Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

7 April 2022 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 44 – Place of supply of services – Implementing Regulation (EU) No 282/2011 – Article 11(1) – Provision of services – Point of reference for tax purposes – Concept of a 'fixed establishment' – Company from one Member State affiliated to a company located in another Member State – Suitable structure in terms of human and technical resources – Ability to receive and use the services for the fixed establishment's own needs – Marketing, regulatory, advertising and representation services provided by a related company to the recipient company'

In Case C?333/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania), made by decision of 30 December 2019, received at the Court on 22 July 2020, in the proceedings

Berlin Chemie A. Menarini SRL

v

Administra?ia Fiscal? pentru Contribuabili Mijlocii Bucure?ti – Direc?ia General? Regional? a Finan?elor Publice Bucure?ti,

intervener:

Berlin Chemie AG,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis (Rapporteur), M. Ileši?, D. Gratsias and Z. Csehi, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Berlin Chemie A. Menarini SRL, initially by M. Galgo?iu-S?raru, M.?R. Farc?u, B. M?rcule? and E. Bondalici, and subsequently by M. Galgo?iu-S?raru, M.?R. Farc?u and E. Bondalici, avoca?i,

– the Romanian Government, by E. Gane, R.I. Ha?ieganu and A. Rot?reanu, acting as Agents,

– the European Commission, by A. Armenia and E.A. Stamate, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11) ('the VAT Directive'), and Article 11 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1).

2 The request has been made in proceedings between Berlin Chemie A. Menarini SRL ('the Romanian company') and the Administra?ia Fiscal? pentru Contribuabili Mijlocii Bucure?ti – Direc?ia General? Regional? a Finan?elor Publice Bucure?ti (Bucharest Tax Authority for Medium-sized Taxpayers – Bucharest Regional Directorate-General of Public Finances, Romania) ('the tax authority') concerning an application for annulment of a decision imposing additional value added tax (VAT) and ancillary tax liabilities, and a claim for reimbursement of the additional VAT and ancillary tax obligations.

Legal context

European Union law

3 Title V of the VAT Directive, on the place of taxable transactions, includes, inter alia, a Chapter 3, entitled 'Place of supply of services'. In Section 2, entitled 'General rules', Article 44 of that directive provides:

'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 place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.'

4 In Section 1, entitled 'Concepts', of Chapter V of Implementing Regulation No 282/2011, entitled 'Place of taxable transactions', Article 11(1) thereof provides:

'For the application of Article 44 of Directive 2006/112/EC, a "fixed establishment" shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.'

Romanian law

5 Article 125a(2)(b) of Legea No 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), in force until 31 December 2015, and Article 266(2)(b) of Legea No 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code), in force from 1 January 2016, which are worded identically, provide:

‘For the purposes of this Title:

…

(b) a taxable person who has established his place of business outside Romania shall be deemed to be established in Romania if he has a fixed establishment in Romania, that is to say, if he has sufficient technical and human resources in Romania to carry out regular supplies of taxable goods and/or services’.

6 Under Article 133(2) of Law No 571/2003 and Article 278(2) of Law No 227/2015, which are worded identically:

‘The place of supply of services rendered to a taxable person acting as such shall be the place where the customer has established his business. 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 is the place where the fixed establishment of the customer is located. In the absence of such a place of business or fixed establishment, the place of supply of services shall be the place where the taxable person to whom the services in question are supplied has his permanent address or usually resides.’

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

7 Berlin Chemie AG (‘the German company’) is a company that has its registered office in Germany and which forms part of the Menarini group. It has marketed pharmaceutical products in Romania continually since 1996 for the purposes of the regular supply of wholesale distributors of medicinal products there, and for that purpose concluded a storage contract with a company established in Romania. It also has a tax representative in Romania and is registered for VAT there.

8 The Romanian company, the registered office of which is in Bucharest, was created in 2011. Its main business is management consultancy in the field of public relations and communication, and it may also engage in secondary activities consisting in the wholesale supply of pharmaceutical products, management consultancy, advertising agency activities, market research and carrying out opinion polls. Its sole shareholder is Berlin Chemie/Menarini Pharma GmbH, which has its registered office in Germany and which has a 100% share in the profits and losses of the Romanian company. Berlin Chemie/Menarini Pharma is itself 95% owned by the German company. The German company is the sole customer of the Romanian company.

9 On 1 June 2011, the German company and the Romanian company entered into a marketing, regulatory, advertising and representation services contract, governed by German law, under which the Romanian company undertook to promote actively the products of the German company in Romania through, inter alia, marketing activities, in accordance with the strategies and budgets established and developed by the German company.

10 In particular, the Romanian company is required to establish and maintain a legally qualified advisory service to deal with advertising, informational and promotional issues, in the name of and on behalf of the German company. The Romanian company also undertook to take all the regulatory actions necessary in order to ensure that the German company is authorised to distribute its products in Romania, to provide assistance with clinical trials and other research and development activities, and to ensure an adequate supply of the medical literature and promotional material approved by the German company. Furthermore, the Romanian company takes orders for pharmaceutical products from wholesale distributors in Romania and forwards them to the German

company. It also deals with the invoices which it sends to the German company's customers.

11 The German company undertook to pay a monthly fee for the services provided by the Romanian company, calculated on the basis of the total expenses actually incurred by that company, plus 7.5% per calendar year. The Romanian company invoiced the services in question, exclusive of VAT, to the German company, taking the view that the place of supply of those services was in Germany. From 14 March 2013, those services were paid by payment netting between the invoices for services issued by the Romanian company to the German company, on the one hand, and the loan and interest accorded by the German company to the Romanian company, on the other, since the invoices and the loan had the same value.

12 Following a tax inspection relating to the period from 1 February 2014 to 31 December 2016, the tax authority took the view that the services supplied by the Romanian company to the German company were received by the latter in Romania, where the German company had a fixed establishment. The tax authority took the view that that fixed establishment consisted of sufficient technical and human resources to carry out regular supplies of taxable goods or services. That assessment was made principally on account of the technical and human resources which belonged to the Romanian company, but to which the German company had continuous access. In particular, the German company had access to technical resources owned by the Romanian company, such as computers, operating systems and motor vehicles.

13 On 29 November 2017, the tax authority issued a tax assessment requiring the Romanian company to pay 41 687 575 Romanian lei (RON) (approximately EUR 8 984 391) in additional VAT relating to the services in question, the sum of RON 5 855 738 (approximately EUR 1 262 012) in interest and RON 3 289 071 (approximately EUR 708 851) by way of a late-payment penalty.

14 By its action before the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania), which is the referring court, the Romanian company seeks the annulment of that tax assessment, disputing the fact that the German company has a fixed establishment in Romania.

15 The referring court states that, in order to rule on the action before it, it must determine the place of taxation of the marketing, regulatory, advertising and representation services supplied by the Romanian company to the German company, by ascertaining whether the latter has a fixed establishment in Romania. The resolution of the dispute in the main proceedings therefore depends on the interpretation of the second sentence of Article 44 of the VAT Directive and of Article 11 of Implementing Regulation No 282/2011.

16 The referring court states that the national provisions applicable to the case before it make the finding of the existence of a fixed establishment in Romania conditional on a taxable person having, in that Member State, sufficient technical and human resources to carry out regular supplies of taxable goods or services. The wording of those national provisions differs from that of Article 11(1) of Implementing Regulation No 282/2011.

17 The referring court has doubts as to the interpretation to be given to the second sentence of Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011. It takes the view that the judgments of the Court relating to the interpretation of those provisions do not enable it to dispel those doubts, since the cases which gave rise to those judgments concerned legal and factual situations that are different from those of the case before it. Furthermore, the Court's earlier case-law does not appear to have addressed the issue of the relevance of the supply of marketing services for the purpose of determining the existence of a fixed establishment, where such services involve the exercise of complex activities that have a fairly close link with the economic activity of the taxable person who is the recipient of those services and are likely to have

a direct impact on the performance of that activity.

18 The referring court is uncertain, in the first place, whether it is necessary, in order to consider that a company that supplies goods in the territory of a Member State other than that in which it has established its business has a fixed establishment in that other Member State, for the human and technical resources used by that company in the territory of that Member State to be owned by it, or whether it is sufficient for it to have immediate and permanent access to such resources through a related company, which it controls as majority shareholder and of which it is the sole client.

19 The referring court regards as particularly relevant the fact that the Romanian company was formed specifically with the aim of providing exclusively to the German company the services which it needs in order to carry on its business in Romania. Moreover, the supply of pharmaceutical products to that Member State by the German company is not occasional and sporadic, but long-standing and stable. The German company has regular customers there and a permanent stock of pharmaceutical products in a warehouse it has rented since 1996, and its sales there are constant and substantial. It also has the right to inspect the records and premises of the Romanian company pursuant to a contract between those two companies.

20 In the second place, the referring court is uncertain whether the second sentence of Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011 must be interpreted as meaning that, in order to hold that a company that supplies goods in the territory of a Member State other than that in which it has established its business has a fixed establishment in the Member State in which it supplies those goods, it is necessary for such a fixed establishment to be directly involved in decisions relating to the supply of goods or whether it is sufficient that that company has, in that Member State, technical and human resources that are made available to it through contracts for marketing, regulatory, advertising and representation activities that are capable of having a direct impact on the performance of that company's economic activity.

21 In that regard, the Romanian company claims before the referring court that the decision to supply medicinal products is taken exclusively by the representatives of the German company and that it only provides that company with administrative and support services that are not relevant as regards the application of the abovementioned provisions. It refers, in that regard, to the judgments of 4 July 1985, *Berkholz* (168/84, EU:C:1985:299); of 17 July 1997, *ARO Lease* (C?190/95, EU:C:1997:374); of 28 June 2007, *Planzer Luxembourg* (C?73/06, EU:C:2007:397); and of 16 October 2014, *Welmory* (C?605/12, EU:C:2014:2298).

22 However, the referring court considers that the situation at issue in the main proceedings differs from the situations in the cases giving rise to the abovementioned judgments, given that the German company has access in Romania to a large number of technical and human resources, which it needs in order to carry on its economic activity in that Member State and which influence its economic performance.

23 Furthermore, it observes that the marketing services provided by the Romanian company appear to be intrinsically linked to that economic activity, since it is difficult to isolate the contribution made by marketing in the sale of pharmaceutical products. In addition, in its view, those services should not be conflated with advertising services and perceived as mere administrative and support activities. They are closely linked to obtaining orders for those products and the employees of the Romanian company are involved in taking orders from Romanian customers and forwarding them to the German company.

24 The referring court is thus uncertain whether the economic activities carried on in the fixed

establishment must necessarily be identical to those carried on at the place of establishment of the business or whether it is sufficient that the economic activities carried on by the fixed establishment have a close link with the realisation of business objectives or an influence thereon.

25 In the third place, the referring court is uncertain whether, in the context of the interpretation of the second sentence of Article 44 of the VAT Directive and Article 11 of Implementing Regulation No 282/2011, the fact that a taxable person has immediate and permanent access to the technical and human resources of another taxable person which the former controls precludes the possibility of considering that the latter taxable person is a provider of services for the benefit of the first taxable person's fixed establishment thus constituted. It has doubts as to whether a legal person may be both the fixed establishment of another legal person and a provider of services for the benefit of that fixed establishment.

26 It is in those circumstances that the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) If a company that carries out supplies of goods in the territory of a Member State other than that in which it has established its business is to be regarded as having, within the meaning of the second sentence of Article 44 of [the VAT Directive] and Article 11 of [Implementing Regulation No 282/2011], a fixed establishment in the State in which it carries out those supplies, is it necessary for the human and technical resources employed by that company in the territory of that Member State to belong to it, or is it sufficient for that company to have immediate and permanent access to such human and technical resources through another affiliated company which it controls since it holds the majority of its shares?

(2) If a company that carries out supplies of goods in the territory of a Member State other than that in which it has established its business is to be regarded as having, within the meaning of the second sentence of Article 44 of [the VAT Directive] and Article 11 of [Implementing Regulation No 282/2011], a fixed establishment in the State in which it carries out those supplies, is it necessary for the presumed fixed establishment to be directly involved in decisions relating to the supply of the goods, or is it sufficient for that company to have, in the State in which it carries out the supply of goods, technical and human resources that are made available to it through contracts concluded with third party companies for marketing, regulatory, advertising, storage and representation activities which are capable of having a direct influence on the volume of sales?

(3) On a proper construction of the second sentence of Article 44 of [the VAT Directive] and Article 11 of [Implementing Regulation No 282/2011], does the possibility for a taxable person to have immediate and permanent access to the technical and human resources of another affiliated taxable person controlled by it preclude that affiliated company from being regarded as a service provider for the fixed establishment thus created?'

Consideration of the questions referred

27 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011 must be interpreted as meaning that a company which has its registered office in one Member State has a fixed establishment in another Member State because that company owns a subsidiary there that provides it with human and technical resources under contracts stipulating that that subsidiary provides, exclusively to that company, marketing, regulatory, advertising and representation services that are capable of having a direct influence on the volume of its sales.

28 Article 44 of the VAT Directive states, in its first sentence, that the place of supply of

services to a taxable person acting as such is to be the place where that taxable person has established its business. However, the second sentence of that article provides that if those services are provided to a fixed establishment of the taxable person located in a place other than the place where it has established its business, the place of supply of those services is to be the place where that fixed establishment is located.

29 In so far as the referring court is uncertain as to the place of supply of the services in question, it should be borne in mind that the most appropriate, and thus primary, point of reference for determining the place of supply of services for tax purposes is the place where the taxable person has established its business, and it is as an exception to that general rule that a fixed establishment of the taxable person may be taken into consideration, provided certain conditions are satisfied (judgment of 7 May 2020, *Dong Yang Electronics*, C?547/18, EU:C:2020:350, paragraph 26 and the case-law cited).

30 As regards the matter of whether there is a fixed establishment within the meaning of the second sentence of Article 44 of that directive, that matter must no longer be determined by reference to the taxable person supplying the services but by reference to the taxable person receiving them (judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 57).

31 In accordance with the Court's case-law (see, inter alia, judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 58 and the case-law cited and paragraph 65) and pursuant to Article 11 of Implementing Regulation No 282/2011, the concept of a 'fixed establishment' refers to any establishment, other than the place of establishment of a business referred to in Article 10 of that regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

32 It is appropriate, in the first place, to examine the first criterion, set out in the preceding paragraph, according to which a fixed establishment must be have a sufficient degree of permanence and a suitable structure in terms of technical and human resources.

33 In that regard, the referring court wonders whether it is necessary for those human and technical resources to belong to the company receiving the services or whether it is sufficient for that company to have immediate and permanent access to such resources through a related company, which it controls as a result of its majority shareholding.

34 In accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, to that effect, judgment of 29 April 2021, *X (European arrest warrant* – Ne bis in idem*)*, C?665/20 PPU, EU:C:2021:339, paragraph 69 and the case-law cited).

35 As regards the wording of Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011, it must be noted that those provisions do not provide any details as to whether human and technical resources must belong to the company that receives the services and is established in another Member State in its own right. Article 11(1) of Implementing Regulation No 282/2011 requires, in order to establish a fixed establishment, only 'a sufficient degree of permanence' and 'a suitable structure in terms of technical and human resources'.

36 In that regard, it is clear from settled case-law that the term 'fixed establishment' implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services (judgment of 28 June 2007, *Planzer Luxembourg*

, C?73/06, EU:C:2007:397, paragraph 54 and the case-law cited).

37 Thus, there cannot be a fixed establishment, first, without a discernible structure, which is evidenced by the existence of human or technical resources. Second, that structure cannot exist only occasionally.

38 As regards the fact that a company providing services is a subsidiary of another company, established in another Member State, which is the recipient of those services, it must be borne in mind that consideration of the economic and commercial reality is a fundamental criterion for the application of the common system of VAT. Therefore, the classification of an establishment as a ‘fixed establishment’ cannot depend solely on the legal status of the entity concerned (judgment of 7 May 2020, *Dong Yang Electronics*, C?547/18, EU:C:2020:350, paragraph 31 and the case-law cited).

39 In that regard, while it is possible that a subsidiary constitutes the fixed establishment of its parent company, such a classification depends, however, on the substantive conditions set out in Implementing Regulation No 282/2011, in particular in Article 11 thereof, which must be assessed in the light of the economic and commercial realities (judgment of 7 May 2020, *Dong Yang Electronics*, C?547/18, EU:C:2020:350, paragraph 32).

40 Therefore, the existence, in the territory of a Member State, of a fixed establishment of a company established in another Member State may not be deduced merely from the fact that that company has a subsidiary there (see, to that effect, judgment of 7 May 2020, *Dong Yang Electronics*, C?547/18, EU:C:2020:350, paragraph 33).

41 Accordingly, the existence of a suitable structure in terms of human and material resources which display a sufficient degree of permanence must be established in the light of the economic and commercial reality. Although it is not a requirement for a taxable person itself to own the human or technical resources in order for that taxable person to be regarded as having a sufficiently permanent and appropriate structure – in terms of human and technical resources – in another Member State, it is however necessary for that taxable person to have the right to dispose of those human and technical resources in the same way as if they were its own, on the basis, for example, of employment and leasing contracts which make those resources available to the taxable person and cannot be terminated at short notice.

42 That conclusion is supported by the context of Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011 and the objectives pursued by those provisions. It should be borne in mind that Article 44 of the VAT Directive determines the point of reference for tax purposes of supplies of services in order to avoid, first, conflicts of jurisdiction which may result in double taxation and, second, non-taxation (judgment of 7 May 2020, *Dong Yang Electronics*, C?547/18, EU:C:2020:350, paragraph 25 and the case-law cited).

43 In that regard, the Court has previously held that the underlying logic of the provisions concerning the place where a service is supplied requires that goods and services are taxed as far as possible at the place of consumption (see, to that effect, judgments of 8 December 2016, *A and B*, C?453/15, EU:C:2016:933, paragraph 25, and of 13 March 2019, *Srf konsulterna*, C?647/17, EU:C:2019:195, paragraph 29).

44 In this respect, in order to prevent circumstances arising which could compromise the proper functioning of the common system of VAT, the EU legislature provided in Article 44 of the VAT Directive that, where the service was provided to an establishment which can be characterised as a ‘fixed establishment’ of the taxable person, the place of supply of the services must be considered to be the place where that fixed establishment is located (judgment of 7 May 2020, *Dong Yang Electronics*

, C?547/18, EU:C:2020:350, paragraph 27).

45 To make the existence of a permanent establishment subject to the condition that the staff of that establishment be bound by an employment contract to the taxable person itself and that the material resources belong to it in its own right would amount, on the one hand, to a very restrictive application of the criterion set out by the wording of Article 11(1) of Implementing Regulation No 282/2011. On the other hand, such a criterion would not contribute to a high level of legal certainty in determining the place where services are deemed to be supplied for tax purposes, if, in order to transfer the taxation of supplies of services from one Member State to another, it were sufficient for a taxable person to cover its staffing and material needs by having recourse to various service providers.

46 It is for the referring court to assess whether, in the case in the main proceedings, the German company has a structure in Romania, in terms of human and technical resources, which is sufficiently permanent. In order to guide the referring court in that assessment the Court may nevertheless provide it with all the elements of interpretation under EU law which may be useful to it (see, inter alia, judgment of 6 October 2021, *A (Crossing of borders in a pleasure boat)*, C?35/20, EU:C:2021:813, paragraph 85).

47 In the present case, it is apparent from the order for reference that the German company did not have its own human and technical resources in Romania, but that those human and technical resources belonged to the Romanian company. However, according to the referring court, the German company had permanent and uninterrupted access to those resources, since the agreement for the provision of marketing, regulatory, advertising and representation services, concluded in 2011, could not be terminated at short notice. On the basis of that contract the Romanian company made technical resources (computers, operating systems, motor vehicles), among other things, available to the German company, but above all human resources of more than 200 employees, including, in particular, more than 150 sales representatives. It is also apparent from the order for reference that the German company is the sole customer of the Romanian company, which provides marketing, regulatory, advertising and representation services exclusively to it.

48 However, given that a legal person, even if it has only one customer, is assumed to use the technical and human resources at its disposal for its own needs, it is only if it were established that, by reason of the applicable contractual provisions, the German company had the technical and human resources of the Romanian company at its disposal as if they were its own that the German company could have a suitable structure with a sufficient degree of permanence in Romania, in terms of human and technical resources, a matter which it is for the referring court to verify.

49 In the second place, it is necessary to examine the second criterion, set out in paragraph 31 above, for establishing the existence of a fixed establishment, according to which such an establishment is characterised by a structure which is capable, in terms of human and technical resources, of enabling it to receive the services supplied to it and to use them for its own business needs.

50 In that regard, the referring court asks more specifically whether the existence of a fixed establishment may be deduced, in the case in the main proceedings, from the fact that the Romanian company provides services capable of having a direct impact on the performance of the German company's economic activity, such as marketing services, in so far as those services are closely linked to obtaining orders for the pharmaceutical products sold by the German company, and whether it is also necessary for the alleged fixed establishment to take part directly in the decisions relating to the German company's business.

51 In the present case, it is apparent from the facts set out by the referring court that the advertising and marketing services supplied by the Romanian company to the German company were principally intended to provide better information to professionals in the field of health and to consumers, in Romania, on the pharmaceutical products sold by that German company. The staff of the Romanian company merely took orders from new wholesale distributors of medicinal products in Romania and forwarded them to the German company, and sent invoices from that German company to its customers in that Member State. The Romanian company was not directly involved in the sale and supply of pharmaceutical products by the German company and did not enter into commitments with third parties in the name of that company.

52 First of all, it is important to distinguish the services supplied by the Romanian company to the German company from the goods which the German company sells and supplies in Romania. They are distinct supplies of services and goods which are subject to different schemes of VAT (see, by analogy, judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 64).

53 Next, as follows from the case-law cited in paragraph 31 above, a fixed establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs, and not by the decisions which such a structure is authorised to take.

54 Lastly, it is apparent from the documents before the Court that, in the case in the main proceedings, the human and technical resources which were made available to the German company by the Romanian company and which, according to the Romanian tax authorities, make it possible to establish the existence of a fixed establishment of the German company in Romania, are also those through which the Romanian company supplies the services to the German company. Yet, the same means cannot be used both to provide and receive the same services.

55 Therefore, it follows from the foregoing considerations that the marketing, regulatory, advertising and representation services provided by the Romanian company seem to be received by the German company, which uses its human and technical resources situated in Germany to conclude and perform the contracts of sale with distributors of its pharmaceutical products in Romania.

56 If those facts are established, which it is for the referring court to verify, the German company does not have a fixed establishment in Romania, since it does not have a structure in that Member State allowing it to receive services there provided by the Romanian company and to use those services for the purposes of its economic activity of selling and supplying pharmaceutical products.

57 In the light of all the foregoing considerations, the answer to the three questions is that Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011 must be interpreted as meaning that a company with its registered office in one Member State does not have a fixed establishment in another Member State on the ground that that company owns a

subsidiary there that makes available to it human and technical resources under contracts by means of which that subsidiary provides, exclusively to it, marketing, regulatory, advertising and representation services that are capable of having a direct influence on the volume of its sales.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fifth Chamber) hereby rules:

Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008, and Article 11(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 must be interpreted as meaning that a company which has its registered office in one Member State does not have a fixed establishment in another Member State on the ground that that company owns a subsidiary there that makes available to it human and technical resources under contracts by means of which that subsidiary provides, exclusively to it, marketing, regulatory, advertising and representation services that are capable of having a direct influence on the volume of its sales.

[Signatures]

* Language of the case: Romanian.