



# CJEU confirms a broad concept of a fixed establishment

The Court of Justice of the EU (CJEU) has recently clarified in its important decision in VAT case C-333/20 (*Berlin Chemie*) the concept of a fixed establishment (FE) for VAT purposes.

A FE can be created by a another legal entity if a business can dispose staff and technical means of another entity as if they are its own.

However, the same staff and means cannot be used both to provide and receive the same services.

## Introduction

The CJEU confirms a broad definition of a FE stating that it is not required that a legal entity has its own human and technical resources if a third party's resources are used by the entity in the same way as those of the entity's own.

CJEU had had chosen for a narrower concept in its earlier decision in C-931/19 (*Titanium*) where it stated that own staff is required for a fixed establishment (FE) to be created.

## Facts

A German pharmaceutical company Berlin Chemie AG (hereafter "BC") contracted its Romanian (sub-)subsidiary to provide various marketing and representation services. BC was the only client of this subsidiary and BC had according to the referring court permanent access to technical and human resources of the subsidiary located in Romania which BC needed for its economic activities.

The services supplied by the subsidiary to BC were principally intended to provide information on the pharmaceutical products sold by BC. The staff of the Romanian company merely took orders from distributors of

medicinal products in Romania and forwarded them to BC, and sent invoices from BC to its customers in Romania. The subsidiary was not directly involved in the sale and supply of pharmaceutical products and did not enter into commitments with third parties in the name of BC.

The Romanian tax authorities took a view that the activities of its subsidiary created a FE for BC in Romania. Consequently, the place of supply was in Romania and Romanian VAT was due on the services under Article 44 of the EU VAT Directive.

## A subsidiary/separate legal entity can create a FE

CJEU refers to its previous *Dong Yang* ( C-547/18) and *Welmory* (C-605/12) cases on the concept of a FE where it found that a (separate) legal entity could create a FE of another (associated) legal entity.

CJEU states that the classification of an establishment as a 'fixed establishment' cannot depend solely on the legal status of the entity concerned. CJEU confirms that a subsidiary can create a fixed establishment (FE) for VAT purposes for a parent company established in another country.

## The disposal of resources as if they were its own is required for a FE to be created

According to the CJEU it is not necessary to own the staff or technical means in another country, however, it is necessary to have the right to dispose of those means in the same way as if they were its own, on the basis, for example, of contracts which make those means available to the business and cannot be terminated at short notice.

In *Welmory*, the CJEU already stated that personnel and technical resources of another entity are sufficient for a FE to exist and that the resources did not need to belong to the company in order to create a FE of that company. It is consequently not required that the legal entity has its own human and technical resources if the third party's resources are used by the entity in the same way as those of the entity's own.

## The resources should enable to receive the services for its own needs

The CJEU further refers to Article 11(1) VATR which provides that the FE must have sufficient structure to be able to receive and use services supplied to it for its own business needs / economic activities.

## Services cannot be both supplied and received by the same FE

The human and technical resources which were made available to BC by its subsidiary and which, according to the Romanian tax authorities, make it possible to establish the existence of a FE of BC in Romania, are also those through which the Romanian subsidiary supplies the services to BC. Consequently, the subsidiary/FE in Romania is both the supplier and the recipient of the services. Yet, the same means cannot be used both to provide and receive the same services.

The last one is an important new aspect in determining the concept of a FE. It has not been mentioned before by the CJEU.

## CJEU Decision

The CJEU concluded that the German company BC does not have a fixed establishment in Romania, since it does not have a structure in that country allowing it to receive services there provided by its subsidiary and to use those services for the purposes of its economic activity of selling pharmaceutical products.

## Conclusions and practical implications

The CJEU provides important guidance how the existence of a FE should be determined. Although the decision speaks about the existence of a FE when the entity receives certain marketing and representation services, its conclusions could have wider implications.

An existence of a FE is very relevant for B2C supplies, but also for B2B services (e.g. a place of supply and the reverse charge issues) or even supply of goods (e.g. the EU call-off stock simplification applicable or not).

Businesses need to consider whether there is a risk (or opportunity) that another legal entity could be regarded as a FE of them. A FE can be created by a separate legal entity if a business can dispose its staff and technical means as if they are business's own.

However, the same means cannot be used both to provide and receive the same services.

## Consequences of the decision

When after CJEU decision in *Titanium* case it seemed that CJEU may take a more limited approach to the concept of a FE by stating that own staff is required for a FE to be created, then its last case confirms a broader approach following from its decisions in *Dong Yang and Welmory*. The CJEU confirms that in order to create a FE, it is not required that a legal entity has its own human and technical resources present if the third party's resources are used by the entity the same way as those of the entity's own. This means that e.g., contracting staff of a third party service provider or a subsidiary, could on certain conditions create a FE.

For more detailed information about the matters discussed above, please contact us.



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**Contact**

Do you have questions or do you need more information? Please do not hesitate to contact us. Grant Thornton's international indirect tax team and digital advisory team can assist you in your VAT / customs matters, compliance and update of your systems and processes. Please contact us if you would like to discuss.

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