



Indirect Tax

VAT alert

CJEU ruling enhances legal certainty for taxpayers on VAT fixed establishment concept

The Court of Justice of the European Union (CJEU) on 7 April 2022 released its judgement in the Berlin Chemie case ([C-333/20](#)) on the concept of a fixed establishment for VAT purposes. The case had been referred to the CJEU by the Curtea de Apel București (Court of Appeal, Bucharest). The CJEU ruled that a subsidiary providing exclusive marketing and publicity services to a group company acting as central entrepreneur does not create a fixed establishment for VAT purposes of the central entrepreneur in the subsidiary's country of residence. In its considerations, the CJEU explicitly acknowledges that the same resources cannot be used simultaneously by the subsidiary to provide services and by the foreign group company to receive those services. The ruling provides clear guidance for tax authorities around Europe to define their position on the VAT fixed establishment concept, which hopefully will restore legal certainty for taxpayers.

Background and facts of the case

Berlin Chemie AG ("BC DE"), a company with its registered office in Germany, and its second-tier subsidiary, the Romanian company Berlin Chemie A. Menarini SRL ("BC RO"), concluded a marketing, advertising, representation, and regulatory services contract. Under the terms of the contract, BC RO agreed to perform all the marketing required to actively promote the sale of BC DE's products in Romania. BC DE always acted as the supplier of the products to customers and was VAT registered in Romania as a non-established supplier.

BC RO considered that the services it supplied to BC DE were not taxable in Romania, based on the general business-to-business (B2B) place of supply rules

set out in Directive 2006/112/EC on the common system of value added tax (“the EU VAT directive”). The Romanian tax authorities maintained that BC DE had sufficient technical and human resources in Romania to have a fixed establishment at BC RO’s place of business in Bucharest. As a consequence, the Romanian tax authorities considered the services rendered by BC RO to BC DE to be subject to VAT in Romania and raised an assessment on BC RO for more than EUR 10 million in VAT, interest, and penalties.

The CJEU was asked to determine whether a company with a registered office in one EU member state could have a fixed establishment in another member state on the basis that the company has a subsidiary in the second member state that provides the company with human and technical resources under contracts to supply the company exclusively with marketing, regulatory, advertising, and representation services likely to have a direct impact on the volume of the company’s sales.

Consideration of the case by the CJEU

Discussion of issues relevant to the application of the fixed establishment definition in a parent-subsiidiary context

The CJEU reiterated that, as a principle, the primary point of reference for determining the place of supply of services is the place where the recipient company has established its seat. Only as an exception in certain specific circumstances may the fixed establishment of the taxable person be taken into account for the localisation of services.

Based on the provisions of regulations implementing the EU VAT directive, the CJEU stated that there can be no fixed establishment without a suitable structure in terms of human or technical resources. The structure must also have a sufficient degree of permanence and cannot be merely temporary.

Where the company providing services is a subsidiary of the recipient, established in another member state, the economic and commercial reality of the situation must be considered; the characterisation as a fixed establishment cannot depend solely on the legal status of the entity concerned. As stated by the CJEU in previous rulings, the existence in a member state of a fixed establishment of a company established in another member state may not be inferred merely from the fact that the company has a subsidiary in the first member state.

While a taxable person need not own the human or technical resources required to deem that person to have a structure with a sufficient degree of permanence and appropriate human and technical resources in another member state, the taxable person must have the power to dispose of those resources as if they were their own to consider them as resources of a fixed establishment. This criterion may be satisfied where the resources are made available to the taxable person through service or rental contracts that may not be terminated at short notice.

Specific application of the principles to the case at hand

Turning to the specific circumstances of the case on which it had been asked to rule, the CJEU found that the advertising and marketing services provided by BC RO were primarily intended to provide health professionals and consumers in the local market with better information concerning the pharmaceutical products sold. The responsibility of local staff was limited to taking orders from wholesale distributors of medicines in Romania and forwarding them to the German parent, as well as forwarding invoices from BC DE to customers. The local entity was not directly involved in the sale and delivery of the

pharmaceutical products and did not make commitments to third parties on behalf of its parent company.

Having regard to these facts, the court made an important distinction between the services provided by the local entity and the goods sold and delivered in Romania by the German parent. Both transactions are separate supplies which are subject to a different VAT treatment.

To have a fixed establishment, the human and technical resources present in a member state must enable the foreign company to receive and use the services which are provided for its own purposes in that member state. A fixed establishment is not characterised by the decisions which such a structure is authorised to take.

In the case at hand, the human and technical resources made available by BC RO to BC DE which, according to the Romanian tax authorities, make it possible to establish the existence of a fixed establishment of BC DE in Romania, are the same resources through which BC RO provides the services for the benefit of BC DE. However, the same resources cannot be used both to provide and receive the same services.

The CJEU concluded that, subject to verification of its understanding of the facts (i.e., that the marketing, regulatory, advertising, and representation services provided by BC RO are received by BC DE, which in turn uses its own human and technical resources situated in Germany to conclude and perform the contracts of sale with distributors of its pharmaceutical products in Romania), which is the responsibility of the referring court, BC DE does not have a fixed establishment in Romania. Consequently, a company in the same situation as BC DE would not have a fixed establishment in another member state.

Impact

In contrast to earlier decisions on this issue, the CJEU's ruling in this case (re)establishes the essentials of the concept of fixed establishment for VAT purposes. It provides clear answers to questions relevant for groups acting through central entrepreneur structures that have remained unanswered, and the subject of dispute, for several years throughout Europe, including in Belgium.

This decision provides taxpayers and tax authorities with clear guidelines and should increase legal certainty for taxpayers acting in a cross-border intragroup context, with subsidiaries providing (exclusive) services to a non-established parent company.

Contacts

If you have any questions concerning the items in this alert, please contact your usual tax consultant at our Deloitte office in Belgium or:

- Johan Van der Paal, jvanderpaal@deloitte.com, + 32 2 600 66 39
- Charlotte Degadt, cdegadt@deloitte.com, +32 2 800 70 23
- Milan Kelher (Deloitte Legal – Lawyers), mkelher@deloitte.com, +32 2 800 71 40

For general inquiries, please contact:
bedeloittetax@deloitte.com, + 32 2 600 60 00

Be sure to visit our websites:

[Deloitte Tax Belgium Home](#) | [Deloitte Legal Belgium Home](#)

Stay tuned with the latest developments:

[Tax News and Insights](#) | [Legal News and Insights](#) | [Deloitte Academy](#)

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

Deloitte provides industry leading audit and assurance, tax and legal, consulting, financial advisory, and risk advisory services to nearly 90% of the Fortune Global 500® and thousands of private companies. Our professionals deliver measurable and lasting results that help reinforce public trust in capital markets, enable clients to transform and thrive, and lead the way toward a stronger economy, a more equitable society and a sustainable world. Building on its 175 plus year history, Deloitte spans more than 150 countries and territories. Learn how Deloitte’s more than 345,000 people worldwide make an impact that matters at www.deloitte.com

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

Deloitte Legal - *Lawyers* BV/SRL in Belgium

Deloitte Legal - *Lawyers* BV/SRL is part of a privileged multidisciplinary cost-sharing association with Deloitte Belastingconsulenten BV/SRL.

© 2022 Deloitte Belgium

[Subscribe](#) | [Unsubscribe](#)