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OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 15 May 2014 (1)

Case C?605/12

Welmory sp. z o.o.

v

Dyrektor Izby Skarbowej w Gda?sku

(Request for a preliminary ruling from the Naczelny S?d Administracyjny (Poland))

(Tax legislation– Value-added tax — Article 44 of Council Directive 2006/112/EC as amended by Council Directive 2008/8/EC — Concept of the 'fixed establishment' of the recipient of a service)

1. Once again a request for a preliminary ruling on value added tax law concerns the place where a service is deemed to be provided. This is not surprising because a dispute about the place of supply of a service is also always a dispute about which Member State is entitled to impose tax.

2. In the present case the dispute concerns the power to tax in the case of a rather complicated business model in the area of e-commerce. This business model is operated in Poland jointly by a Polish and a Cypriot company. The question thereby arises, in the main proceedings, of whether the *Cypriot* company maintains in Poland a fixed establishment within the meaning of value added tax legislation. The question whether certain services by the *Polish* company are subject to value added tax in Poland or in Cyprus depends specifically on this.

3. The Court has indeed already commented in several cases on the issue of the circumstances under which a taxable person maintains a fixed establishment in a different Member State from that of his place of business. (2) However, there has not yet been any case-law on e-commerce. Furthermore, in the current case, for the first time since the reform of the place of supply provisions by Directive 2008/8/EC, (3) the question concerns the circumstances under which a service is supplied *to* and not *from* a taxable person's fixed establishment.

I – **Legal context**

4. The charging of value added tax within the European Union is regulated by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (4) ('VAT Directive'). Article 43 et seq. contains provisions on the place of supply of the service. This governs the question of the Member State in which a service is subject to value added tax.

5. With effect from 2009, these provisions were comprehensively amended by Directive

2008/8. The first sentence in recital 3 of this directive states as follows:

‘For all supplies of services the place of taxation should, in principle, be the place where the actual consumption takes place.’

6. Therefore Article 44 of the VAT Directive now includes the following basic rule to establish the place of supply of the service in the case of services whose *recipient* is a taxable person:

‘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. …’

7. According to Article 193 of the VAT Directive the person liable for VAT is in principle the ‘taxable person carrying out a taxable supply … of services’. However, Article 196 of the VAT Directive as amended by Directive 2008/8/EC deviates from this basic rule where the place of supply of the service is governed by Article 44, cited above:

‘VAT shall be payable by any taxable person … to whom … the services referred to in Article 44 … are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.’

8. Polish legislation has implemented Article 44 of the VAT Directive through Article 28b of the Ustawa o podatku towarów i us?ug of 11 March 2004.

II – **Main proceedings**

9. The main proceedings concern the value added tax liability of the Polish company Welmory sp. z o.o. (‘Welmory’) for the months of January to April 2010.

10. Welmory had entered into a cooperation agreement with a Cypriot company, Welmory Limited. Under that agreement the Cypriot company was to provide a Polish-language auction site. On that website Welmory was supposed to offer and sell products by auction for its own account.

11. However, customers could purchase these products by auction only if they had previously acquired rights from the Cypriot company to submit a bid. This business model resulted in the sale of a product leading to two different types of turnover: on the one hand Welmory collected the purchase price, which was as a rule below the product’s market value; on the other, the Cypriot company had an income from the sale of rights to bid.

12. To operate the website the Cypriot company used staff which was not employed by it, and it used Welmory’s technical resources for that purpose. In April 2010 Welmory became a wholly-owned subsidiary of the Cypriot company.

13. On the basis of the cooperation agreement Welmory received remuneration from the Cypriot company for the service of selling the products and associated services, such as advertising. Welmory paid no value added tax on this, as it is of the opinion that the recipient of the services, namely the Cypriot company, is liable for the tax at its place of business in Cyprus.

14. However, the Polish tax authorities take the view that Welmory’s services should be taxed in Poland, because the Cypriot company maintained a fixed establishment in Poland to which the services had been provided.

III – **Proceedings before the Court**

15. The Naczelny S?d Administracyjny, currently hearing the dispute, has referred the following question to the Court for a preliminary ruling under the third paragraph of Article 267 TFEU:

For the purposes of the taxation of services supplied by company A, which is established in Poland, to company B, which is established in another Member State of the European Union, in circumstances where company B carries out its economic activity by making use of company A's infrastructure, is the fixed establishment within the meaning of Article 44 of the VAT Directive situated in the place in which company A is established?

16. Welmory, the Republic of Cyprus, the Republic of Poland, the United Kingdom of Great Britain and Northern Ireland as well as the Commission have commented in writing on the proceedings before the Court. In addition, the defendant in the main proceedings, the director of the Gdansk tax office, also participated in the hearing.

IV – **Legal appraisal**

17. By its question the referring court essentially wants to know whether, in circumstances such as those in the main proceedings, it should be held that services within the meaning of the second sentence of Article 44 of the VAT Directive are being supplied at a fixed establishment of the taxable person.

18. What distinguishes the circumstances in the main proceedings in particular is the fact that, for the operation of the website under the cooperation agreement it has entered into with Welmory, the Cypriot company uses staff and resources that do not belong to it but rather belong, at least in part, to Welmory. Do these staff and resources amount to a fixed establishment of the Cypriot company in Poland to which Welmory supplies its services on the basis of the cooperation agreement?

19. I will approach the answer to this question gradually. Firstly, I shall lay the foundations for an interpretation of the term 'fixed establishment' with an analysis of the system of regulation (under A). I will then examine the case-law to date on this term in previous versions of the provisions (under B) and whether this case-law can be applied to the amended place of supply provisions (under C). Once the criteria thereby established have been applied to the circumstances in the main proceedings (under D), then, finally, a further reference will be necessary to another, potentially decisive aspect of the VAT treatment of the present case (under E).

A – *The system governing the determination of the place of supply of a service*

20. The answer to the question of whether the taxable recipient of services — in the present case the Cypriot company — maintains a fixed establishment within the territory of the country initially decides the issue of which Member State is entitled to the value added tax on these services. This is because the place where the services are to be taxed is determined, according to Article 44 of the VAT Directive, on the basis of the place where the taxable *recipient* of the services has his place of business or fixed establishment. Thus, inasmuch as in the main proceedings the Cypriot company has a fixed establishment in Poland, the value added tax is owed to the Republic of Poland. Otherwise, it is owed to the Republic of Cyprus where the Cypriot company has its place of business.

21. Furthermore, this question is also of decisive significance to the obligations of a service

provider such as Welmory: depending on whether or not his taxable contractual partner is resident within the country on the basis of a fixed establishment, the service provider will or will not have to account for value added tax. Thus in the present case, if the Cypriot company has no fixed establishment in Poland, tax on the services is, under Article 196 and Article 44 of the VAT Directive, to be paid by the Cypriot company itself in Cyprus. If, however, the Cypriot company has a fixed establishment in Poland then under Article 193 of the VAT Directive Welmory has to pay the value added tax and, what is more, this must be paid in Poland.

22. There are two ideas behind this system of regulation: the allocation between the Member States of the power to tax and the avoidance of an unreasonable administrative burden on taxable persons. Both aspects call for a particular degree of legal certainty by means of foreseeable objective criteria determining whether there is a fixed establishment within the meaning of the second sentence of Article 44 of the VAT Directive.

1. Allocation between the Member States of the power to tax

23. The allocation between the Member States of the power to tax is determined by the place where the supply of the service is deemed to be. According to the third recital of Directive 2008/8/EC the value added tax is in principle owed to the Member State in which the service is consumed. As a rule this is likely to occur at the place where the recipient is established. Consequently, Article 44 of the VAT Directive allocates the power to tax to the Member State of the recipient of the service.

24. Admittedly, the provision of Article 44 of the VAT Directive to be examined here applies only to *taxable* recipients of a service who are in principle entitled to deduct input tax. For this reason the taxation of such a service in a Member State is frequently only provisional because the taxable recipient of the service will, as a result of its right to deduct input tax under Article 167 et seq. of the VAT Directive, often be able to require a refund of the value added tax incurred. Thus in the present case, even if Welmory's services were to be taxable in Poland, the Cypriot company could, as the recipient of these services, potentially obtain a refund of the corresponding value added tax from the Republic of Poland.

25. This does not apply in all cases, however. If the recipient of the service carries out a business activity that does not entitle it to a deduction of input tax, or if the specific service is subject to a prohibition on deduction, then the value added tax chargeable on the service remains permanently with the Member State in which the place of supply of the service is located under Article 44 of the VAT Directive.

26. As Welmory and the Republic of Cyprus have in particular rightly emphasised during the hearing, instances of double taxation must, however, also be avoided in relation to this allocation of the right to tax. This risk exists where two Member States are of the opinion that the service is consumed in their respective countries. However, the uniform determination throughout the EU of the place of supply of a service is specifically intended to determine unequivocally the right to tax and thereby to avoid both double taxation and no taxation. (5) Advocate-General Jacobs has already emphasised in this context that the interpretation of the provisions relating to the place of supply of a service must in any case guarantee legal certainty in order to avoid conflicts between Member States relating to jurisdiction. (6) The determination of a fixed establishment within the meaning of Article 44 of the VAT Directive also thus requires first and foremost that criteria are practicable. (7)

2. Avoidance of an unreasonable administrative burden on taxable persons

27. In the system for determining the place of supply of a service an unreasonable

administrative burden on taxable persons should also be avoided through a flexible approach to determining who is liable for tax. Thus, pursuant to Article 193 and Article 196, in cases falling under Article 44 of the VAT Directive both the service provider and the taxable recipient of a service may be liable for VAT.

28. The reason for this is that the service provider should fulfil tax obligations only in the place where he is established. Therefore, in cases in which the recipient of the service is established in only another Member State and consequently the value added tax is owed there, the tax liability is reversed and thus the recipient of the service becomes the person liable for tax. This prevents a service provider having to register for value added tax in multiple Member States and having to file tax returns in all of them. (8)

29. In this context there should be unreserved agreement with Welmory's argument that for the service provider there must be legal certainty as to the existence of a fixed establishment of the recipient of his service. This is because, depending on the existence of such a fixed establishment within the territory of the country, the service provider will or will not be liable for tax.

30. In order to satisfy the requirements of a functioning single market, service providers cannot here be expected either to carry out extensive investigations into the recipient of their service or to put up with uncertainty on the issue of their liability for tax. Thus, if the flexible approach to identifying the person liable for tax is not, contrary to its aim, itself to become an administrative burden for the service provider, then for this reason too there is a need for objective and clear criteria by which service providers can determine whether the recipient of their service is established within the territory of the country on the basis of a fixed establishment.

B – *Existing case-law on the term 'fixed establishment'*

31. In the case-law of the Court the term 'fixed establishment' has so far been interpreted primarily in regard to Article 9(1) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment (9) ('Sixth Directive'). Under this provision what used to be treated as the place of supply of the service was in principle the place where the service *provider* 'has established his business or has a fixed establishment from which the service is supplied'.

32. It is settled case-law that the place of business is the primary point of reference here. A further establishment is to be taken into account only 'if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State'. (10)

33. A 'fixed establishment' within the meaning of Article 9(1) of the Sixth Directive hence only exists if the taxable person's place of business has a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis. (11)

34. In this regard the Court held that it was significant in the vehicle leasing business whether a taxable person had its own staff available to it at a given place and whether contracts could be drawn up there or decisions made on the management of the business. (12)

35. Furthermore, various parties to the proceedings have referred to the judgment in *DFDS*. In this judgment the Court can be understood as stating that a company which, although having its own legal personality, is completely controlled by its parent company may be regarded as a fixed establishment of the parent company. (13) For the present case this would be significant inasmuch

as the Cypriot company was, for part of the period disputed in the main proceedings, Welmory's sole shareholder.

36. However, in the judgment in *DFDS* the Court only interpreted the special rule in what is currently Article 307(2) of the VAT Directive, which specifies the Member State in which the single service is to be taxed under the special rules applying to tour operators. (14) Although in its reasoning it also referred to the general rule for determining the place of supply of a service, (15) the judgment in *DFDS* is not, however, capable of general application, as the Court recently found in the judgment in *Daimler*. (16) Furthermore it serves the purpose of legal certainty in regard to the person liable for tax if a legal person with its own legal personality cannot at the same time be the fixed establishment of a different legal person.

C – *Application of existing case-law to the amended place of supply provisions*

37. The referring court has rightly pointed out that the above case-law principles in relation to Article 9(1) of the Sixth Directive relate only to the question of when the *provider* of a service maintains a fixed establishment. However, pursuant to the second sentence of Article 44 of the VAT Directive, the present case concerns the determination of a fixed establishment of the *recipient* of a service. Therefore the question arises of whether, in the course of interpreting this provision, we may have recourse to the case-law on Article 9(1) of the Sixth Directive.

38. The EU legislature has given a clear answer in this respect. Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (17) ('VAT Implementing Regulation') defines the term 'fixed establishment' within the meaning of the second sentence of Article 44 of the VAT Directive by reference to the Court's case-law on Article 9(1) of the Sixth Directive. According to Article 11(1) of the VAT Implementing Regulation this is any establishment '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.'

39. Although, pursuant to the second paragraph of Article 65 of the VAT Implementing Regulation, this provision is not yet applicable to the period in the main proceedings, I believe this definition to be important also for the present case.

40. In this regard it is admittedly of little relevance that Article 11(1) of the VAT Implementing Regulation can be traced back to a corresponding VAT Committee guideline under Article 398 of the VAT Directive which was already decided upon prior to the period relevant in the main proceedings. (18) This is because it is unclear whether this guideline was also already published prior to this period. (19)

41. However, the definition in Article 11(1) of the VAT Implementing Regulation is consistent with the principles that have to be taken into account in the interpretation of Article 44 of the VAT Directive. (20) This is because on the one hand, according to the definition, the use of the service is decisive, inasmuch as the establishment must thereafter be in a position to receive and use the services for its own needs. On the other hand, both the fact that the definition in Article 11(1) of the VAT Implementing Regulation requires a discernible structure in terms of human and technical resources, and this definition's recourse to established case-law of the Court in relation to the term 'fixed establishment', guarantee the particular degree of legal certainty required for the protection of taxable persons and the prevention of double taxation or no taxation.

42. In addition, the definition in Article 11(1) of the VAT Implementing Regulation also fits the — now amended — place of taxation of the service inasmuch as it no longer depends on the

establishment in question being capable of *performing* its own services but on its *using* services for its own needs.

43. Whether, above and beyond this, a fixed establishment within the meaning of the second sentence of Article 44 of the VAT Directive is required not only to use services but also to be capable of performing its own taxable supplies, as both the director of the Gdansk tax office and the Commission have suggested at the hearing, does not ultimately need to be decided in the present case. This is because, provided the Cypriot company maintained a fixed establishment in Poland, this establishment would also carry out services in the form of the operation of the auction website, which the cooperation agreement requires it to do for Welmory. Moreover, from a factual point of view it is doubtful whether as a rule every structure which, in terms of its human and technical resources, is able to use services for its own needs would not indeed at least have the *possibility* of supplying services itself. From a legal point of view, the further question would arise of whether the view taken by both parties to the proceedings, namely that the second sentence of Article 44 also applies in certain cases if the recipient of a service is not a taxable person, is compatible with Article 43(2) of the VAT Directive.

44. Ultimately, for reasons of legal certainty, the precedence in consistent case-law given by the Court to the place of business (21) should also be extended to the application of Article 44 of the VAT Directive. This is because it serves the requirement for legal certainty if the place of supply of the service is, in case of doubt, linked to the place of business of the recipient of the service, which as a rule is a more easily ascertainable objective criterion than the maintenance of a fixed establishment. This precedence is also consistent with the relationship, expressed in the wording of Article 44 of the VAT Directive, between the basic rule in the first sentence relying on the place of business and the exception in the second sentence concerning a fixed establishment.

D – *Application to the circumstances in the main proceedings*

45. In circumstances such as those in the main proceedings, a fixed establishment of the Cypriot company in Poland can thus be assumed only if that company has an establishment there which displays 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. In case of doubt, the assumption is that no fixed establishment exists so that pursuant to the first sentence of Article 44 of the VAT Directive the Cypriot company’s place of business is to be regarded as the place where the service is supplied.

46. There is no doubt that ultimately it is for the referring court to make a finding on the basis of the facts, to which it alone has full access. This is all the more so in light of the fact that the parties to the proceedings were unable to agree before the Court on all the facts of the main proceedings.

47. In making its findings, the referring court must, however, in view of the particular circumstances of the main proceedings, take account of the following points.

48. First of all, for the assumption that there is a fixed establishment within a State it is not necessary for the taxable person to have at his disposal there human resources who are employed by him, or to have technical resources which he owns.

49. Advocate General Poiares Maduro has already stated that it would lead to unacceptable results if a fixed establishment were to be assumed only where the human resources deployed are employed by the taxable person himself. (22) It would also invite abuse if a taxable person were able to transfer the taxation of his services from one Member State to another simply by covering his human resource requirements using different service providers. The Court’s reference, when determining a fixed establishment, to the absence of human resources in the vehicle leasing

business (23) thus cannot be applied generally.

50. Since a similar situation applies to the technical resources, a fixed establishment of the Cypriot company in Poland is not ruled out in the present case merely because it uses Welmory's technical resources and human resources not employed by it.

51. However, that does not mean that Welmory would function simultaneously as both the service provider and — in the form of a fixed establishment of the Cypriot company — also as the recipient of the service, as in particular Welmory fears. This is because, even if a fixed establishment does not necessarily require its own human and technical resources, the taxable person must nevertheless — based on the requirement for a sufficient degree of permanence in relation to the establishment — have comparable control over the human and technical resources. Therefore employment and lease contracts are required in particular in relation to the human and technical resources which put the latter at the taxable person's disposal as if they were his own and which therefore also cannot be terminated at short notice.

52. In other words, it should be emphasised that a taxable person cannot *as such* constitute a fixed establishment of a different taxable person. This does not, however, exclude the possibility of a taxable person having immediate and constant access to the human and technical resources of a different taxable person who, in a different respect, can at the same time be a service provider for the fixed establishment thereby constituted.

53. That said, where the human and technical resources of the service provider and of the establishment of the recipient of a service are virtually the same, it may be questioned whether there is a supply of a service to *another* taxable person at all.

54. Secondly, the United Kingdom of Great Britain and Northern Ireland has rightly referred to the fact that the question *where* the Cypriot company conducts a business activity and uses the Welmory services is also crucial. This is because, in order to be 'fixed' within the meaning of the second sentence of Article 44 of the VAT Directive, the establishment must be capable of using services for its own needs.

55. To that end the referring court will have to examine what independent business the Cypriot company carries out using the human and technical resources at its disposal in Poland as the case may be and whether Welmory's services under the cooperation agreement are applied specifically for this business.

56. The answer to the question referred is therefore that a fixed establishment within the meaning of the second sentence of Article 44 of the VAT Directive is an establishment 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. It is not necessary for it to have its own human and technical resources for this, provided the third-party resources at the establishment are available to it in a way that is comparable to having its own resources.

E – *The sale of rights to bid and the basis of assessment of the sale of the products*

57. Various parties to the proceedings have contended that the actual problem in the main proceedings lies not in the question of whether Welmory's services are performed at a fixed establishment of the Cypriot company within the territory of the country but whether the sale by the Cypriot company of rights to persons to bid for the goods offered by Welmory should be taxed in Cyprus or in Poland. This is because, commercially speaking, both Welmory and the Cypriot company have made money from the sale of the goods in Poland.

58. For the moment, I want to leave undecided the question of whether the place of the Cypriot company's sale of the rights to bid is determined under Article 44 of the VAT Directive or rather whether in this respect the provisions governing the place of supply of goods under Article 31 et seq. of the VAT Directive apply. This is because it does not seem to be excluded that the acquisition of the right to make an offer for the purchase of an item should be regarded, according to the definition of a supply of goods in Article 14(1) of the VAT Directive, as part of the 'transfer of the right to dispose of tangible property as owner'. This could at any rate be assumed for those rights acquired by the person whose bid was ultimately accepted in the auction. However, this question concerns the taxation of the Cypriot company, which is not the subject of the main proceedings.

59. Nevertheless, in connection with the taxation of Welmory, which is disputed in the main proceedings, a further question arises.

60. The Republic of Poland has rightly pointed out that the basis of assessment of the products which Welmory has sold in the context of the auction may not have been accurately determined in the main proceedings. This is because Article 73 of the VAT Directive provides that the taxable amount could comprise two parts: the purchasers' payments and the fees which the Cypriot company pays Welmory in return for the latter selling products on the website.

61. In the present case the consequence would be, at least in part, that none of the services supplied by Welmory to the Cypriot company but rather the supplies of goods to Welmory's customers would be taxable, albeit with a higher taxable amount. For these supplies the place is governed not by Article 44 but by Article 31 et seq. of the VAT Directive.

62. Under Article 73 of the VAT Directive the taxable amount of value added tax includes 'everything which constitutes consideration obtained … by the supplier in return for the supply, from the customer or a third party …' Since pursuant to the above the taxable amount also includes a payment from a person who is not the recipient of the service, (24) the fees which Welmory has received from the Cypriot company under the cooperation agreement for the services supplied in selling the products could constitute consideration from a third party for the sale.

63. It is settled case-law that this would be the case if there is a direct link between the delivery of the goods by Welmory to its customers and the payments received by the Cypriot company. (25) Such a link would in any case have to be assumed if the amount of the fees depended on the number or volume of product sales.

64. If it were possible to ascertain a direct link between the sale of the goods and the fees paid to Welmory by the Cypriot company under the cooperation agreement, these fees should therefore not be regarded as consideration for Welmory's services to the Cypriot company but as consideration for the sale to purchasers of goods offered in the context of the auctions. Whether this is the case must, where relevant, be clarified by the referring court in the context of the main proceedings.

V – **Conclusion**

65. I nevertheless propose that the question referred by the Naczelny S?d Administracyjny be answered as follows:

A fixed establishment within the meaning of the second sentence of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as amended by Directive 2008/8/EC is an establishment that has 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. It is not necessary for it to have its own human and technical resources for this, provided the third-party resources at the establishment are available to it in a way that is comparable to having its own resources.

1 – Original language: German.

2 – On the place where a service is provided, see the judgments in *Berkholz* (168/84, EU:C:1985:299); *Faaborg-Gelting Linien* (C?231/94, EU:C:1996:184); *ARO Lease* (C?190/95, EU:C:1997:374); *Lease Plan* (C?390/96, EU:C:1998:206); and *Cookies World* (C?155/01, EU:C:2003:449).

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

4 – OJ 2006 L 347, p. 1.

5 – In this regard see my Opinion in *RR Donnelly Global Turnkey Solutions Poland* (C?155/12, EU:C:2013:57, No 30 and the case-law cited there in relation to Article 9 of the Sixth Directive); see, particularly in relation to the background to Article 44 of the VAT Directive, the Commission's amended proposal of 20 July 2005 for a Council Directive amending Directive 77/388/EEC in relation to the place of supply of the service, COM(2005) 334 final, pp. 5 and 6.

6 – See, Opinions in *Design Concept* (C?438/01, EU:C:2002:767, points 29 and 30) in relation to Article 9 of the Sixth Directive.

7 – See, in this context, the judgments in *Hamann* (51/88, EU:C:1989:132, paragraph 18) and *Commission* v *France* (C?429/97, EU:C:2001:54, paragraph 49).

8 – See in this regard the Commission's proposal of 23 December 2003 for a Council Directive amending Directive 77/388/EEC in relation to the place of supply of the service, COM(2003) 822 final, under 4.3.

9 – OJ 1977 L 145, p. 1.

10 – Judgments in *Berkholz* (EU:C:1985:299, paragraph 17) ; *Faaborg-Gelting Linien* (EU:C:1996:184, paragraph 16) ; *ARO Lease* (EU:C:1997:374, paragraph 15) ; and *Lease Plan* (EU:C:1998:206, paragraph 24).

11 – Judgments in *ARO Lease* (EU:C:1997:374, paragraph 16) and *Lease Plan* (EU:C:1998:206, paragraph 24); see similarly the judgment in *E.ON Global Commodities (formerly E.On Energy Trading)* (C?323/12, EU:C:2014:53 paragraph 46) on Article 1 of the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to Turnover Taxes — arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11) as well as the judgment in *Planzer Luxembourg*

(C?73/06, EU:C:2007:397, paragraph 54) on Article 1(1) of the Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to Turnover Taxes — arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ 1986 L 326, p. 40).

12 – Cf. Judgments in *ARO Lease* ((EU:C:1997:374, paragraph 15) and *Lease Plan* (EU:C:1998:206, paragraph 26).

13 – Judgment in *DFDS* (C?260/95, EU:C:1997:77, paragraph 26).

14– Ibid., operative part).

15 – Ibid., paragraph 17).

16 – See judgment in *Daimler* (C?318/11 and C?319/11, EU:C:2012:666, paragraphs 47 to 49).

17 – OJ 2011 L 77, p. 1.

18 – Guidelines resulting from the 88th meeting of the VAT Committee on 13 and 14 July 2009, taxud.d. l (2009)358416 — 634, p. 2, which can be downloaded from the Commission's website (http://ec.europa.eu/taxation_customs/taxation/vat/key_documents/vat_committee).

19 – On the significance of the published VAT Commission guidelines for the construction of the VAT Directive, see my Opinion in *RR Donnelley Global Turnkey Solutions Poland* (EU:C:2013:57, points 47 to 50).

20 – See point 20 et seq. above.

21 – See point 32 above.

22 – Opinion in *RAL(Channel Islands) and Others* (C?452/03, EU:C:2005:65, point 52).

23 – See point 34 above.

24 – See judgment in *Le Rayon d'Or* (C?151/13, EU:C:2014:185, paragraph 34).

25 – See for example the judgments in *Naturally Yours Cosmetics* (230/87, EU:C:1988:508, paragraphs 11 and 12); *First Choice Holidays* (C?149/01, EU:C:2003:358, paragraph 30); and *Dixons Retail* (C?494/12, EU:C:2013:758, paragraph 33).