

Group company not a fixed establishment for VAT purposes, but CJEU has left the door open

On April 7, 2022, the Court of Justice of the European Union (hereinafter: CJEU) rendered judgment in the Berlin Chemie case (C-333/20). At issue was whether a sub-subsidiary in this specific case qualifies as a fixed establishment of its second-tier parent company. The CJEU concluded that this was not the case. Although this appears to be a reassuring outcome in practice, the CJEU has allowed for the possibility that there could indeed be a fixed establishment. In its Berlin Chemie judgment, the CJEU provided more guidance on the circumstances in which the human and technical resources of an independent legal entity could result in a separate fixed establishment. Whether this provides the desired clarity in practice is debatable. After recent CJEU judgments in, among others, [Dong Yang \(C-547/18\)](#) and [Titanium \(C-931/19\)](#), this case shows that the fixed establishment concept continues to demand attention.

1. Background

Berlin Chemie AG (hereinafter: BC) is a company established in Germany that has been selling pharmaceutical products in Romania from a Romanian warehouse since 1996. BC is registered for VAT purposes in Romania and has a tax representative who declares the goods supplies. In 2011 BC incorporated the Romanian sub-subsidiary BCAM. It was laid down in an agreement that BCAM would perform marketing, advertising and regulatory services for BC under strategies developed and budgets established by BC. In this context BCAM also receives orders for pharmaceutical products from wholesalers in Romania, which BCAM passes on to BC. BCAM charged BC a monthly cost-plus fee for its activities. BCAM employs, on average, 200 staff, including 150 sales representatives. The Romanian employees are not authorized to conclude contracts on behalf of BC. This is done exclusively from Germany.

BCAM applied the reverse-charge mechanism to the services it provided to BC in the belief that the services were not taxable in Romania, but in Germany, the country of establishment of BC. The Romania tax authorities contended that BC has a fixed establishment and that the services are therefore taxable in Romania. The Romanian tax authorities argued that BC has uninterrupted access to the human and technical resources of BCAM and therefore has, via BCAM, a fixed establishment in Romania. The Romanian referring court had doubts about the Romanian tax authorities' interpretation and therefore asked the CJEU for a preliminary ruling.

2. CJEU considerations and ruling

The CJEU begins by noting that the place of supply of a general B2B service is the country where the customer has established its place of business. An exception to this are the services performed for a customer's fixed establishment. In that case, the place of supply of the service is the country where the fixed establishment is established.

There is a fixed establishment if a taxpayer has a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs or to render services itself. The

fact that a company constitutes an independent legal entity, is not decisive in determining whether there may be a fixed establishment. According to the CJEU, any assessment of whether the substantive conditions for a fixed establishment have been complied with must be based on economic and commercial reality.

One of the conditions is that the taxpayer has sufficient technical and human resources in the country where there may be a fixed establishment. In that respect, the Romanian court wanted to know whether the technical and human resources must belong to the taxpayer itself, or whether it is sufficient for the taxpayer to have access to such resources through an affiliated company on the basis of a majority shareholding. The CJEU ruled that a taxpayer does not have to have its own human and technical resources, but that it must have access to these as if they were its own resources. That can, for example, be the case if an affiliated entity makes human and technical resources available to the taxpayer under services or lease agreements. It is important that these agreements cannot be terminated at short notice. It is for the referring court to ascertain whether BCAM actually complies with this.

The CJEU then examined whether the existence of a fixed establishment can be inferred from the circumstance that BCAM provides services that may affect the results of BC, and whether it is necessary for BCAM to participate in decisions taken by BC.

The CJEU established that it is important to distinguish between, on the one hand, the services provided by BCAM and, on the other, the goods BC supplies in Romania. The CJEU subsequently noted that the human and technical resources that constitute a fixed establishment for BC in Romania, are the same resources with which BCAM provides its services to BC. According to the CJEU, the same technical resources and the same human resources cannot be used to provide and purchase the same services at the same time. The CJEU thus concluded that BC had purchased BCAM's services in Germany and that BCAM therefore must not be regarded as a fixed establishment of BC in Romania.

3. Analysis and impact on the Dutch practice

In the Netherlands, a sub-subsiidiary is rarely regarded as a fixed establishment of a second-tier parent company. Under the [Fixed Establishment Decree](#), the general rule is that a legally independent sub-subsiidiary is regarded as an independent taxpayer. It is therefore reassuring news that the CJEU has reconfirmed that a sub-subsiidiary does not automatically constitute a fixed establishment for VAT purposes.

Other EU Member States sometimes see this differently. Therefore, it cannot be ruled out that in other EU Member States a sub-subsiidiary may qualify as a fixed establishment. Tax authorities may use the ruling of the CJEU in this case to argue that a sub-subsiidiary does indeed qualify as a fixed establishment in certain cases. It was just recently that a Belgian court asked the CJEU for a preliminary ruling in the Cabot Plastics Belgium (C-232/22) case. That case revolved around whether a Belgian toll manufacturer can qualify as a fixed establishment of a Swiss principal.

We believe that the judgment in the BC case is also relevant, because the CJEU briefly explained the situations in which insourced/hired technical and human resources may constitute a fixed establishment. The CJEU has clarified that a taxpayer does not have to have its own human and technical resources, but that it must have access to these as if they were its own resources. However, the CJEU is less clear about the practical interpretation of this condition. It merely gives as example that human and technical resources may be hired/insourced, subject to the condition that the agreements concluded for this may not be terminated at short notice. Time will tell how this explanation works out in practice.

What also stands out in the BC judgment is that the CJEU seems to only have assessed the dispute along the lines of a 'purchasing fixed establishment' and not along the lines of a 'sales fixed establishment'. The purchasing fixed establishment was introduced in 2011 with the entry into force of the VAT Implementing Regulation (No. 282/2011). The Fixed Establishment Decree elaborates on this concept. Typically, a purchasing fixed establishment does not provide any goods or services to third parties itself, but may purchase services for its own needs that can be used on site. By only assessing whether BC has a purchasing fixed establishment, the CJEU ultimately limited the dispute to the question in which country the services received from BCAM are subject to VAT: in Germany or in Romania? According to the CJEU, the transactions that BC performs from the Romanian warehouse, for which it had appointed a tax representative and was registered for VAT purposes, do not constitute a (sales) fixed establishment. What was considered to be crucial here was that BCAM does not directly intervene in the sale and supply of the pharmaceutical products by BC and does not enter into any commitments with third parties on behalf of BC.

4. Your options

In view of current developments in EU case law, we recommend regularly assessing whether your cross-border activities could lead to the existence of a fixed establishment and the associated tax obligations. Our advice is to ensure that the relevant facts and the results of such assessments are properly documented, just in case the Dutch or foreign tax authorities raise questions about this.

The tax advisors of KPMG Meijburg & Co's Indirect Tax Group would be pleased to help you identify the potential implications of this judgment. Feel free to contact one of them or your regular advisor.

KPMG Meijburg & Co
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