

Giurisprudenza della Corte di Giustizia in materia di sistema comune di imposizione sul valore aggiunto



Sustainable issues: Fixed Establishments in the VAT-
Jurisprudence of the CJEU

Agenda

- I. Relevance of a fixed establishment in VAT
- II. Relation between place of business and fixed establishment
- III. Recent case law of the CJEU
 - (1) Personal staff required ? (Titanium – C-931/19)
 - (2) Subsidiary as a fixed establishment ? (Dong Yang – C-547/18, Berlin Chemie – C-333/20)
 - (3) Pending cases (Adient - C-533/22; Cabot Plastics Belgium – C-232/22)

II. Relevance of a fixed establishment in VAT

- Settled case-law of the Court: The object of the provisions determining the point of reference for tax purposes of supplies of services is to avoid, first, conflicts of jurisdiction which may result in double taxation and, secondly, non-taxation.
- Art. 44 and 45 VAT Directive: Place of supply of services
- Art. 192a seq. VAT Directive: Persons liable for payment of VAT to the tax authorities
- Art. 3 lit. a Directive 2008/9/EC (refund directive): Refund of value added tax or right of deduction (Art. 168 VAT Directive)

III. Relation between place of business and fixed establishment

CJEU, C-605/12 – Welmory (points 55 seq.):

- The place where the taxable person has established his business as primary point of reference appears to be a criterion that is objective, simple and practical and offers great legal certainty, being easier to verify than, for example, the existence of a fixed establishment.
- Furthermore, the place of business is mentioned in the first sentence of Article 44 of the VAT Directive, whereas the fixed establishment is mentioned only in the following sentence. That sentence, introduced by the adverb ‘however’, can only be understood as creating an exception to the general rule set out in the previous sentence.
- A fixed establishment must be 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.



IV. Recent case law of the CJEU

1. Personal staff required to have a fixed establishment ?

- ECJ, Judg. of 3 June 2021 – C-931/19, Titanium

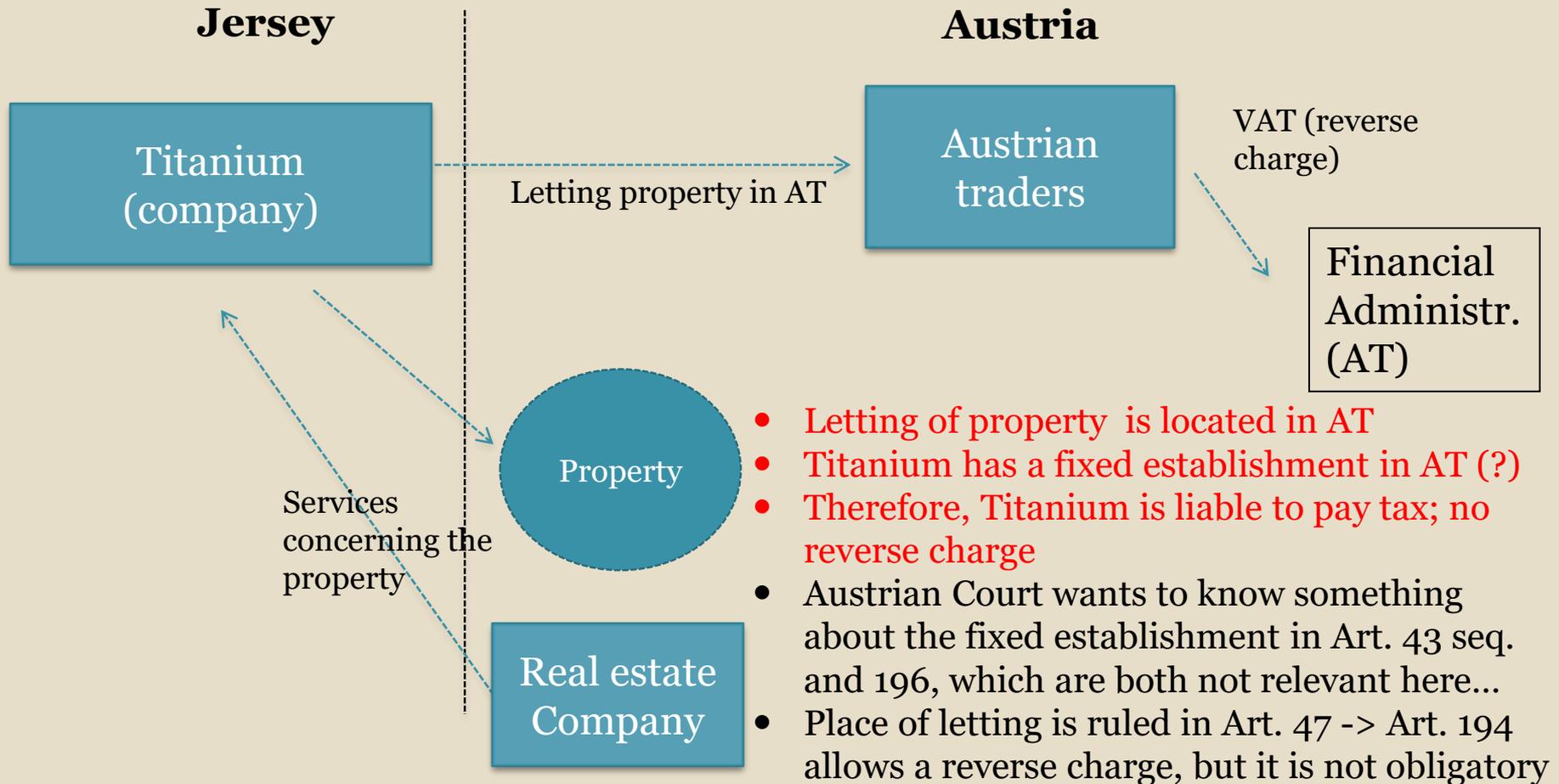
2. Subsidiary as a fixed establishment ?

- ECJ, Judg. of 7 May 2020 – C-547/18, Dong Yang
- ECJ, Judg. of 7 April 2022 – C-333/20, Berlin Chemie

3. Pending Cases

- C-533/22 – Adient (RO)
- C-232/22 – Cabot Plastics Belgium (BE)

ECJ, Judg. of 3 June 2021 – C-931/19, Titanium





ECJ, Judg. of 3 June 2021 – C-931/19, Titanium

Question:

Is the concept of “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 whereby the supplier authorises a third party to do something that the latter could not do without such authorisation (*Duldungsleistung*) – that property, even without human resources, be regarded as a “fixed establishment”?



ECJ, Judg. of 3 June 2021 – C-931/19, Titanium

Judgment:

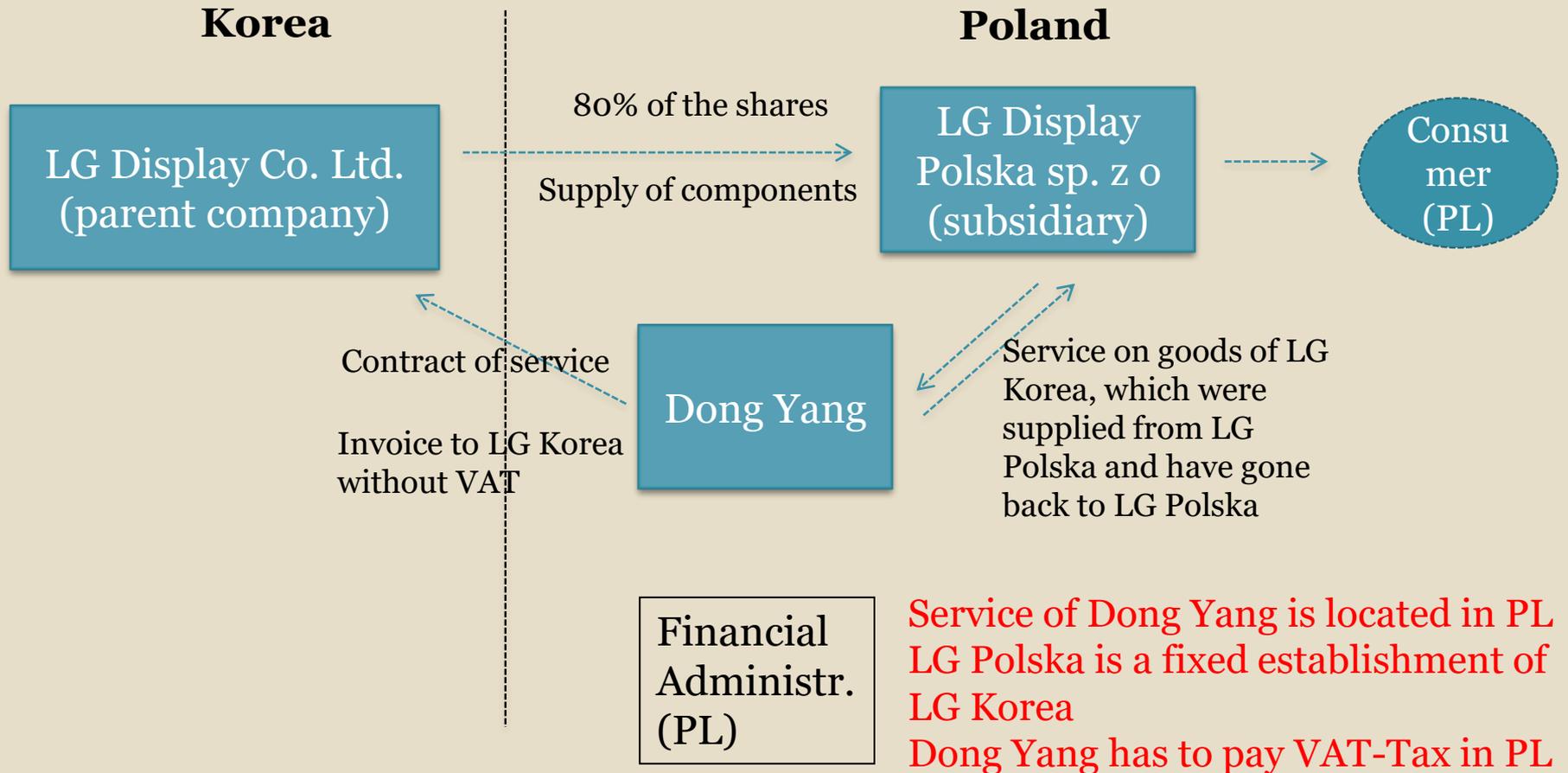
A property which is let in a Member State, in the circumstance where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a fixed establishment within the meaning of Article 43 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and of Articles 44 and 45 of Directive 2006/112, as amended by Council Directive 2008/8/EC of 12 February 2008.

ECJ, Judg. of 3 June 2021 – C-931/19, Titanium

Problems:

- (1) Question is stupid and badly done -> the Republic of Austria concludes that the concept of ‘fixed establishment’ has nothing to do with the case at issue in the main proceedings, which justifies the request for a preliminary ruling being declared inadmissible.
- (2) CJEU: Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling.
- (3) Only one “new” point (45) as “reasoning”: ”A property which does not have any human resource enabling it to act independently clearly does not satisfy the criteria established by the case-law to be characterised as a fixed establishment within the meaning of the VAT Directive.”

ECJ, Judg. of. 7 May 2020 – C-547/18, Dong Yang



ECJ, Judg. of. 7 May 2020 – C-547/18, Dong Yang

Opinion of the Advocate General Kokott:

(29) It is clear from the wording of the VAT Directive alone that a dependent but legally autonomous subsidiary cannot at the same time be regarded as a fixed establishment of its parent company. Article 44 of the VAT Directive refers to a single taxable person who has established his business in one place and has a fixed establishment in another. However, a parent company and a subsidiary are not one taxable person, but two.

(34) Therefore, in line with the view taken by the Commission, the first question can be answered with a clear ‘no’. The mere fact that a company from a third country has a subsidiary in a Member State does not mean that that subsidiary is a fixed establishment.

ECJ, Judg. of. 7 May 2020 – C-547/18, Dong Yang

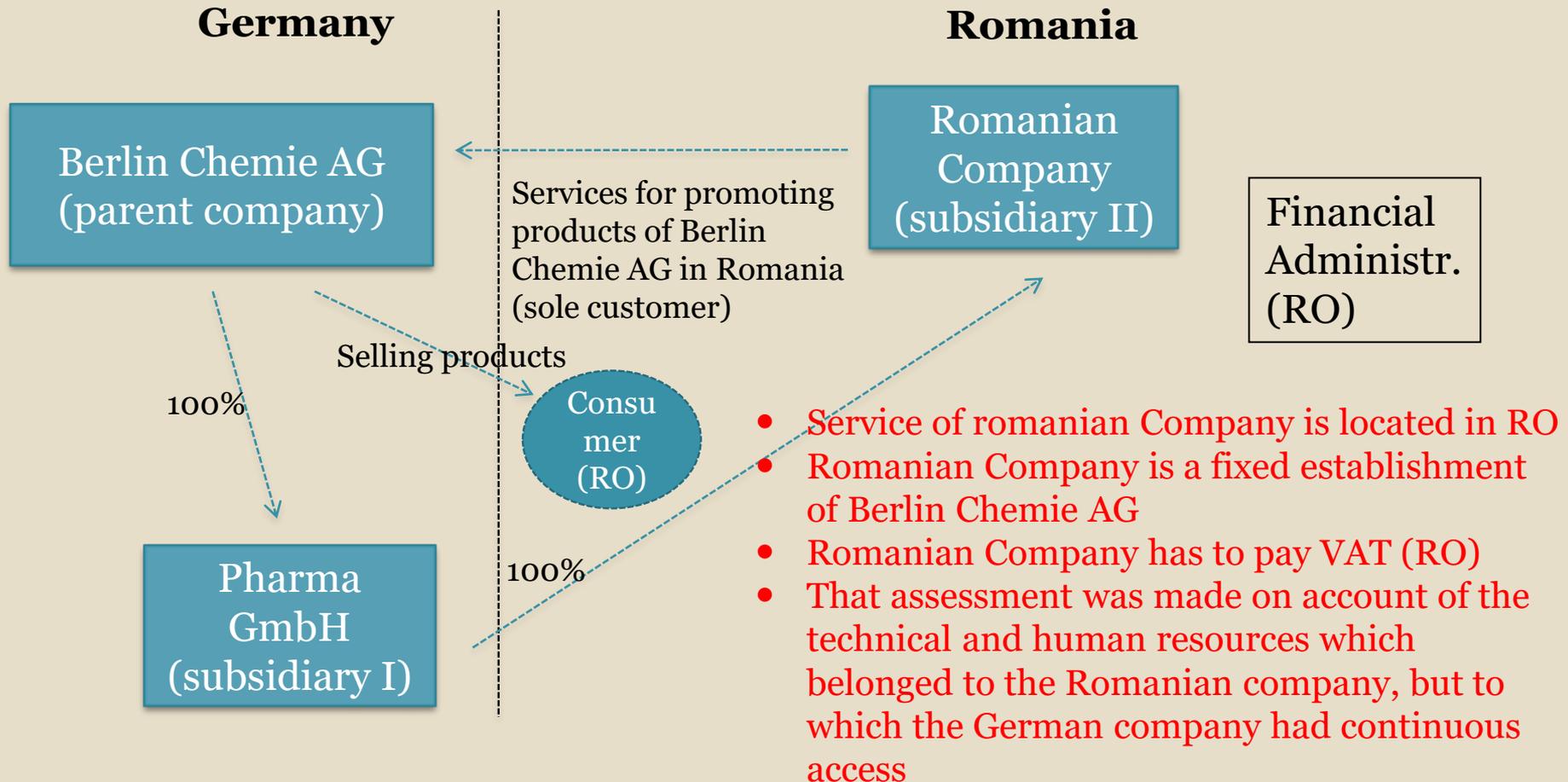
Judgment:

(30) Nevertheless, it cannot be ruled out that the subsidiary held for the purposes of conducting economic activity by the parent company established in South Korea may constitute a fixed establishment of that parent company in a Member State of the European Union...

But:

(33) It follows from the foregoing considerations 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.

ECJ, Judg. of 7 April 2022 – C-333/20, Berlin Chemie





ECJ, Judg. of 7 April 2022 – C-333/20, Berlin Chemie

Question:

(1) If a company that carries out supplies of goods in the territory of a Member State other than that in which it has established its business is to be regarded as having ... a fixed establishment in the State in which it carries out those supplies, is it necessary for the human and technical resources employed by that company in the territory of that Member State to belong to it, or is it sufficient for that company to have immediate and permanent access to such human and technical resources through another affiliated company which it controls since it holds the majority of its shares?



ECJ, Judg. of 7 April 2022 – C-333/20, Berlin Chemie

Judgment:

(37) Thus, there cannot be a fixed establishment, first, without a discernible structure, which is evidenced by the existence of human or technical resources. Second, that structure cannot exist only occasionally.

(40) Therefore, the existence of a fixed establishment of a company established in another Member State may not be deduced merely from the fact that that company has a subsidiary there.

(41) Although it is not a requirement for a taxable person itself to own the human or technical resources ..., it is however necessary for that taxable person to have the right to dispose of those human and technical resources in the same way as if they were its own, on the basis, for example, of employment and leasing contracts which make those resources available to the taxable person and cannot be terminated at short notice.

ECJ, Judg. of 7 April 2022 – C-333/20, Berlin Chemie

Judgment:

(52) First of all, it is important to distinguish the services supplied by the Romanian company to the German company from the goods which the German company sells and supplies in Romania. They are distinct supplies of services and goods which are subject to different schemes of VAT.

(54) Lastly, it is apparent from the documents before the Court that, in the case in the main proceedings, the human and technical resources which were made available to the German company by the Romanian company and which, according to the Romanian tax authorities, make it possible to establish the existence of a fixed establishment of the German company in Romania, are also those through which the Romanian company supplies the services to the German company. Yet, the same means cannot be used both to provide and receive the same services.

Pending cases

1. C-232/22 – Cabot Plastics Belgium (BE)

- similar problems like in Berlin Chemie and Dong Yang
- Company of the same group as a fixed establishment?
- Attribution of human and technical resources to a third person

2. C-533/22 – Adient (RO)

- similar problems like in Berlin Chemie and Dong Yang
- Subsidiary as a fixed establishment?
- Differences between a fixed establishment in Art. 44 and Art. 192a?

Thank you for your attention

