THE EVOLUTION AND UNCERTAINTIES OF THE FIXED ESTABLISHMENT CONCEPT

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Abstract: *The following paper makes a radiography of the ``fixed establishment`` notion specific to the VAT field, by highlining the requirements that have been attached to this concept by the CJEU in its case-law, having regard also to the specifics of the cases. The analysis shows that the concept's uncertainty has not been unveiled and, as it results from the working documents of the VAT Expert Group, despite the need of more clarity, it is highly improbably that actions in this regard shall be undertaken by positive measures. The reason is represented by the high factual dependence of this concept. This must be also the reason why, although over the time the CJEU seemed to attach some requirements to the content of this concept, the result of their application is not predictable. In the meantime, the taxable persons and the tax administrations have to face this uncertainty and argue their positions in courts of law. That should not be an effect of a harmonised tax using autonomous concepts. Unfortunately, at this stage, no one can provide clear cut answers on the existence of a fixed establishment; instead, the taxable persons probably must prepare a defence file, taking into consideration what is known until now in this regard.*
Keywords: *VAT; fixed establishment; case-law;*

The relevance of the fixed establishment concept

The concept of fixed establishment is specific to the VAT field. Although both the VAT Directive (2006/112/EC) and the Implementing Regulation (282/2011) use the concept of fixed establishment, a definition of that concept is to be found in the Implementing Regulation, representing an illustration of the case-law of the CJEU on that concept. It is not yet possible to ascertain precisely the reasons behind the adoption of the institution of fixed establishment in the field of VAT, just as it is not yet very clear which are the situations in which an entity constitutes a fixed establishment in another Member State. As such, unlike the permanent establishment, a notion on which the OECD has drawn up instructions in its Commentaries to the Model Convention and on which a number of certainties can be issued, the fixed establishment is still an enigma and the case-law of the CJEU in the field, the staff working documents of the European Commission recommend that an objective analysis should be carried out on a case-by-case basis, under available information and facts.

Of course, such a recommendation does not come very much to the aid of taxpayers, because it is quite possible that an objective assessment, in the absence of clear limits or benchmarks, will be carried out differently by the tax authorities and by taxpayers.

Article 11 of Regulation 282/2011 defines as follows the fixed establishment:

"1. For the application of Article 44 of Directive 2006/112/EC, 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: (…)
3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment".

The first paragraph provides a definition of passive fixed establishment (as a beneficiary), the second provides a definition of active fixed establishment (as provider).
One would point out that, at this point, establishing the existence of a fixed establishment is of importance only from the point of view of the place where the services are provided and not with regard to the supplies of goods. Moreover, from the texts of art. 11 above, results also an approach to the fixed establishment from the perspective of the ability to receive/use and provide services. As such, if a fixed establishment is deemed to exist, the taxable person would be regarded as established in the territory of the State where the fixed establishment is situated, with the result that any services supplied by the fixed establishment should be regarded, from the point of view of the place of supply, as being supplied by the fixed establishment. For example, if the recipient of the service is established in the same State where the fixed establishment is located, then we will be in the presence of a domestic supply of services (with VAT) and not of an intra-Community or extra-EU supply of services (exclusive of VAT), even if in both cases the same rule of determining the place of supply of services applies: B2B.

Similarly, if a fixed establishment would be the recipient of the services, the place of supply of the services would be assessed according to the State where the fixed establishment is situated (these are services provided under the B2B rule). As such, any services received by the fixed establishment from suppliers located in the same State will be invoiced with VAT (in the absence of an exemption) and will no longer represent intra-Community supplies of services, net of VAT. It should be noted that the registration of a company for VAT purposes in another Member State (directly or through a tax representative) does not give rise to a fixed establishment, nor does it change the regime of services rendered or received by that entity.
As mentioned above, perhaps the most difficult task is to determine whether there is a fixed establishment, given that the benchmarks resulting from the above definitions allow for fairly broad interpretations.

The requirements of a fixed establishment

It follows from the above definitions and the case-law of the CJEU that the following are cumulatively required for the existence of a fixed establishment:
(a) „a sufficient degree of permanence and an appropriate structure in terms of human and technical resources".
a.1. „sufficient degree of permanence"

The VAT Expert Group (VAT Expert Group 13th meeting, 2 May 2016) recognises that, from the perspective of this criterion, taxpayers lack any guidance. As such, although it is considered that the degree of permanence of the fixed establishment does not derive

from a single transaction, it is not known whether that degree of permanence should be assessed by reference to the transactions carried out by the taxable person or whether other factors should also be taken into account. It is considered that the operation of a workshop for a period of one year satisfies the criterion of the degree of permanence, in so far as the premises where the workshop is situated are constantly used (VAT Expert Group 13th meeting, 2 May 2016, p. 44).

If, given the structure of the business, the taxable person would have access to the premises only 1 day every 2 months then it is considered that there would be no fixed establishment (VAT Expert Group 13th meeting, 2 May 2016, p. 45). An access of 2 days/week could support both interpretations, in favour of and against the existence of a fixed establishment (VAT Expert Group 13th meeting, 2 May 2016, p. 43). In the absence of clear instructions, accompanied by examples, it is recommended that the taxable person's intention, from the point of view of the degree of permanence, is examined at the time of the transaction or before the start of the transactions, on the basis of objective elements, and not *ex post*, after they have been carried out, since, on the one hand, the taxpayer should bear a tax burden increased by tax accessories, and, on the other hand, the premises for a double taxation are created (VAT having already been collected).

a.2. „an appropriate structure in terms of human and technical resources"

The existence of the human and technical resources is, in theory, cumulatively required (for a different approach see the *Welmore* case, mentioned below) and the resources thus existing must enable the fixed establishment either to receive and use the services for its own needs or to provide services. The sufficiency of human and technical resources is assessed on a case-by-case basis, depending on the nature of the fixed establishment's activity, and should enable the fixed establishment to benefit from or provide services.

(b) „the ability of the establishment to receive the services supplied and to use them for its own business needs/to provide the services"

From VAT point of view, the existence of a fixed establishment must be taken into account when services in which it participates or which are for the benefit of the fixed establishment are supplied or received. For example, in *Welmory*, C-605/12, the Polish company argued that the infrastructure it makes available to the Cypriot company does not enable the Cypriot company to receive and use for its business the services supplied to it by the Polish company, as the human and technical resources for the business carried on by the Cypriot company, such as computer servers, software, servicing and the system for concluding contracts with consumers and receiving income from them, are situated outside Polish territory. The Court stated that if the facts alleged by the Polish company were shown to be correct, the referring court would then be led to conclude that the Cypriot company does not have a fixed establishment in Poland. In case of services provided/received by the entity (in which the fixed establishment does not participate), the rules on the place of supply will have to be considered by reference to the place where the entity is established.

Case-law of the CJEU on the notion of ``fixed establishment``

Whilst the definition of the fixed establishment exists in the EU VAT legislation, it has been largely left to the CJEU to provide guidance regarding this notion and its scope of application. The first landmark decision is *Berkholz*, Case 168/84, based on which art.

11 from the Implementing Regulation was adopted. However, the challenges of the new economic realities determined the revision of the fixed establishment concept, with the effect of bringing more uncertainties regarding this concept. In *Berkholz*, the issue was if a German company, operating gaming machines on board of ferries, especially when located outside the territorial waters, constituted a fixed establishment. By referring firstly to the rationality test, the Court pointed out that the place where the supplier has established his business is a primary point of reference in order to determine the tax jurisdiction over a given service, and that regard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State (para. 17). In the following paragraph the Court mentioned the two requirements that have to be fulfilled in order for a fixed establishment to be considered to exist, for the purpose of the general services place of supply rules: (1) an establishment must be of a certain minimum size; (2) both the human and technical resources necessary for the provision of the services must be permanently present. Advocate General Mancini observed that it does not matter whether or not the human and technical resources belong to the taxable person, as long as, in the latter case, it has control over them. The Court concluded that ``*it does not appear that the installation on board a sea-going ship of gaming machines, which are maintained* ***intermittently****, is capable of constituting such an establishment, especially if tax may appropriately be charged at the place where the operator of the machines has his permanent business establishment*``.

The same conclusion, the lack of the fixed establishment, was reached by the Court in *Faaborg-Gelting Linien*, Case 231/94, although, in this case, the human and technical resources were permanently present on the ferry. The key argument of the Court was represented by the rationality test, i.e., the place of supply has as main point of reference the place where the taxable person has its place of business/establishment, another place being used only if the application of the primary point of reference did not lead to a rational result for VAT purposes. From these two cases results that the Court resorted to the rationality test as defining factor in order to exclude the qualification of fixed establishment in situations in which such a creation would lead to an avoidance of paying the VAT. In the *DFDS*, Case C-260/95, the Court analysed whether an English subsidiary of a Denmark company may constitute a fixed establishment, having a specific subject the regime of tour operators. The Court ruled out that where a tour operator established in one Member State provides services to travellers through the intermediary of a company operating as an agent in another Member State, VAT is payable on those services in the latter State if that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment. In *ARO Lease BV*, Case C-190/95, the Court had to answer the following question: Where a leasing company established in one Member State (the Netherlands) leases cars under operational leases to clients established in another Member State (Belgium), in which Member State are the leasing services supplied for VAT purposes? Contrary to the expectations, following the decision previously delivered in DFDS, the Court was reluctant to create a fixed establishment. In the *ARO Lease BV* the CJEU refers to the independence that the fixed establishment should enjoy in the provision of the services: ``*Consequently, when a leasing company does not possess in a Member State either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be*

drawn up or management decisions taken and thus to enable the services in question ***to be supplied on an independent basis****, it cannot be regarded as having a fixed establishment in that State*`` (para. 19).

In *Luxemburg Leaseplan,* Case C-390/96, the Court repeated literally its point of view in the *ARO Lease BV* case. That lead the literature to the opinion that the DFDS decision applies only in very specific circumstances (Terra and Kajus, 2014, p. 702). In *RAL,* Case 452/03, the dispute in the main proceedings arose from a tax avoidance scheme, whereby, by establishing an offshore subsidiary (Guernsey) to operate the machines, by separating that function from ownership and operation of the premises, an UK mainly based group of companies wanted to escape the VAT liability on gaming machine services (by claiming that the place of supply of the gaming machine services is in Guernsey) and to recover the input VAT (related to services provided to it by the other members of the group). The offshore established subsidiary activity consisted in permitting the access to the public to use the slot gaming machines, leased to it by another company from the group, on the premises made available by a second company from the group, both established in UK. The management of the machine was subcontracted to a third company from the group, also established in UK. The question was if the persons whose presence is an important factor in conferring a fixed character on an establishment must be employed or directly dependent on the provider. According to the Advocate General in the case, this would lead to absurd results. He gave the example of an establishment where the security staff are the only people with keys to the establishment and are in charge of opening and closing the premises at regular hours. Such persons are certainly indispensable to ensure that the establishment does not operate merely intermittently. They deserve to be considered as human resources whose permanent presence is necessary for the provision of the services in the establishment to take place and, therefore, to confer a fixed character on the establishment. In any case, it would certainly be unacceptable that such an establishment would cease to be characterised as a fixed establishment of the supplier of the services by virtue of the fact that he had decided to outsource the activities of security in the establishment to an independent security company.

The Court decided the case ruling that the provisions of article 9(2)(c) of the Sixth Directive (77/388/EEC) are applicable (arts. 53 and 54 of the VAT Directive): the supply of services consisting of enabling the public to use, for consideration, slot gaming machines installed in amusement arcades established in the territory of a Member State must be regarded as constituting entertainment or similar activities, so that the place where those services are supplied is the place where they are physically carried out. The alternative, implying the analysis of the fixed establishment notion, would lead to intricate result, keeping in mind the rationality test from *Berkholz,* as the evident purpose of levying VAT would mean that there is a fixed establishment outside the territory where the supplier has his place of business, even in the absence of any personnel. The question is whether in this case, in the absence of the provisions article 9(2)(c) of the Sixth Directive, the Court would have resorted to the general principle of EU that abusive practices are prohibited, settled in future case regarding indirect and indirect taxation (*Cussens and Others*, C-251/16, paras. 28 and 31; *N Luxembourg 1*, C-115/16, C-118/16, C-119/16 and C-299/16, para. 101).
The *Planzer Luxemburg* case, C-73/06, concerned an issue regarding the refund of VAT and implied a company registered in Luxemburg, with a sole shareholder in Switzerland, having as director two employees of the sole shareholder and living in Switzerland and

Italy. The Luxemburg company had the registered office at the same address where thirteen other companies had their registered office. *Inter alia*, the Court examined whether, in the eventuality of the lack of a place of business in Luxemburg, the existence of a fixed establishment could be determined, independent in its scope. In this regard, the Court ruled that, concerning transport activities in particular, the fixed establishment term implies, at least an office in which contracts may be drawn up and daily management decisions taken, and a place where the vehicles used for the said activities are stored. By contrast, registration of those vehicles in the Member State concerned is not an indicator of a fixed establishment in that Member State. A fixed installation used by the undertaking only for preparatory or auxiliary activities, such as recruitment of staff or purchase of the technical means needed for carrying out the undertaking's tasks, does not constitute a fixed establishment. In joined cases *Daimler and Widex*, C-318/11 and C-319/11, the questions were whether a taxable person established in one Member State (Denmark in *Widex* and Germany in *Daimler*), carrying out technical and research work, not including taxable transactions, in another Member State (Sweden), through its subsidiary, can be regarded as having in that other Member State a fixed establishment.

The Court pointed out that such an examination included two cumulative conditions: the existence of a fixed establishment and those transactions be carried out from that establishment. The question is if such transactions must be actually carried out or if the mere ability to carry them out is sufficient. The Court ruled in favour of the second alternative and thus decided against the existence of a fixed establishment, without examining if the two companies in the dispute had a fixed establishment. However, in answering the third question in case 318/11, the CJEU pointed out that the interpretation given to the concept of 'fixed establishment from which business transactions are effected' is not called into question by the fact that the taxable person has, in the Member State where it has applied for refund, a wholly-owned subsidiary, the purpose of which is almost exclusively to supply the person with various services in respect of its technical testing activity. The Court mentioned that a wholly-owned subsidiary is a taxable legal person on its own account and that the purchases of goods at issue in the main proceedings were not made by it. In addition, the Court mentioned that ``*it is appropriate to point out that, in the case which gave rise to the judgment in* ***DFDS, the independence of the of status of the subsidiary was disregarded in favour of the commercial reality only to ascertain which of the parent company and the subsidiary had actually carried out the active taxable transactions of supplies of services in dispute in the main proceedings*** *and, subsequently, which was the Member State of taxation for those transactions*``.

In *Welmory*, Case C-605/12, the Court had to significantly revise the concept of fixed establishment, for the first time appearing to depart from the strict physicality of the concept. In this case a company from Cyprus, the activity of which consisted in operating a system of electronic auctions, provided e-commerce services to a Polish one, represented by making an auction website available to the Polish company and issuing and selling 'bids' to customers in Poland. At the same time, the Polish company provided services to the Cypriot one, represented by advertising, servicing, provision of information and data processing and the place of supply of such services was at issue, i.e., whether the Cypriot company has a fixed establishment in Poland. Having regard to the activity performed by the Cypriot company in Poland (services provided to the Polish company), the Court noted that the fact that they can be carried on without requiring an effective human and material

structure in Polish territory is not determinative. In such a case, an appropriate structure – such as computer equipment, servers and software – could qualify as a fixed establishment (para. 60). How much of this ``appropriate structure`` was necessary to qualify as a fixed establishment remained unclear (De La Feria, 2022, p. 5). The introduction of a new criterion – ``appropriate structure``, raises the question of how far the traditional perceptions are fully clarified and whether further additional criteria can be expected. Moreover, it is not entirely clear what the requirements of the structure in question should be in order to satisfy the fixed establishment's constitution. The mentioned non-exhaustive examples – computer equipment and software, are two different manifestations of in/tangible assets (Dulevski 2022, p. 47). Case C-547/18, *Dong Yang Electronics*, re-examines the possibility for fixed establishment's constitution via a subsidiary; in this case the subsidiary belonged to a Korean company. CJEU drew attention to the ``economic and commercial realities`` and, therefore, the treatment of an establishment as a fixed establishment cannot depend solely on the legal status of the entity concerned (paras. 31 and 32). As a consequence, it cannot be stated categorically that the subsidiary does not form a fixed establishment (para. 30); however, the supplier is not required to inquire, for the purposes of such an assessment, into contractual relationships between the two entities. In *Titanium*, C-931/19, a company whose registered office and management were located in Jersey let, subject to tax, a property which it owned in Vienna to two Austrian traders. Although the company had an intermediary (agent) in Austria, the responsibilities of this intermediary excluded the important decisions concerning the letting of the property in question. After the decision delivered in *Welmory*, having regard to the new developed criterion of ``adequate structure``, it was expected that the Court would rule in favour of the existence of a fixed establishment, even in the absence of the company's own human resources in Austria. However, this did not turn out to be the case. In a very concise reasoning, by referring to its previous case-law, namely *Planzer Luxembourg* and *ARO Lease*, the Court decided that ``*a property which does not have any human resource enabling it to act independently clearly does not satisfy the criteria established by the case-law to be characterised as a fixed establishment*`` (para. 45).

The conclusions regarding the fixed establishment case-law before *Berlin Chemie A. Menarini*, Case C-333/20, is presented us such: ``*As far back as the late 1990s, it was argued that if the CJEU did not drop the human resources element from the fixed establishment concept, the tax system would be "slowly committing suicide". In Welmory the Court did just that. The key question in that case was whether Court would depart from previous case law, and endorse the possibility of a virtual fixed establishment, and whilst it fixed establishmentll short of removing the physicality nexus, it did clearly depart from the Berkholz line of case law. (…) The decision in Dong Yang seemed to confirm that Welmory was not accidental, and that the Court was now set on that path. Titanium puts this assessment into doubt: given the option to continue on the path set out in Welmory and Dong Yang, further extending the concept of fixed establishment, or to retreat into a more limited concept, as set out in older case law, the Court opted for the second.*
(...) ***We now must await additional guidance from the Court in pending cases with added anxiety****. If the Court follows the same approach as in Titanium, then it will add credence to the view that Welmory and Dong Yang were but a temporary departure from its traditional approach; on the contrary, if the Court goes back to a wider interpretation of the concept of fixed establishment, then Titanium might come to be seen as a fluke in the*

otherwise clear path towards a modernisation of the concept of fixed establishment`` (De La Feria, 2022, pp. 7-8).

One of the long-awaited pending cases referred to above is Case C-333/20, *Berlin Chemie A. Menarini*, in which the Court delivered its decision on 7th of April 2022. This is a Romanian case, in which the CJEU was asked if a company which has its registered office in one Member State (Germany) has a fixed establishment in another Member State (Romania) because that company owns a subsidiary there that provides it with human and technical resources under contracts stipulating that that subsidiary provides, exclusively to that company, marketing, regulatory, advertising and representation services that are capable of having a direct influence on the volume of its sales. It is important to mention that the German company has a tax representative in Romania and is registered for VAT here; the German company owns 95% from the capital of the Romanian one and is its only client. The considerations of the Court are the following:

(a) As to the place of supply of the services in question, it should be borne in mind that the most appropriate, and thus primary, point of reference for determining the place of supply of services for tax purposes is the place where the taxable person has established its business, and it is as an **exception** to that general rule that a fixed establishment of the taxable person may be taken into consideration, **provided certain conditions are satisfied** (para. 29). The underlying logic of the provisions concerning the place where a service is supplied (art. 44 from the VAT Directive) requires that goods and services are taxed as far as possible at the **place of consumption**.

(b) The **existence** of a fixed establishment must be determined **by reference to the taxable person receiving the services** not to the taxable person supplying them (para. 30).

(c) Taking into consideration those pointed out above, the concept of a 'fixed establishment' refers to any establishment characterized by a (1) sufficient degree of permanence and a suitable structure in terms of human and technical resources to **(2) enable it to receive and use the services supplied to it for its own needs**.

Regarding the **FIRST CONDITION**, the Court was asked to decide whether it is necessary for those human and technical resources to belong to the company receiving the services or whether it is sufficient for that company to have immediate and permanent access to such resources through a related company, which it controls as a result of its majority shareholding. The Court referred to its case-law, in order to answer this question, as art. 44 from the VAT Directive and art. 11 para. (1) from the Implementing regulation, are silent in this regard: ``*it must be borne in mind that* ***consideration of the economic and commercial reality is a fundamental criterion for the application of the common system of VAT****. Therefore, the classification of an establishment as a 'fixed establishment' cannot depend solely on the legal status of the entity concerned (para. 38)*``.

The existence, in the territory of a Member State, of a fixed establishment of a company established in another Member State may not be deduced merely from the fact that that company has a subsidiary there. Such a classification depends on the **substantive conditions** set out in art. 11 of the Implementing Regulation, **which must be assessed in the light of the economic and commercial realities.** ``*Although it is not a requirement for a taxable person itself to own the human or technical resources in order for that taxable person to be regarded as having a sufficiently permanent and appropriate structure – in terms of human and technical resources – in another Member State, it is however necessary for that taxable person to have the right to dispose of those human and technical resources*

in the same way as if they were its own, on the basis, for example, of employment and leasing contracts which make those resources available to the taxable person and cannot be terminated at short notice (para. 41). To make the existence of a permanent establishment subject to the condition that the staff of that establishment be bound by an employment contract to the taxable person itself and that the material resources belong to it in its own right would amount, on the one hand, to a very restrictive application of the criterion set out by the wording of Article 11(1) of Implementing Regulation No 282/2011. On the other hand, ***such a criterion would not contribute to a high level of legal certainty in determining the place where services are deemed to be supplied for tax purposes, if, in order to transfer the taxation of supplies of services from one Member State to another, it were sufficient for a taxable person to cover its staffing and material needs by having recourse to various service providers*** *(para. 45)*``.

The Court gave the following guidance to the national court in order to determine whether the parent company constitutes a fixed establishment through its subsidiary established in another Member State: It is apparent from the order for reference that the German company did not have its own human and technical resources in Romania, but that those human and technical resources belonged to the Romanian company. However, according to the referring court, the German company had permanent and uninterrupted access to those resources, since the agreement for the provision of marketing, regulatory, advertising and representation services, concluded in 2011, could not be terminated at short notice. On the basis of that contract the Romanian company made technical resources (computers, operating systems, motor vehicles), among other things, available to the German company, but above all human resources of more than 200 employees, including, in particular, more than 150 sales representatives. It is also apparent from the order for reference that the German company is the sole customer of the Romanian company, which provides marketing, regulatory, advertising and representation services exclusively to it. **THE COURT**: 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**, the German company had the technical and human resources of the Romanian company at its disposal as if they were its own that the German company could have a suitable structure with a sufficient degree of permanence in Romania, in terms of human and technical resources.
As to the **SECOND CONDITION**, the Court pointed out that it is important to distinguish the services supplied by the Romanian company to the German company from the goods which the German company sells and supplies in Romania. They are distinct supplies of services and goods which are subject to different schemes of VAT. The elements of the case showed that the Romanian subsidiary company **was not directly involved** in the sale and supply of pharmaceutical products by the German company on the Romanian territory and **did not enter into commitments with third parties in the name of that company** (the staff of the Romanian company merely took orders from new wholesale distributors of medicinal products in Romania and forwarded them to the German company, and sent invoices from that German company to its customers in that Member State. The fact that such an activity is capable to have direct impact on the performance of the German company's economic activity seems to be insufficient).

Very important, from the facts of the case resulted that **the human and technical resources which were made available to the German company** by the Romanian

company **are also those through which the Romanian company supplies the services to the German company**. Yet, the same means cannot be used both to provide and receive the same services. The Court reached the conclusion that if the facts as highlighted in the decision are established, the **German company does not have a fixed establishment in Romania,** since it does not have a structure in that Member State allowing it to receive services there provided by the Romanian company and to use those services for the purposes of its economic activity of selling and supplying pharmaceutical products.

Therefore, the **close link with the economic activity** of the German company, the **direct impact on the performance of that activity** and the fact that the **Romanian company was formed specifically with the aim of providing exclusively to the German company** the services which it needs in order to carry on its business in Romania, were not taken into account by the CJEU in order to ascertain the fixed establishment capacity of the Romanian subsidiary. It seems that in this case, which sheds some more light on the fixed establishment concept and restricts the practice of the tax authorities based on the previous case-law, the Court highlighted the second criterion to be fulfilled in order for a fixed establishment to be considered to exist, probably because the examination of the first criterion would have brought to a conclusion favouring the existence of a fixed establishment.

It is clear, that:

a. From the perspective of an adequate structures in terms of technical and human resources, the contractual and, we would add, factual relationship should not lead to a conclusion that the human and technical resources of the subsidiary are at the disposal of the parent company. The decisions related to these resources should belong to the subsidiary. The exclusion principle: human and technical resources used to provide the services cannot be the same one that would create a fixed establishment (receive those same services).

b. The services provided by the subsidiary should be distinguished from the other activities caried out by the mother company in the state of the subsidiary. The fact that such services are linked with the other activities carried out by the mother company in the member state of the subsidiary is not sufficient to ascertain that they are provided for the use of the subsidiary viewed as a fixed establishment. The potential subsidiary-fixed establishment must be involved (decision-making aspect) in the performance of the activities in favour of which the services are provided.

c. These two substantive conditions must be assessed in the light of the commercial and economic realities, meaning that if the relations between companies are structured in a way that has no economic and commercial reasons (i.e., having as main or one of the mains objective tax reasons), and the normal assessment would be in favour of a fixed establishment, there will be no impediment in qualifying the subsidiary as a fixed establishment, as the court did in *Dong Yang Electronics*, C-547/18.

Conclusions

Two general conclusions can be inferred from the above presentation. On one hand, the notion of fixed establishment presents a high degree of uncertainty, both for taxpayers and tax administrations of the Member States. On the other hand, the content of this notion is adjusted by the CJEU on a case-by-case basis.

The cumulative requirements of human and technical resources had to be met when the EU was at risk of VAT losings (*Berkholz*) or when VAT was requested for refund (*Planzer Luxembourg*), however the human element seems to succumb to a more general criterion of ``adequate structure`` in other cases (*Welmory*). Also, for the purpose of taxation purposes, in cases in which the human and technical resources requirement is met, the rationality test is performed in order to link the services with the place of business of the taxable person (*Faaborg-Gelting Linien).* Although normally the subsidiaries are independent taxable persons (*Daimler and Widex), t*he commercial and economic realities may transform a subsidiary into a fixed establishment of the parent company for VAT purposes (*DFDS, Dong Yang*). However, human and technical resources used to provide the services cannot be the same one that would create a fixed establishment (*Berlin Chemie A. Menarini).*

The fixed establishment must be able to receive the services for its own use and/or supply the services (*Berlin Chemie A. Menarini)* on an independent basis (*ARO Lease and Lease Plan*); it is not clear, however, if the independence criterion regarding the receipt/supply of services could and should be analysed in the same way as the independence in relation to the parent company (*FCE Bank,* C-210/04). We agree with the VAT Expert Group that ``the topic of fixed establishment causes legal uncertainty, bureaucracy, cash-flow issues and ultimately result in VAT costs`` and that positive and practical criteria should be laid down in order to clarify this topic (VAT Expert Group 28th meeting, 30 November 2020, p. 8). It is doubtful that such criteria will be developed, at least not at the legislative level, considering that the Commission services opinion is that a fixed establishment requires a case-by-case handling, being a very delicate, difficult and a contentious subject for the member states (*Ibidem*). Considering this, the CJEU remains the only one from which we expect further clarification; there is no doubt that they are still needed.

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