

SHORT GUIDEBOOK on FIXED ESTABLISHMENT for the Sellers to be registered on Allegro

The purpose of this SHORT GUIDEBOOK on FIXED ESTABLISHMENT (GUIDEBOOK) is to present general information regarding a FIXED ESTABLISHMENT and its potential existence in Poland or other EU countries (as this aspect may be important for the Sellers and Allegro from the perspective of VAT obligations). The GUIDEBOOK contains general guidelines, as well as some practical tips for the Sellers which may be helpful during an analysis of particular cases. Nevertheless, this GUIDEBOOK should not be treated as any sort of individual tax advice regarding classification of potential existence of a FIXED ESTABLISHMENT or an assessment of tax position in individual Sellers' cases. In particular situations, the Sellers should perform relevant analysis of all aspects and circumstances connected with their operations in Poland or other EU countries from the perspective of the discussed FIXED ESTABLISHMENT in order to assess their situation in this respect, while it should be remembered that the potential existence of FIXED ESTABLISHMENT of a given Seller in the EU may trigger relevant VAT obligations also for the Seller themselves.

If you are a Seller in the middle of the process of registration on Allegro, remember that you have to check whether you possess a so-called FIXED ESTABLISHMENT in Poland or another EU country. It may trigger VAT reporting obligations for both you and Allegro. This GUIDEBOOK refers only to aspect of FIXED ESTABLISHMENT for VAT purposes and does not cover other tax aspects and potential obligations that may arise in Poland or other EU countries regarding operations of foreign entities (e.g. in area of corporate tax).

1. Why is identifying FIXED ESTABLISHMENT so important?

As of July 1, 2021, depending on the details of the transactions performed by the Seller via Allegro and the existence of the Seller's FIXED ESTABLISHMENT on the territory of the EU (or a lack thereof), **either the supplier or Allegro** can be obliged to collect VAT for certain transactions carried on the territory of the EU and declare it to relevant VAT authorities by a relevant VAT reporting system existing in the EU. Proper information regarding the existence of a FIXED ESTABLISHMENT in the EU (including Poland) will help you and Allegro determine who and how should settle and collect VAT for particular supplies.

Note that according to VAT regulations which are effective in the European Union (including Poland) as of July 1, 2021 in the case of **distance sales of goods** to customers (**B2C relation**) **facilitated by electronic platform such as Allegro**, the VAT due in Poland or other EU countries and may need to be settled by the platform (instead of the Seller) for such supplies. This may be the case in the following situation:

- **goods** which were already released into free circulation in the EU and goods which are located in the EU and supplied to customers in the EU, irrespective of their value, **when the Seller is not established in the EU** i.e. **has no seat or fixed establishment** within the EU, even if such Seller has a VAT registration in any EU country.

Consequently, if you (i) do not have a seat in the EU, but (ii) you do have a FIXED ESTABLISHMENT on the territory of the EU, and (iii) the goods which were already released into free circulation in the EU and goods which are located in the EU are supplied by you to customers in the EU, irrespective of their value - you as a Seller (not Allegro) should be obliged to settle VAT on this transaction using a proper VAT rate based on rules of the buyer's country. For example, in case the Seller from China has a FIXED ESTABLISHMENT in the EU and supplies goods via Allegro to customer in Germany (in B2C relation), VAT will be due for that supply in Germany, and the Seller will be obliged to collect the VAT and pay the VAT to tax authorities there.

On the other hand, in case you as the Seller (i) do not have a seat in the EU and (ii) you do not have a FIXED ESTABLISHMENT on the territory of the EU, Allegro will be obliged to collect VAT and declare it to tax authorities – in the case of transactions where you supply via Allegro platform goods which were already released by you into free circulation in the EU and goods which are located in the EU, and these goods are supplied to customers in the EU (irrespective of their value). It does not mean that you will have no VAT obligations in the EU with respect to this supply (you will still have VAT reporting obligations, however, different than in case where you would have a FIXED ESTABLISHMENT in the EU). It is important to know that this rule will apply even if you are registered for VAT purposes in the EU, as the rule applies each time when the supply is performed by the non-EU Seller having no FIXED ESTABLISHMENT in the EU (even if such Seller has a VAT registration in the EU).

Remarks presented in this GUIDEBOOK generally refer to rules and tax practice regarding the existence of a FIXED ESTABLISHMENT in Poland. However, as Polish rules of FIXED ESTABLISHMENT determination are taken from the EU regulations and general EU guidelines (resulting, among others, from European court rulings), analogous rules of FIXED ESTABLISHMENT determination should apply in all EU countries (although we cannot rule out the possibility that the tax practice of every single EU country may in specific aspects differ from the Polish tax practice). Therefore, if based on the comments resulting from this GUIDEBOOK you already know that you have a FIXED ESTABLISHMENT in Poland or in other EU country, you should inform Allegro during registration on Allegro or by editing your profile's tax information. If you are not sure if you

have a FIXED ESTABLISHMENT in Poland or another EU country, but based on this GUIDEBOOK you suspect that you do, contact your tax advisor to have that verified carefully (as it may have significant impact on determining VAT obligations within the EU – for you and for Allegro).

IMPORTANT: A potential existence of your FIXED ESTABLISHMENT in the EU may trigger relevant obligations also for you!

Moreover, information regarding the existence of a FIXED ESTABLISHMENT of the Seller is also important for settlements between the Seller and Allegro. Allegro charges the Sellers for provided services (and issues invoices documenting them). In order to comply with the Polish VAT regulations regarding services rendered to the Sellers without a seat in Poland (foreign entities), information regarding your potential FIXED ESTABLISHMENT in Poland will, among others, let Allegro know whether it should issue an invoice:

- **with a Polish VAT** and as a consequence output VAT resulting from Allegro service should be included in the invoice issued to the Seller and paid by Allegro in Poland - such situation will happen in case the Seller has a FIXED ESTABLISHMENT in Poland to which the Allegro provides services (since VAT is generally neutral, it should be recoverable for the Seller according to relevant general VAT recovery rules), or
- **without a Polish VAT** - such a situation will happen if the Seller does not possess a FIXED ESTABLISHMENT in Poland (or if such FIXED ESTABLISHMENT exists but the Allegro does not render services for the needs of that FIXED ESTABLISHMENT).

The above process is very important, because failure to comply with the VAT rules concerning FIXED ESTABLISHMENT could lead to tax arrears in Poland and trigger risks for both Allegro and the Seller.

IMPORTANT: Inform Allegro if you possess a FIXED ESTABLISHMENT in Poland or any other EU country.

Below you will find additional comments on the FIXED ESTABLISHMENT. Examples concern mostly the Polish perspective but these comments are applicable also to other EU countries.

2. Is a FIXED ESTABLISHMENT the same as a BUSINESS ESTABLISHMENT (SEAT)?

No. Business establishment is the place where you have established your business and where main functions of the business' central administration are carried out. This will usually be the head office, headquarters, or 'seat' from which the business is run. This is where essential day-to-day decisions concerning the general management of the business are taken. A FIXED ESTABLISHMENT in practice is something different while it may exist "in addition" to a business establishment.

3. Is a FIXED ESTABLISHMENT the same as a PERMANENT ESTABLISHMENT (used for the corporate income tax purposes)?

No. The rules for determination of potentially creating a FIXED ESTABLISHMENT for VAT purposes are different from the rules applicable for determination of permanent establishment for the corporate income tax (CIT) purposes. As a result, in specific situations, depending on circumstances and model of operations in Poland, a foreign entity may:

- (i) possess a FIXED ESTABLISHMENT for VAT in Poland or another EU country without having a permanent establishment in Poland for CIT purposes;
- (ii) possess a permanent establishment in Poland or another EU country for CIT purposes without having a FIXED ESTABLISHMENT for VAT in Poland or another EU country.

4. Does REGISTERING for the VAT purposes automatically create a FIXED ESTABLISHMENT?

No. The formal VAT registration is not enough to recognize that a taxpayer has a FIXED ESTABLISHMENT. In many cases foreign entities registered for the VAT purposes in a given EU country do not possess a FIXED ESTABLISHMENT in that country. A certain minimum scale of activity is needed to prove that the activity is carried out by a foreign entity in a given EU country constantly (a permanence aspect) and with a use of relevant human and technical resources.

NOTE: For a fixed establishment to be considered as such, it should have a sufficient degree of permanence and a suitable structure in terms of human and technical resources to receive and use or to make the respective supplies. Simply having a VAT identification number does not in itself mean that an establishment qualifies as a fixed establishment.

Therefore, it is crucial to verify the model of operations of the Seller as a foreign taxpayer in particular EU countries to verify if a FIXED ESTABLISHMENT is created (the indicators of the existence of a FIXED ESTABLISHMENT must be met cumulatively).

5. What actually a “FIXED ESTABLISHMENT” is?

A **FIXED ESTABLISHMENT** is an establishment in the country other than the country of business establishment (seat), which has the **human and technical resources** necessary for providing or receiving services permanently and which must have all of the following three features:

- ✓ **permanence** – only temporary presence does not create a FIXED ESTABLISHMENT.

NOTE: It is important how long you are going to conduct your business activity in Poland.
(see point 5a below to make sure what it means that the place of running a business is permanent);

- ✓ **suitable structure** – technical and human resources located in Poland;

NOTE: It is important if you have employees, staff, or representatives in Poland but also if you have a warehouse or an office, or have an access to such places in Poland.
(for details see point 5b below)

- ✓ **independence and autonomy** – who and where takes decisions that affect your Polish business.
(for details see point 5c below).

NOTE: Although it may seem that usually a FIXED ESTABLISHMENT operates as a **branch or an agency**, it may not necessarily be the case. There are number of situations where a FIXED ESTABLISHMENT exists in a given country without any “formalized” presence.

In practice, a business may possess several FIXED ESTABLISHMENTS in different countries.

For more information as regards legal framework, please refer, among others, to Article 11 of the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

If you need examples, go to point 6.

5a. What is a PERMANENT PRESENCE?

Permanence as a rule means the intention to carry out business in Poland permanently (or at least on a long-term basis).

There is no rule on how much time must pass before a place of running a business becomes ‘fixed’ (it may depend on the nature of the activities).

No fixed minimum period has been established in the VAT regulations in this respect.

If your presence in Poland is only temporary, you should not possess a **FIXED ESTABLISHMENT** in Poland.

5b. What are HUMAN AND TECHNICAL RESOURCES?

Human resources are employees or other people acting for the Seller in Poland (these may not be necessary your own employees but those of a third party, still effectively operating for you).

By **technical resources**, the tax practice understands properties (such as warehouses or offices) or equipment necessary for operating in Poland which remain at the Seller’s disposal in Poland.

In general, you need to have both human and technical resources under control in Poland to have a fixed establishment (still, it may depend on the type of your activities).

5c. What are AUTONOMY and INDEPENDENCE*?

Human and technical resources held in Poland must be **autonomous and independent** to be able to receive and use the supplied services for its own needs.

In other words, your structure in Poland (human and technical resources) should have capability to act independently.

There is an **autonomy** when the Seller - with the use of their own or controlled resources in Poland - is able to receive and make use of services regardless of the headquarters (is self-sufficient).

*assessment regarding the autonomy and independence is very difficult and often judgmental

6. Examples of what is and what is not a FIXED ESTABLISHMENT

In order to illustrate what the FIXED ESTABLISHMENT could mean in practice, find below a few examples of situations in which a FIXED ESTABLISHMENT exists or not.

FIXED ESTABLISHMENT

- an overseas company that sets up a branch comprising staff and offices in Poland to provide services or supply goods - the Polish branch;
- an overseas company that holds or has access to a property (such as a warehouse) and possesses or involves employees (even formally employed by a third party or a subcontractor) in Poland, and sells goods or services, for example, for the benefit of local customers.

NO FIXED ESTABLISHMENT

- an overseas company that has no office, warehouse, or staff in Poland, and sells goods to Polish customers directly from abroad.

CASES RAISING DOUBTS

- an overseas company that rents a warehouse in Poland from which goods are sold for the benefit of local customers (see point 5 in this respect).

Supplies from outside the EU: Sometimes the Sellers decide to supply goods directly from the country outside the EU, without any involvement of human or technical resources in the EU (including Poland). Assuming that in such case goods will be transferred directly from a country outside the EU to the customer within the EU (the Seller will neither warehouse goods in any EU country, purchase fulfilment services, nor involve any other personal and technical resources), a FIXED ESTABLISHMENT should not be created in the EU for those supplies.

NOTE: Based on available guidelines (court rulings, local country tax practice), a FIXED ESTABLISHMENT does not require owning technical and human resources in a given country, as long as the availability of other similar “facilities” is comparable to the availability of own facilities.

Thus, a FIXED ESTABLISHMENT potentially may be created in Poland also if, for example:

- employees of a Polish service provider or the subcontractor are actually controlled by a foreign entity (as if they were their own employees)
- foreign entity has actual control over technical assets or premises of a Polish service provider or a subcontractor
- a Polish subcontractor is fully devoted to cooperation with a given foreign entity and this cooperation is permanent
- a Polish service provider or a subcontractor is not acting as a fully independent service provider (rather as an entity controlled by a foreign entity, without relevant autonomy).

If it is your case, contact your tax advisor as detailed analysis of the situation could be required.

7. Cases raising doubts (requiring detailed analysis) – warehousing, fulfilment services

Warehousing: In order to ensure that customers get their products as quickly as possible, Sellers sometimes warehouse goods in Poland. Depending on the scope of activities related to such warehousing, it can create a FIXED ESTABLISHMENT or not.

For example, if goods are transported from another country to a warehouse in Poland with an intention of supplying those goods at a later stage to customers, and the warehouse is owned (or rented) and potentially directly run by the supplier with their own means present in the country where the warehouse is located (as mentioned above), this warehouse could be seen as their fixed establishment.

Fulfilment services: In order to ensure that customers get their products as quickly as possible, Sellers sometimes purchase so-called fulfilment services to store their goods in local warehouses in Poland.

Fulfilment services (logistic services), usually consist of a number of various activities, such as:

- ✓ product collection
- ✓ warehouse management
- ✓ delivery route planning, distribution, including the organization of product transport
- ✓ delivery of products
- ✓ collection of receivables or administrative and information services, etc.

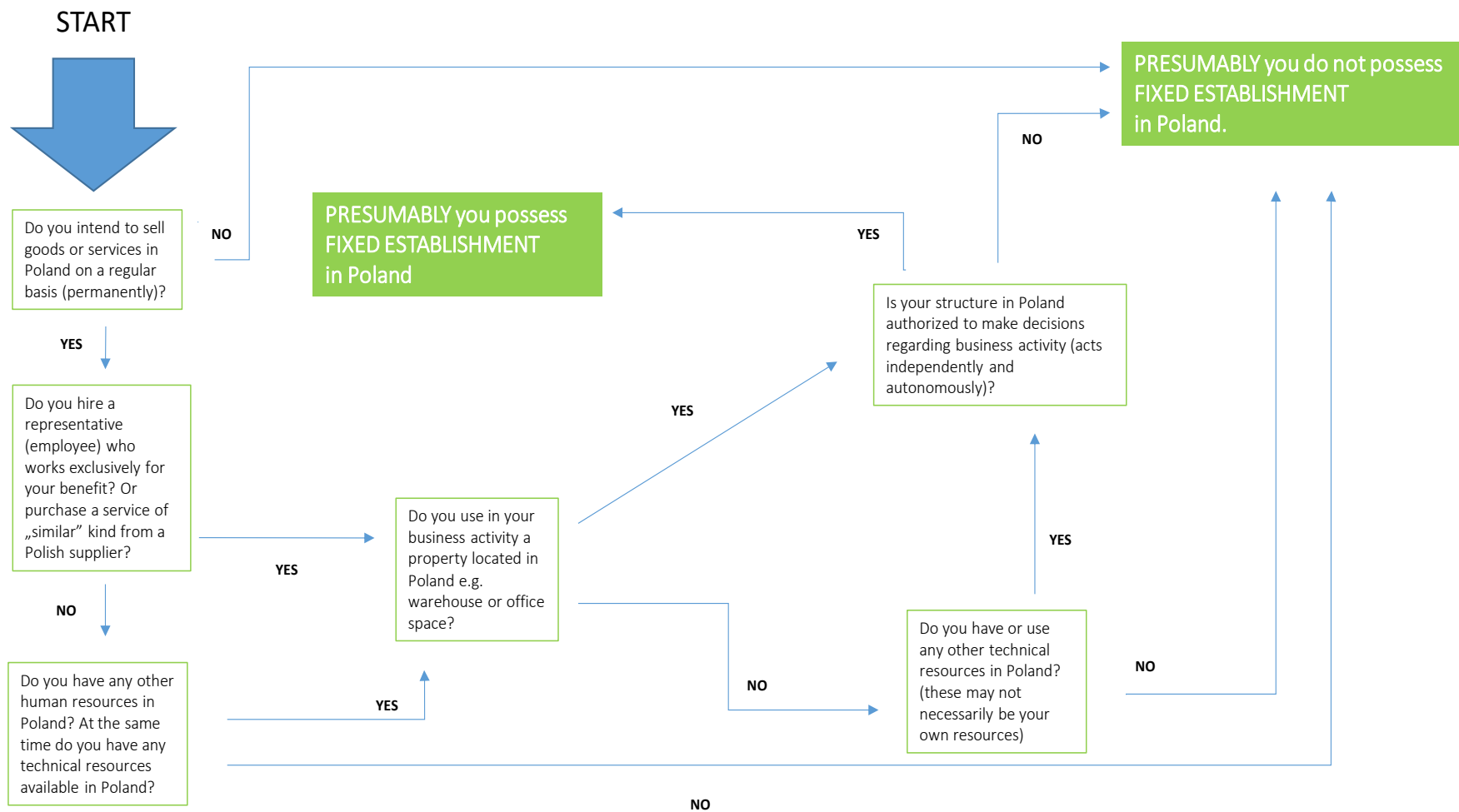
In case you have been a part of such a fulfilment arrangement (or you intend to be), analyse guidelines presented above. If you have any doubts or questions, contact your tax advisor to determine whether your respective “presence” in Poland will affect your VAT settlements (especially in view of the scope of services acquired within the fulfilment arrangement).

8. Do I have a FIXED ESTABLISHMENT in Poland?

Below you can find a graph, which presents the rules of determining a FIXED ESTABLISHMENT in a simplified form. This could help you analyse whether you possess a FIXED ESTABLISHMENT in Poland or not.

By answering a few questions and following the directions showed by the arrows, you should be able to make a preliminary assessment and understand basic rules regarding a FIXED ESTABLISHMENT.

Bear in mind that the graph may serve as a general guide only, while it includes only simplified features of a FIXED ESTABLISHMENT. In each case, a detailed analysis is required.



9. Still not sure?

In some cases, identification of a FIXED ESTABLISHMENT may be difficult and raise multiple questions. Remember that **this guidebook is not a tax advice**. It should not be treated as any sort of advice regarding determination of potential existence of a FIXED ESTABLISHMENT or an assessment of tax position in individual Sellers' cases. In particular situations, the Seller should perform relevant analysis on their own. In case of doubts regarding your individual case, as well as scope of obligations in Poland, contact your Polish tax advisor and consult your case.

It should be remembered that the potential existence of a FIXED ESTABLISHMENT of given Seller in Poland may trigger relevant **obligations also for the Seller themselves**. At the same time, properly determining whether you have a FIXED ESTABLISHMENT in Poland or not will result in both yours and Allegro's compliance with the binding VAT regulations.