Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 1 February 2024[1]

**Case C-533/22**

**SC Adient Ltd & Co. KG**
**v**
**Agenția Națională de Administrare Fiscală,**
**Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Argeș**

(Request for a preliminary ruling from the Tribunalul Argeș (Regional Court, Argeș, Romania))

(Reference for a preliminary ruling – Common system of value added tax – Directive 2006/112/EC – Place of supply of services – Head office or fixed establishment – Establishment of a domestic group company as a fixed establishment of a foreign group company – Irrelevance of connections recognised under company law – Attribution of the establishment of the contract partner – Constitution of a fixed establishment by means of a contract for supply of services – Fixed establishment within the territory of a Member State as a substitute for a head office established within the territory of a different Member State)

## I. Introduction

1. This is now the fifth[2] request for a preliminary ruling since 2018 concerning the criteria for determining whether a fixed establishment exists for the purposes of VAT law. Of those requests, it is already the third[3] since the judgment in *Dong Yang*[4] in 2020 that asks, in essence, whether a controlled company or a group company is to be regarded as a fixed establishment of the parent company or another group company. That development is astonishing in view of the fact that there had been, up to that point, a total of just six[5] comparable requests for a preliminary ruling since the introduction of the Sixth Council Directive 77/388/EEC (that is to say during a period of more than 40 years).

1 Original language: German.

2 The other four are: judgments of 7 May 2020, *Dong Yang Electronics* (C-547/18, EU:C:2020:350); of 3 June 2021, *Titanium* (C-931/19, EU:C:2021:446); of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291); and of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530).

3 The other two were: judgments of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291), and of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530).

4 Judgment of 7 May 2020, *Dong Yang Electronics* (C-547/18, EU:C:2020:350).

5 Judgments of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298); of 7 May 1998, *Lease Plan* (C-390/96, EU:C:1998:206); of 17 July 1997, *ARO Lease* (C-190/95, EU:C:1997:374); of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77); of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184); and of 4 July 1985, *Berkholz* (168/84, EU:C:1985:299). There are also two further judgments delivered in connection with the Eighth VAT Directive: judgments of 25 October 2012, *Daimler and Widex* (C-318/11 and C-319/11, EU:C:2012:666), and of 28 June 2007, *Planzer Luxembourg* (C-73/06, EU:C:2007:397).

2. The Court was not completely uninvolved in that development. In its judgment in *DFDS*, for example, which involved an artificial tax arrangement, the Court explained that a company acting as a mere auxiliary organ of the tour operator, but having the human and technical resources characteristic of a fixed establishment, could be regarded as a fixed establishment of the tour operator.[6] In the subsequent judgment in *Dong Yang*, the Court ruled that it could not be ruled out that the subsidiary held by the parent company may constitute a fixed establishment of that parent company.[7] It is possible that many tax authorities subsequently started searching within corporate structures for fixed establishments constituted in the form of subsidiaries or even just other group companies.

3. As a consequence thereof, a Romanian court is now asking for the second time[8] whether a group company in Romania can, at the same time, be the fixed establishment of its contract partner (a different group company in Germany). In such case, the place of performance of the provided service could not be in Germany (where it is likely that the transaction would have been correctly taxed), but rather in Romania. However, in view of the fact that all affected companies are entitled to deduct input tax, a closer inspection reveals that, for Romania, it is not a matter of safeguarding tax revenues (for which the amount in the present case does not change in any way); instead it is clearly simply a matter of interest and penalty charges.

4. The Court therefore has a fresh opportunity to fundamentally determine if and when an independent company can, at the same time, be the fixed establishment of its contract partner, that is to say a different independent company, and thus provide some further improvement in the level of legal certainty for both the tax authorities and the relevant taxable persons.

## II. Legal framework

### *A. European Union law*

5. The framework of the case in EU law is formed by Directive 2006/112/EC on the common system of value added tax ('the VAT Directive').[9] Article 2(1)(c) of the VAT Directive contains one of the two constituent elements and states:

'(1) The following transactions shall be subject to VAT:

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

6. Article 44 of the VAT Directive governs the place of performance of a service and is worded as follows:

'The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed

6 Judgment of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77, paragraph 26 et seq.).

7 Judgment of 7 May 2020, *Dong Yang Electronics* (C-547/18, EU:C:2020:350, paragraph 30).

8 For the previous case, see judgment of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291).

9 Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1), in the version applicable during the years at issue (2016 to 2018).

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.'

7. Article 11(1) of Council Implementing Regulation (EU) No 282/2011 ('the VAT Implementing Regulation') [10] lays down the following definition of a fixed establishment:

'For the application of Article 44 of [the VAT Directive], 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.'

8. Article 192a of the VAT Directive states:

'For the purposes of this Section, a taxable person who has a fixed establishment within the territory of the Member State where the tax is due shall be regarded as a taxable person who is not established within that Member State when the following conditions are met:

(a) he makes a taxable supply of goods or of services within the territory of that Member State;

(b) an establishment which the supplier has within the territory of that Member State does not intervene in that supply.'

9. In that respect, Article 53(2) of the VAT Implementing Regulation states more specifically:

'Where a taxable person has a fixed establishment within the territory of the Member State where the VAT is due, that establishment shall be considered as not intervening in the supply of goods or services within the meaning of point (b) of Article 192a of [the VAT Directive], unless the technical and human resources of that fixed establishment are used by him for transactions inherent in the fulfilment of the taxable supply of those goods or services made within that Member State, before or during this fulfilment.

Where the resources of the fixed establishment are only used for administrative support tasks such as accounting, invoicing and collection of debt-claims, they shall not be regarded as being used for the fulfilment of the supply of goods or services.

However, if an invoice is issued under the VAT identification number attributed by the Member State of the fixed establishment, that fixed establishment shall be regarded as having intervened in the supply of goods or services made in that Member State unless there is proof to the contrary.'

### *B. Romanian law*

10. Romania transposed the VAT Directive for the years at issue by enacting the Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code; 'the Tax Code').

[10] Council Implementing Regulation of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1).

11. Article 266(2)(b) of the Tax Code states:

'For the purposes of this Title:

(b) a taxable person who has established his or her business outside Romania shall be deemed to be established in Romania if he or she has a fixed establishment in Romania, in particular if he or she has sufficient technical and human resources in Romania to make regular taxable supplies of goods and/or services.'

12. Article 278(2) of the Tax Code provides:

'The place of supply of services rendered to a taxable person acting as such shall be the place where the taxable person to whom those services are provided has established his or her 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 or she has established his or her business, the place of supply of those services shall be the place where that fixed establishment to whom those services are provided 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 or her permanent address or usually resides.'

## III. Facts of the case and preliminary ruling procedure

13. The claimant company in the main proceedings in Romania is Adient Ltd & Co. KG ('Adient DE'), which has its place of establishment in Germany. It belongs to the Adient group. The group has its head office in Europe. The group is a global supplier to manufacturers in the automotive industry. It has a global network of manufacturing and assembly facilities which supply complete seating systems, modules and components to original equipment manufacturers.

14. On 1 June 2016, Adient DE entered into a contract with SC Adient Automotive România SRL ('Adient RO') – another company within the Adient group – to provide a comprehensive service consisting of both the manufacture and assembly of upholstery components, as well as ancillary and administrative services. The manufacturing services consist of cutting and sewing raw materials to make car seat covers. The ancillary services include storing raw materials and finished products, taking delivery of, inspecting and managing raw materials. In that respect, Adient RO has two establishments in Pitești and Ploiești (Romania), in which the relevant goods are manufactured for Adient DE.

15. All expenses incurred by Adient RO in order to ensure that those activities are carried out are included in the fee invoiced to Adient DE. The latter purchases the raw material which it sends to Adient RO for treatment. Adient DE is the legal owner of the raw materials, semi-finished products and finished products throughout the treatment process.

16. In view of the transactions carried out in Romania, Adient DE is a non-resident person with its registered office in Germany. It was directly registered for VAT purposes in Romania as of 16 March 2016 and was assigned a VAT number. Adient DE uses the Romanian VAT number both for domestic and intra-Community purchases of goods in Romania and for supplies to its customers of the products manufactured by Adient RO. For the receipt of services rendered by Adient RO under the contract (manufacturing, assembly, storage and administrative services), it used its German VAT number.

17. The service provider (Adient RO) considered that the place of supply of its services was the place of establishment of the recipient of those services (Adient DE), namely Germany. Hence, it did not calculate and deduct any Romanian VAT. It may be assumed that the transactions were taxed appropriately in Germany.

18. Following a tax inspection carried out at Adient RO, which concerned value added tax for the period from 18 February 2016 to 31 July 2018, the tax authority concluded that Adient RO was required to collect VAT on supplies of services to Adient DE, since it considered the place of supply of those services to be in Romania. It also found that Adient DE had technical and human resources in Romania through the branches of Adient RO in Pitești and Ploiești, with the result that it satisfied the conditions for a fixed establishment for VAT purposes in Romania. Consequently, the services in question, which were rendered to Adient DE by Adient RO, were subject to VAT in Romania and Adient RO was required to collect Romanian VAT. On 29 March 2019, the tax authority issued a decision by which it imposed additional payment obligations on Adient RO. That decision has been contested and the case is still pending before the court in separate proceedings.

19. The tax authority also considered that the VAT number issued by the German authorities had been improperly used by Adient DE. By decision of 4 June 2020, Adient DE was thus automatically registered for tax purposes, through a fixed establishment located in Romania, at an address that was virtually identical to the address of the branch of Adient RO in the city of Pitești. Adient DE lodged a complaint against that decision. By decision of 28 August 2020, the tax authority rejected that complaint as unfounded. Adient DE lodged a complaint against that decision with the referring court.

20. Adient DE argues that the conditions for a fixed establishment in Romania are not satisfied. Adient RO receives, analyses, responds to, and takes corrective action concerning customer complaints, manages and compiles customer reports in the database, obtains data and information from suppliers, prepares monitoring plans for the products received, and so on. Through those activities, Adient RO fulfils its obligations as a manufacturer. According to Adient DE's submissions, shared use of its accounting system takes place only because both companies form part of a corporate group. Moreover, Adient DE does not have any human resources in Romania, in view of the fact that the staff are employed by Adient RO, and the terms of their employment and their pay are negotiated with that company. Likewise, Adient DE does not choose which equipment should be used for the manufacturing activity; nor does it decide on the timing of equipment maintenance, replacement or modernisation.

21. By contrast, the supply of the goods from the branches of Adient RO in Romania is carried out by Adient DE, even if Adient RO initiates the shipping orders on behalf of Adient DE. Placing the shipping order is merely an administrative task which involves sending the information to the carrier, since, for objective reasons, the manufacturer needs to prepare the goods for loading and, naturally, must work with the carrier to ensure that they are delivered on time. However, Adient RO's employees have no decision-making powers regarding the actual sale/purchase of the goods by Adient DE. Moreover, they are not involved in the supply of finished products and are not entitled to make decisions about the quantities, prices or parties involved.

22. The tax authority found, however, that Adient DE has the necessary human and technical resources to carry out regular taxable transactions in Romania. In the course of performing their duties and responsibilities and carrying out their activities, the employees in Adient RO's quality department communicate with customers and suppliers, and represent Adient DE vis-à-vis third

parties. They are also involved in organising and compiling an annual inventory of assets belonging to Adient DE, assigning a monetary value to the latter, and in audits requested by customers of Adient DE. As a result, Romanian natural persons working for Adient RO are in fact permanent human resources of Adient DE in Romania. The tax authority therefore considers that Adient DE has a fixed establishment in Romania (in the form of the two branches of Adient RO in Pitești and Ploiești).

23. The Tribunalul Argeș (Regional Court, Argeș, Romania), which has jurisdiction to hear Adient DE's action, stayed the proceedings and referred eight questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'(1) Are the provisions of Article 44 of [the VAT Directive] and of Articles 10 and 11 of [the VAT Implementing Regulation] to be interpreted as precluding the practice of a national tax authority whereby an independent resident legal person is classified as the fixed establishment of a non-resident entity solely on the basis that the two companies belong to the same group?

(2) Are the provisions of Article 44 of [the VAT Directive] and of Articles 10 and 11 of [the VAT Implementing Regulation] to be interpreted as precluding the practice of a national tax authority whereby it is considered, by reference only to the services supplied to a non-resident entity by a resident legal person, that a fixed establishment of a non-resident entity exists within the territory of a Member State?

(3) Are the provisions of Article 44 of [the VAT Directive] and of Articles 10 and 11 of [the VAT Implementing Regulation] to be interpreted as precluding tax legislation and the practice of a national tax authority whereby it is considered that a fixed establishment of a non-resident entity exists within the territory of a Member State, given that that fixed establishment supplies only goods and not services?

(4) Where a non-resident person has, within the territory of a Member State, human and technical resources within a resident legal person which are used to ensure the supply of services whereby goods are manufactured – goods which are to be supplied by the non-resident entity – are the provisions of Article 192a(b) of [the VAT Directive] and of Article 11 and Article 53(2) of [the VAT Implementing Regulation] to be interpreted as meaning that those manufacturing services supplied by means of the technical and human resources of the non-resident legal person are: (i) services received by the non-resident legal person from the resident person by means of those human and technical resources, or, as the case may be, (ii) services provided by the non-resident legal person itself by means of those human and technical resources?

(5) Depending on the answer to Question 4, how is the place of supply of services to be determined with reference to the provisions of Article 44 of [the VAT Directive] and of Articles 10 and 11 of [the VAT Implementing Regulation]?

(6) In the light of Article 53(2) of [the VAT Implementing Regulation], should activities linked to the treatment of goods, such as taking delivery, recording inventory, placing orders with suppliers, providing storage areas, managing inventory in the IT system, processing customer orders, indicating the address on transport documents and invoices, providing quality control

support, and so on, be disregarded when determining the existence of a fixed establishment, given that they are ancillary administrative activities which are strictly necessary for the manufacture of the goods?

(7) In view of the principles relating to the place of taxation as the place where final consumption takes place, is it relevant for determining the place of supply of the manufacturing services that the goods resulting from those services are mostly (intended to be) sold outside Romania, while those sold in Romania are subject to VAT, and therefore the result of the services is not "consumed" in Romania or, if it is "consumed" in Romania, it is subject to VAT?

(8) Where the technical and human resources of the fixed establishment receiving the services are virtually the same as those of the provider through whom the services are actually performed, is there still a supply of services for the purposes of Article 2(1)(c) of [the VAT Directive]?'

24. In the proceedings before the Court, Adient DE, Romania and the Commission submitted written observations. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court did not consider it necessary to hold a hearing.

## IV. Legal assessment

### *A. The questions referred for a preliminary ruling, their admissibility and the course of the investigation*

25. The eight questions referred by the referring court can be divided into three groups. By its last question, which will be answered first, the court is seeking to ascertain whether a taxable transaction actually takes place at all if the facilities and human resources of one group company (Adient RO), which is claimed to be a fixed establishment of the other group company (Adient DE), are used both to provide the service and to receive it (in that regard, see Section B.).

26. By its first, second, third and seventh questions, the referring court is essentially asking how a fixed establishment that is to be regarded as the recipient of a service is to be defined within a group, such that the place of supply of services is determined by reference to the location of the fixed establishment and not by reference to the location of the head office (the place of establishment of the recipient of the services) (in that regard, see Section C.).

27. By its fourth, fifth and sixth questions, the referring court is raising a question concerning the application of Article 192a(b) of the VAT Directive, in order to establish whether Adient DE is to be regarded as a resident person or a non-resident person in Romania. That presupposes that Adient DE has a fixed establishment in Romania, which is, if necessary, to be determined in isolation from the group structure (in that regard, see Section D).

28. Romania is challenging the admissibility of the questions referred for a preliminary ruling. In principle, it is solely a matter for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent decision, to determine both the need for a preliminary ruling in order to enable it to deliver judgment, and the relevance of the questions that it submits to the Court. The Court is therefore called upon in principle to rule on the questions referred to it, if those questions relate to the interpretation of a provision of EU law.

Such questions enjoy a presumption of relevance. Consequently, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[11]

29. On the basis of that presumption, all of the questions referred for a preliminary ruling, which therefore also includes the seventh question, are admissible, even if – as Romania emphasises in its statement of written observations – the referring court has not explained in detail where the transactions involving the supplies of Adient DE are realised. That is not necessary in view of the fact that there are only two possibilities with respect to the supplies of a supplier that are at issue in the present case. A supply made to an undertaking can either be a cross-border (tax-free) intra-Community supply that results in the (taxable) intra-Community purchase of that supply being subject to taxation at the location of the recipient of the services in another Member State (the same applies in the case of a supply made to a third country, provided that that country recognises an import event), or there is a 'normal' domestic supply that is taxed in Romania. Consequently, the presumption of relevance should not be dismissed even in the case of the seventh question.

### *B. Taxable service of a taxable person (eighth question)*

30. By its eighth question, the referring court is essentially asking whether there is a taxable transaction if the facilities and human resources of one group company (Adient RO), which is claimed to be a fixed establishment of the other group company (Adient DE), are used both to provide the service and to receive it.

31. The background to that question is the fact that VAT is a general tax on consumption that taxes the expenditure outlaid by the recipient of a consumer good,[12] and paid to the taxable person in return for that consumer good. It therefore follows that a taxable transaction within the meaning of Article 2(1)(a) and (c) of the VAT Directive always presupposes the existence of two persons, at least one of whom – the supplier – must be a taxable person.

32. The fundamental requirement for there to be two persons – which even Adient DE expressly emphasises in its written submissions – is also apparent from a reverse conclusion drawn from Articles 16 and 26 of the VAT Directive. These articles deem it a supply of goods or services if the taxable person receives or uses a good itself, with the result that the 'supplier' and the 'recipient' are thus one and the same person.

33. The same is confirmed by Article 11 of the VAT Directive. That provision enables the Member States, under certain conditions, to treat two (or more) persons together *as a single* taxable person, in order to avoid the existence of a transaction between those persons *inter se*. That serves to confer a certain 'organisational neutrality'. For the purposes of VAT law, it should

[11] Judgments of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraphs 27 and 28), and of 9 July 2020, *Santen* (C-673/18, EU:C:2020:531, paragraph 27 and the case-law cited).

[12] See judgments of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraph 23 – 'a general tax on consumption which is exactly proportional to the price of the goods and services'); of 11 October 2007, *KÖGÁZ and Others* (C-283/06 and C-312/06, EU:C:2007:598, paragraph 37 – 'it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied'); and of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraphs 20 and 23 – 'Only the nature of the undertaking given is to be taken into consideration: for such an undertaking to be covered by the common system of VAT it must imply consumption').

not make a difference whether an undertaking (for example, a hospital) performs all services (including, for example, cleaning the hospital) itself, or creates a company and provides the same services (that is to say, cleaning the hospital) through that controlled company. [13] In that case too, it follows by reverse conclusion that, outside the scope of Article 11 of the VAT Directive, it is necessary for two persons to be involved in order to find that a taxable transaction has taken place.

34. The eighth question referred for a preliminary ruling may possibly be a reflection of the fact that some Member States [14] try to relocate the place of supply of the services rendered by a subsidiary or group company to a parent company or other group company not established within the territory of that Member State to within their domestic territory, because the subsidiary or other group company providing the service is, at the same time, a fixed establishment of the recipient of the services, which is established outside the territory of the Member State. However, that qualification precludes a finding that a transaction is taxable and thus subject to taxation.

35. If the relevant services supplied by Adient RO are actually performed through a branch in Romania, which is, to that extent, simultaneously a fixed establishment of Adient DE, then the supplier (that is to say the party providing the services) is also Adient DE. In such case, a fixed establishment (of Adient DE) would be 'supplying' a service to a fixed establishment (of Adient DE). However, as the Court has already made clear, fixed establishments are merely independent parts of one and the same taxable person. [15] In such case, the 'supplier' and the 'recipient' would thus be identical, with the consequence that the existence of a taxable transaction is already precluded. There would be a non-taxable internal transaction within an undertaking, without there being any need for the Member State to make use of the option under Article 11 of the VAT Directive.

36. An internal transaction of that nature would not be taxable because no other person is being supplied with a consumer good. Consequently, the question concerning the place of supply, the tax liability and the tax debt no longer arises. The Court is clearly of the same opinion, in view of the fact that it has recently made clear on two occasions that the same means cannot be used both to provide and receive the same services. [16]

37. Even if it were to be found that a fixed establishment of Adient DE existed, it can therefore be held as an interim conclusion that, in the present case, no Romanian VAT is payable on account of the services supplied by that fixed establishment since there is no taxable transaction. The service provider and the recipient of the services would be one and the same person. However, the following questions are still relevant for the purposes of ascertaining a possible obligation to register Adient DE in Romania.

[13] Other than the associated administrative simplification (no reportable internal transactions), this has material significance only for undertakings not entitled to deduct input tax (such as hospitals, for example). Those entities, whether they perform all services themselves or through a controlled undertaking, will not be burdened by an additional VAT liability as a result of 'internal transactions'. In both cases – if the Member States have made recourse to Article 11 – no additional VAT will be payable by, for example, the hospital, and consequently the tax-free services to the patients will not be burdened, even indirectly, by that VAT.

[14] For example, Belgium – see judgment of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530), or Romania – see judgment of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291).

[15] Explicitly: judgment of 23 March 2006, *FCE Bank* (C-210/04, EU:C:2006:196, paragraph 41 – a fixed establishment is not a legal entity distinct from the company of which it forms part).

[16] Judgments of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530, paragraph 41), and of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291, paragraph 54).

### *C. A group company as a fixed establishment of another group company?*

38. By its first, second, third and seventh questions, the referring court is essentially asking how a fixed establishment that is to be regarded as the recipient of a service is to be defined within a group, such that the place of supply of services is determined by reference to the place of the fixed establishment and not by reference to the place of the head office (the place of establishment of the recipient of the services).

#### *1. Irrelevance of connections recognised under company law*

39. The first question seeks to ascertain whether it is sufficient to rely on connections recognised under company law (in this case, membership of the same corporate group) in order to find that a fixed establishment exists. That question must clearly be answered in the negative.

40. It is apparent from the very wording of the VAT Directive that a controlled but legally independent company cannot be regarded as being, at the same time, a fixed establishment of a different group company. More specifically, Article 44 of the VAT Directive refers to *a* taxable person who has established his business at one place and has a fixed establishment at another place. However, two group companies – as is the case here – are not one taxable person but *two* taxable persons.

41. Only Article 11 of the VAT Directive, which has already been addressed above in this Opinion (point 33), allows the Member States, under certain circumstances, to 'regard' multiple taxable persons who are closely bound to one another (referred to as a 'VAT group') as 'a single taxable person'. However, that possibility is limited to the territory of the particular Member State concerned ('persons established in the territory of that Member State'). As Adient DE is indisputably established in Germany, the existence of a VAT group that includes a group company in Romania is precluded from the outset. There would still be two taxable persons even if they were, as the wording of Article 11 of the VAT Directive provides, 'closely bound to one another'.

42. Even the additional substantive criteria laid down in Article 44 of the VAT Directive – which are specified in further detail under Article 11(1) of the VAT Implementing Regulation – do not support the conclusion that a connection recognised under company law with a different taxable person would facilitate a finding that a fixed establishment existed. On the contrary, Article 11(1) of the VAT Implementing Regulation sets out criteria such as a sufficient degree of permanence of the establishment, and a structure that enables it to receive and use services. None of those criteria are of a company-law nature. There is nothing under Article 11(1) of the VAT Implementing Regulation that could support a finding that the infrastructure of *another* taxable person (in this case, its fixed establishments) could also constitute a fixed establishment of a taxable person that *is to be distinguished* from the former.

43. Consequently, the mere fact that a company in another Member State and a domestic company happen to belong to the same corporate group cannot support a finding that a fixed establishment, as referred to under the second sentence of Article 44 of the VAT Directive, exists. Other criteria must be fulfilled in order for there to be a fixed establishment.

44. Moreover, the decision of the Court in *DFDS* changes nothing in that regard. While that decision could be construed as meaning that it was possible for a subsidiary that was merely an auxiliary organ of the parent company, and acting as such, to constitute a fixed establishment of

the parent company,[17] that decision related to the special area of tour operators that would otherwise be subject to a special VAT regime (now Article 306 et seq. of the VAT Directive). For that reason alone, the above decision is not automatically transferable to other situations. Furthermore, the judgment in *DFDS* was characterised by the question as to who had, from an economic point of view, *provided* (rather than received) the travel services. Lastly, the Court itself had already departed from the decision in *DFDS*, making it clear that even a wholly owned subsidiary is a taxable legal person on its own account.[18]

45. Unfortunately, however, the Court stated in *Dong Yang*[19] – which Romania explicitly cites – that it could not 'be ruled out that the subsidiary held for the purposes of conducting economic activity by the parent company … may constitute a fixed establishment of that parent company in a Member State of the European Union, within the meaning of Article 44 …'. However, that assertion is at the very least ambiguous, and undermines the legal certainty required for the purposes of determining the place of performance. Moreover, it is not automatically transferable to cases that merely involve group companies.

46. It is probably for that reason that the Court expressly stated in the last two relevant decisions that the classification as a 'fixed establishment', which must be assessed in the light of the economic and commercial reality, cannot depend solely on the legal status of the entity concerned, and the fact that a company has a subsidiary in a Member State does not, in itself, mean that it also has its fixed establishment there.[20] As that statement is also to be found in a case that involved only a group company,[21] it is likely that it also covers group companies.

47. The Court has also stated in *Welmory*,[22] that the place where the taxable person has established his business as primary point of reference appears to be a criterion that is objective, simple and practical and offers great legal certainty, being easier to verify than, for example, the existence of a fixed establishment. I referred to the paramount importance of legal certainty for the service provider in determining his, her or its tax obligations as early as my Opinion in *Welmory*.[23] On that basis, I inferred that a legal person with its own legal personality cannot at the same time be the fixed establishment of a different legal person.

48. If the aspect of legal certainty is combined with the Court's recent case-law (point 46), then a connection, recognised under company law, with another independent person cannot constitute a fixed establishment. Hence, an independent company cannot at the same time be regarded as a fixed establishment of a different independent company, even if it belongs to the same group (answer to the first question referred).

*2. Other criteria for a fixed establishment in the form of a group company?*

49. However, the foregoing conclusion does not preclude the possibility of a company, B, providing technical and human resources to a different company, A, in such manner as to constitute a fixed establishment of company A. Those resources would thus constitute a fixed

17 Judgment of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77, paragraph 26).

18 Judgment of 25 October 2012, *Daimler and Widex* (C-318/11 and C-319/11, EU:C:2012:666, paragraph 48).

19 Judgment of 7 May 2020, *Dong Yang Electronics* (C-547/18, EU:C:2020:350, paragraph 30).

20 Judgments of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530, paragraph 36), and of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291, paragraph 40).

21 Judgment of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530).

22 Judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 55).

23 C-605/12, EU:C:2014:340, points 29, 30 and 36.

establishment of company A and, consequently, they could no longer be attributed to company B. In that respect, however, the determinative factor is whether those provided resources are of a sufficient quality and quantity and not whether companies A and B are part of the same group.

50. However, a contract for the supplies of services between two group companies is not a contract for the provision of resources. That is because the service provider fulfils the obligations arising out of that contract in his or her own name and economic interests as an independent contract partner, and not as a controlled component of the other contracting party. In that respect the Court has already made clear 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. [24]

51. It therefore follows that a contract for the supply of services does not mean, in principle, that the supplier of the service effects a taxable transaction in favour of a fixed establishment of the recipient of the services (answer to the second question referred).

*3. Irrelevance of whether the recipient of the services is supplying services or 'only' effecting deliveries and the place where the goods are ultimately consumed*

52. The third question referred for a preliminary ruling suggests that the question as to whether the group recipient of the services (Adient DE) is subsequently providing services or 'only' delivering goods could be decisive for the purposes of determining whether there is a fixed establishment. However, there is no apparent reason for making such a distinction. The question as to whether the place of supply of the services rendered by Adient RO is in Romania or Germany is completely independent of the nature of the output transactions (supply of goods or services) of Adient DE (answer to the third question referred).

53. The seventh question referred for a preliminary ruling seeks to ascertain the relevance of the place of specific consumption of the goods manufactured in Romania for the purposes of finding the existence of a fixed establishment. However, the place where the goods are ultimately 'consumed' is irrelevant for the purposes of VAT law. That is because VAT does not tax the actual consumption, but rather the (financial) expense of purchasing the consumer good. Ultimately, in a chain of transactions involving multiple undertakings that are fully entitled to deduct input tax (as in the present case), it is solely the place of performance of the last transaction – as defined by the directive-issuing body according to various criteria – that determines the allocation of VAT revenue to a Member State.

54. In other words: The question of whether, in the context of a chain of services, the result of the individual manufacturing services (for example: invention in Germany, manufacture in Romania, finishing in France, sale in Luxembourg) is also 'consumed' in the relevant Member State, is irrelevant for the purposes of determining the place of taxation (answer to the seventh question referred).

[24] Judgments of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530, paragraph 37), and of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291, paragraph 48).

*4. Is there an exception based on the prohibition against abusive practices?*

55. At best, the position could be different if the chosen contractual relations (in the present case, those between Adient DE and Adient RO) would amount to an abusive practice. [25]

56. In the present case, however, it is clear that Adient DE is not engaged in any abusive practice based on a contracting processing assignment involving multiple additional components. It is clear that the complex service agreement did not merely exist on paper but was instead being appropriately performed. Even on consideration of the commercial realities (referred to as an 'economic perspective'), which is a fundamental criterion for the application of the common system of VAT, [26] it is not possible to assume anything to the contrary in the present case. Even if Adient RO had been called upon to assist in the sale of goods to other companies, Adient DE remained the contract partner of those companies. It remained the owner of the raw materials and the goods manufactured from them, and delivered those goods to its customers. Moreover, the fact that both companies made use of the internal group accounting system has no bearing on that assessment.

57. Furthermore – contrary to the situation underlying the judgment in *DFDS* [27] – I cannot see any evidence of a tax-saving scheme in the contractual agreement. Even if the place of supply had been in Romania and Adient RO had executed a taxable transaction in Romania in favour of Adient DE, the Romanian VAT (just like the German VAT) would have had to be neutralised by way of input tax deduction (or by way of input tax reimbursement). Evidence of an artificial tax arrangement is thus equally lacking in the present case.

58. In that respect, the accusation of misuse of the VAT identification number levied by the Romanian tax authority is also baseless. The German VAT identification number is used only to provide proof of establishment in Germany. [28] As the place of establishment is in Germany, and the VAT number that had hitherto been issued by Romania did not constitute, or serve as proof of, a fixed establishment, there can be no question of misuse of the German VAT identification number.

*5. Interim conclusion*

59. An independent company cannot in principle be a fixed establishment of a different independent company at the same time. Even a complex contract for the supply of services does not mean, in and of itself, that the supplier is effecting a taxable transaction in favour of a fixed establishment of the service recipient that came into being on the basis of that contract. In that regard, the place of supply of those services depends neither on the nature of the output transactions (supply of goods or services) of the service recipient, nor on the place of 'consumption' of the individual manufacturing services.

[25] See, to that effect, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 31), which cites the judgment of 15 October 2009, *Audiolux and Others* (C-101/08, EU:C:2009:626, paragraph 50).

[26] As expressly stated in the judgments of 20 January 2022, *Apcoa Parking Danmark* (C-90/20, EU:C:2022:37, paragraph 38); of 22 February 2018, *T-2* (C-396/16, EU:C:2018:109, paragraph 43); and of 28 June 2007, *Planzer Luxembourg* (C-73/06, EU:C:2007:397, paragraph 43).

[27] Judgment of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77).

[28] In that regard, see the third paragraph of Article 20 of the VAT Implementing Regulation as regards the location of the customer: 'The information may include the VAT identification number attributed by the Member State where the customer is established.'

### *D. The place of establishment of a taxable person*

60. By its fourth, fifth and sixth questions, the referring court is essentially seeking to ascertain when a taxable person who has a fixed establishment within the territory of a Member State is nevertheless to be regarded as not established in that Member State. Article 192a of the VAT Directive precludes that in cases where, although the taxable person effects transactions in that Member State (that is to say that the place of performance is in Romania), his or her fixed establishment in Romania did not intervene in the supply. The background to that rule lies primarily in the reverse charge mechanism, which is triggered when services are supplied by a taxable person not established within the territory of the Member State (see, for example, Article 196 of the VAT Directive). Article 192a of the VAT Directive makes it clear that the mere existence of a fixed establishment is not by itself sufficient in order for a taxable person to be regarded as a taxable person who is established within the Member State. Rather, the fixed establishment must also be involved in the transactions within the Member State.

61. Those questions presuppose, however, that Adient DE does actually have a fixed establishment in Romania. As explained above in this Opinion (point 39 et seq.), that cannot be deduced from either the existence of a service contract for the manufacture of goods or from the fact that Adient RO is a company within the same group. The Court can however provide information on the prerequisites for making a finding that a fixed establishment of Adient DE existed in Romania. In that regard, the general criteria for determining the place of supply are dispositive, irrespective of any connections recognised under company law (that is to say, regardless of membership of a group).

62. According to the settled case-law of the Court, the most appropriate and, therefore, the primary point of reference [29] for determining the place of supply of services for tax purposes is the place where the taxable person has established his or her business. It is only if that place of business does not lead to a rational result or creates a conflict with another Member State that another establishment may come into consideration. [30]

63. The place where the taxable person has established his or her business as the primary point of reference appears to be – as the Court has expressly stated – a criterion that is objective, simple and practical and offers great legal certainty, being easier to verify than, for example, the existence of a fixed establishment. Moreover, the presumption that the services are supplied at the place where the taxable person receiving them has established his or her business makes it possible both for the competent authorities of the Member States and for suppliers of services to avoid having to undertake complex investigations in order to determine the point of reference for tax purposes. [31]

[29] With regard to the former legal position, see also judgments of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77, paragraph 19); of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184, paragraph 16); and of 4 July 1985, *Berkholz* (168/84, EU:C:1985:299, paragraph 17).

[30] Judgments of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 53); of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184, paragraph 16); and of 4 July 1985, *Berkholz* (168/84, EU:C:1985:299, paragraph 17).

[31] Judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 55).

64. Furthermore – according to the Court – the place of business is mentioned in the first sentence of Article 44 of the VAT Directive, whereas the fixed establishment is mentioned only in the following sentence. That sentence, introduced by the adverb 'however', can only be understood as creating an exception to the general rule set out in the previous sentence. [32]

65. It is well known that exceptions to EU law are to be interpreted restrictively. [33] However, the terms are not to be interpreted so restrictively that they deprive the exception of its effects. [34] On a closer examination, it therefore follows that the Court requires a teleological interpretation to be applied to exceptions.

66. In that respect, a fixed establishment must – according to the settled case-law of the Court – be 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. [35] That interpretation is appropriately reiterated (and thus has declaratory effect) in Article 11 of the VAT Implementing Regulation, which, as an implementing regulation, can only set out more detailed clarifications concerning the provisions of the VAT Directive but cannot introduce amendments. [36]

67. In that regard, the question as to whether a fixed establishment must always have human *and* technical resources at the same time, [37] is of fairly secondary importance. That is because a determination of whether a fixed establishment exists for the purposes of VAT law comes into consideration only when it is necessary to depart from a point of reference for the place of supply that can be identified as precisely as the place where the taxable person has established his or her business (that is to say, the head office), if and because, in exceptional cases, [38] that point of reference to the place of business does not lead to a rational result for tax purposes. [39]

68. However, that will be the case only if, in the specific situation, the fixed establishment takes the place of the head office and performs its function (in another Member State) in a comparable manner. [40] In that event, a sole point of reference to the place of establishment (that is to say the head office) will no longer lead to a rational result for tax purposes. It is prerequisite that the fixed establishment performs comparable services to those of the head office if it is consequently to be regarded as substituting for the head office. If, for example, the head office no longer requires

[32] Judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 56). See also, to that effect, judgments of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530, paragraph 29), and of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291, paragraph 29).

[33] See, to that effect, judgments of 5 September 2019, *Regards Photographiques* (C-145/18, EU:C:2019:668, paragraph 43); of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 24); and of 6 May 2010, *Commission v France* (C-94/09, EU:C:2010:253, paragraph 29).

[34] Judgment of 5 September 2019, *Regards Photographiques* (C-145/18, EU:C:2019:668, paragraph 32). Similarly: judgments of 29 November 2018, *Mensing* (C-264/17, EU:C:2018:968, paragraphs 22 and 23 on special regimes), and of 21 March 2013, *PFC Clinic* (C-91/12, EU:C:2013:198, paragraph 23 on grounds for exemptions).

[35] See, to that effect, judgments of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 58), and of 28 June 2007, *Planzer Luxembourg* (C-73/06, EU:C:2007:397, paragraph 54 and the case-law cited).

[36] Judgment of 28 February 2023, *Fenix International* (C-695/20, EU:C:2023:127, paragraph 51 at the end – the provision of the directive 'neither … supplements nor amends … in any way').

[37] See, to that effect, judgments of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530, paragraph 35), and of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291, paragraph 41).

[38] Expressly: judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 56).

[39] Judgments of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 53); of 17 July 1997, *ARO Lease* (C-190/95, EU:C:1997:374, paragraph 15); and of 4 July 1985, *Berkholz* (168/84, EU:C:1985:299, paragraph 17).

[40] Early signs of that approach are already apparent in the judgment of 17 July 1997, *ARO Lease* (C-190/95, EU:C:1997:374, paragraphs 18 and 19), when the Court based its assessment on the actual activity performed by the undertaking (that is to say, by the head office). That approach was confirmed by the judgment of 7 May 1998, *Lease Plan* (C-390/96, EU:C:1998:206, paragraphs 25 and 26).

any human resources to perform comparable services (because all services are automated), then the fixed establishment need not have its own human resources either,[41] and it will suffice if the appropriate technical resources are held on site.

69. The question of whether or not the contract for the supply of services refers to auxiliary support services is therefore immaterial in the present case. The fact that auxiliary support services are rendered at the premises of the supplier using the human resources of the supplier does not mean that the recipient of the services has a fixed establishment. Instead, the decisive factor is, in that respect, whether the relevant contract enables the recipient of the services to create a fixed establishment on site, from where it can provide comparable services to those provided at a head office. It appears to me that the European Commission is also adopting that line of argument in its statement of written observations.

70. However, if a fixed establishment can be regarded as constituted for the purposes of VAT law only if the head office is substituted for to a given extent in another Member State, then that must also form part of the subject matter of the contract. In other words: the contract must have as its object the provision of those human and/or technical resources that are necessary for that purpose,[42] in order that the recipient of the services can effect similar transactions on site (that is to say at the place of the fixed establishment) to those effected (beforehand, in most cases) at its place of establishment – that is, using those resources in its own name and at its own risk.

71. However, that constitutes a different type of performance to that of a mere contract for the supply of services. In the instant case, the contract relates – in so far as can be determined – to multiple services to be performed by Adient RO, in its own name and at its own risk, to products of Adient DE, which is established within the territory of another Member State, that Adient DE subsequently uses to effect its own transactions. Adient DE and Adient RO thus act independently in their own respective areas, without the head office of Adient DE, which takes decisions locally on matters relating to the finishing and sales of the goods, being substituted for as a result of those contractual provisions.

## V. Conclusion

72. I therefore propose that the questions referred for a preliminary ruling by the Tribunalul Argeş (Regional Court, Argeş, Romania) should be answered as follows:

(1) In view of the fact that the same means cannot be used at the same both to provide and receive the same services, there could not be a taxable transaction under Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in the present case, even if it were to be found that a fixed establishment existed.

(2) For the purposes of the second sentence of Article 44 of Directive 2006/112, an independent group company (in another Member State) is not to be regarded as a fixed establishment of a different group company on the sole basis of a link recognised under company law. Even a complex contract for the supply of services does not mean, in principle, that the supplier is effecting a taxable transaction in favour of a fixed establishment of the service recipient

[41] A different view may potentially be found, albeit without a detailed justification, in the judgment of 3 June 2021, *Titanium* (C-931/19, EU:C:2021:446, paragraph 42).

[42] See also, to that effect, judgments of 29 June 2023, *Cabot Plastics Belgium* (C-232/22, EU:C:2023:530, paragraph 37, at the end), and of 7 April 2022, *Berlin Chemie A. Menarini* (C-333/20, EU:C:2022:291, paragraph 41, at the end, and paragraph 48).

formed on the basis of that contract. In that regard, the place of supply of those services depends neither on the nature of the output transactions (supply of goods or services) of the service recipient, nor on the place of 'consumption' of the specific manufacturing services.

(3) For the purposes of the second sentence of Article 44 of Directive 2006/112, a fixed establishment exists only if it substitutes for a head office located within the territory of another Member State. Consequently, a contract entered into with a supplier of services can be capable of constituting a fixed establishment only if that contract does not relate solely to the provision of services to goods belonging to the recipient of the services. Instead, it must be aimed at provision of the human and/or technical resources that are necessary to ensure that the recipient can supply goods or services on site (that is, at the place of the fixed establishment) that are similar to those provided at a head office.