Fixed establishments: is the definition 'fixed' yet?

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In a series of legal cases, the CJEU has laid out authoritative guidelines on what does *not* constitute a fixed establishment.

The repetitious nature of certain referrals to the Court of Justice of the European Union is perhaps a fact of life. It is not difficult to sense the exasperation in the Advocate General's Opinion in *SC Adient* (Case C-533/22) on the matter of fixed establishments: 'This is now the fifth request for a preliminary ruling since 2018 concerning the criteria for determining whether a fixed establishments. It is already the third since the judgment in *Dong Yang* in 2020.'

So, has there been genuine confusion across the member states as to what constitutes a fixed establishment? Or, as the AG suggested – in the context of cross-border supplies of services – have 'tax authorities subsequently started searching within corporate structures for … subsidiaries or even just other group companies'

that could be construed as fixed establishments, which would attract a charge to VAT within their jurisdictions?

Defining fixed establishments

The old cornerstone of the case law on fixed establishments was *DFDS* (Case C-260/95), where the ECJ (as it then was) considered the activities of a UK branch of a Danish travel agency. The case of *DFDS* was concerned with the Sixth Directive, which provided that the place of supply of a business-to-business service would be 'the fixed establishment from which the service is supplied'.

Observing that the Sixth Directive sought to secure 'the rational delimitation of the respective areas covered by national VAT rules' and thereby to prevent the double taxation of cross-border services, in *DFDS* the court – building upon its judgment in *Berkholz* (Case C-168/84) – enshrined several key phrases in the vocabulary of VAT practitioners:

- First, the ECJ found that an entity should be regarded as the fixed establishment of a particular taxpayer only if that 'establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the [relevant] services are permanently present'.
- Second and consequently, it suggested that an entity, regardless of whether it had an independent legal personality, should be regarded as a fixed establishment of its parent if it were 'merely act[ing] as an auxiliary organ of its parent'. In other words, if the facilities and employees of the entity were entirely at the disposal of the parent, the former should be regarded as a fixed establishment of the latter.

In 2008 and 2011, however, the Place of Supply of Services Directive and the associated Implementing Regulation reversed the position and established 'the general rule [that] the place of supply of services should be based on the place where the recipient is established' (Place of Supply of Services Directive, Recital 4).

The Principal VAT Directive Article 44 henceforth provided that, where business-to-business services were provided to a place other than the customer's business establishment, it would be the relevant fixed establishment which determined the place of supply.

More specifically, Articles 10 and 11 of the Implementing Regulation provided detailed guidance on how suppliers should discern the business and fixed establishments of their customers:

- **Article 10:** A taxpayer's business establishment would be where 'the functions of the business's central administration are carried out'. Article10(3) discounts 'the mere presence of a postal address'. Instead, for the purposes of determining that location, suppliers must now consider 'the place where essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located, and the place where management meets'.
- **Article 11:** This has codified the historic guidance of the ECJ/CJEU by defining a fixed establishment as an entity which – more than simply having a VAT number associated with it– 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'.

But what exactly are *sufficient* resources? And what are the other commercial, real-world indices of the existence of a fixed establishment?

Significant court judgments

Dong Yang Electronics

Perhaps the first significant judgment on the matter came with *Dong Yang Electronics* (Case C-547/18).

A Polish company had contracted with a Korean parent company for the provision of services to its Polish subsidiary. The question before the court was whether the subsidiary was a fixed establishment of the parent. If so, the place of supply would have switched from Korea to Poland and thereby created a charge to Polish VAT.

The CJEU, however, was adamant that 'the existence, in the territory of a member state, of a fixed establishment of a company established in a non-member state may not be inferred by a supplier of services *from the mere fact that that company has a subsidiary there'* [33].

Moreover, the court found that there was nothing in the Implementing Regulation which obliged a supplier to investigate the contractual arrangements between its customer and that customer's parent company for the purposes of determining the place of supply.

Berlin Chemie

A similar issue came before the court two years later in *Berlin Chemie* (Case C-333/20), where a German company had outsourced a major part of its functions to a Romanian business, which thereby made supplies of those services – which concerned marketing, advertising and regulatory obligations – from Romania to Germany. The question, therefore, was whether the Romanian company had become a fixed establishment of its customer.

In the view of the Romanian authorities, it was decisive that the German company had sustained and almost automatic access to the human and technical resources of the Romanian entity, and that the German company was the Romanian entity's only customer.

For the CJEU, however, there were several problems with that analysis:

- First, it was necessary to assume that, even if a business has only one customer, its human and technical resources – including more than200employees in this case – nonetheless belonged to it, not to the customer, and so were used for its own needs (i.e. making supplies of services to that customer).
- Second, and more importantly, it was logically impossible for the Romanian company to *make* supplies of outsourced services to its German customer, yet simultaneously to *receive* those same supplies as a fixed establishment of that German customer. In other words, if the Romanian entity's human and technical resources had been economically used to *make* supplies, how could those same resources then be used to *consume* those supplies?

Cabot Plastics

Within a year, an extremely similar set of facts came before the CJEU in *Cabot Plastics* (Case C-232/22), where a Belgium company was making supplies of toll processing to a Swiss business within the same corporate group and which had the

same ultimate parent.

As in *Berlin Chemie*, the supplier appeared to have only one customer, so the question was asked: should the Belgian company be regarded as a fixed establishment of the Swiss company, with the effect that charges to VAT would arise in Belgium and not in Switzerland?

This time, in reaching the same decision that the Belgian company was *not* a fixed establishment of the Swiss customer, the court emphasised that in circumstances where a supplier 'remains responsible for its own resources and provides those services at its own risk', even an exclusive contract could not transmute the human and technical resources of the supplier into those of the customer.

More to the point, the court understood that such an analysis would risk the elision of the supplies of services by the taxpayer (i.e. toll processing) with the supplies of goods by the customer (i.e. the goods being processed), whereas those transactions were economically, contractually and literally separate.

SC Adient

Most recently, and subsequent to the Advocate General cited at the beginning ofthis article, the court confirmed in its judgment in *SC Adient* that considerations of company law and the mere fact that a supplier and its customer might have shared infrastructure and facilities – such as IT networks – were not determinant of the existence of a fixed establishment.

In conclusion

Following this flurry of cases, it appears that the CJEU has laid down – even if wearily at times – a series of authoritative guidelines on what does *not* constitute a fixed establishment.

Now, where tax authorities are seeking to establish a place of supply for cross-border services that would create a VAT liability within their jurisdiction, they may not engineer a fixed establishment from the existence of a parent-subsidiary relationship (*Dong Yang*), or the outsourcing of services (*Berlin Chemie*), or an exclusive customer base (*Cabot Plastics*), or shared infrastructure or considerations of company law (*SC Adient*).

But given the myriad ways in which businesses can structure themselves and their operations, and given the myriad VAT analyses that follow, what odds that another question on fixed establishments may soon trouble the CJEU?