In *Berlin Chemie A. Menarini SRL (C-333/20)* the taxpayer was a German company which supplied pharmaceutical products including to wholesalers in Romania on a regular basis since 1996. The German taxpayer had a Romanian affiliate which had been created in 2011 specifically for the purpose of providing services to the German company. The taxpayer and its Romanian affiliate entered into a contract for marketing and advertising services under which the Romanian affiliate agreed to promote the taxpayer’s products in Romania. The Romanian affiliate was also responsible for obtaining regulatory approvals to enable the taxpayer to distribute its products in Romania as well as taking orders for pharmaceutical products from wholesale distributors and providing assistance in clinical studies and other research and development.

The taxpayer paid the Romanian company a monthly fee based on its costs plus an uplift of 7.5%. The Romanian company considered that the place of supply of the services was in Germany where the customer was established. The Romanian tax authorities argued however that the services were received by the German company in Romania where it had a fixed establishment in the form of the human and technical means of the Romanian affiliate, including more than 200 employees and computers and operating systems, to which the German company had uninterrupted access. Consequently, argued the Romanian tax authority, VAT was due in Romania.

Answering to the three questions proposed by the referring court, the Court confirmed that in order for a taxpayer to have a ‘fixed establishment’ it must have a suitable structure in terms of technical and human resources of a sufficient degree of permanence to enable it to receive and use the services provided to it. The Court confirmed that the relevant case-law demonstrated that a company registered in one Member State does not have a fixed establishment in another Member State solely by virtue of its affiliate making human and technical resources available to it on an exclusive basis. While it was possible for a subsidiary to constitute the fixed establishment of its parent company, it would require that the parent had the power to dispose of the human and technical resources of the subsidiary in the same way as it would if they belonged to it; it however would be too restrictive to say that the staff would have to be employed by the parent company itself and that the technical resources would have to belong to the parent company.

The Court made the following further observations to assist the referring court to reach its final conclusion:

- The fact that the German company was the sole customer of its Romanian affiliate would not be determinative of whether the affiliate's human and technical resources constituted the taxpayer’s fixed establishment.
- The extent of the authority of the putative fixed establishment to take decisions for the main establishment and the fact that the affiliate’s services were capable of having a direct influence on the volume of the sales of the German company was not relevant to the question of whether a fixed establishment existed in the form of the human and technical resources of the affiliate. In any case, the Romanian company was not involved in the sale and supply of products, limiting their role to collection of orders from new Romanian wholesale distributors then forwarded to the German company.

**DLA Piper comment:** Another important Court decision which reaffirmed the scope (essentially to identify the territory where a supply of service has to be taxed for VAT purposes) and concept of the “fixed establishment” referred by the EU
VAT Directive (art. 44) and art. 11 of the Implementing Regulation 282/2011.

Firstly, the Court reiterated that pursuant to art. 11 of Implementing Regulation a fixed establishment is characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources. These elements cannot be presumed by the mere presence of a controlled subsidiary (the Romanian company) in the host country which carries out supplies of services to the mother company (the German company) but must be verified in the light of the concrete commercial and economic reality. A mere formalistic approach based on the legal status of the entity involved (i.e. subsidiary) per se cannot imply a fixed establishment for VAT purposes.

For said reason, under a substance over form approach, the Court made another important statement: it is not required under the EU VAT legislation that the human and technical resources characterizing the fixed establishment are directly owned by a taxable person in another Member State (see par. 41). It is sufficient that the latter have the “right to dispose of them”. Otherwise, the primary scope of the “fixed establishment” – i.e. identify the country of consumption for the correct application of VAT – would be frustrated by a restrictive application of said art. 11 of the Implementing Regulation.

Again, ascertaining the presence of the “right to dispose” requires a detailed analysis that has to be performed by the referring court on the basis of all the facts and circumstances of the specific case. However, the Court also stated that on the basis of the description of facts made by the referring court, the German company did not have its own human and technical resources in Romania since these elements belonged to the Romanian company which limited its activity to collect orders from a local wholesale dealer and forward them to the German company, without being involved in any negotiation or sale process.

In this respect, the Court made another important statement solving one of the main concerns of the referring court which had doubts as to whether a legal entity (the Romanian company) may be both the fixed establishment of another legal person (the German company) and the service provider of such fixed establishment. The Court, indeed, affirmed that the same human and technical means cannot be used both to provide and receive the same service. Thus, if such means are at disposal of the local supplier (the Romanian company) they cannot be at the same time the pillars of an alleged fixed establishment.

It followed that no fixed establishment occurs where the marketing, regulatory, advertising and representation services provided by the Romanian company seem to be received by the German company, which uses its human and technical resources situated in Germany to conclude and perform the contracts of sale with distributors in Romania.

**DLA Piper comment:** Another (surely not the last one) brick in the wall of the fixed establishment concept after previous judgments on that matter (among others, case C-547/18, Dong Yang Electronics sp. Z o.o; case C-931/19. Titanium ltd), which revealed how different is the purpose of such concept if compared with the notion of “permanent establishment” relevant for income tax purposes under OECD guidelines. Two different concepts that often coexist.

The case is helpful as surely it will only be on rare occasions that access to third party resources is sufficient to create a fixed establishment. The case makes it clear that overseas resources cannot both constitute a fixed establishment that makes and receives supplies.

Operators must pay attention to the factual and economic aspects underneath cross-border arrangements, especially within multinational groups where roles and responsibilities of local subsidiaries could raise doubts on the hidden existence of fixed establishment for VAT purposes every time the actual role goes beyond the formal one.

In I GmbH (C-228/20), the taxpayer was a German-based private limited liability company which managed and operated hospitals providing neurological medical care. The taxpayer considered its medical services to be exempt but the German tax authorities determined that a significant portion of the private hospital company’s transactions were not exempt on the basis that the company was not considered a specific kind of approved hospital under German law. However, the private hospital company argued that its transactions were exempt under article 132(1)(b) of the VAT directive because it carried out medical services comparable with those of public hospitals. Article 132(1)(b) of the PVD exempts from VAT “hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law.”

The first question for the Court concerned the legality under EU law of the specific rule under German law that services of hospitals may only fall within the VAT exemption for medical care if the relevant hospital is on a regional approval list. The Court found that the German national rule was precluded by the VAT Directive in so far as it resulted in comparable
private hospitals being treated differently as regards the VAT exemption (which, on the facts, appeared to be the case)

A second question for the Court concerned what factors should be taken into account in determining whether medical care is being supplied under social conditions comparable with those applicable to bodies governed by public law within the meaning of the exemption in the VAT Directive. Noting that the Directive itself does not elaborate on the meaning of such ‘social conditions’ the Court looked to the purpose of the exemption to inform its meaning; since the purpose of the exemption was to reduce the cost of medical care and make that care more accessible to individuals, social conditions aimed at fulfilling that purpose would be the appropriate kind to take into account. For example, whether fixed-rate daily fees are calculated in a comparable way to a hospital governed by public law and whether the services supplied by private hospitals are covered by the social security regime or under contracts concluded with public authorities so that the costs borne by patients are comparable with those borne by patients of public hospitals.

Further, the private hospital’s performance in terms of staff, premises and equipment and the cost-efficiency of its management may be taken into consideration if public hospitals are subject to comparable indicators and the indictors contribute to achieving the exemption’s purpose of reducing medical costs and making high-quality care more accessible to individuals.

**DLA Piper comment:** The VAT exemption of medical care cannot be excluded to private hospital companies every time such supplies of services are rendered “under social conditions comparable with those applicable to bodies governed by public law” as requested by art. 132(1)(b) of the VAT Directive.

The discretion granted to Member States by articles 132 and 133 of the VAT Directive cannot be equated with the authorization to carry out certain activities in accordance with national legislation, if the national authorities are not to be deprived of such power of discretion.

It follows, according to the Court (in contrast with the referring court view), that the German law is not compliant with the VAT Directive since it grants the VAT exemption regime to a private hospital if that establishment is approved in accordance with the national provisions relating to general health insurance regime (following its inclusion in the land-level hospital plan or the conclusion of care supply contracts with statutory health insurance or substitute funds). This situation in the Court’s view, results in comparable private hospitals being unlawfully treated differently as regards the VAT exemption laid down by the VAT Directive.

In order to grant the VAT exemption to private hospital medical care, the Court recalled that the VAT Directive does not define the concept of “comparable social conditions” and, hence, made reference to previous judgments (case C-262/08, CopyGene and C-211/18, Idealmed III) where specific factors may be taken into account to verify if such VAT Directive’s requirement is met. In particular, the Court made reference to: a) whether the services are in the public interest; b) the fact that the services are covered by the social security scheme; c) the circumstance that these services are supplied under contracts concluded with public authorities of a Member State, at prices fixed by those contracts and whose costs are partially borne by the social security institutions of that Member State.

Indeed, the scope of the “comparable social conditions” requirement is to avoid the services offered by private hospital benefiting from the VAT exemption even if those establishments are not subject to the same social obligations as establishments governed by public law.

Therefore, in order to ascertain if the services of private hospitals may be subject to VAT exemption regime, reference has to be made to the regulatory conditions set forth by the applicable legislation to which public hospitals are subject which are suitable to achieve the objectives underneath the VAT exemption regime (the reduction of cost of medical care and making more accessible high-quality cares to individuals).

To this end, ascertaining whether or not fixed-rate daily fees are calculated in similar ways in private and public hospitals may help, especially if the final costs supported by private patients are comparable to those supported by public hospitals patients.