Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

13 June 2024 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 44 – Implementing Regulation (EU) No 282/2011 – Article 11(1) – Place of supply of services – Concept of a ‘fixed establishment’ – Ability, in terms of human and technical resources, to receive and use the services for its own needs – Services for the manufacture of car seat covers performed by one company on behalf of another company, belonging to the same group and established in another Member State’)

In Case C?533/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Arge? (Regional Court, Arge?, Romania), made by decision of 10 June 2021, received at the Court on 9 August 2022, in the proceedings

SC Adient Ltd & Co. KG

v

Agen?ia Na?ional? de Administrare Fiscal?,

Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? Regional? a Finan?elor Publice Ploie?ti – Administra?ia Jude?ean? a Finan?elor Publice Arge?,

THE COURT (Tenth Chamber),

composed of M. Ileši?, acting as President of the Tenth Chamber, I. Jarukaitis (Rapporteur) and D. Gratsias, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– SC Adient Ltd & Co. KG, by M. Ezer and F. Nanu, avoca?i,

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

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

after hearing the Opinion of the Advocate General at the sitting on 1 February 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 44 and 192a of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Directive (EU) 2018/1695 of 6 November 2018 (OJ 2018 L 282, p. 5 and corrigendum OJ 2018 L 329, p. 53), ('the VAT Directive'), and of Articles 10, 11 and 53 of 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 (OJ 2011 L 77, p. 1).

2 The request has been made in proceedings between, of the one part, SC Adient Ltd & Co. KG ('Adient Germany') and, of the other part, the Agen?ia Na?ional? de Administrare Fiscal? (National Agency for Tax Administration) and the Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? Regional? a Finan?elor Publice Ploie?ti – Administra?ia Jude?ean? a Finan?elor Publice Arge? (National Agency for Tax Administration – Regional Directorate-General of Public Finances, Ploie?ti – County Public Finance Administration, Arge?) ('the tax administration') concerning an application for annulment of a decision declaring the automatic tax registration of Adient Germany in Romania on the ground that that company has a fixed establishment in that country.

Legal context

European Union law

The VAT Directive

3 Title V of the VAT Directive, entitled 'Place of taxable transactions', includes Chapter 3, relating to the 'place of supply of services', which contains Section 2, entitled 'General rules', in which Article 44 of that directive provides:

'The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.'

4 Title XI of that directive, entitled 'Obligations of taxable persons and certain non-taxable persons', includes Chapter 1 on obligations to pay. Section 1 of that chapter, entitled 'Persons liable for payment of VAT to the tax authorities', includes Articles 192a to 205 of that directive.

5 Article 192a of the VAT Directive provides:

'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.'

6 Under Article 193 of that directive:

‘[Value added tax (VAT)] shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199b and Article 202.’

7 Article 194 of the VAT Directive is worded as follows:

‘1. Where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due, Member States may provide that the person liable for payment of VAT is the person to whom the goods or services are supplied.

2. Member States shall lay down the conditions for implementation of paragraph 1.’

Implementing Regulation No 282/2011

8 Recital 14 of Implementing Regulation No 282/2011 states:

‘To ensure the uniform application of rules relating to the place of taxable transactions, concepts such as the place where a taxable person has established his business, fixed establishment, permanent address and the place where a person usually resides should be clarified. While taking into account the case-law of the Court of Justice [of the European Union], the use of criteria which are as clear and objective as possible should facilitate the practical application of these concepts.’

9 Under Article 10(1) of that implementing regulation:

‘For the application of Articles 44 and 45 of [the VAT Directive], the place where the business of a taxable person is established shall be the place where the functions of the business’s central administration are carried out.’

10 Article 11(1) and (2) of Implementing Regulation No 282/2011 provides:

‘1. 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.

2. For the application of the following Articles, 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 provide the services which it supplies:

…

(d) Article 192a of [the VAT Directive].’

11 Article 53 of Implementing Regulation No 282/2011 provides:

‘1. For the application of Article 192a of [the VAT Directive], a fixed establishment of the taxable person shall be taken into consideration only when it is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of goods or services in which it intervenes.

2. 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.'

Romanian law

12 Article 266(2)(b) of Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code) of 8 September 2015 (*Monitorul Oficial al României*, Part I, No 688 of 10 September 2015; 'the Tax Code') provides:

'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'.

13 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.'

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

14 Adient Germany and SC Adient Automotive România SRL ('Adient Romania') both belong to the Adient group, which is an automotive equipment supplier specialising in the manufacture and marketing of seats and other components for motor vehicles.

15 On 1 June 2016, Adient Germany concluded a contract with Adient Romania for the provision of services, including both services for the manufacturing of upholstery components for those seats and ancillary services. The manufacturing services consist, for Adient Romania, in cutting and sewing raw materials provided by Adient Germany for the manufacture of seat covers. The ancillary services carried out by Adient Romania consist, inter alia, in taking delivery of, storing, inspecting and managing the raw materials and in storing the finished products. Adient

Germany remains the owner of the raw materials, semi-finished products and finished products throughout the manufacturing process.

16 Adient Germany has a VAT number in Romania, which it uses both for its purchases of goods in that Member State and for the supply to its customers of the products manufactured by Adient Romania. For the services provided to it by Adient Romania, it used its German VAT number.

17 Taking the view that the supplies of services by it, under the contract concluded with Adient Germany, were made at the place where that company, the recipient of those services, was established, Adient Romania issued invoices excluding VAT, since, in its view, those supplies should be taxed in Germany.

18 Following a tax inspection relating to the period from 18 February 2016 to 31 July 2018, the tax administration took the view, however, that the recipient of the supplies of services by Adient Romania was a fixed establishment of Adient Germany located in Romania, consisting in two of Adient Romania's branches, that is to say those branches established in Pite?ti and Ploie?ti (Romania). The tax administration inferred from this that Adient Romania was required to collect VAT on those supplies, and issued a tax assessment notice against that company, which the latter challenged in proceedings separate from those at issue in the main proceedings.

19 In addition, the tax administration considered that since Adient Germany had a fixed establishment in Romania, it could not be identified by the VAT number issued to it by the German authorities and that it was required to register as a taxable person established in Romania. By decision of 4 June 2020, it therefore registered that company automatically.

20 Adient Germany lodged a complaint against that decision, which was rejected by a decision of 28 August 2020.

21 Adient Germany brought an action for annulment of the decisions of 4 June and 28 August 2020 before the Tribunalul Arge? (Regional Court, Arge?, Romania), which is the referring court.

22 The referring court states that the outcome of the dispute before it depends on whether Adient Germany has, through Adient Romania's branches established in Pite?ti and Ploie?ti, the necessary human and technical resources to carry out regular taxable transactions in Romania.

23 The referring court has doubts concerning the tax administration's position that this is the case in the light of the following considerations with regard to Adient Germany's human resources.

24 First, the tax administration takes account of the fact that, under the contract for the supply of services concluded between Adient Germany and Adient Romania, Adient Germany has the right to inspect and examine accounting documents, registers, reports and any other documents belonging Adient Romania, and may require the latter to participate in cost reduction programmes or initiatives.

25 Second, the tax administration takes into consideration the fact that Adient Romania's employees are involved in the activity of supplying the products, carried out by Adient Germany, since they receive orders placed by Adient Germany's customers, calculate the needs in raw materials and other materials, ensure the storage and transport of the raw materials and finished products and the delivery of those products, being responsible for quality control, take part in organising and compiling the annual inventory of Adient Germany's assets and communicate with that company's customers and suppliers, thereby representing that company vis-à-vis third parties.

26 Furthermore, the referring court has doubts concerning the circumstance that the tax administration, in order to find the existence of technical resources, took into consideration the fact that Adient Romania's employees operate using the IT and accounting systems of Adient Germany, which also has a storage warehouse at the Pite?ti branch, fitted with the necessary equipment and materials.

27 In those circumstances the Tribunalul Arge? (Regional Court, Arge?) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the provisions of Article 44 of [the VAT Directive] and of Articles 10 and 11 of … Implementing Regulation No 282/2011 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 … Implementing Regulation No 282/2011 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 … Implementing Regulation No 282/2011 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 [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 … Implementing Regulation No 282/2011 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 … Implementing Regulation No 282/2011?

(6) In the light of Article 53(2) of … Implementing Regulation No 282/2011 …, 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]?’

Admissibility of the request for a preliminary ruling

28 The Romanian Government submits that the present request for a preliminary ruling is inadmissible.

29 In the first place, that government considers that the first to sixth questions are based on erroneous assumptions. It submits, in that regard, that, contrary to what is suggested by the wording of the first two questions, the tax administration did not rely solely on the fact that Adient Germany and Adient Romania belong to the same group of companies or on the provision of manufacturing services by Adient Romania to Adient Germany in order to infer that there was a fixed establishment in Romania of Adient Germany, but carried out an overall analysis of all the relevant circumstances. As regards the third to sixth questions, they are based on the erroneous premiss that the tax administration relied on the human and technical resources used to supply the manufacturing services or to carry out administrative support activities ancillary to those supplies, whereas account was taken of the human and technical resources of Adient Germany in Romania to carry out that company’s operations of supplying the products from the territory of that Member State.

30 In the second place, as regards the seventh question referred for a preliminary ruling, the Romanian Government submits that the referring court has not stated the reasons for which it questions the impact of the place where the products resulting from the manufacturing services are sold.

31 In the third place, in the Romanian Government’s view, the eighth question referred for a preliminary ruling is inadmissible since it is apparent from the request for a preliminary ruling that the technical and human resources of the fixed establishment of Adient Germany in Romania are distinct from those used by Adient Romania for carrying out the supply of services.

32 In that regard, it must be noted, as follows from the settled case-law of the Court, that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is, in principle, required to give a ruling. It follows that questions referred by national courts enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling 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 (judgments of 16 June 2015, *Gauweiler and Others*, C?62/14, EU:C:2015:400, paragraphs 24 and 25, and of 18 January 2024, *Comune di Copertino*, C?218/22, EU:C:2024:51, paragraphs 19 and 20 and the case-law cited).

33 Furthermore, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (judgment of 9 February 2023, *Finanzamt X (Supplies of the owner of a stable)*, C?713/21, EU:C:2023:80, paragraph 38 and the case-law cited).

34 In the present case, it should be noted that the description of the legal and factual context of the case in the main proceedings, contained in the request for a preliminary ruling, shows that the resolution of the dispute before the referring court is conditional upon that court obtaining a series of clarifications concerning the criteria for classifying an entity as a fixed establishment. Indeed, the referring court makes reference, in that request, to the applicant's claims that the tax administration found that there was a fixed establishment by taking account of the fact that the two companies concerned belonged to the same group and of the contract for the provision of services linking those two companies. The referring court also notes that the tax administration also took account of the human and technical resources involved in Romania in the supply of the goods downstream by that fixed establishment.

35 Furthermore, nothing in the file before the Court supports the inference that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose or that the problem is hypothetical.

36 Last, it should be borne in mind that, even if the facts presented by the referring court consisted in a reproduction of the applicant's claims, that circumstance alone, even if proven, does not establish that, by proceeding in that manner, that court failed to fulfil its obligation to state in the order for reference, in accordance with Article 94 of the Rules of Procedure of the Court, the facts on which the questions are based or the reasons which prompted it to inquire about the interpretation of the provisions of EU law referred to in the questions submitted or in respect of which it considers that an answer from the Court is necessary in order to resolve the dispute before it (see, to that effect, judgment of 21 October 2021, *Wilo Salmson France*, C?80/20, EU:C:2021:870, paragraph 51).

37 It follows from the foregoing that the request for a preliminary ruling is admissible.

Consideration of the questions referred

The first two questions

38 By its first two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011 must be interpreted as meaning that a company subject to VAT having its business in one Member State, which receives services provided by a company established in another Member State, must be regarded as having a fixed establishment in that other Member State, for the purposes of determining the place of supply of those services, solely because the two companies belong to the same group and those companies are bound as between themselves by a contract for the provision of services.

39 As a preliminary point, it should be borne in mind that, according to settled case-law, the most appropriate, and thus the primary, point of reference for determining the place of supply of services for tax purposes is the place where the taxable person has established his or her business, because, as an objective criterion that is simple and practical, it offers great legal certainty. By contrast, the connection to the taxable person's fixed establishment is a secondary point of reference which is an exception to the general rule and is taken into consideration provided that certain conditions are satisfied (see, to that effect, judgments of 16 October 2014, *Welmory*

, C?605/12, EU:C:2014:2298, paragraphs 53 to 56; of 7 April 2022, *Berlin Chemie A. Menarini*, C?333/20, EU:C:2022:291, paragraph 29; and of 29 June 2023, *Cabot Plastics Belgium*, C?232/22, EU:C:2023:530, paragraph 29).

40 Accordingly, it is only if that connection to the place of business does not lead to a rational result or creates a conflict with another Member State that that secondary point of reference may come into consideration (see, in particular, judgments of 4 July 1985, *Berkholz*, 168/84, EU:C:1985:299, paragraph 17; of 7 May 1998, *Lease Plan*, C?390/96, EU:C:1998:206, paragraph 24 and the case-law cited; and of 29 June 2023, *Cabot Plastics Belgium*, C?232/22, EU:C:2023:530, paragraph 30 and the case-law cited).

41 As regards the concept of ‘fixed establishment’, within the meaning of Article 44 of the VAT Directive, it follows from the very wording of Article 11(1) of Implementing Regulation No 282/2011 that that concept is to cover any establishment, other than the place of establishment of a business, 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.

42 For a taxable person to be considered as having a fixed establishment in a Member State in which the services concerned are provided to it, it must, therefore, have in that Member State a sufficiently permanent and suitable structure to enable it to receive the services concerned there and to use them for its business (judgment of 29 June 2023, *Cabot Plastics Belgium*, C?232/22, EU:C:2023:530, paragraph 31).

43 As the Court has repeatedly held, the treatment of an establishment as a fixed establishment depends on the substantive conditions set out in Implementing Regulation No 282/2011, in particular in Article 11 thereof, which must be assessed in the light of economic and commercial realities, with the result that treatment cannot depend solely on the legal status of the entity concerned (judgment of 7 May 2020, *Dong Yang Electronics*, C?547/18, EU:C:2020:350, paragraphs 31 and 32).

44 It follows that, while it is possible that a subsidiary providing services, established in a Member State, constitutes the fixed establishment of its parent company which is the recipient of those services, established in another Member State or third country, that treatment may not be deduced merely from the fact that that parent company has a subsidiary there (judgment of 7 April 2022, *Berlin Chemie A. Menarini*, C?333/20, EU:C:2022:291, paragraph 40 and the case-law cited).

45 For the same reasons, nor can the fact that two companies, legally independent of each other, belong to the same group, in itself determine the existence of a fixed establishment of the company receiving the services supplied by the second company.

46 Nor can the existence of a fixed establishment be inferred from the mere fact that both companies are legally bound as between themselves by a contract which sets out the conditions under which the services provided by one company for the exclusive benefit of the other are carried out.

47 First, as the Court has repeatedly held, given that a legal person, even if it has only one customer, is assumed to use the technical and human resources at its disposal for its own needs, it is only if it were established that, by reason of the applicable contractual provisions, a company receiving services had the technical and human resources of its service provider at its disposal as if they were its own that it could be regarded as having a suitable structure with a sufficient degree of permanence, in terms of human and technical resources, in the Member State where its service

provider has established its business (judgments of 7 April 2022, *Berlin Chemie A. Menarini*, C?333/20, EU:C:2022:291, paragraph 48, and of 29 June 2023, *Cabot Plastics Belgium*, C?232/22, EU:C:2023:530, paragraph 37).

48 As the Advocate General observed in point 50 of her Opinion, the service provider acts, in principle, 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.

49 Consequently, the fact that the parties are bound by an exclusive service contract does not of itself mean that the service provider's resources become those of his or her customer, unless it is shown that, under that contract, that provider does not remain responsible for his or her own resources and does not provide his or her services at his own risk (see, to that effect, judgment of 29 June 2023, *Cabot Plastics Belgium*, C?232/22, EU:C:2023:530, paragraph 39).

50 In the present case, it is for the referring court to assess whether it is apparent in particular from the provisions of the contract between the parties that the human and technical resources of the Pite?ti and Ploie?ti branches of Adient Romania were made available, on a sufficiently permanent basis, to Adient Germany to enable it to receive there the manufacturing services provided by Adient Romania and to use them for its own business. In the context of the cooperation established by Article 267 TFEU, it is for the national courts alone to make all definitive findings of fact in that regard (see, to that effect, judgments of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraph 55, and of 20 April 2023, *Dyrektor Krajowej Informacji Skarbowej* C?282/22, EU:C:2023:312, paragraph 31 and the case-law cited).

51 Nevertheless, the Court may provide the national courts with all the guidance as to the interpretation of EU law which may be of assistance in adjudicating on the case pending before them (judgments of 17 December 2020, *FRANCK*, C?801/19, EU:C:2020:1049, paragraph 27 and the case-law cited; of 4 March 2021, *Frenetikexito*, C?581/19, EU:C:2021:167, paragraph 36 and the case-law cited; and of 7 April 2022, *Berlin Chemie A. Menarini*, C?333/20, EU:C:2022:291, paragraph 46 and the case-law cited).

52 In that regard, in so far as it appears from the order for reference that all the companies in the Adient group have the same IT and accounting system, the fact that the employees of Adient Romania's Pite?ti and Ploie?ti branches have access electronically to Adient Germany's accounting system in order, inter alia, to register directly the raw materials supplied by Adient Germany and the finished products, does not, however, mean that Adient Germany possesses in Romania infrastructure such as to make it possible, independently, to carry out its own operations at the end of the manufacturing process for those products. Nor can the existence of such infrastructure be inferred from the fact that Adient Germany was provided with a storage facility for those products and the raw materials which it supplied to its service provider while retaining ownership over them.

53 As regards the fact that the employees of the Pite?ti and Ploie?ti branches of Adient Romania perform functions which go beyond those normally assigned to them in the context of the supply of services carried out by it, and which make them intervene directly in the activities of supplying finished products to Adient Germany's customers, it is for the referring court to determine whether, as Adient Germany argued before it, the activities that they carry out are limited to tasks directly related to the performance of the manufacturing service or are purely administrative in nature; it must also ascertain whether, in the light of the conditions of employment and remuneration of those employees, although the latter are contractually linked to Adient Romania, they are, in actual fact, removed from the hierarchical subordination of that company and placed at the disposal and under the authority of Adient Germany in the performance of the

tasks entrusted to them.

54 In the light of the foregoing considerations, the answer to the first two questions is that Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011 must be interpreted as meaning that a company subject to VAT having its business in one Member State, which receives services provided by a company established in another Member State, cannot be regarded as having a fixed establishment in that other Member State, for the purposes of determining the place of supply of those services, solely because the two companies belong to the same group or those companies are bound as between themselves by a contract for the provision of services.

The third and seventh questions

55 By its third and seventh questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 44 of the VAT Directive and Article 11 of Implementing Regulation No 282/2011 must be interpreted as meaning that a company subject to VAT having its business in one Member State, which receives manufacturing services supplied by a company established in another Member State, may be regarded as having a fixed establishment in that other Member State, for the purposes of determining the place of supply of services, where, first, it has a structure there which intervenes in the supply of the finished products resulting from those manufacturing services and, second, those supply transactions are carried out for the most part outside that other Member State and those transactions carried out there are subject to VAT.

56 In the first place, as the Court has already pointed out, the question whether there is a fixed establishment, within the meaning of Article 44 of the VAT Directive, must be determined in relation to the taxable person receiving the services at issue (judgments of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 57, and of 7 April 2022, *Berlin Chemie A. Menarini*, C?333/20, EU:C:2022:291, paragraph 30), whereas, for the application of the other provisions of that directive which refer to the concept of fixed establishment, that question must be determined by reference to the taxable person supplying the services.

57 That distinction is apparent from the very wording of Article 11(1) and (2) of Implementing Regulation No 282/2011.

58 Indeed, it follows from Article 11(1) of that implementing regulation that, for the application of Article 44 of the VAT Directive, relating to the place of supply of services, a fixed establishment is defined as any establishment, other than the place of establishment of a business referred to in Article 10 of that regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

59 By contrast, for the application, in particular, of Article 192a of the VAT Directive, relating to the determination of the person liable for payment of the tax, a fixed establishment is, according to Article 11(2) of that regulation, any establishment, other than the place of establishment of a business, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies.

60 Thus, even if every fixed establishment has the common characteristic of comprising a structure which has a sufficient degree of permanence and is suitable to carry on its business independently, a distinction must be drawn according to whether the functions assigned to that structure consist in receiving or supplying services and, as regards the question of whether there is a fixed establishment for the purpose of determining the place of supply of services the focus must be on the activity of receiving services.

61 In the second place, in a context such as that of the main proceedings, it is necessary, first of all, to make a distinction between, on the one hand, the supplies of services made by Adient Romania to Adient Germany and, on the other hand, the sales and supplies of goods arising from those services which Adient Germany carries out from Romania, with those supplies of services and those supplies of goods constituting separate transactions subject to different VAT schemes. Therefore, for the purposes of establishing the place where Adient Germany receives those supplies of services, it is necessary to identify the place where the human and technical resources which that company uses for that purpose are situated, and not the place where the resources it uses for its activity of delivering the finished products are located (see, by analogy, judgment of 29 June 2023, *Cabot Plastics Belgium*, C?232/22, EU:C:2023:530, paragraph 40, and the case-law cited).

62 Thus, assuming that it were established that Adient Germany has, within a structure situated in Romania, resources by which it carries out supplies of goods resulting from the services provided to it by Adient Romania, that circumstance is not relevant to determining the existence of a fixed establishment for the purpose of ascertaining the place of supply of those services. *A fortiori* , the fact that the aforementioned supplies of goods are carried out mostly outside Romania or that those carried out in Romania are subject to VAT is also irrelevant for that purpose.

63 Next, in so far as the referring court explains – in order to justify those questions relating to the taking into consideration of Adient Germany’s activity of supplying goods – that both Article 192a of the VAT Directive and Article 53 of Implementing Regulation No 282/2011, as well as Article 266(2)(b) of the Tax Code, refer without distinction to the supply of goods or the supply of services, it is necessary to provide clarification as to the scope of those provisions of EU law and the reference to the concept of ‘supply of goods’.

64 First, it must be pointed out that those provisions do not concern the determination of the place of supply of services, but rather the determination of the person liable to pay the tax due in a Member State on supplies of goods or services taxable in that Member State carried out by a taxable person established in another Member State.

65 It should be noted that it is not apparent either from the order for reference or from the observations submitted to the Court that the dispute in the main proceedings concerns the VAT scheme applicable to supplies of goods carried out by Adient Germany in Romania.

66 Article 192a of the VAT Directive and Article 53 of Implementing Regulation No 282/2011, to which the referring court makes reference in order to justify those questions, are not, therefore, applicable in a situation such as that at issue in the main proceedings, which concerns exclusively the determination of the place of the supply of services made by Adient Romania to Adient Germany.

67 Second, and in any event, it should be noted that it does indeed follow from Article 192a of the VAT Directive that the intervention of the fixed establishment in the activity of supplying goods is to be taken into account in the same way as its intervention in the activity of supplying services, in order to determine which of the taxable person or of his or her fixed establishment is liable for

VAT in respect of those transactions.

68 In accordance with that article, a taxable person who has a fixed establishment within the territory of the Member State where the tax is due is to be regarded as a taxable person who is not established within that Member State when he or she makes a taxable supply of goods or of services within the territory of that Member State and an establishment which he or she has within the territory of that Member State does not intervene in that supply.

69 Furthermore, Article 53(1) of Implementing Regulation No 282/2011 states that a fixed establishment of the taxable person is to be taken into consideration only when it is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of goods or services in which it intervenes. According to Article 53(2) of that implementing regulation, those means must be used by that taxable person for transactions inherent in the supply of those goods or services made before or during that supply.

70 It follows from a combined reading of those provisions that, for the purposes of determining the person liable for payment of VAT, the taxable person is regarded as established in the territory of the Member State in which he or she makes a supply of goods or services only if he or she has, in that Member State, a structure having a minimum degree of stability derived from the permanent presence of human and technical resources, which intervenes in the taxable transactions in question, before or during their performance.

71 However, as has been recalled in paragraph 59 above, it is also apparent from Article 11(2) of Implementing Regulation No 282/2011 that, for the application of Article 192a of the VAT Directive, the fixed establishment to be taken into account is that which provides the services which it supplies and not that which uses the services supplied to it. A fixed establishment which intervenes in a supply of goods or services, for the purposes of Article 53(1) of that implementing regulation, can therefore only be a fixed establishment supplying services.

72 It follows that where the taxable person making a supply of goods in a Member State has, in that Member State, only a fixed establishment which receives supplies of services, the fact that that establishment intervenes in the supplies of goods carried out by that taxable person in that Member State cannot affect the determination of the person liable to pay VAT in respect of those transactions.

73 In the present case, assuming that Adient Germany has a fixed establishment receiving the supplies of services carried out by Adient Romania and that that fixed establishment intervenes in the supplies of goods carried out by Adient Germany in Romania, Adient Germany could not, however, be regarded as established in Romanian territory pursuant to Article 192a of the VAT Directive.

74 In the light of the foregoing considerations, the answer to the third and seventh questions is that Article 44 of the VAT Directive and Article 11 of Implementing Regulation No 282/2011 must be interpreted as meaning that neither the fact that a company subject to VAT having its business in one Member State, which receives manufacturing services provided by a company established in another Member State, has in that other Member State a structure which intervenes in the supply of the finished products arising from those manufacturing services, nor the fact that those supply transactions are carried out mostly outside that Member State and that those that are carried out there are subject to VAT are relevant to establishing, for the purposes of determining the place of supply of services, that that company has a fixed establishment in that other Member State.

The fourth to sixth and eighth questions

75 By its fourth to sixth and eighth questions, the referring court asks, in essence, whether Articles 44 and 192a of the VAT Directive and Articles 11 and 53 of Implementing Regulation No 282/2011 must be interpreted as meaning that where a company subject to VAT having its business in one Member State receives services supplied by a company established in another Member State, account may be taken, in order to determine whether the first company has a fixed establishment in that other Member State, of the technical and human resources by which that second company provides the services that it supplies or of the resources which are used for the administrative activities linked to those supplies.

76 It should be noted that it is not apparent from the order for reference that, in the case in the main proceedings, the tax administration took into account, in order to determine the existence of a fixed establishment of Adient Germany in Romania, the human and technical resources used by Adient Romania in order to carry out its supplies of manufacturing services. The referring court explains, moreover, in support of its fourth and fifth questions, that the tax administration found that the human and technical resources involved in the supply of manufacturing services belonged to Adient Romania and not to Adient Germany, which used the human and technical resources involved in the supply of the goods downstream. It is, therefore, for the referring court, which alone has jurisdiction to assess the facts, to carry out the necessary checks in that regard.

77 Subject to those checks, it should be borne in mind that the Court has held that the same means cannot be used both by a taxable person, established in one Member State, to provide services and by a taxable person, established in another Member State, to receive the same services within a supposed fixed establishment situated in the first Member State (judgments of 7 April 2022, *Berlin Chemie A. Menarini*, C?333/20, EU:C:2022:291, paragraph 54, and of 9 June 2023, *Cabot Plastics Belgium*, C?232/22, EU:C:2023:530, paragraph 41).

78 The existence of a fixed establishment of the recipient of the services therefore presupposes that it is possible to identify human and technical resources which are distinct from those used by the supplier for the fulfilment of its own supplies of services, and which are made available to the recipient of those services to ensure that they are received and used in accordance with its own needs. In the absence of such a finding, such a recipient does not have a fixed establishment in the Member State of the supplier and cannot, therefore, be regarded as established in that Member State.

79 Even assuming that the fixed establishment could be both the supplier and the recipient of the same supply of services, in such a case the supplier and the recipient would thus be identical, with the consequence that the existence of a taxable transaction is already precluded, as the Advocate General observed in point 35 of her Opinion.

80 As to whether services ancillary to the manufacturing services may be taken into account, the Court has already held that preparatory or auxiliary activities needed for carrying out the undertaking’s tasks cannot determine that there is a fixed establishment (see, to that effect, judgment of 28 June 2007, *Planzer Luxembourg*, C?73/06, EU:C:2007:397, paragraph 56). In the present case, subject to the assessment of all the relevant circumstances which it will be for the referring court to carry out, it appears from the evidence before the Court, as presented in the request for a preliminary ruling, that activities such as the taking delivery, management or inspection of the raw materials and finished products, quality control support or the placing of orders for the dispatch of the finished products constitute preparatory or auxiliary activities in relation to the manufacturing activity carried out by Adient Romania.

81 In the light of all the foregoing considerations, the answer to the fourth to sixth and eighth questions is that Articles 44 and 192a of the VAT Directive and Articles 11 and 53 of Implementing Regulation No 282/2011 must be interpreted as meaning that a company subject to VAT having its business in one Member State, which receives services provided by a company established in another Member State, does not have a fixed establishment in that other Member State if its technical and human resources in that Member State are not distinct from those by which the services are supplied to it or if those human and technical resources perform only preparatory or auxiliary activities.

Costs

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

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

1. **Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive (EU) 2018/1695 of 6 November 2018, and Article 11(1) of 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**

must be interpreted as meaning that a company subject to value added tax having its business in one Member State, which receives services provided by a company established in another Member State, cannot be regarded as having a fixed establishment in that other Member State, for the purposes of determining the place of supply of those services, solely because the two companies belong to the same group or those companies are bound as between themselves by a contract for the provision of services.

2. **Article 44 of Directive 2006/112, as amended by Directive 2018/1695, and Article 11 of Implementing Regulation No 282/2011**

must be interpreted as meaning that neither the fact that a company subject to value added tax (VAT) having its business in one Member State, which receives manufacturing services provided by a company established in another Member State, has in that other Member State a structure which intervenes in the supply of the finished products arising from those manufacturing services, nor the fact that those supply transactions are carried out mostly outside that Member State and that those that are carried out there are subject to VAT are relevant to establishing, for the purposes of determining the place of supply of services, that that company has a fixed establishment in that other Member State.

3. **Articles 44 and 192a of Directive 2006/112, as amended by Directive 2018/1695, and Articles 11 and 53 of Implementing Regulation No 282/2011**

must be interpreted as meaning that a company subject to value added tax having its business in one Member State, which receives services provided by a company established in another Member State, does not have a fixed establishment in that other Member State if its technical and human resources in that Member State are not distinct from those by which the services are supplied to it or if those human and technical resources perform only preparatory or auxiliary activities.

[Signatures]

* Language of the case: Romanian.