Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

17 December 2015*

(Reference for a preliminary ruling — Value added tax — Directive 2006/112/EC — Articles 2, 24, 43, 250 and 273 — Place of supply of electronically supplied services — Artificial fixing of that place by means of an arrangement not reflecting economic reality — Abuse of rights — Regulation (EU) No 904/2010 — Charter of Fundamental Rights of the European Union — Articles 7, 8, 41, 47, 48, 51(1) and 52(1) and (3) — Rights of the defence — Right to be heard — Use by the tax authorities of evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not been concluded — Interception of telecommunications and seizure of emails)

In Case C-419/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Közigazgatási és Munkaügyi bíróság (Administrative and Labour Court, Budapest, Hungary), made by decision of 3 September 2014, received at the Court on 8 September 2014, in the proceedings

WebMindLicenses Kft.

v

Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting as President of the Third Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, C. Toader, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: M. Wathelet,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2015,

after considering the observations submitted on behalf of:

— WebMindLicenses Kft., by Z. Várszegi and C. Dékány, ügyvédek,

— Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság, by D. Bajusz, ügyvéd,

— the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

* Language of the case: Hungarian.

— the Portuguese Government, by L. Inez Fernandes, A. Cunha and R. Campos Laires, acting as Agents,

— the European Commission, by M. Owsiany-Hornung and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(1)(c), 24(1), 43 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive'), of 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), of Article 4(3) TEU and Articles 49 TFEU, 56 TFEU and 325 TFEU, and of Articles 7, 8, 41, 47, 48, 51 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between WebMindLicenses Kft. ('WML') and the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság (National Tax and Customs Authority, Principal Directorate of Taxes and Customs for Major Taxpayers; 'the National Tax and Customs Authority') concerning a decision by the latter ordering the payment of various sums in tax relating to the tax years 2009 to 2011 as well as of a fine and of penalties for late payment.

Legal context

EU law

3 Under Article 2(1)(c) of the VAT Directive, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to value added tax (VAT).

4 The second subparagraph of Article 9(1) of the VAT Directive states:

'Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

5 Article 24(1) of the VAT Directive specifies that '[s]upply of services' is to mean any transaction which does not constitute a supply of goods.

6 In the version of the VAT Directive in force from 1 January 2007 until 31 December 2009, Article 43 provided:

'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.'

7 In the version of the VAT Directive resulting from Council Directive 2008/8/EC of 12 February 2008 amending the VAT Directive as regards the place of supply of services (OJ 2008 L 44, p. 11), in force from 1 January 2010, Article 45 provides:

‘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.’

8 Article 56 of the VAT Directive, in the version in force from 1 January 2007 to 31 December 2009, 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;

...’

9 Annex II, headed ‘Indicative list of the electronically supplied services referred to in point (k) of Article 56(1)’, mentions inter alia ‘[w]ebsite supply, web-hosting, distance maintenance of programmes and equipment’ and ‘supply of images, text and information and making available of databases’.

10 Article 59 of the VAT Directive as amended by Directive 2008/8 provides:

‘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 Community, 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.

...’

11 Article 250(1) of the VAT Directive states:

‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

12 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.

...’

13 Recital 7 in the preamble to 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.’

14 As set out in Article 1 of Regulation No 904/2010:

‘1. 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.

...’

Hungarian law

15 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.’

16 Paragraph 46 of that law states:

‘(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:

...

(k) electronically supplied services.

...'

17 Paragraph 50(4) to (6) of Law No CXL of 2004 laying down general rules on administrative authorities' procedures and services (a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény) provides:

'(4) In the context of the administrative procedure, it is possible to use evidence that is such as to facilitate clarification of the facts. Evidence shall include: statements of the parties, documents, witness evidence, site inspection reports, experts' reports, records made at the time of the administrative check and physical evidence.

(5) The administrative authority shall freely choose the means of proof to be used. The law may require the administrative authority to base its decision on exclusively one means of proof; furthermore, a legislative or regulatory provision may, for certain cases, require a particular means of proof to be used or the opinion of a given body to be sought.

(6) The administrative authority shall assess the evidence separately and as a whole and shall establish the facts in the light of the conviction that it has come to on that basis.'

18 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.'

19 Paragraph 97(4) to (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.

(5) Means of proof and evidence shall include: documents, experts' reports, statements by the taxpayer, his representative, his employees or other taxpayers, witness evidence, site visits, test purchases, secret test purchases, trial production, on-the-spot inventories, data of other taxpayers, findings of related checks that have been ordered, the content of information communicated, and electronic data or information that comes from the registers of other authorities or is publicly available.

(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.'

The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

20 WML is a commercial company registered in Hungary which was set up in 2009 and whose entire capital is held by its manager. By a contract of 1 September 2009, it acquired free of charge from Hypodest Patent Development Company, an undertaking established in Portugal, know-how enabling a website to be operated through which erotic interactive audiovisual services in which individuals throughout the world took part in real time were supplied ('WML's know-how'). On the same day it made that know-how available, by a licensing agreement, to Lalib — Gestão e Investimentos Lda ('Lalib'), a company established in Madeira (Portugal).

21 Following a tax inspection of WML relating to part of 2009 and to 2010 and 2011, the first-tier tax authority, by decision of 8 October 2013, made various adjustments and required WML to pay various sums, including 10 293 457 000 Hungarian forints (HUF) in VAT, HUF 7 940 528 000 by way of a fine and HUF 2 985 262 000 by way of penalties for late payment, on the ground that, according to the evidence that it had gathered, the transfer of WML's know-how to Lalib did not correspond to a genuine economic transaction as the know-how was in reality exploited by WML, so that the view was to be taken that the exploitation of that know-how had taken place on Hungarian territory.

22 That decision was amended in part by the National Tax and Customs Authority, which, however, also took the view that WML's know-how had not actually been exploited by and for Lalib and that, accordingly, by concluding the licensing agreement with it, WML had committed an abuse of rights aimed at circumventing Hungarian tax law, which was less advantageous than Portuguese tax law. In support of that conclusion, it was noted in particular that WML had never intended to transfer to Lalib the use of the profits from exploiting WML's know-how, that there were close personal ties between the proprietor of the know-how and the subcontractors actually operating the website concerned, and that the Portuguese company was irrationally managed, was deliberately run at a loss and had no operating capability of its own.

23 WML brought an action against the decision of the National Tax and Customs Authority, complaining that it had used evidence obtained without WML's knowledge by means of intercepting telecommunications and seizing emails in the course of a parallel criminal procedure which was not open to WML.

24 WML further submitted that there were commercial, technical and legal reasons for Lalib's involvement in the exploitation of WML's know-how. The services at issue, accessible through the internet in return for payment, could not have been supplied from Hungary during the period under examination as at the time membership of a bank card system was impossible in that country for such services. WML did not have the staff, technical competence, assets, contract portfolio or international connections enabling it to operate the website concerned. It was Lalib, the owner of the domain names, which, as the supplier of content, bore civil and criminal liability for the services offered. Therefore,

according to WML, the conclusion of the licensing agreement with Lalib did not have a tax objective and VAT was properly paid in Portugal. Nor did it enjoy a real tax advantage as the difference between the rates of VAT in Hungary and Portugal was small at the time.

25 Making reference to 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 states that it is unsure, in the light of the particular nature of the services at issue offered on the internet, as to the circumstances which should be taken into account in assessing, for the purpose of determining the place of supply of services, whether the contractual construction used arises from an abusive practice.

26 The referring court is also uncertain whether it is to be inferred from the objectives of the VAT Directive that the tax authorities may gather evidence obtained in the context of a criminal procedure, including by secret means, and use it as the basis for an administrative decision. In this connection, referring to the judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105), it raises the question of what limits the Charter places on the institutional and procedural autonomy of the Member States.

27 The referring court states, furthermore, that the main proceedings also raise the question of how a Member State's tax authorities must proceed, in the context of cross-border administrative cooperation, in a situation where VAT has already been paid in another Member State.

28 In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay 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) 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 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?'

The request that the oral procedure be reopened

29 By document lodged at the Court Registry on 17 August 2015, WML requested, on the basis of Article 83 of the Rules of Procedure of the Court of Justice, that the oral procedure be reopened, submitting that at the hearing the National Tax and Customs Authority, in order to establish the existence of an artificial arrangement in the main proceedings, referred to circumstances which had never been mentioned previously or had not been mentioned for that purpose.

30 That request was made before the Advocate General delivered his Opinion and, therefore, before the oral part of the procedure was declared closed in accordance with Article 82(2) of the Rules of Procedure. It must accordingly be understood as a request that the hearing be reopened.

31 WML took part in the hearing and had the opportunity to reply orally to the observations of the National Tax and Customs Authority. Also, the Court considers that it has sufficient information regarding the circumstances of the dispute in the main proceedings to give a useful answer to the questions asked by the referring court, to which it in any event falls to assess those circumstances in order to decide the case before it (see inter alia, to this effect, judgment in *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 15).

32 Consequently, the request is rejected.

Consideration of the questions referred

Questions 1 to 5 and 7 to 9

33 By questions 1 to 5 and 7 to 9, which it is appropriate to examine together, the referring court asks, in essence, whether EU law must be interpreted as meaning that, in order to determine whether, in circumstances such as those of the main proceedings, a licensing agreement concerning the making available of know-how enabling operation of a website by which interactive audiovisual services were supplied, concluded with a company established in a Member State other than that in which the

company granting the licence was established, arose from an abuse of rights designed to benefit from the fact that the rate of VAT applicable to those services was lower in that other Member State, relevance attaches to the fact that the manager and sole shareholder of the company granting the licence was the creator of that know-how, the fact that that same person exercised influence or control over the development and exploitation of that know-how and over the supply of the services which were based on it and the fact that management of the financial transactions, staff and technical instruments necessary for the supply of those services was carried out by subcontractors. It asks, furthermore, whether the commercial, technical, organisational and legal reasons put forward by the company granting the licence to explain why the know-how was made available to the company established in the other Member State are to be taken into consideration.

34 As the referring court points out, it is for it to assess the facts which are placed before it and to determine whether action constituting an abusive practice has taken place in the case before it. The Court, when giving a preliminary ruling, may however provide clarification designed to give the referring court guidance in its interpretation (see inter alia, to this effect, judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 76 and 77, and *Part Service*, C-425/06, EU:C:2008:108, paragraphs 54 to 56).

35 In that regard, it should be pointed out that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive and that the effect of the principle that abusive practices are prohibited, which applies to the field of VAT, 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 (see, to this effect, judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 70, and *Newey*, C-653/11, EU:C:2013:409, paragraph 46 and the case-law cited).

36 In paragraphs 74 and 75 of the judgment in *Halifax and Others* (C-255/02, EU:C:2006:121), the Court held 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 and, secondly, it is apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage.

37 As regards, in the first place, whether a transaction such as the conclusion of the licensing agreement at issue in the main proceedings results in the accrual of a tax advantage contrary to the objectives of the VAT Directive, it is to be pointed out, first, that the term 'place of supply of services', which determines the place where the supply is taxed, is — like the terms 'taxable person', 'supply of services' and 'economic activity' — objective in nature and applies without regard to the purpose or results of the transactions concerned and without it being necessary for the tax authorities to examine the intention of the taxable person (see, to this effect, judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 56 and 57, and *Newey*, C-653/11, EU:C:2013:409, paragraph 41).

38 So far as concerns electronically supplied services such as those at issue in the main proceedings, it is apparent from Articles 43 and 56(1)(k) of the VAT Directive in the version thereof in force from 1 January 2007 until 31 December 2009 or from Articles 45 and 59(k) of that directive as amended by Directive 2008/8 that the place of supply of services to a non-taxable person established in the European Union is the place where the supplier has established his business or has a fixed establishment, or, in the absence thereof, the place where he has his permanent address or usually resides.

39 Secondly, the differences between the standard rates of VAT applied by the Member States result from the absence of full harmonisation by the VAT Directive, which sets only the minimum rate.

40 Accordingly, enjoyment in a Member State of a standard rate of VAT lower than the standard rate in force in another Member State cannot be regarded in itself as a tax advantage the grant of which is contrary to the objectives of the VAT Directive.

41 On the other hand, the position is different if the services are in fact supplied in that other Member State. Such a situation is contrary to the objective of the provisions of the VAT Directive determining the place where supplies of services are taxed, which is to avoid, first, conflicts of jurisdiction which may result in double taxation and, secondly, non-taxation (see, to this effect, judgment in *Welmory*, C-605/12, EU:C:2014:2298, paragraph 42). Furthermore, such a situation, in that it results in VAT due in a Member State being avoided, is contrary both to the obligation of the Member States, which stems from Article 4(3) TEU, Article 325 TFEU and Articles 2, 250(1) and 273 of the VAT Directive, to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing evasion and to the principle of fiscal neutrality inherent in the common system of VAT, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT (see, to this effect, judgments in *Commission* v *Italy*, C-132/06, EU:C:2008:412, paragraphs 37, 39 and 46; *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraphs 20 to 22; and *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 25 and 26).

42 As regards, in the second place, whether the essential aim of a transaction is solely to obtain that tax advantage, the Court has already held in the sphere of VAT that, where the taxable person has a choice between two transactions, he is not obliged to choose the one which involves paying the higher amount of VAT but, on the contrary, may choose to structure his business so as to limit his tax liability (see, inter alia, 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). Taxable persons are thus 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 purpose of limiting their tax burdens (judgment in *RBS Deutschland Holdings*, C-277/09, EU:C:2010:810, paragraph 53).

43 So far as concerns the main proceedings, it is apparent from the documents submitted to the Court that Lalib is a company separate from WML, as it is not a branch, subsidiary or agency of the latter, and that it paid VAT in Portugal.

44 In those circumstances, in order to find that the licensing agreement in question arose from an abusive practice designed to benefit from a lower rate of VAT in Madeira, it is necessary to establish that that agreement constituted a wholly artificial arrangement concealing the fact that the services concerned, that is to say, operation of the website using WML's know-how, were not actually supplied in Madeira by Lalib, but were in fact supplied in Hungary by WML. As regards determining the actual place of that supply, such a finding must be based on objective factors which are ascertainable by third parties, such as the physical existence of Lalib in terms of premises, staff and equipment (see, by analogy, judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 67).

45 In order to determine whether that agreement constituted such an arrangement, it is incumbent upon the referring court to analyse all the facts placed before it, examining, in particular, whether the establishment of Lalib's place of business or fixed establishment in Madeira 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.

46 On the other hand, the fact that the manager and sole shareholder of WML was the creator of WML's know-how, that that same person exercised influence or control over the development and exploitation of that know-how and over the supply of the services which were based on it and that management of the financial transactions, staff and technical instruments necessary for the supply of those services was carried out by subcontractors, and the reasons which may have led WML to make the know-how at issue available to Lalib instead of exploiting it itself, do not appear decisive in themselves.

47 Finally, in order to respond to the queries of the referring court, as regards the question whether a licensing agreement such as that at issue in the main proceedings might be regarded as an abusive practice in the light of freedom of establishment and the freedom to provide services, it must be stated, first, that the nature of the relations existing between the company granting the licence concerned, namely WML, and the company acquiring it, namely Lalib, does not appear to be covered by freedom of establishment, as Lalib is not a branch, subsidiary or agency of WML.

48 Secondly, since the differences between the standard rates of VAT applied by the Member States result from the absence of full harmonisation by the VAT Directive, the mere fact that a licensing agreement, such as that at issue in the main proceedings, has been concluded with a company established in a Member State which applies a standard rate of VAT lower than that of the Member State where the company granting the licence is established cannot, in the absence of other factors, be regarded as an abusive practice in the light of the freedom to provide services.

49 Consequently, the answer to questions 1 to 5 and 7 to 9 is that EU law must be interpreted as meaning that, in order to determine whether, in circumstances such as those of the main proceedings, a licensing agreement concerning the making available of know-how enabling operation of a website by which interactive audiovisual services were supplied, concluded with a company established in a Member State other than that in which the company granting the licence is established, arose from an abuse of rights designed to benefit from the fact that the rate of VAT applicable to those services was lower in that other Member State, the fact that the manager and sole shareholder of the latter company was the creator of that know-how, that that same person exercised influence or control over the development and exploitation of that know-how and over the supply of the services which were based on it and that management of the financial transactions, staff and technical instruments necessary for the supply of those services was carried out by subcontractors, and the reasons which may have led the company granting the licence to make the know-how at issue available to a company established in that other Member State instead of exploiting it itself, do not appear decisive in themselves.

50 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, examining 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.

Question 6

51 By question 6, the referring court asks, in essence, whether EU law must be interpreted as meaning that, if an abusive practice is found which has resulted in the place of supply of services being fixed in a Member State other than the Member State where it would have been fixed in the absence of that

abusive practice, the fact that VAT has been paid in that other Member State in accordance with its legislation precludes an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located.

52 It need merely be recalled that, 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 practice (judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 98, and *Newey*, C-653/11, EU:C:2013:409, paragraph 50).

53 It follows that the place of supply of services must be rectified if it has been fixed in a Member State other than the Member State where it would have been fixed in the absence of an abusive practice and that VAT must be paid in the Member State where it should have been paid even if it has been paid in the other State.

54 Consequently, the answer to question 6 is that EU law must be interpreted as meaning that, if an abusive practice is found which has resulted in the place of supply of services being fixed in a Member State other than the Member State where it would have been fixed in the absence of that abusive practice, the fact that VAT has been paid in that other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located.

Questions 16 and 17

55 By question 16, the referring court asks, in essence, whether Regulation No 904/2010 must be interpreted as meaning that the tax authorities of a Member State which are examining whether VAT is chargeable in respect of supplies of services that have already been subject to VAT in other Member States are required to send a request for cooperation to the tax authorities of those other Member States.

56 Regulation No 904/2010, which, as provided in Article 1, lays down the conditions under which the competent national authorities are to cooperate with each other and with the European Commission and lays down rules and procedures to that end, does not specify the circumstances in which the tax authorities of a Member State might be required to send a request for administrative cooperation to the tax authorities of another Member State.

57 However, having regard to the duty, set out in recital 7 in the preamble to that regulation, to cooperate to help ensure that VAT is correctly assessed, such a request may prove expedient, or even necessary.

58 That may be so, in particular, where the tax authorities of a Member State know or should reasonably know that the tax authorities of another Member State have information which is useful, or even essential, for determining whether VAT is chargeable in the first Member State.

59 The answer to question 16 therefore is that Regulation No 904/2010 must be interpreted as meaning that the tax authorities of a Member State which are examining whether VAT is chargeable in respect of supplies of services that have already been subject to that tax in other Member States are required 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.

60 In view of the answer to question 16, there is no need to answer question 17.

Questions 10 to 15

61 By questions 10 to 15, which it is appropriate to examine together, the referring court asks, in essence, whether EU law must be interpreted as not precluding, for the purposes of the application of Article 4(3) TEU, Article 325 TFEU and Articles 2, 250(1) and 273 of the VAT Directive, the tax authorities from being able, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means, for example, of the interception of telecommunications and seizure of emails.

62 It is apparent from the grounds of the order for reference and the wording of the questions asked that the referring court is uncertain, first of all, whether, having regard to the freedom of action given to the Member States for ensuring collection of all the VAT due on their territory and for preventing tax evasion and avoidance, the tax authorities may, in the context of an administrative procedure, gather and use such evidence, although it was initially sought for the purpose of prosecution and by means specific to criminal procedure which, moreover, offers persons safeguards that they cannot enjoy in the context of an administrative procedure. It raises the question whether that possibility exists and, as the case may be, the question of the limits and obligations stemming in that regard from Article 8 of the ECHR and Articles 7, 8 and 52 of the Charter.

63 Should such a possibility be recognised, the referring court is uncertain, next, whether, in order to ensure observance of the rights of the defence, as referred to in Article 48 of the Charter, and the principle of good administration, enshrined in Article 41 thereof, the tax authorities are obliged to grant the taxable person access to the evidence thereby gathered and to hear him.

64 Finally, the referring court is uncertain whether Article 47 of the Charter means that the court hearing an action challenging the decision of the tax authorities that have adjusted the tax may review the legality of the obtaining of the evidence in the context of the criminal procedure when the taxable person has not been able to ascertain that evidence in that procedure and has not had the opportunity to contest its legality before another court. Furthermore, where national legislation provides that a procedural defect results in annulment of the contested decision vitiated by it only if that decision could have been different without the defect and if the applicant's legal position is affected by it, the referring court is uncertain whether the right to an effective judicial remedy means that, if the provisions of the Charter are infringed, that decision must be annulled irrespective of the effect of that infringement.

65 It should be noted, first, that the question whether action constituting an abusive practice has taken place must be examined in accordance with the rules of evidence of national law. Those rules must not, however, undermine the effectiveness of EU law (see, to this effect, judgment in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 76).

66 Secondly, in accordance with settled case-law, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (see, to this effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 19 and the case-law cited).

67 Thirdly, an adjustment of VAT after an abusive practice has been found, such as the adjustment which is the subject-matter of the main proceedings, constitutes implementation of Articles 2, 250(1) and 273 of the VAT Directive and Article 325 TFEU and, therefore, of EU law, for the purposes of Article 51(1) of the Charter (see, to this effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 25 to 27).

68 It follows that EU law does not preclude the tax authorities from being able in the context of an administrative procedure, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, provided that the rights guaranteed by EU law, especially by the Charter, are observed.

69 Article 52(1) of the Charter states regarding the scope and interpretation of the rights guaranteed by it that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In observance of the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

70 In this instance, as regards, in the first place, the obtaining of the evidence in the context of the criminal procedure, it should be noted that Article 7 of the Charter, concerning the right to respect for private and family life, contains rights which correspond to those guaranteed by Article 8(1) of the ECHR and that, in accordance with Article 52(3) of the Charter, Article 7 thereof is thus to be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (judgments in *McB.*, C-400/10 PPU, EU:C:2010:582, paragraph 53, and *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 70).

71 Thus, since interception of telecommunications constitutes interference with the exercise of the right guaranteed by Article 8(1) of the ECHR (see, inter alia, European Court of Human Rights, *Klass and Others v. Germany*, 6 September 1978, § 41, Series A no. 28; *Malone v. the United Kingdom*, 2 August 1984, § 64, Series A no. 82; *Kruslin v. France* and *Huvig v. France*, 24 April 1990, § 26 and § 25, Series A nos. 176-A and 176-B; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 79, ECHR 2006-XI), it also constitutes a limitation on the exercise of the corresponding right laid down in Article 7 of the Charter.

72 The same applies to the seizure of emails in the course of searches at the professional or business premises of a natural person or the premises of a commercial company, which also constitutes interference with the exercise of the right guaranteed by Article 8 of the ECHR (see, inter alia, European Court of Human Rights, *Niemietz v. Germany*, 16 December 1992, §§ 29 to 31, Series A no. 251-B; *Société Colas Est and Others v. France*, no. 37971/97, §§ 40 and 41, ECHR 2002-III; and *Vinci Construction and GTM Génie Civil et Services v. France*, nos. 63629/10 and 60567/10, § 63, 2 April 2015).

73 Such limitations are accordingly possible only if they are provided for by law and if, in observance of the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union.

74 As regards the principle of proportionality, the Court has already held that, in accordance with that principle, the measures which the Member States may adopt must not go further than is necessary to attain the objectives of ensuring the correct levying and collection of VAT and the prevention of tax evasion (judgment in *R.*, C-285/09, EU:C:2010:742, paragraph 45).

75 In the main proceedings, as the telecommunications were intercepted and the emails were seized in the context of a criminal procedure, it is in the light of that procedure that the aim of those acts and the need for them must be assessed.

76 In that regard, since, as has been pointed out in paragraph 35 of the present judgment, preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive (see inter alia, to this effect, judgment in *Halifax and Others*, C-255/02, EU:C:2006:121,

paragraph 71), investigative measures carried out in the context of a criminal procedure with a view, in particular, to prosecuting offences in that sphere have an aim which meets an objective of general interest recognised by the European Union.

77 As for the examination of the necessity of the investigative measures, the tax authority stated at the hearing that the emails were seized without judicial authorisation. It is to be noted that, in the absence of prior judicial authorisation, a strict legal framework for, and strict limits on, such seizure are required if individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 7 of the Charter (see European Court of Human Rights, *Camenzind v. Switzerland*, 16 December 1997, § 45, *Reports of Judgments and Decisions* 1997-VIII). Thus, such seizure can be compatible with Article 7 only if domestic legislation and practice afford adequate and effective safeguards against abuse and arbitrariness (see, inter alia, European Court of Human Rights, *Funke v. France*, 25 February 1993, §§ 56 and 57, Series A no. 256-A; *Miailhe v. France (no. 1)*, 25 February 1993, §§ 37 and 38, Series A no. 256-C; and *Société Colas Est and Others v. France*, §§ 48 and 49).

78 In the course of that examination, it is incumbent upon the referring court to examine whether the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability to the person concerned by the seizure of an *ex post factum* judicial review relating to both the legality and necessity of the seizure, a review which must be effective in the particular circumstances of the case at issue (see European Court of Human Rights, *Smirnov v. Russia*, no. 71362/01, § 45, 7 June 2007).

79 So far as concerns, in the second place, the gathering and use of the evidence by the tax authorities, there is no need in this instance to examine whether transmission of the evidence by the department responsible for the criminal investigation and the gathering thereof by the department conducting the administrative procedure with a view to its use interfere with the right, guaranteed by Article 8 of the Charter, to the protection of personal data. WML is not a natural person and therefore cannot invoke that protection as its official title does not identify any natural person (see, to this effect, judgment in *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraphs 52 and 53).

80 On the other hand, in the light of Article 7 of the Charter, use by the tax authorities of evidence obtained, in the context of a criminal procedure that has not been concluded, by means of the interception of telecommunications and seizure of emails constitutes as such a limitation on the exercise of the right guaranteed by that article. It must therefore be examined whether that use also satisfies the requirements set out in Article 52(1) of the Charter.

81 In that regard, the requirement that any limitation on the exercise of that right must be provided for by law implies that the legal basis which permits the tax authorities to use the evidence referred to in the preceding paragraph must be sufficiently clear and precise and that, by defining itself the scope of the limitation on the exercise of the right guaranteed by Article 7 of the Charter, it affords a measure of legal protection against any arbitrary interferences by those authorities (see, inter alia, European Court of Human Rights, *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82, and *Gillan and Quinton v. the United Kingdom*, 12 January 2010, no. 4158/05, § 77, ECHR 2010).

82 When considering the necessity for such use in the main proceedings, it must be assessed in particular, as the Advocate General has observed in point 133 of his Opinion, whether the use is proportionate to the aim pursued, examining whether all the necessary information could not have been obtained by means of investigation that interfere less with the right guaranteed by Article 7 of the Charter than interception of telecommunications and seizure of emails, such as a simple inspection at WML's premises and a request for information or for an administrative enquiry sent to the Portuguese authorities pursuant to Regulation No 904/2010.

83 In addition, with regard to observance of the rights of the defence and of the principle of good administration, it is to be observed that Articles 41 and 48 of the Charter, which are mentioned by the referring court, are not relevant in the main proceedings. First, it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (judgments in *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, paragraph 44). Secondly, Article 48 of the Charter protects the presumption of innocence and rights of the defence of which must be enjoyed by a person 'who has been charged' and is therefore not applicable in the main proceedings.

84 Nevertheless, observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt in respect of a person a measure which will adversely affect him. In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even if the EU legislation applicable does not expressly provide for such a procedural requirement (judgment in *Sabou*, C-276/12, EU:C:2013:678, paragraph 38 and the case-law cited).

85 In this instance, it appears from WML's written observations and the submissions made during the hearing that the tax authorities granted WML access to the transcripts of telephone conversations and emails used as evidence in support of the decision adjusting the tax and that WML had the opportunity to be heard on that evidence before the decision was adopted, a matter which is, however, for the referring court to verify.

86 As regards, in the third place, the right to an effective judicial remedy, guaranteed by Article 47 of the Charter, and the conclusions to be drawn from an infringement of the rights guaranteed by EU law, it should be noted that, under Article 47, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

87 In order for the judicial review guaranteed by that article to be effective, the court reviewing the legality of a decision implementing EU law must be able to verify whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter.

88 That requirement is satisfied if the court hearing an action challenging the decision of the tax authorities adjusting VAT is empowered to check that the evidence upon which that decision is founded, deriving from a parallel criminal procedure that has not yet been concluded, was obtained in that criminal procedure in accordance with the rights guaranteed by EU law or can at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that that evidence was obtained in accordance with EU law.

89 If that requirement is not satisfied and, therefore, the right to a judicial remedy is not effective, or if another right guaranteed by EU law is infringed, the evidence obtained in the context of the criminal procedure and used in the administrative tax procedure must be disregarded and the contested decision which is founded on that evidence must be annulled if, as a result, the decision has no basis.

90 Consequently, the answer to questions 10 to 15 is that EU law must be interpreted as not precluding, for the purposes of the application of Article 4(3) TEU, Article 325 TFEU and Articles 2, 250(1) and 273 of the VAT Directive, the tax authorities from being able, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means,

for example, of the interception of telecommunications and seizure of emails, provided that the obtaining of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure do not infringe the rights guaranteed by EU law.

91 In circumstances such as those of the main proceedings, by virtue of Articles 7, 47 and 52(1) of the Charter it is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting VAT to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter, it must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **EU law must be interpreted as meaning that, in order to determine whether, in circumstances such as those of the main proceedings, a licensing agreement concerning the making available of know-how enabling operation of a website by which interactive audiovisual services were supplied, concluded with a company established in a Member State other than that in which the company granting the licence is established, arose from an abuse of rights designed to benefit from the fact that the rate of value added tax applicable to those services was lower in that other Member State, the fact that the manager and sole shareholder of the latter company was the creator of that know-how, that that same person exercised influence or control over the development and exploitation of that know-how and over the supply of the services which were based on it and that management of the financial transactions, staff and technical instruments necessary for the supply of those services was carried out by subcontractors, and the reasons which may have led the company granting the licence to make the know-how at issue available to a company established in that other Member State instead of exploiting it itself, do not appear decisive in themselves.**

   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, examining 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.

2. **EU law must be interpreted as meaning that, if an abusive practice is found which has resulted in the place of supply of services being fixed in a Member State other than the Member State where it would have been fixed in the absence of that abusive practice, the fact that value added tax has been paid in that other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located.**

3. **Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax must be interpreted as meaning that the tax authorities of a Member State which are examining whether value added tax is chargeable in respect of supplies of services that have already been subject to that tax in other Member States are required 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 value added tax is chargeable in the first Member State.**

4. **EU law must be interpreted as not precluding, for the purposes of the application of Article 4(3) TEU, Article 325 TFEU and Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, the tax authorities from being able, in order to establish the existence of an abusive practice concerning value added tax, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means, for example, of the interception of telecommunications and seizure of emails, provided that the obtaining of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure do not infringe the rights guaranteed by EU law.**

   In circumstances such as those of the main proceedings, by virtue of Articles 7, 47 and 52(1) of the Charter of Fundamental Rights of the European Union it is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting value added tax to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter of Fundamental Rights of the European Union, it must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law.

[Signatures]