The concept of fixed establishment for VAT purposes on the occasion of the ECJ decision in Dong Yang Electronics (C-547/18)

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The concept of fixed establishment for VAT purposes

CJEU, Dong Yang Electronics C-547/18
Dong Yang Electronics (Case C-547/18)

- The question dealt by the Court of Justice of the European Union in his judgment issued on May 7, 2020 in Dong Yang Electronics case is whether an EU subsidiary may be regarded as a fixed establishment of a parent company established outside the European Union.

- Fixed establishment is an important concept in EU VAT law, since it is crucial in determining the location of the supply of services and the person liable to charge VAT.


- The VAT Directive introduced the concept of the “fixed establishment”, without providing any specific guidance on how this concept should be interpreted.

- The above Directive ensure that VAT on services accrues to the country where consumption occurs.
VAT: the place of taxable transactions (Where to tax?)

• There are four types of taxable transactions:
  • Supply of goods
  • Intra-Community acquisition of goods
  • Supply of services (is any transaction which does not constitute a supply of goods)
  • Importation of goods

• Depending on the nature of the transaction, different rules to determine the place of taxation will apply.
VAT: the place of taxation in the case of supply of services

• The place of taxation in case of supply of services is determined by **where the services are supplied**.

• This depends not only on the **nature of the service** supplied but also on the **status of the customer** receiving the service.

• Distinction must be made between:
  - a **taxable person acting as such** (a business acting in its business capacity) and
  - a **non-taxable person** (a private individual who is the final consumer)

❖ The concept of a taxable person covers anyone who independently carries out an economic activity, even if that person is not identified for VAT purposes, but it also includes a non-taxable legal person identified for VAT purposes.
VAT: the place of taxation in the case of supply of services (general rules)

• business-to-business (B2B) supplies of services will be taxed where the customer is situated (place of establishment), rather than where the supplier is located

• For business-to-consumer supplies of services (B2C), the place of taxation will continue to be where the supplier is established
VAT: the place of taxation in the case of supply of services (specific rules)

- However, in certain circumstances, the general rules for supplies both to businesses and to consumers will not be applicable and specific rules will apply to reflect the principle of taxation at the place of consumption.

- These exceptions concern services such as: restaurant and catering services, the hiring of means of transport, cultural, sporting, scientific and educational services, and telecommunications, broadcasting and electronic services supplied to consumers.
The customer is VAT taxable (B2B transaction)?

Does this type of service fall within any exemption under the EU Directive?

No

The general rule is applicable: the place of services is the location of customer

VAT is reported by the customer under reverse charge procedure and is not payable in fact

What is the business status of the customer of services?

See special rule established by the EU Directive for this type of service

Does this type of service fall within any exemption under the EU Directive?

No

The general rule is applicable: the place of services is the location of supplier

The supplier charges and pays VAT in his country

The customer is not VAT taxable (B2C transaction)?
Supply of services to taxable persons (article 44 of the Directive)

The place of supply of services to a taxable person acting as such shall be the place where that person has *established his business*.

However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located.

In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.
Supply of services to a non taxable person (article 45 of the Directive)

• The place of supply of services to a non-taxable person shall be the place where the supplier has established his business.

• However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located.
Supply of services to a non taxable person (article 45 of the Directive)

• In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has:
  ➢ his permanent address (i.e. the address entered in the population or similar register, or the address indicated by that person to the relevant tax authorities, unless there is evidence that this address does not reflect reality) or
  ➢ usually resides (i.e. the place where that natural person usually lives as a result of personal and occupational ties).
Supply of services to taxable persons (article 44 of the Directive)

• For supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the recipient is established, rather than where the supplier is established.

• For the purposes of rules determining the place of supply of services, taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them.

• Similarly, non-taxable legal persons who are identified for VAT purposes should be regarded as taxable persons.
B2B services (article 44 of the VAT Directive)

- Example: The place of supply of services supplied by a company in Salzburg to a business client in Vienna will be Vienna. As the supplier is established in Austria, he will charge Austrian VAT to his client.

- Example: For accountancy services supplied by a Bulgarian company to a business customer with his place of business in Austria, Austrian VAT must be charged. If the Bulgarian supplier is not established in Austria, the Austrian customer will account for VAT under the reverse charge mechanism.

- Example: Finnish VAT must be charged (by the customer using the reverse charge procedure) where legal services are supplied by a Polish company to a customer whose place of business is in Sweden but provided to the customer’s fixed establishment in Finland.
• Example: For consultancy services provided by a supplier established in Lisbon to a private customer who resides in Denmark, Portuguese VAT must be charged.

• Example: A supplier established in Greece will need to charge Greek VAT to a business customer established in Romania who acquires legal services to be used for his private purposes.
Place of supply

Services

Is it one of the 7 “special” services?

1. The Place of Supply is where the goods start their journey

2. Yes

Business to Business

3. The Place of Supply is where the customer belongs

No

Goods

4. The Place of Supply is where the service is performed

Business to Consumer

5. The Place of Supply is where the supplier is established

6. Broadcasting, telecoms or e-services (EU)
If services are supplied cross border this may trigger the reverse charge procedure for the business customer.

Where a taxable person receives services from a person not established in the same Member State, the reverse charge mechanism is provided in the Directive.

Under the reverse charge procedure it is the customer rather than the supplier of the service which has the obligation to account for VAT on the supply, the customer essentially charges itself local VAT and will take a simultaneous input credit for that VAT (in line with its VAT recovery entitlement). For those with full recovery, this transaction will be VAT neutral.
The concept of fixed establishment for VAT purposes: case law of the ECJ before the introduction of the Implementing Regulation 282/2011

- The VAT Directive introduced the concept of the “fixed establishment”, without providing any specific guidance on how this concept should be interpreted.

- In the Berkholz case (C-168/84) the ECJ stated that “…an installation for carrying on a commercial activity, such as the operation of gaming machines, on board a ship sailing on the high seas outside the national territory may be regarded as a fixed establishment within the meaning of that provision only if the establishment entails the permanent presence of both the human and technical resources necessary for the provision of those services and it is not appropriate to deem those services to have been provided at the place where the supplier has established his business”.

- In the ARO Lease case (C-190/95), the ECJ stated that “[…] an establishment must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis”.

VAT: the place of supply of services (Implementing Regulation 282/2011)

• The correct application of the rules governing the place of supply of services relies mainly on the status of the customer as a taxable or non-taxable person, and on the capacity in which he is acting.

• In order to determine the customer's status as a taxable person, it is necessary to establish what the supplier should be required to obtain as evidence from his customer.

• Communication by the customer of his VAT identification number to the supplier is sufficient to establish that the customer is acting in his capacity as a taxable person, unless the supplier has information to the contrary.

• It should be clarified that when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person.
The place of establishment (article 10 of the Implementing Regulation 282/2011)

- For the application of Articles 44 and 45 of VAT Directive, the place where the business of a taxable person is established shall be the place where the functions of the business's central administration are carried out.
- In order to determine the place of establishment, account shall be taken of 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.
- Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take precedence.
- The mere presence of a postal address may not be taken to be the place of establishment of a business of a taxable person.

- The Implementing Regulation introduced a legal definition of the fixed establishment.

- Article 11(1) of the Regulation defines the “passive fixed establishment” for the application of Article 44 of the VAT Directive (B2B services) as: “any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by 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”.

- Article 11(2) of the Implementing Regulation defines the “active fixed establishment” for the purposes of applying Articles 45 (business-to-consumer (B2C) services), 56(2) second paragraph (short-term letting of pleasure craft) and 192a (applicability, or otherwise, of local reverse charge mechanisms) of the VAT Directive, as any establishment: […] other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services[...].
The concept of a fixed establishment (article 11 of the Implementing Regulation 282/2011)

• For the application of article 44 and 45 of VAT Directive, a "fixed establishment" shall be any establishment, other than the place of establishment of a business, characterized by:

➢ 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

➢ or a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies

❖ The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.
Case law regarding the concept of fixed establishment after the introduction of the Implementing Regulation 282/2011

- In the DFDS case (C-260/95):
  - The CJEU was asked to provide guidance on the fixed establishment concept for the purposes of article 26 of the Sixth VAT Directive (special scheme for travel agents) and to answer the question whether a separate legal entity (a subsidiary in another Member State) could constitute an FE.
  - The Court ruled that a subsidiary may be regarded as a FE of the parent company if it acts as a mere auxiliary organ of the parent and has the human and technical resources characteristic of an FE.
DFDS case (C-260/95): the facts

- DFDS, a company incorporated in Denmark, whose objects are shipping, travel and general transport, has an English subsidiary, DFDS Ltd. An agency agreement concluded by the two companies designates the subsidiary as a 'general sales and port agent' for the parent company in the United Kingdom and as 'central booking office for the United Kingdom and Ireland for all ... the passenger services' of the Danish company.

- In 1993 the Commissioners of Customs and Excise took the view that VAT was payable by DFDS on the package tours marketed on its behalf by its English subsidiary. They took the view that, by means of the agreement with its subsidiary, the Danish company established its business in the United Kingdom or made the supplies in question from a fixed establishment in the United Kingdom within the meaning of those terms in the United Kingdom legislation giving effect to Article 26 of the Sixth Directive.

- DFDS contended that the services at issue were taxable at the place where it had established its business, namely Denmark, a Member State which has availed itself of the possibility of exempting such services from VAT under Article 28(3)(b) and Annex F of the Sixth Directive.

- Article 26(2) of the Sixth Council Directive is to be interpreted as meaning that, where a tour operator established in one Member State provides services to travellers through the intermediary of a company operating as an agent in another Member State, VAT is payable on those services in the latter State if that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment.
Case law regarding the concept of fixed establishment

- In the ARO Lease case (C-190/95) and Lease Plan Luxembourg case (C-390/96):
  - The term fixed establishment requires a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis.
  - Concerning transport activities in particular, that term implies, for the purposes of applying Community legislation on VAT, at least an office in which contracts may be drawn up and daily management decisions taken, and a place where the vehicles used for the said activities are stored.
  - By contrast, registration of those vehicles in the Member State concerned is not an indicator of a fixed establishment in that Member State.
  - A fixed installation used by the undertaking only for preparatory or auxiliary activities, such as recruitment of staff or purchase of the technical means needed for carrying out the undertaking's tasks, does not constitute a fixed establishment.
Case law regarding the concept of fixed establishment

• In the ARO Lease case (C-190/95): the CJEU did not consider a fleet of cars in Belgium to be an FE of a Dutch company. The Court held that the leasing of vehicles consisted principally in the negotiating, signing and administering of the relevant agreements; therefore, a leasing company that did not possess in a Member State either its own staff or a suitable structure to provide a framework in which agreements may be drawn up or management decisions taken could not be regarded as having a FE in that country.

• In the Lease Plan Luxembourg case (C-390/96): The case involved the lease of passenger cars by a Luxembourg company, Lease Plan Luxembourg, to Belgian customers. The CJEU merely repeated its position, expressly referring to the ARO Lease judgment.
Case law regarding the concept of fixed establishment

• **RAL (C-452/03):**
  - The RAL case concerned the exploitation of gaming machines and whether they could constitute an FE of a non-resident company.
  - The CJEU did not comment on the FE issue in its judgment but applied the VAT rules on entertainment and similar activities.
  - An interesting point was made in the Opinion of Advocate General, who said that the RAL Group’s gaming machines in the United Kingdom satisfied the “minimum-requirements test” for the existence of an fixed establishment.
Case law regarding the concept of fixed establishment

- **Planzer Luxembourg (C-73/06):**
  - The ECJ made it clear that the performance of preparatory and auxiliary activities did not give rise to an fixed establishment.
  - According to the Court, the place of a company's business is the place where the essential decisions concerning its general management are taken and where the functions of its central administration are exercised.
Case law regarding the concept of fixed establishment

- Daimler (C-318/11) and Widex (C-319/11): The CJEU was asked whether a taxable person carrying out technical testing or research work in another Member State could be regarded as having an FE in that other Member State.
- The Court ruled that a right to VAT was excluded if two conditions were cumulatively present: (1) the presence of an FE and (2) taxable transactions were carried out by the FE.
- Since no output transactions were performed by Daimler and Widex in Sweden, the right to refund could not be excluded irrespective of whether or not they had an FE in that State.
Case law regarding the concept of fixed establishment

- **E.ON Global Commodities SE (C-323/12):**
  - This was another case concerning the right to VAT refund.
  - The CJEU ruled that a tax representative did not constitute an **Fixed Establishment** for the purposes of Eighth Council Directive (79/1072/EEC).
  - Therefore, E.ON’s right to VAT refund could not be excluded based on the fact that it designated a tax representative in Romania.
Case law regarding the concept of fixed establishment

- **Welmory (C-605/12):**
  - The Welmory case was the first one where the CJEU was asked to interpret the concept of a "receiving FE" (i.e. an FE that is a recipient of services within the meaning of article 44 of the VAT Directive).
  - The CJEU was asked to determine whether by using the infrastructure of the supplier (the Polish Welmory) the customer (the Cypriot Welmory) had an FE in the Member State of the supplier (Poland).
Case law regarding the concept of fixed establishment

• A first taxable person who has established his business in one Member State, and receives services supplied by a second taxable person established in another Member State, must be regarded as having a “fixed establishment”, in that other Member State, for the purpose of determining the place of taxation of those services, if that establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business.

• The Court did not provide a clear answer as to whether this structure could give rise to an FE. Instead, it asked the referring national court to determine whether the Cypriot company Welmory had the necessary human and technical resources to receive and use the supplied services in Poland for the operation and maintenance of the auction sales website and the issuing and selling of “bids” and its degree of independence.

• Nevertheless, the Court point that the fact that the economic activities of the two companies, which are linked by a cooperation agreement, form an economic whole and that their results are of benefit essentially to consumers in Poland is not material for determining whether the Cypriot company possesses a fixed establishment in Poland. So, the services supplied by the Polish company to the Cypriot company must be distinguished from those supplied by the Cypriot company to consumers in Poland. They are distinct supplies of services which are subject to different schemes of VAT.
Case law regarding the concept of fixed establishment

- **WebMindLicences (C-419/14):**
  - The WebMindLicences case did not focus on the concept of an FE but on the activities which must be performed by an FE in order for the services to be considered to have been supplied from there.
  - The CJEU ruled that services are supplied from an FE if the FE is engaged in the economic activity in its own name and on its own behalf, under its own responsibility and at its own risk.
Case law regarding the concept of fixed establishment

• The ECJ was asked to consider a number of questions relating to the application of the abuse of rights doctrine (*Halifax* C-255/02).

• The ECJ confirmed that it was not abusive for a company established in one member state to enter into a licensing agreement with a company established in another member state to exploit the lower VAT rate in force in that second member state. Only if the arrangements were fictitious would they satisfy the *Halifax* principle and be considered abusive.

• In the instant case, it was clear from the documents submitted to the Court that Lalib was a separate company from WML and that it paid VAT in Portugal.

• However, the ECJ concluded that it was for the referring court to analyse all the facts placed before it to determine whether the arrangements were genuine or not. This would include examining whether the establishment of the licensee’s place of business, or fixed establishment, was genuine. In particular, whether the licensee (in this case, Lalib) had an appropriate structure, premises, human and technical resources and equipment to engage in economic activity in its own name, on its own behalf, under its own responsibility and at its own risk.
Dong Yang Electronics (Case C-547/18)

- The concept of fixed establishment has been long-debated before the CJEU.
- So why Dong Yang Electronics is important?
- What’s new?
The issue of place of taxation is dealt by the COUNCIL DIRECTIVE 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services.

To ensure more uniform application, certain aspects of these rules have been clarified through implementing measures which have applied directly since 1 July 2011 (see: Implementing Regulation No 282/2011 adopted by the Council.

However, although the fixed establishment concept has been defined in the above VAT Implementing Regulation and clarified by numerous court judgments (the landmark DFDS case (C-260/95), Welmory (C-605/12), Budimex (C-224/18), Skandia America Corporation (Skandia) (C-7/13), Le Crédit Lyonnais (LCL) (C-388/11)), it is still surrounded by some uncertainty and being interpreted differently across EU Member States.
Dong Yang Electronics (Case C-547/18): Facts of the case

- Dong Yang Electronics Sp. z o.o (‘Dong Yang’) was a business established in Poland. In 2010 it concluded a contract with a Korean company (‘LG Korea’) to provide services consisting in the assembly of printed circuit boards.

  - [a transaction which consists solely of assembling the various parts of a machine provided by a customer must be considered as a supply of services].

- LG Korea had no human or technical resources in Poland and had assured Dong Yang of this fact. However, LG Korea did have a legally separate Polish subsidiary (‘LG Production Poland’). It was this subsidiary which provided the materials to Dong Yang and to which, following assembly, Dong Yang provided the printed circuit boards.

- The materials were imported in Poland and delivered to Dong Yang by the Polish subsidiary of LG Korea ("LG Poland"). Upon assembly, Dong Yang turned over the products to LG Poland to be used as components for the further production based on the services agreement between LG Poland and LG Korea. The finished products were then sold by LG Korea to another Polish subsidiary for onward sale on the European market. This is a quite common tolling structure in the multinational groups.

- Given the contractual relationship and the assurances from the Korean parent company, Dong Yang took the view that its services were supplied to a business established in Korea. Applying the place of supply rules for B2B supplies of services, no VAT was charged because the transaction was outside the scope of Polish VAT.
Dong Yang Electronics (Case C-547/18)
Dong Yang Electronics (Case C-547/18): Facts of the case

- However, the Polish tax authorities considered that Dong Yang should have charged Polish VAT on its invoices on the grounds that LG Poland acted as a fixed establishment of LG Korea.

- According to the Polish tax authorities, in light of the contractual relationship between LG Korea and LG Poland, Dong Yang should have examined the use of the assembly services and assessed that the Polish subsidiary was the actual beneficiary in its capacity as fixed establishment of its foreign parent entity.

- Consequently, the place of supply rules would dictate that there was a domestic Polish supply, on which Polish VAT was due.

- Dong Yang does not agree with this view. It argues that the requirements for the existence of a fixed establishment within the meaning of Article 44 of the VAT Directive and Article 11(1) of the Implementing Regulation had not been met.
Dong Yang Electronics (Case C-547/18): questions

• The questions for which a preliminary ruling was requested were:
  ❖ Can it be inferred from the mere fact that a company established outside the European Union has a subsidiary in Poland, that this company has a fixed establishment in Poland?
  ❖ If not, is the supplier required to examine the contractual relationships between the customer established outside the European Union and its subsidiary in the European Union in order to determine whether there is a fixed establishment?
Dong Yang Electronics (Case C-547/18): reasoning

• The ECJ has begun by referring to the general rule of locating the recipient of the services in the headquarters (article 44 of the VAT Directive).

• However, when the services are provided to a fixed establishment located in a place other than the one where the headquarters is located, the place where these services are provided will be the place where that fixed establishment is located.

• The above location rules are to avoid conflicts of jurisdiction between States that may give rise to cases of double taxation or non-taxation (Berkholz (C-168/84), Welmory (C-605/12)).
• The CJEU reminded that the legal form of the entity is not relevant in order to determine whether such entity can qualify as a fixed establishment for VAT purposes.

• According to the CJEU, the concept of fixed establishment relies on material conditions being fulfilled, namely the existence of: “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” (article 11 of the Council Implementing Regulation 282/2011).

• The fulfilment of these conditions should be examined on a case-by-case basis, in the light of the economic and commercial reality of the operations in question.

• Finally, the CJEU dismissed that the mere fact that a third-country company has a subsidiary in the European Union cannot lead to the conclusion that this subsidiary constitutes a fixed establishment of the non-EU parent for VAT purposes.
Dong Yang Electronics (Case C-547/18): the judgement (2 question)

• The existence of a subsidiary does not place a requirement on the supplier (in this case Dong Yang) to examine contractual relationships between the parent and subsidiary to work out if a fixed establishment has been created.

• What a supplier must do, is follow the criteria in Implementing Regulation No 282/2011 (article 22), namely:
  o it must examine the nature and use of the service provided to the taxable person constituting the customer.
  o Next, where that examination does not enable the fixed establishment of that customer of the service to be identified, it is necessary to pay particular attention to whether the contract, the order form and the VAT identification number attributed by the member state of the customer and communicated to him by the customer identify the fixed establishment as the customer of the service and whether the fixed establishment is the entity paying for the service.

❖ where the two abovementioned criteria do not enable the fixed establishment of the customer to be identified, the supplier may legitimately consider that the services have been supplied at the place where the customer has established his business.
Dong Yang Electronics (Case C-547/18): some conclusions

❖ According to AG (Opinion in the Dong Yang case), “in principle, a subsidiary of a company (from a third country) is not a permanent establishment of the latter within the meaning of the second sentence of Article 44 of Directive”.

❖ According to AG, “if the subsidiary has its own legal personality and is therefore also a taxable entity in its own right, there is a strong argument in favour of generally excluding attribution to another legal entity”.

❖ According to AG (Opinion in the Welmory case), “the overriding importance of legal certainty for the supplier in determining his tax obligations and concluded from this that a legal person with its own legal personality cannot at the same time be the fixed establishment of a different legal person. The same applies to the legal certainty of the customer which must know whether it, its subsidiary and/or its parent company (see Article 196 of the VAT Directive) is liable for VAT”.

❖ To note that according to the Court a subsidiary may, in certain circumstances, be regarded as a fixed establishment for VAT purposes.
Dong Yang Electronics (Case C-547/18): some conclusions

- The Dong Yang judgement brings more clarity on the fixed establishment status of non EU (foreign) subsidiaries in confirming that the mere presence of a subsidiary is not sufficient to constitute a fixed establishment of a foreign-based parent entity.
- So, a further analysis, that it constitutes a fixed establishment, is needed. More precisely, the concurrence of the requirements established in the article 11 of the Implementing Regulation must be analyzed to determine whether or not the fixed establishment in question exists.
- The Court confirmed once again that the qualification of fixed establishment should rely on material conditions and be assessed on the basis of the economic and commercial reality (application of the principle of substance over form).
Dong Yang Electronics (Case C-547/18): some conclusions

• The possibility that the service provider had to investigate, for this purpose, the contractual relations between the two client entities, has been considered irrelevant, given that, in order to determine the location of their services, they only had to take into account questions relating to his client, in this case, LG Poland.

• By considering that a service provider isn’t required to carry out a detailed examination of the contractual relationships within the customer’s corporate group when determining the taxability of its services in order to work out if it has a fixed establishment in a given member state, the CJEU has avoided an heavy burden of proof for service providers.

• According to AG, “Directive 2006/112 requires a taxable person to exercise a reasonable degree of care in determining the correct place of supply. However, this does not include seeking out and verifying inaccessible contractual relationships between his contracting partner and the subsidiaries thereof”.
Nevertheless, the CJEU did not go as far as the Advocate General’s opinion which suggested that a subsidiary could only create a fixed establishment for its parent in very exceptional circumstances, i.e. where there is abuse of law.

The AG mentioned that a subsidiary cannot be regarded as a FE unless the contractual structure applied by the parties constitutes an abusive practice that gives rise to a tax benefit.

In her opinion, the AG observed that the supplier may rely on a written statement from its customer that it does not have a fixed establishment in the EU.

But, both remarks did not adopted by the CJEU judgment.
Dong Yang Electronics (Case C-547/18): some conclusions

- According to AG, the principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in Halifax, is a general principle of EU law. This assessment falls within the remit of the referring court. However, based on the facts communicated to the Court, there is no evidence to support this in the present case.

- First, Dong Yang not only formally provided the services to LG Korea, it actually provided them to LG Poland Production as well. Nor can the contrary be assumed here after consideration of economic realities.

- LG Poland Production was neither a contracting partner of Dong Yang nor the owner of the processed goods, and it did not make further use of them (sell them) itself. Rather, LG Korea sold the finished goods to LG Poland Sales.

- Secondly, even if it were assumed that Dong Yang had actually provided the services to LG Poland Production, this would not have any effect whatsoever on the amount of Polish tax revenue and the amount of the tax charge for LG Poland Production under VAT law. In this case, LG Poland Production would have a right to deduct the appropriate amount of input VAT when the invoice is issued.

- Nor would the situation be any different if it were assumed that LG Korea had a fixed establishment in Poland via its subsidiary LG Poland Production. In such a case, LG Korea would have a right to deduct input tax in Poland and would therefore not have a VAT burden in Poland either. For both points of view, the tax authority could not demonstrate what VAT burden had been abusively evaded.
Dong Yang Electronics (Case C-547/18): some conclusions

- So, the opinion that a subsidiary may constitute a fixed establishment is not excluded! This creates legal uncertainty to companies dealing with subsidiaries of non-EU parent companies.

- So, transactions, like multiparty service agreements and manufacturing arrangements involving intra-group flows could trigger debate on the existence of local fixed establishment.

- In order to mitigate the risk of VAT assessments, it is crucial to assess the role and functions attributed to entities and setting up processes to identify the recipient of the services.

- In any case, the lack of an abusive practice does not excuse the provider for neglect in making the necessary checks to establish when and where VAT is applicable.
Principle of legal certainty

- The principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them (*Plantanol* - C-201/08).

- That principle is to be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the obligations which such rules impose on them (*Traum EOOD* - C-492/13).

- It follows that it is necessary that taxable persons be aware, before concluding a transaction, of their tax obligations (see judgment in *Teleos and Others*).
Titanium Ltd (Case C-931/19)

- **Request for a preliminary ruling from the Bundesfinanzgericht (Austria) lodged on 20 December 2019**

- Is the term “fixed establishment” to be interpreted as meaning that the existence of human and technical resources is always necessary and therefore that the service provider’s own staff must be present at the establishment, or can — in the specific case of the letting, subject to tax, of a property situated in national territory, which constitutes only a passive tolerance of an act or situation — that property, even without human resources, be regarded as a “fixed establishment”?

- The case concerns a property letting company established on Jersey. The let property is located in Austria. The question is whether the let property must be regarded for VAT purposes as a fixed establishment in Austria. If so, the property letting company has to charge Austrian VAT.

- Austrian court wants to know from the CJEU is whether the fixed establishment concept must involve the use of own personnel and technical resources (the property company does not have those in Austria), or whether there can also be a fixed establishment without the deployment of own personnel (but with the aid of the services of a property manager).
Titanium Ltd (Case C-931/19): the facts

- Titanium is a company established on Jersey, whose activities include the letting of property. It lets VAT-tax ed property it owns to two Austrian VAT taxable persons.
- The management of the property is outsourced to an Austrian property manager, which performs support and technical management activities in respect of the property.
- Titanium did not charge any Austrian VAT on the rent received. It believes that the let property in Austria is not a fixed establishment for VAT purposes, because it does not have any of its own personnel in Austria. As a result of the absence of such a fixed establishment, the VAT liability is reverse-charged to the Austrian tenants.
- However, the Austrian tax authorities take the view that the property does result in a fixed establishment in Austria. The consequence of this argument is that Titanium should charge VAT to the tenants, because there is no reverse-charged VAT.
Titanium Ltd (Case C-931/19)

• To be noted that the concept of fixed establishment has been interpreted in such a way that there must be a certain degree of permanence and an appropriate structure of personnel and technical resources to perform services.

• According to the Austrian referring court, it is unclear whether both characteristics (personnel and technical resources), must be complied with cumulatively or whether that is only necessary when the business activity is not possible without personnel and technical resources.

• In case where the CJEU concludes that it is sufficient for a fixed establishment to use the personnel of another contracted business and the deployment of its own personnel is not necessary, the practical consequences would be huge.
Other issues regarding the supply of goods

- Tax administrations can only conclude to the existence of a fixed establishment if the conditions set out on the VAT Implementing Regulation are fulfilled, in case of supply of services.

- A contrario, carrying out transactions consisting in supplies of goods cannot create a fixed establishment.

- For example, the mere existence of a warehouse in a Member State does not in itself allow characterising this to be a fixed establishment in that jurisdiction.

- Moreover, even in the situation where a warehouse would actually meet the conditions of Article 11 of the VAT Implementing Regulation and would qualify as a fixed establishment, it cannot be automatically considered that all goods supplied to the Member State where that fixed establishment is located are necessarily transferred to the warehouse, thereby refusing that the goods could have been directly supplied to customers of that Member State.
Other issues regarding the supply of goods

• At the 113th meeting of the VAT committee, the implementation of the Quick Fixes was discussed.

• This included a discussion on whether the (new) call-off stock arrangements would result (or not) in a Fixed Establishment for VAT purposes for the owner of the consignment stock in another Member State.

• The outcome of the VAT Committee was also mentioned in the Explanatory Notes on Quick Fixes which were issued end of December 2019.
## Fixed establishment v. Permanent establishment

<table>
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<tr>
<th>Fixed establishment &amp; VAT purposes (place of taxation)</th>
<th>Permanent establishment &amp; corporate income tax purposes</th>
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<tr>
<td>• FE plays an important role in distributing taxing powers between Member States and Member States and third countries, both in the situation where FEs provide and receive services (articles 44 and 45 VAT Directive)</td>
<td>• the use of the concept of a PE is to determine the right of a Contracting State to tax the profits of an enterprise of the other Contracting State (see OECD Model Convention)</td>
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Fixed establishment v. Permanent establishment

- The fixed establishment concept for VAT is an autonomous concept that has its own interpretation independently from the interpretation of permanent establishment used for income tax purposes (double tax treaties).

- The FE and PE concepts are distinct. A PE for the purpose of direct taxes should therefore not automatically lead to a FE for indirect taxes or vice versa.

- The CJEU in case C-210/04, “FCE Bank” stated that with regard to the FE concept: “39. It should be noted that the OECD Convention is irrelevant since it concerns direct taxation whereas VAT is an indirect tax”.

- Nevertheless, the concept of PE and FE have some main similarities regarding the requirements that an entrepreneur should be a place of business with a certain degree of permanence and should have human and technical resources.

- The two concepts raise the same doubts as to whether or not there is a PE/FE: e.g. whether a subsidiary can be a PE/FE of the parent company, the treatment of an establishment carrying out preparatory and auxiliary activities and the PE/FE status in the case of a server, computer equipment, a website, etc. in a State while no personnel is present.
Fixed establishment v. Permanent establishment

- VAT Expert Group (Draft Opinion on Welmory (Case C-605/12)):
  - “There is increasing evidence that tax authorities incorrectly conclude that an FE exists on the basis of the existence of a PE, and vice versa. This gives rise to legal uncertainty, disputes, increased costs, the imposition of penalties and, in some cases criminal sanctions, even though there is no VAT risk and loss for the tax authorities”.
Remarques

- The concept of Fixed Establishment for VAT purposes still remains a concern for business
- In the same time, the number or disputes related to alleged presence of Fixed Establishment for VAT purposes is increased these last years
- So, this concept of Fixed Establishment still poses interpretation issues for national judges when the respective location rules are applied and national tax authorities make VAT assessments and impose taxes
- The case-law of the ECJ is useful giving guidance in that respect
- The developments to the Permanent Establishment concept due to the BEPS project (direct taxation) may influence also the concept of fixed establishment for VAT purposes
Further reading

• M.L. Schippers ; J.M.B. Boender, VAT and fixed establishments: mysteries solved?, [https://core.ac.uk/download/pdf/43308877.pdf](https://core.ac.uk/download/pdf/43308877.pdf)

Thank you!