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## VAT fixed establishment in parent-subsidary supplies

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the concept of a 'fixed establishment' for VAT purposes

The Court of Justice of the European Union (the "CJEU") has further clarified the concept of a 'fixed establishment' for VAT purposes. In the recently published case *Berlin Chemie A. Menarini* (decision C-333/20 of 7 April 2022), the CJEU held that a foreign subsidiary that provides services exclusively to its parent company established in another Member State does not automatically qualify as a fixed establishment of the parent company.

A German company involved in the marketing and sale of pharmaceutical products concluded a service contract with its Romanian subsidiary for the purposes of promoting, advertising and marketing its sales in Romania. The German parent company was the only client of its Romanian subsidiary and had access, in particular, to technical resources of the subsidiary such as computers, operating systems and vehicles. The German parent company directly supplied its products to its customers in Romania.

The Romanian subsidiary had been invoicing the German parent company for marketing services exclusive of VAT under general B2B place of supply rules (i.e. with the services located for VAT purposes in Germany, the country of the recipient). The Romanian tax authorities challenged this position, taking the view that the German parent company had sufficient technical and human resources located in Romania (i.e. access to the subsidiary's resources) to carry out economic activity in Romania, which would shift the place of supply of the marketing services from Germany to Romania. Consequently, VAT was imposed in Romania on those services.

In its decision, the CJEU recalled that, in order for a location to qualify as a fixed establishment, (i) the company must have its own human and technical resources there (or resources at its disposal as if they were its own), and (ii) this structure of resources must allow it to receive services supplied to it and to use them for the purposes of its own economic activity.

The CJEU added that the same human and technical resources cannot be understood to provide and receive the same services at the same time, meaning that the resource structure in Romania could not be understood to be used for provision by the subsidiary and receipt by the parent.

Since the German parent must therefore be understood to be using its Germany-based resource structure to carry out its economic activities, the criteria for a fixed establishment were not met, and the CJEU could not qualify the Romanian subsidiary as a fixed establishment of the German parent.

This decision further clarifies the concept of 'fixed establishment' and whether the place of taxation can be shifted on the basis of third-party human and technical resources. Nevertheless, economic reality remains the fundamental test for interpreting VAT rules, which process continues to require a case-by-case analysis of the facts at hand. Many questions about how the concept of 'fixed establishment' is to be applied are still unanswered, and will depend on the circumstances of each business model.

The Arendt VAT team remains at your disposal for any questions arising in this area.

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