payments made from the bank account);

(e) registered in its own name the internet domains allowing access to the websites via the internet;

(f) was listed on the websites as a service provider;

(g) took steps itself to preserve the popularity of the websites;

(h) itself concluded, in its own name, the contracts with partners and subcontractors that were necessary in order to provide the service (in particular, with banks offering payment by bank card on the websites, with creators providing content accessible on the websites and with webmasters promoting that content);

(i) had a complete system for receiving revenue from providing the service in question to end users, such as bank accounts, full and exclusive powers of disposal over those accounts, an end user database enabling end users to be invoiced for that service and its own invoicing software;

(j) indicated on the websites its own headquarters in the first Member State as the physical customer service centre; and

(k) is a company independent of both the grantor of the licence and the Hungarian subcontractors responsible for carrying out certain technical processes described in the know-how,

given also that: (i) the circumstances set out above were confirmed by the relevant authority in the first Member State, in its capacity as the appropriate body to establish the presence of those objective and externally verifiable circumstances; (ii) the fact that the company in the other Member State could not access a payment service provider able to guarantee receipt of payments by bank card on the website, with the result that the company established in that Member State never provided the service available on the websites, either before or after the period under examination, constituted an objective obstacle to the provision of that service in that other Member State via the websites; and (iii) the company acquiring the licence and its related undertakings derived a profit from the operation of the website that was higher overall than the difference between applying the rate of VAT in the first Member State and in the second respectively?

2. Must Articles 2(1)(c), 24(1) and 43 of the VAT Directive be interpreted as meaning that, since the grantor of the know-how licence – a company established in the other Member State – provides the services available on a website to end users, it is the recipient of the service of technical support for that know-how provided by the taxable person as a subcontractor, that service not being provided by the taxable person to the acquirer of the licence, established in the first Member State, in circumstances in which the company granting the licence:

(a) had resources of its own consisting solely of a rented office and a computer used by the company manager;

(b) had as its own employees only a manager and a legal adviser who worked a few hours a week on a part-time basis;

(c) had as its only contract the know-how development contract;

(d) ordered that the domain names that it owned be registered by the acquirer of the licence in its own name, in accordance with the contract concluded with the latter;

(e) never appeared as the provider of the services in question in dealings with third parties, in particular end users, banks offering payment by bank card on the websites, creators of content accessible on the websites and webmasters promoting that content;

(f) has never issued any supporting documentation in relation to the services available on the websites, other than the invoice for the licence fees; and

(g) did not have a system (such as bank accounts and other infrastructure) for receiving revenue from the service provided via the websites;

given also that, in accordance with the judgment of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832), the fact that the manager and sole shareholder of the company granting the licence is the creator of the know-how and, moreover, that that person exercises influence or control over the development and exploitation of that know-how and over the supply of the services based on it, with the result that the natural person who is the manager and owner of the company granting the licence is also the manager and/or owner of those subcontracted commercial companies (and, therefore, of the applicant), which work together to provide the service, as subcontractors, on behalf of the acquirer of the licence and perform the abovementioned functions for which they are responsible, does not appear to be decisive in itself?’

32. In the proceedings before the Court, the applicant, the Portuguese Republic, Hungary and

the European Commission submitted written observations. In accordance with Article 76(2) of the Rules of Procedure, the Court did not consider it necessary to hold a hearing.

V. **Legal assessment**

A. **The questions referred**

33. The two questions referred can be understood only when viewed in the light of the subject matter of the main proceedings. In those proceedings, the applicant and the Hungarian tax authorities are in dispute as to the place of supply of the IT services provided by the applicant to Lalib.

34. The place of supply of such electronically supplied services *to another taxable person* is – both under the old law (Article 43 in conjunction with Article 56(1)(k) of the VAT Directive in the version applicable to 2009) and under the new law (Article 44 of the VAT Directive in the version applicable to 2011) – the place where the recipient has established his or her business. If Lalib were the recipient of the supply of services, the place of supply would be in Portugal, with the result that the Portuguese Republic would have been correct to levy VAT. If, on the other hand, an undertaking in Hungary were the actual recipient of the supply (such as WML), the place of supply of the IT services would be in Hungary, with the result that Hungary would have been correct to levy VAT.

35. On closer examination, the place of supply of the applicant's services is irrelevant for it if both of the recipients of its supplies are undertakings with a right of deduction, which pay the agreed price plus the VAT applicable in each case. In that case, the difference in the tax rates of Hungary and Portugal has no effect. However, the circumstance of whether the transaction is taxable once – in Hungary *or* Portugal – or twice – in Hungary *and* Portugal – is not irrelevant for the applicant, since it will nevertheless receive the remuneration agreed with a recipient of the supply only once.

36. Against that background, the two questions referred concern the interpretation of the place-of-supply rules in the VAT Directive with a view to determining, in this specific case, the correct place of supply under EU law for the services provided by the applicant. Since that place depends on the place of business of the recipient of the supply, the referring court's primary objective is to determine the 'correct' recipient of the supply correctly under EU law in the present (cross-border) case, which involves another tax authority that reaches an outcome different from that reached by the first tax authority ('conflict of qualification').

37. Furthermore, since the doubts regarding the determination of the correct recipient of the supply result from the disputed 'abusiveness' of the granting of the licence by WML to Lalib, the referring court incidentally asks the question as to whether the (possible) abusiveness of the granting of the licence can have an influence on the place of supply of a third party.

38. I therefore suggest to the Court that the two questions be substantially shortened and rephrased in order to allow a useful answer to be provided to the referring court.

39. This is because, in essence, the referring court seeks to ascertain whether Articles 2, 24, 28, and 43 et seq. in the light of Article 196 of the VAT Directive, in their respectively applicable versions, must be interpreted as meaning that, in the circumstances of the present case, the contracting party governed by civil law that paid the consideration (*in casu*, Lalib) is the recipient of the supply, on the basis of which the place of supply is determined. Or does the possible existence of an abusive practice between the contracting party and a third party (*in casu*, WML) mean that that third party is to be regarded as the recipient of the supply, and the place of supply is

determined on that basis?

40. The particular background to the case as described above also provides the Court with the opportunity to clarify whether, taking into account Regulation No 904/2010, the principle of neutrality under the VAT Directive requires there to be only one place of supply in cross-border situations or whether the taxable person may, in certain circumstances, be exposed to the risk of divergent decisions by the two tax authorities involved and thus to double taxation in respect of VAT.

41. In order to answer the reformulated questions, it is first necessary to clarify how the recipient of a supply of services is to be determined in VAT law (see section B). It will then be examined whether the existence of an abusive practice between that recipient and a third party can have an influence on the place of supply of the services of the supplier (see section C). After that, the problem of conflicting decisions by the tax authorities of different Member States within a harmonised VAT system will be addressed (see section D).

B. **Determination of the recipient of the supply in VAT law**

42. The determination of the ‘correct’ recipient of a supply of services is governed by general principles. The question as to the existence of an abusive practice must be distinguished from that. The determination of the correct recipient of a supply of services results from the interpretation of the VAT Directive and, in the present case, has an impact on the place of supply of those services. By contrast, the finding of an abusive practice concerns the assessment of the facts. Such a finding has the consequence that the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of those transactions. (9)

43. However, it only follows from the request for a preliminary ruling that the Hungarian tax authorities consider that the contractual arrangement between WML and Lalib constitutes an abusive practice, since, through that contractual structure, the users of the website are supplied from Portugal at a lower VAT rate than would apply if they were supplied from Hungary. However, as follows from the applicant’s statements, criminal proceedings instituted in that regard have hitherto not led to an allegation of tax evasion.

44. By contrast, it does not follow from the request for a preliminary ruling that the referring court considers that the contractual arrangement between the applicant and Lalib constitutes an abusive practice. This is also understandable, because the rate of VAT is irrelevant in the relationship between undertakings with a right of deduction. Both Lalib and WML could neutralise the VAT burden by means of input tax deduction. In that respect, it is not apparent from the case file what tax advantage the applicant is supposed to obtain by providing the IT support services to a Portuguese undertaking and not to a Hungarian undertaking. The Portuguese Republic rightly points to that fact.

45. This raises – as also rightly pointed out by the Portuguese Republic – primarily the question as to how the recipient of the supply (*in casu*, the applicant’s IT services) is to be determined under the place-of-supply rules of the VAT Directive.

46. In accordance with settled case-law, 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, second, non-taxation. (10) This implies that there can be only one recipient of a taxable supply of services within the meaning of Article 2(1)(c) of the VAT Directive.

47. In accordance with settled case-law, a taxable supply of services within the meaning of

Article 2(1)(c) of the VAT Directive exists only where there is a legal relationship between a provider of the service and a recipient pursuant to which there is reciprocal performance. In that relationship, the remuneration received by the provider of the service constitutes the value actually given in return for the identifiable service supplied to the recipient. This is the case if there is a direct link between the service supplied and the consideration received. (11)

48. Between two contracting parties who have agreed on the provision of a service and the remuneration for that service, there is normally a legal relationship pursuant to which there is reciprocal performance. According to the preliminary-ruling procedure, this was the case only between the applicant and Lalib in the present dispute. By contrast, WML was neither involved in the conclusion of the contract for the IT support services to be provided, nor did it pay the remuneration for them. Consequently, the contracting partner governed by civil law, Lalib, is the recipient of the supply of services, on the basis of which the place of supply is determined.

49. That interpretation – according to which the recipient of a supply is, in principle, the party which is the contracting partner of the supplier and is obliged to pay the consideration – is confirmed by the provision of Article 196 of the VAT Directive, which supplements the place-of-supply rules.

50. This is because Article 196 of the VAT Directive provides for a transfer of tax liability from the supplier of services (*in casu*, the applicant) to the commercial recipient of the supply (*in casu*, Lalib) if the services are supplied by an undertaking not established in the Member State of the recipient. This is intended to simplify tax collection and ensure the effectiveness of taxation, as made clear by recital 42 of the VAT Directive. (12) The background to the transfer of tax liability under Article 196 of the VAT Directive is formed by the fact that the Member State of destination would have difficulties in collecting taxes from undertakings established abroad. In addition, such a transfer of tax liability releases the supplier from registration and declaration requirements in other Member States. (13)

51. The transfer of tax liability turns an indirect tax on consumption into a direct tax on consumption, which directly burdens the recipient of the supply. However, such a change of the person liable to pay tax presupposes that the recipient of the supply, which now owes VAT in addition to the remuneration, can take that tax liability into account when agreeing on the remuneration or, at the latest, when paying it. This is in principle possible only for the contracting partner which owes the consideration on the basis of the abovementioned legal relationship.

52. In conclusion, it follows from an interpretation of the place-of-supply rules in line with Article 196 of the VAT Directive that, in principle, the contracting partner of the undertaking supplying the service is the recipient of the supply, on the basis of which the place of supply is determined.

C. **Influence of the existence of an abusive practice between the actual recipient of a supply and a third party**

53. It is thus established that, in principle, the contracting partner governed by civil law which owes the consideration is the recipient of a supply for the purposes of the VAT Directive. It must be examined whether a possible abusive practice between the recipient of a supply and a third party (that is to say, *in casu*, between Lalib and WML) changes that in any way.

1. ***The view taken by the Hungarian tax authorities***

54. In my opinion, that question should be answered in the negative, in line with the view taken by the Portuguese Republic. The opposite position taken by the Hungarian tax authorities contradicts the very foundations of the system of the VAT Directive. It proceeds on the assumption

that it follows from the abusive practice between WML and Lalib that the website is operated from Hungary by WML, with the result that the IT support services could likewise have been provided only to WML in Hungary. Contrary to the view taken by the Commission, however, the determination of the 'correct' recipient of the applicant's supplies is not closely linked to the question as to whether the licence agreement between WML and Lalib is to be assessed as constituting an abuse of rights.

55. This is because, according to that logic, not only the supplies of the applicant, but all the supplies received by Lalib – an existing Portuguese company (if the Portuguese response to the Hungarian request for information was accurately reproduced) – in connection with the operation of the website would have been taxable in Hungary; that would also apply to the supplies of other Portuguese service providers. The fact that the Hungarian tax authorities – unlike the Portuguese tax authorities – consider that Lalib either does not exist or else is thus to be equated to WML is in any event not a sufficient basis for that.

2. ***Taking into account the fiscal neutrality of VAT law***

56. First, the VAT Directive is, in principle, fiscally neutral. (14) According to settled case-law of the Court, regard must be had to the objective character of the *transaction in question*. (15) This applies, in particular, to the interpretation of the place-of-supply rules, the object of which – as the Court rightly put it – is to avoid (i) conflicts of jurisdiction which may result in double taxation and (ii) non-taxation. (16) They therefore serve to allocate powers of taxation between the Member States.

57. Therefore, the question of whether the recipient of a car wash, that is to say, a service, is also the owner of the car, has rented it in a valid manner or has stolen it has no bearing on the question as to who is the recipient of the supply and where the place of supply is. Even a thief who commissioned and paid for the cleaning of the stolen car is and remains the recipient of the supply, with the result that the place of supply of the service is determined on the basis of his or her status (for example, whether or not he or she is the taxable person – see Article 44 of the VAT Directive, on the one hand, and Article 45, on the other).

3. ***Taking into account the perspective of the supplier of the service***

58. Moreover, the abovementioned logic of the Hungarian tax authorities fails to take into account the indirect taxation technique of VAT. This is because the 'abstraction principle' explained in the example of the car thief also follows from the fact that the undertaking that makes the supply acts as an extension of the State in the collection of tax ('tax collector on behalf of the State'). (17) Since that undertaking does not do so voluntarily, but by virtue of statutory rules imposed on it, it could also be described as a 'compulsory accessory of the State'. (18)

59. However, such an accessory of the State must know where the place of supply of goods or services is situated in order to be able to apply the correct rate of tax and pay the appropriate amount of tax. If the place of supply of a service depends on the status of the recipient of that supply (for example, whether he or she is the taxable person), the supplier of the service must be able to determine that status autonomously.

60. He or she must be able to identify and determine his or her contractual partner which is obliged to pay him or her the consideration (the price) on the basis of the contractual agreements. By contrast, the supplier of the service has, in principle, neither any influence on nor any knowledge of circumstances that concern only the relationship between the recipient of that supply and third parties. Therefore, such elements must, in principle, be irrelevant to the determination of the place of supply of his or her goods or services. When providing his or her service, the taxable

person may rightly be indifferent as to the real owner of the car to be washed. The recipient of the supply is his or her contracting partner and the place of supply is always the same, irrespective of whether the car was rented, purchased or stolen.

4. ***Taking into account the rules on trading for commission***

61. In addition, as made clear by Article 28 of the VAT Directive, the recipient of the supply may act in his or her own name but on behalf of another person. Consequently, the fact that, in the end, any person other than the contracting partner actually uses the service is irrelevant for VAT purposes. A non-owner who acts in his or her own name but on behalf of another person (for example, the owner) is also the recipient of a supply of services.

62. It is therefore decisive that Lalib is obliged to pay the consideration for the applicant's IT support services pursuant to the underlying legal relationship. Thus, the question as to whether Lalib received the supplies in its own name and on its own behalf or in its own name but on behalf of WML is, in principle, irrelevant to Lalib's status as recipient of the supplies. Therefore, the place of supply of the IT services to Lalib by the applicant is in Portugal and must be assessed independently of a possible abusive practice between WML and Lalib.

5. ***A conceivable exception: abusive arrangement by all parties involved***

63. The outcome might be different only if the entire legal structure between Lalib, WML and the applicant were to be regarded as a single significantly abusive arrangement. This would allow the transactions involved to be redefined so as to re-establish the situation that would have prevailed in the absence of those transactions. However, such an abusive arrangement does not follow from the request for a preliminary ruling.

64. In view of the fact that everything indicates that Lalib does in fact exist, is in fact established in Portugal and has in fact settled the applicant's invoices, and that there is no discernible VAT advantage, at least with regard to the IT support services, there are considerable doubts as to whether such an arrangement exists. The Commission also appears to take the view that Lalib alone supplies the end consumers by means of the website. However, that is a matter that can ultimately be assessed only by the referring court.

6. ***Interim conclusion***

65. The recipient of the applicant's supply of IT services is its contracting partner (Lalib). A possible abusive practice between WML and Lalib has no bearing on this. That applies in any event if the conclusion of the contract between the applicant and Lalib is not, in itself, to be assessed as forming part of an abusive practice. However, on the one hand, the Court has no evidence that that is the case and, on the other hand, that matter can be assessed only by the referring court.

D. **In the alternative: dealing with conflicting findings of the tax authorities of different Member States in VAT law**

1. ***Explanation of the problem***

66. It is true that the place of supply of the applicant's services has been clarified in this Opinion. Nevertheless, there remains a *risk of double taxation* inherent in the VAT system in the present case also. That risk would materialise if the referring court were to find that the entire legal structure between Lalib, WML and the applicant is to be regarded as a single abusive arrangement.

67. Hungary would assume a supply to WML and a place of supply in Hungary, and would levy

VAT in Hungary. The Portuguese Republic, on the other hand, would probably continue to assess the facts as not constituting an abusive arrangement, with the result that the recipient of the supply would be Lalib and the place of supply would be in Portugal. This would lead to double taxation due to a conflict of qualification.

68. That potential outcome is contrary to the concept of the principle of neutrality in VAT law. This is because, as the Court has already held, the double taxation of business activities is contrary to the principle of fiscal neutrality inherent in the common system of VAT. (19) This also confirms the previous case-law on the risk of double taxation in the case of imports of goods on which VAT has already been levied. (20)

69. A number of approaches by which such double taxation might be avoided already follow from the case-law of the Court.

2. ***First tax assessment not binding in nature***

70. In that respect, the Court has already rightly held that, in correct application of the VAT Directive, the Member State which first assesses the tax does not bind the other Member State. (21) Such a ‘first come, first served’ principle would run counter to the place-of-supply rules, which are intended to allocate tax revenue to the Member States and divide it among them.

71. The question as to whether it already follows from Regulation No 904/2010 that the tax authority of one Member State is required to send a request for information to the tax authorities of another Member State where such a request is useful, or even essential, for determining that VAT may be chargeable in the first Member State (22) can be left open.

72. This is because, where the courts of one Member State find that the same transaction has been the object of a different tax treatment in another Member State, they have the power, or even – depending on whether there is a judicial remedy against their decision – the obligation, to refer a request for a preliminary ruling to the Court. (23) Accordingly, the referring court has asked the Court to interpret the place-of-supply rules of the VAT Directive in the present case.

3. ***Divergent interpretation of the rules on the place of supply***

73. In so far as the underlying conflict relates to the interpretation of the place-of-supply rules, the solution is simple. It can and must be resolved by referring the matter to the Court. Such an interpretation of EU law within the framework of the request for a preliminary ruling is also binding on the other tax authorities.

74. In so far as the latter have not yet taken a final decision at that time, double taxation is thereby prevented. If there is already a final decision which, contrary to the interpretation given by the Court, gives rise to such double taxation, that decision is contrary to EU law. Therefore, if it turns out – after a preliminary ruling by the Court, as the case may be – that VAT has already been wrongly paid in another Member State, the person concerned is entitled to a refund of the excess VAT paid. According to settled case-law, the right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court. The Member State concerned is therefore required, in principle, to repay charges levied in breach of EU law. (24)

4. ***Divergent assessment of the underlying facts***

75. However, where the conflict does not relate to a divergent interpretation of EU law, but to a divergent assessment of the facts (for example, the existence of an abusive practice), the path

outlined above does not lead any further. This is because it is for the national courts to apply EU law to the specific facts of the case. Their decisions are not binding on the tax authorities of the other Member States, with the result that the risk of double taxation persists.

76. Such double taxation is contrary to the objectives of the VAT Directive (see point 68 above). It is true that the Court has ruled, in the context of income tax law, that, *in the absence of harmonisation* at EU level, the Member States are not obliged to adapt their own tax systems to the different tax systems of other Member States, in order to eliminate double taxation. (25) However, that concerns double taxation due to non-harmonised income tax law and follows from the Member States' remaining legislative competence in that respect. That argument does not apply to VAT law.

77. Moreover, double taxation based on EU law (*in casu*, the VAT Directive) affects the fundamental rights of the taxable person (see Articles 15, 16 and 17 of the Charter of Fundamental Rights of the European Union) in the implementation of EU law. (26) Furthermore, double taxation in respect of VAT for cross-border supplies of goods and services would impair the free movement of goods and the freedom to provide services.

78. The double taxation, which is thus contrary to the internal market, could ultimately be avoided only if, in that special situation – double taxation by two Member States due to a conflict of qualification under VAT law in a cross-border case – the Court itself were to establish, on an exceptional basis, how the facts of the case are to be assessed, that is to say, in the present case, therefore, whether there is abuse.

79. As the only authority that can take a decision which is binding on the Member States involved and can thus effectively prevent double taxation, the Court previously made its own de facto assessment of the facts in a similar situation. For example, the *Auto Lease Holland* case was based on a different assessment of the facts in two Member States, as the referring court expressly emphasised in the proceedings in that case. (27) Nevertheless, the Court answered the question referred and ruled that 'Article 5(1) of the Sixth Directive is to be interpreted as meaning that there is not a supply of fuel by the lessor of a vehicle to the lessee where the lessee fills up at filling stations the vehicle which is the subject-matter of a leasing contract, even if the vehicle is filled up in the name and at the expense of that lessor'. (28) This amounted to nothing more than the Court's assessment of the facts as requested by the referring court.

80. However, in order to take into account the fact that the assessment of the facts is, in principle, the task of the national court and that the Member States have possibilities to exchange information by virtue of Regulation No 904/2010 and to reach agreement by virtue of the VAT Committee (Article 398 of the VAT Directive), the Court could make the answer to such questions referred for a preliminary ruling subject to the condition that, as a general rule, those other possibilities have been exhausted beforehand.

VI. **Conclusion**

81. I therefore propose that the Court answer the questions referred by the F?városi Törvényszék (Budapest High Court, Hungary) as follows:

1. The recipient of the supply who is relevant for the purposes of determining the place of supply is to be determined from the perspective of the supplier on the basis of the underlying legal relationship, which establishes who must bear the expense for the supply received. An allegation of abuse of rights relating only to the recipient of the supply and a third party is irrelevant to the determination of the recipient of the supply and the place of supply.

2. Having regard to the Charter of Fundamental Rights of the European Union and the fundamental freedoms, the principle of neutrality of Council Directive 2006/112/EC of 28 November on the common system of value added tax and Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax preclude double taxation by several Member States in respect of VAT for one and the same transaction. If such double taxation is based on a different assessment of the facts and, the Member States do not agree on a solution, the national court may or must ask the Court for such a solution.

1 Original language: German.

2 In this regard, see, inter alia, judgments of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraph 25); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 21); and of 23 November 2017, *Di Maura* (C?246/16, EU:C:2017:887, paragraph 23).

3 ‘the VAT Directive’.

4 As last amended, at that point in time, by Council Directive 2009/69/EC of 25 June 2009 (OJ 2009 L 175, p. 12).

5 As last amended, at that point in time, by Council Directive 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1).

6 Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44. p. 11).

7 Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1).

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

9 Judgments of 21 February 2006, *Halifax and Others* (C?255/02, EU:C:2006:121, paragraph 98); of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraph 52); and of 22 November 2017, *Cussens and Others* (C?251/16, EU:C:2017:881, paragraph 46).

10 Judgments of 26 January 2012, *ADV Allround* (C?218/10, EU:C:2012:35, paragraph 27 and the case?law cited), and of 16 October 2014, *Welmory* (C?605/12, EU:C:2014:2298, paragraph 42). See also, to that effect, judgment of 18 June 2020, *KrakVet Marek Batko* (C?276/18, EU:C:2020:485, paragraph 42).

11 Judgment of 16 September 2021, *Balgarska natsionalna televizia* (C?21/20, EU:C:2021:743, paragraphs 31). See, to that effect, judgments of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, paragraphs 21 and 22), and of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia* (C?295/17, EU:C:2018:942, paragraph 39).

12 See, to that effect, judgments of 13 June 2013, *Promociones y Construcciones BJ 200* (C?125/12, EU:C:2013:392, paragraph 28), and of 26 April 2017, *Farkas* (C?564/15, EU:C:2017:302, paragraph 24), each of which concerned Article 199 of the VAT Directive.

13 Judgment of 6 October 2011, *Stoppelkamp* (C?421/10, EU:C:2011:640, paragraph 33), which concerned Article 21(1)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of

value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; ‘the Sixth Directive’).

14 Judgments of 29 June 1999, *Coffeeshop “Siberië”* (C?158/98, EU:C:1999:334, paragraphs 14 and 21); of 29 June 2000, *Salumets and Others* (C?455/98, EU:C:2000:352, paragraph 19); and of 6 July 2006, *Kittel and Recolta Recycling* (C?439/04 and C?440/04, EU:C:2006:446, paragraph 50 – the principle of fiscal neutrality prevents any general distinction between lawful and unlawful transactions). Regarding the exceptions, see judgments of 5 July 1988, *Vereniging Happy Family Rustenburgerstraat* (289/86, EU:C:1988:360, paragraph 20), and of 6 December 1990, *Witzemann* (C?343/89, EU:C:1990:445).

15 Judgments of 6 April 1995, *BLP Group* (C?4/94, EU:C:1995:107, paragraph 24); of 9 October 2001, *Cantor Fitzgerald International* (C?108/99, EU:C:2001:526, paragraph 33); of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 39); and of 21 February 2013, *Žamberk* (C?18/12, EU:C:2013:95, paragraph 36).

16 Judgments of 26 January 2012, *ADV Allround* (C?218/10, EU:C:2012:35, paragraph 27 and the case?law cited), and of 16 October 2014, *Welmory* (C?605/12, EU:C:2014:2298, paragraph 42). See also, to that effect, judgment of 18 June 2020, *KrakVet Marek Batko* (C?276/18, EU:C:2020:485, paragraph 42).

17 In this regard, see, inter alia, judgments of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraph 25); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 21); and of 23 November 2017, *Di Maura* (C?246/16, EU:C:2017:887, paragraph 23).

18 See Stadie, H., *Umsatzsteuerrecht*, 2005, paragraph 1.18.

19 Judgments of 25 May 1993, *Mohsche* (C?193/91, EU:C:1993:203, paragraph 9); of 8 March 2001, *Bakcsi* (C?415/98, EU:C:2001:136, paragraph 46); of 17 May 2001, *Fischer and Brandenstein* (C?322/99 and C?323/99, EU:C:2001:280, paragraph 76); and of 23 April 2009, *Puffer* (C?460/07, EU:C:2009:254, paragraph 46).

20 Judgment of 5 May 1982, *Schul Douane Expediteur* (15/81, EU:C:1982:135, operative part 2); similarly, judgment of 6 July 1988, *Ledoux* (127/86, EU:C:1988:366, paragraph 20).

21 Judgment of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraph 54), confirmed by judgment of 18 June 2020, *KrakVet Marek Batko* (C?276/18, EU:C:2020:485, paragraph 53). Along similar lines, see also judgment of 5 July 2018, *Marcandi* (C?544/16, EU:C:2018:540, paragraph 65).

22 See judgment of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraph 59); to the opposite effect, see judgment of 18 June 2020, *KrakVet Marek Batko* (C?276/18, EU:C:2020:485, paragraph 48).

23 Judgments of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraph 59); of 5 July 2018, *Marcandi* (C?544/16, EU:C:2018:540, paragraphs 64 and 66); and of 18 June 2020, *KrakVet Marek Batko* (C?276/18, EU:C:2020:485, paragraph 51).

24 See judgments of 14 June 2017, *Compass Contract Services* (C?38/16, EU:C:2017:454, paragraphs 29 and 30 and the case?law cited), and of 18 June 2020, *KrakVet Marek Batko* (C?276/18, EU:C:2020:485, paragraph 52).

25 Judgments of 12 February 2009, *Block* (C?67/08, EU:C:2009:92, paragraph 31); of 8 December 2011, *Banco Bilbao Vizcaya Argentaria* (C?157/10, EU:C:2011:813, paragraph 39); and

of 26 May 2016, *NN (L) International* (C?48/15, EU:C:2016:356, paragraph 47).

26 As is known, that requirement contained in Article 51(1) of the Charter of Fundamental Rights is understood very broadly by the Court – see, inter alia, judgment of 26 February 2013, *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 25 et seq.).

27 Bundesfinanzhof (Federal Finance Court, Germany), decision of 22 February 2001 – V R 26/00, UR 2001, 305, paragraphs 54 and 56.

28 Judgment of 6 February 2003, *Auto Lease Holland* (C?185/01, EU:C:2003:73, paragraph 37). Similarly, judgment of 5 July 2018, *Marcandi* (C?544/16, EU:C:2018:540, paragraph 49), which was based on a different assessment of the issuance of ‘credits’ in the Member States.