



C-533/22: Concept of Fixed Establishment

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In brief

The Court of Justice of the European Union (CJEU) has ruled that a company established in one Member State, receiving services by a company established in another Member State is not to be regarded as having a fixed establishment solely because:

1. the two companies belong to the same group under company law; or
2. those companies are bound as between themselves by a contract for the provision of services.

The CJEU further clarifies that:

1. a company having in another Member State a structure which intervenes in the supply of the finished goods arising from the services received, or
2. the fact that those supply transactions are carried out mostly outside that Member State and that those that are carried out there are subject to VAT

is not relevant to establishing that that company has a fixed establishment in that other Member State.

Lastly, the CJEU held that a company does not have a fixed establishment if its technical and human resources in that other Member State are not distinct from those by which the services are supplied to it or if those human and technical resources perform only preparatory or auxiliary activities.

The claimant in the main proceedings in Romania is Adient Germany, a company established in Germany which belongs to the Adient group, a global supplier to the automotive industry. Adient Germany entered into a contract with Adient RO, another group company established in Romania, to receive manufacturing and assembly services for car seat covers.

Adient RO invoiced those services to Adient Germany without charging VAT, considering that the place of supply was in Germany, where Adient Germany was established. The Romanian tax authorities, however, argued that Adient Germany had a fixed establishment in Romania, consisting of two branches of Adient RO, and that the place of supply of services was in Romania, where VAT was due.

The Tax authorities considered that Adient Germany had a fixed establishment in Romania and was therefore registered for VAT purposes in Romania automatically. Adient Germany brought an action against the said decision and the case was referred to the CJEU.

Group company as a fixed establishment of another group company

As a first point, the CJEU considered the 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. The connection to the taxable person's fixed establishment is a secondary point of reference which is an exception to the general rule and is taken into consideration provided that certain conditions are satisfied.

The CJEU recalled that for a fixed establishment to exist, it must be assessed in the light of economic and commercial realities with the result that treatment cannot depend solely on the legal status of the entity concerned. It follows that the fact that two companies, legally independent of each other and belonging to the same group, is not a determining factor for the existence of a fixed establishment. Nor can the existence of a fixed establishment be inferred from the mere fact that both companies are legally bound as between themselves by a contract.

Therefore, an independent group company is not to be regarded as a fixed establishment of a different foreign group company on the sole basis of a link recognised under company law.

Activity of receiving services and intervention of the fixed establishment

The CJEU stated that, for the application of Article 192a, the fixed establishment to be taken into account is that which provides the services which it supplies, and not that which uses the services supplied to it. The CJEU added that, for the purposes of determining the person liable for VAT, the taxable person is regarded as established in the territory of the Member State in which he or she makes a supply of goods or services only if he or she has, in that Member State, a structure having a minimum degree of stability derived from the permanent presence of human and technical resources, which intervenes in the taxable transactions in question, before or during their performance.

The CJEU inferred that where the taxable person making a supply of goods in a Member State has, in that Member State, only a fixed establishment which receives supplies of services, the fact that that establishment intervenes in the supplies of goods carried out by that taxable person in that Member State cannot affect the determination of the person liable for VAT in respect of those transactions.



Therefore, the CJEU concluded that neither the fact that Adient Germany had a structure in Romania that intervened in the supply of the finished products arising from the services provided by Adient RO, nor the fact that those supply transactions were carried out mostly outside Romania and that those that were carried out there were subject to VAT, were relevant for establishing the existence of a fixed establishment in Romania.

Same means cannot be used both to provide and receive those services

As far as the human and technical resources are concerned, the CJEU recalled that the same means cannot be used both by a taxable person, established in one Member State, to provide services and by a taxable person, established in another Member State, to receive the same services within a supposed fixed establishment situated in the first Member State.

It considered that the existence of a fixed establishment of the recipient of the services therefore presupposes that it is possible to identify human and technical resources which are distinct from those used by the supplier for the fulfillment of its own supplies of services, and which are made available to the recipient of those services to ensure that they are received and used in accordance with its own needs. In the absence of such a finding, such a recipient does not have a fixed establishment in the Member State of the supplier and cannot, therefore, be regarded as established in that Member State.

As to whether services ancillary to the manufacturing services may be taken into account, the Court has already held that preparatory or auxiliary activities needed for carrying out the undertaking's tasks cannot determine that there is a fixed establishment.

Possible Consequences in the Cyprus Framework

The judgment of the CJEU, provides useful guidance on the interpretation of the concept of fixed establishment for VAT purposes, which is relevant for determining the place of supply of services and the person liable for VAT.

The judgment confirms that the concept of fixed establishment is not uniform and may vary depending on the context and the function of the establishment. The judgment also emphasizes the need to assess the human and technical resources of the establishment in relation to the specific activity of receiving or supplying services, and to take into consideration all the relevant factors that are applicable.

The judgment may have implications for Cyprus-based companies that receive or provide services from or to companies established in other Member States, as they may need to review their VAT position and documentation in light of the CJEU's criteria. The judgment may also affect the VAT audits and assessments carried out by the Cyprus tax authorities, who may have to reconsider their approach to the identification and verification of fixed establishments for VAT purposes.



How can we help?

Our designated team of Indirect Tax Specialists is at your disposal to critically examine the impact this latest decision of the CJEU may have on your business, quantify the impact and recommend, where applicable, corrective actions.

Let's Talk!

For a deeper discussion of how this issue might affect your business, please contact:

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