



VAT NEWSLETTER

## ECJ: Fixed establishment through attribution of third-party human and technical resources

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### 1 Background

A fixed establishment requires a permanent structure which, in terms of its human and technical resources, permits the autonomous provision of or the receipt of supplies of services (Art. 11 of the Council Implementing Regulation). In the past, the ECJ has often been asked to answer questions concerning the conditions required for the existence of a fixed establishment. For example, the ECJ has already held that a subsidiary also constitutes the fixed establishment of its parent company (C-547/18 - *Dong Yang*). In the *Berlin Chemie A. Menarini SRL* case (C-333/20), the ECJ once again had the opportunity to address the question of whether a taxable person, who uses the human and technical resources of an affiliated company, constitutes a fixed establishment.

### 2 Facts

*Berlin Chemie AG* ("AG"), established in Germany, distributes pharmaceuticals in Romania. AG holds 100% of the shares in *Berlin Chemie/Menarini Pharma GmbH* which, in turn, holds 95% of the shares in the Romania based *Berlin Chemie A. Menarini SRL* ("SRL"). SRL carries out marketing, advertising, regulatory and representative services to AG. The purpose of SRL's marketing and advertising activities is to promote the sale of AG's medicinal products in Romania. SRL also takes orders for medicinal products from wholesalers in Romania and forwards them to AG. AG is the only customer of SRL.

SRL did not show any Romanian VAT in its invoices to AG. It assumed that the services were taxable at AG's registered office in Germany and that the VAT liability was shifted to AG (see Art. 196 of the VAT Directive). The Romanian tax authorities, however, took the view that AG had sufficient technical and human resources in Romania to constitute a fixed



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establishment and they therefore assessed Romanian VAT. SRL took legal action against the VAT assessment. The Court of Appeal in Bucharest, inter alia, referred the question to the ECJ of whether the existence of a fixed establishment requires that the taxable person itself owns the human and technical resources.

### 3 ECJ's decision

In its judgment of 7 April 2022 (C-333/20 – *Berlin Chemie A. Menarini SRL*), the ECJ held (once again) that the existence of a fixed establishment may not be deduced merely from the fact that a company has a subsidiary in another EU Member State. The economic and commercial reality is crucial for the constitution of a fixed establishment. In this context, it is not necessary for the existence of a fixed establishment that the taxable person itself owns the human and technical resources. This would lead to a restrictive interpretation of the regulations on the concept of a fixed establishment and also to legal uncertainty. Nevertheless, the taxable person must be able to dispose of the human and technical resources in the same way as if they were his own (e.g. due to contracts that cannot be terminated at short notice). The ECJ referred back to the Court of Appeal in Bucharest the question of to what extent these conditions were met in the underlying facts.

The ECJ came to the conclusion that the human and technical resources, provided to AG, on which the existence of a fixed establishment was based were the same as those used by SRL to carry out its supplies of services to AG. Yet, the same means cannot be used both to provide and receive the identical supplies of services.

### 4 Consequences for the practice

Third-party human and material resources are to be attributed to a taxable person if he can dispose of them as if they were his own (e.g. on the basis of long-term rental or leasing contracts, rights to issue instructions, etc.). The ECJ's statements in this regard are pleasingly clear. Otherwise, taxable persons could shift the taxation of supplies of services by engaging different service providers to cover the need for human and material resources.

In its jurisprudence, the ECJ follows the opinion of the Advocate General in the case *Welmory* (C-605/12). In 2014, the Advocate General argued that a taxable person who has third-party human and material resources available to him, on the basis of power of disposal, must have these resources attributed to him as his own. The current decision of the ECJ was taken in the absence of any opinion from an Advocate General. The German Federal Fiscal Court has already followed this view and assumed, in the case decided, that third-party human resources (of a commissioned service provider) can also replace the taxable person's own human resources (even if the preconditions were not met in the specific facts, see Federal Fiscal Court, decision of 15 February 2017 – XI R 21/15).

The current decision also leaves open the question of the specific circumstances required for an affiliated company/subsidiary to constitute a fixed establishment of its parent company. It seems clear that merely having access to the human and technical resources of an affiliated company does not justify the assumption of a fixed establishment. But what else is required to assume the existence of a fixed establishment? And what are the legal consequences? Many questions remain unanswered, leaving taxable persons exposed to considerable legal uncertainty.