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TO BE OR NOT B(2B)?

THE QUESTION IS ABOUT THE (SUB)DIGITAL P(F)E

Stoycho Dulevski

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To Be or not B(2B)?
The question is about the (sub)digital P(F)E [1,2]

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Table of Contents

Old problem – new solutions? A good start before the beginning

Challenges regarding the permanent establishment's (PE) and fixed establishment's (FE) legal nature have existed and been well-known for an extensive period of time, however, they still remain up-to-date and without a definite resolution.

Over the years, many authors have explored both concepts, examining various aspects of them and making appropriate suggestions. However, the series of new and increasingly debatable issues is endless. This determines their significance both theoretically and practically thus researching them will always be of interest and can never be considered as fully completed.

The purpose of this paper is to examine two debatable and current aspects of the PE and FE concept – tax treatment of the subsidiary and digital economy. These two issues are both different and similar and continue to raise follow-up discussions and the lack of definitive answers.

On the one hand, there is an explicit provision in the OECD Model Tax Convention on Income and on Capital (OECD-MC) – Article 5, paragraph 7 – that outlines a subsidiary's taxation from a PE perspective. On the other hand, there is no such text about an FE, and the arguments are derived from Court of Justice of the European Union's (CJEU) practice.

This is not the case with the digital PE/FE. The concept of a digital PE is primarily based on the proposal for a council directive, i.e. COM/2018/0147 (Proposal), laying down rules relating to the corporate taxation of a significant digital presence in relation to the Action Plan 1 Base Erosion and Profit Shifting (BEPS) Project. Some countries have already taken such measures worldwide, and the future seems increasingly uncertain for the traditional approach under Article 5, paragraph 1 OECD-MC that requires the permanence at a specific geographical location for a definite amount of time.

The idea of a digital FE is rather imaginary and not so widely discussed. It is barely noticeable in the CJEU's practice and seems more like an abstraction. The traditional view is that, at this stage, it is rather impossible to introduce this hypothesis. If the concept of a digital PE is adopted, however, the question would also arise about the FE's destiny. Therefore, attention should be paid to the FE's digital aspect.

Voltar ao índice

PE's principle of subsidiary(ity)

Article 5, paragraph 7 OECD-MC, Article 5, paragraph 8 United Nations Model Double Taxation Convention between Developed and Developing Countries (UN-MC), and Article 5, paragraph 7 United States Model Income Tax Convention (USA-MC) contain a similar provision on a subsidiary's tax treatment from a PE's perspective.[1] Upon an initial thorough reading, it can be noted that, in this case, there can be no discussion regarding the PE's constitution.

Historically, Article 5, paragraph 7 OECD-MC was introduced in the Draft Double Taxation Convention on Income and Capital from 1963 (former Article 5, paragraph 6) and has not been textually amended over the years. Such an approach is logically determined for two reasons. First, the traditional view is that the subsidiary does not constitute a PE as it is independent legal entity. In this regard, there is a second argument – the scope is strictly fixed, and it is unconditional to be unnecessarily expanded. This would lead to significant amendments in the provision. It does not lead to any ambiguous interpretation and is relatively clear.

As seen from Article 5, paragraph 7 OECD-MC, the term 'control' is of particular relevance. It is not conceptually outlined in the OECD-MC, therefore, it is at every state's discretion to design it according to its internal understanding. For example, Bulgarian tax law outlines what constitutes 'control' in § 1, item 4 of the Additional Provisions of the Tax and Social Security Procedure Code (TSSPC). It is usually associated with a percentage of the right to vote and/or a company's participation. Sometimes, that is also typical from the Bulgarian tax perspective; the list of examples of its manifestations is non-exhaustive. According to Reimer and Rust, control does not have be exercised to provide evidence of its existence.[2]

Article 5, paragraph 7 OECD-MC introduces two hypotheses about the possibility for a company to fall within the scope of the provision in question – through a PE or otherwise. Several things are noteworthy in this regard. First, in this context, unlike Article 5, paragraph 1 OECD-

1 For the purposes of the current paper and the similarity of the provisions in question, only Art. 5, para 7 OECD-MC will be discussed.

2 Reimer E. & Rust A. (2015). Klaus Vogel on Double Tax Convention, 4th Edition, Volume 1, the Netherlands

Voltar ao índice

MC, the term 'company' is used instead of 'enterprise'. This legislative technique regarding a PE appears only in Article 5, paragraph 8 OECD-MC in which the term 'company' again appears. Both have their own definition in Article 3 OECD-MC.[3] The OECD Commentary (Commentary), as an interpretive tool, is rather general and concise in this regard. Relying thereon, it can be concluded that the term 'company' has a narrower scope and applies to strictly defined provisions, including the two mentioned previously.

The term 'enterprise', on the other hand, is designed via domestic law and encompasses numerous manifestations, including independent activities. Moreover, it is not necessary to be conceptually introduced by double tax treaties' (DTT) conclusion.[4]

As mentioned above, both hypotheses – PE or otherwise – clarify the possible application of Article 5, paragraph 7 OECD-MC. The use of the expression 'otherwise' leads to a broad interpretation. Since the comparison with an FE is inevitable for the purpose of the this contribution, the question arises whether, if it is not simultaneously a PE, it falls within the scope of this second option. Following the strict wording of Article 5, paragraph 7 OECD-MC, the answer should be affirmative. An argument for such a view is that the second hypothesis has no restrictive features (for example, only from a direct tax perspective).

Despite the use of 'shall' for a PE's non-constitution in the provision in question, paragraph 116 and 117 to Article 5 of the Commentary examine cases regarding its possible existence. They can be defined as an 'exception of the exception'. For this purpose, reference is made to the previous paragraphs of Article 5 OECD-MC. The Commentary also contains this 'exception to the exception of the exception', i.e. paragraph 118. In this case, the emphasis is on the implication of the terms 'at the disposal' and 'own personnel' which determines the need for a comprehensive individual analysis.

To summarize, the Commentary contains only four paragraphs regarding Article 5, paragraph 7 OECD-MC, but half of them precisely address a PE's possible constitution. The OECD does not explicitly focus on the elements contained in the interpretation of the provision in question but only pays attention to the practical aspects. Such an approach is both logically conditioned and incurs a number of risks. The examined hypotheses show that, in fact, the provision is not as definite as it initially appears. Indeed, the variety of cases can lead to different tax treatment and an absolutization of Article 5, paragraph 7 OECD-MC as a non-constituting PE is always a convenient way for abusing the law. Therefore, the application of this exception presupposes the in-depth concept's knowledge and particularly the traditional views followed in Article 5, paragraph 1 OECD-MC.

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3 Art. 3, para 1, l. 'b' OECD-MC: the term 'company' means any body corporate or any entity that is treated as a corporate body for tax purposes.
Art. 3, para 1, l. 'c' OECD-MC: the term 'enterprise' applies to carrying on of any business.

4 OECD-Commentary, para 4 of Art. 3

It is intriguing to note that, in some cases, despite the number of differences between a branch and a subsidiary, there are hypotheses that lead to the same result – a PE's constitution. From the digital economy's perspective, it seems that the idea for a subsidiary's digital PE is futuristic at this stage. The Commentary explicitly refers to the concept's characteristic features, i.e. place of business and staff.

It is interesting to examine the relevant practice of different states for a more detailed analysis. For example, India has already had the opportunity to take a position on this issue.

The secondment of employees to the parent company's subsidiary does not constitute a PE in the case of Samsung Electronics Company Ltd.[5] In this case, the head office was located in South Korea and had two subsidiaries in India. Indian competent authorities considered that, pursuant to Article 5, paragraph 2(l)(a) DTT India-South Korea, a PE existed for the parent company due to its place of management in India. They also posited that the Indian subsidiary functioned as a dependent agent under Article 5, paragraph 5 DTT and the seconded South Korean employees satisfied the requirements for constituting a service PE. In this regard, it was necessary to specify their exact function and their economic employer. Proceeding from the nature of their activities, it was concluded that they are rather auxiliary under Article 5, paragraph 4(1)d, e, and f the DTT. They were also associated with the subsidiary's business.

The following conclusions can be drawn from this judgement. The mere fact is that the subsidiary's presence does not preclude the possibility for a PE's constitution. In this case, three options are examined. Two elements are crucial – what exactly is the activity performed by the seconded employees and for whom are they completed. Even if their formal employer is the South Korean company, what matters is who is the economic employer. Although appropriate arguments have been found that this is the subsidiary, the auxiliary nature of the activity is the reason for the PE's non-constitution even if the opposite hypothesis exists.

The opposite conclusion was reached in the case of Daikin Industries Ltd., Gurgaon vs Acit Delhi Income Tax Appellate Tribunal (ITAT) in which it was determined that a PE's constitution is due to the presence of dependent agent[6] In the present case, a Japanese company had an Indian subsidiary. It performed direct sales to both Indian customers and to the subsidiary. In this regard, the parent company paid a commission for marketing services offered to the customers by the subsidiary. Indian authorities applied the concept of a dependent agent according to DTT Japan-India. Therefore, the argument was that the subsidiary negotiates with the customers; this included issues of prices.

5 Samsung Electronics Company Ltd. V. DCIT [2018-TII-91-ITAT-DEL-INTL]

6 Daikin Industries Ltd., Gurgaon vs Acit, New Delhi on 28 May, 2018

The Japanese company took the opposite view according to which the activities carried out by its subsidiary were rather auxiliary and supported customers' communication. It was also an independent legal entity. Moreover, the employees came to India to negotiate with customers. Therefore, the subsidiary was an independent agent and did not constitute a PE.

The main challenge in proving these arguments was that the Japanese company had no evidence to support its view. It was considered that the activities performed were consultancy. Indeed, the contracts were signed in Japan, however, the negotiations themselves were carried out by the subsidiary in India. In addition, almost all of the orders were from the Japanese company.

The following conclusions can be drawn from this judgement. First, the nature of the activity itself is again important and not the formalities (substance over form approach). Second, this reflects the latest amendments regarding Article 5, paragraph 5 OECD-MC from 2017. Third, the case in question is an example of the exception of Article 5, paragraph 7 OECD-MC that a subsidiary may not constitute a PE. It also corresponds with the Commentary on this issue. With a literal reading of the provision, the circumvention of law is possible. Therefore, the legal form and the formalities for carrying out the activity are not always a solid argument. Last but not least, the lack of relevant evidence makes it difficult to take the opposite view.

These two Indian judgements in question address the two opposite perspectives on the scope of Article 5, paragraph 7 OECD-MC.[7] Although they do not seem to be so complicated that they provide proper tax treatment (in the first case, the activities performed are auxiliary while, in the second, there is insufficient evidence), the following conclusion can be drawn. Upon their examination, the actual economic situation is taken into account. The possibility of a PE's constitution in all relevant paragraphs of Article 5 OECD-MC is also analysed. This means that all possible scenarios under Article 5, paragraph 1 OECD-MC are examined and not only those that are traditional.

7 It should be noted that that are also other judgements on this issue. For example, Networks OY v. Jt. CIT, New Delhi, ITA No. 1963-64/DEL/2001, Rolls Royce Plc v DIT, (2011) 339 ITR 147 (Delhi) and Conseil d'Etat 31 mars 2010 n° 304715, 308525, 10e et 9e s.-s., Sté Zimmer limited.

Voltar ao índice

Digital PE- real illusion or complicated confusion?

Currently, one of the most controversial issues regarding a PE is digitalization. This discussion is not new, however, it continually provokes different comments, many suggestions, and almost no definite solutions.

In order to consider the possibility of construing a PE as digital, a number of queries should be answered. First, a comparison between the normal and digital economy should be made and, in particular, determine whether they really differ very much. The answer is somewhere in the middle. What they have in common is their ultimate goal – doing business in order to generate profit. The difference may therefore be ascertained in the methods and the means that are used.

The digital economy is not a new development, but it has recently incited a more serious debate regarding tax challenges.[8] Over the years, the OECD has also paid attention to e-commerce[9], and the OECD Commentary also pays special attention to it in Article 5 OECD-MC, paragraphs 122-131. However, it only affects a minimal number of the possible cases. This directly corresponds with the subsequent question of whether all possible scenarios can be covered due to the dynamic nature of this type of activity.

The fact is, however, that e-commerce has become the preferred option due to the simplified and rapid interaction, especially with the current COVID situation. In this regard, an avalanche of questions is arising from a tax perspective. Some are related to fair tax treatment while others concern possible abuse. This author shares the view that the introduction of new digital taxes is a type of tool for states' survival.[10] Thus, they are logically conditioned to pay attention to the possibility of a digital PE's constitution.

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8 OECD, Addressing Tax Challenges of the Digital Economy, https://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm

9 OECD, Clarification on the application of the Permanent Establishment definition in E-commerce: changes to the Commentary on the Model tax convention on Article 5, 2000; OECD, Attribution of profit to a permanent establishment involved in electronic commerce transactions, 2001; Taxation and Electronic Commerce, Implementing the Ottawa taxation framework conditions, 2001

10 Dourado, A., Is there a Light at the End of the Tunnel of the International Tax System?, Intertax, Volume 46, Issue 8 & 9, 2018, Kluwer Law International, the Netherlands, p. 608

Voltar ao índice

Many authors have already explored the possibility of its introduction,[11] and their positions on this issue are diverse. Some admire such solutions as reflecting modern needs. Others absolutely reject it as a belated and short-sighted change that cannot lead to a final decision. However, the truth is somewhere in the middle. Even belated or short-sighted, change is necessary as these activities are common in daily life, and their tax treatment cannot be postponed permanently.

For the purposes of this paper, the key question is whether society is ready for a digital PE and its subsequent consequences. An additional inquiry would be whether the PE concept is unambiguous so that changes that are more revolutionary can be made. It is not surprising that the answer to this is rather negative. The reasons are numerous and primarily due to the fact of the dynamic nature, different national tax systems, and traditional perceptions. The derivation of the time criterion according to Article 5, paragraph 1 OECD-MC may be determined as still challenging. The 6-month period outlined in the Commentary does not always meet the requirements. Sometimes, a PE can be constituted in a shorter timeframe and, in other instances, the interruptions reflect another perception of its determination.

The difference in the time criterion can be noticed at different levels – by comparison between Article 5, paragraph 1 and Article 5, paragraph 3 OECD-MC, the Commentary, the concluded DTTs, and at international and domestic levels. This is typical based on the idea that DTTs are international agreements and inherently provide parties the opportunity to negotiate with each other. At the same time, the various options lead to different practical specifics.

The time criterion is also intriguing regarding the constitution of a possible digital PE. In this regard, should it follow the generally accepted principles, is it totally irrelevant, or should new criteria be outlined? The proposal provides an answer with the introduction of new criteria for its constitution. Article 4 thereof focuses on total revenues, the number of users, and the number of business contracts. Thus, the time criterion that is so important for the traditional PE is irrelevant here with priority being given to brand new prerequisites.

What is intriguing is whether the current perceptions regarding a normal PE are ready to consider such significantly different phenomenon. Even when discussions ensue in accordance with the modern trends, it seems that the focus has shifted to the introduction of a new PE concept that will 'merge' with the old idea and complement it.

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11 Blum, D.l (2015). Permanent Establishments and Action 1 on the Digital Economy of the OECD Base Erosion and Profit Shifting Initiative – The Nexus Criterion Redefined?. Bulletin for International Taxation, June/July 2015, IBFD, Hellerstein, W. (2014). Jurisdiction to Tax in the Digital Economy: Permanent and Other Establishments, Bulletin for International Taxation, June/July 2014, IBFD, Hongler P., P. Pistone (2015). Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy, IBFD, L. Marina, Savina Goleminova-Mikhalyova, Aleksey Ivanov, (2020) Implementation of the Rights of Taxpayers: Digital Companies under Double Tax Avoidance Agreements, Analyses and Studies CASP, May 2020, No 1(9), Reuven, Avi-Yonah (2013). Virtual PE: International Taxation and the Fairness Act, Public Law and Legal Theory Research Paper Series, Paper 328, Apr. 2013, University of Michigan Law School, Dulevski, S. Digital Permanent Establishment, Economic Archive 4, 2020, 52-69

Voltar ao índice

Another interesting point is whether the Proposal contradicts primary EU law. The question of the legitimacy of digital taxes has already been discussed.[12] Although the subject of the present study differs therefrom, some remarks should be noted because of their possible indirect application. The paper in question draws attention to the risk of discrimination in relation to the categories of companies or sectors that should pay digital taxes.[13] If actively entertaining this prism, the inequality between the national economies of the Member States should be considered with regard to the introduced thresholds for a digital PE. An example is the comparison between Luxembourg and Germany. The proposal does not mention if this threshold can be changed in relation to other factors. However, if it is permissible, other challenges would arise such as how it should be calculated, what the minimum and maximum are, and whether it can be changed annually.

Another point regarding the quantitative threshold is whether it can be circumvented so that it does not constitute a significant digital presence. The answer is affirmative insofar as this is typical for other tax concepts and due to precisely pre-set numbers. All of this demonstrates that such an approach may lead to incurring numerous risks.

If this is defined as the latest official version of a digital PE, the Commentary's reflections and modifications in this regard would also have be taken into account. On the one hand, the examples in question, although with different a focus and in connection with Article 5, paragraph 1 OECD-MC, should either be deleted or substantially amended in order to avoid contradiction. Another option is to overlap with the digital PE which will incite an overall debate on the legal nature of Article 5, paragraph 1 OECD-MC. On the other hand, the possibility of a digital PE's introduction has thus far been outlined through the proposal at the EU level, therefore, it directly reflects on the OECD MC.

Another issue would be when one state has a digital PE definition, but the other does not. The DTT between Bulgaria and Saudi Arabia is such an example. In this case, the most appropriate option seems to be the initiation of a mutual agreement procedure.[14] This shows that the introduction of digital PE in some states does not seem to be the final solution. Its absence in the OECD MC cannot guarantee fair tax treatment unless it has been agreed in advance. Even if the procedure in question is applied, it takes a considerable period of time and can lead to new issues that will further complicate the already challenging matter.

If the digital PE concept is not adopted, the question of the digital economy's tax treatment is still relevant and extremely debatable. However, similar hypotheses are outlined in the

12 Mason, R., Parada, L. The Legality of Digital Taxes in Europe, Virginia Tax Review, 2020

13 Mason, R., Parada, L. The Legality of Digital…, p. 3-4

14 Антонов, Ив. Относно виртуално място на стопанска дейност в Кралство Саудитска Арабия и процедура по взаимно споразумение, сп. Тита, бр. 159

Commentary; this topic has been the subject of lengthy discussions by theorists and practitioners, and this type of economy plays a significant role in daily life.

Other challenges may arise in this regard. Is a PE really so old and archaic that it has undergone such a significant metamorphosis? If the answer is affirmative, is this step too belated as these 'new' trends dated from 10-20 years ago? If the answer is negative, then why should different criteria and ideas be mixed? For example, is it not more appropriate to introduce a stand-alone provision regarding the digital economy with its own typical features to be designed over the years? This author believes that this seems to be the better option since it will not contradict traditional perceptions of PEs and will accord with the OECD's trends.[15]

It can be summarized that the digital PE is neither a myth nor a reality but instead a long-awaited 'salvation' with an unexpected end. Any measures taken by the OECD will unlikely lead to the anticipated conclusion and will still only provide guidance.

15 Dulevski, S. Digital Permanent Establishment, Economic Archive, 2020, p. 67

Voltar ao índice

(sub)FE? Question or exclusion: just modern perspective confusion

Two cases should be taken into account when analysing whether a subsidiary may constitute an FE. The first one is C-260/95 DFDS that has a specific subject regarding a regime of tour operators. The other is the judgement's year when there was no FE definition. In the opinion, Advocate General (AG) La Pergola followed the criteria outlined in the Berkholz case[16] (paragraph 16).[17] The AG considered the company in question as a dependent agent of the parent company. It was an auxiliary body and should respectively be treated as a FE (paragraphs 22, 24). Proof of its subordination were the agreements between the two entities, including the lack of risk-taking by the subsidiary (paragraph 23). There were also other arguments regarding the FE's constitution (paragraphs 26, 27).

What conclusions can be drawn from the AG's opinion? First, La Pergola took into account the subordination between the companies. It is irrelevant to him that one is a subsidiary of the other and is an independent legal entity. He focused on the economic approach (what is their actual relationship) rather than the legal form. Second, the AG both observed the traditional perceptions of the FE (by reference to Berkholz) and added new relevant elements. These were requirements for subordination, an auxiliary, economically dependent body. Other accompanying explanations are 'actual pursuit of an economic activity' 'for an indefinite period'. Regarding the first one, it can be concluded that it concerns the performance of actual activity. Therefore, the subjective intention was not a sufficient criterion. The indefinite period of time was associated with a certain duration during which this activity can be performed. Although it does not have certain limits, which is normal due to various hypotheses, this author considers that it cannot be incidental. However, its indeterminacy may also may also be indefinite.

The CJEU reached the same conclusions as the AG's opinion regarding the FE's constitution in its judgement (paragraphs 23, 26, 29). It introduced additional elements to the concept's

16 This case can be defined as fundamental for the concept. It is not a subject of an analysis because of the goals pursued in this paper.

17 The paragraphs in brackets used correspond to the examined opinion/judgement.

Voltar ao índice

legal nature. These were the requisite minimum size (paragraph 27) and number of employees (paragraph 28). From the first, it can be concluded that certain minimum requirements should be met. They were not specifically mentioned, perhaps due to the idea that each case is different. Regarding human resources, the CJEU used the plural form. A literal reading can lead to the understanding that the presence of one employee is not sufficient. It should be noted that they should be employed by the company.

The DFDS case examined a specific hypothesis, therefore, the question remains whether these views can be followed in other cases regarding the VAT treatment of a subsidiary. If the services provided are by tour operators, the answer should be rather positive. This author believes that the crucial moment is the determination of the possible subsidiary's subordination to the parent company and the genuine economic situation. Even though these two aspects are clear, there is still uncertainty from a legal perspective.

It is interesting in this case that the findings are not limited to the CJEU's previous practice on this topic but add (consciously or not) further criteria to the FE concept. This shows that it is a dynamic concept and allows possibility for amendments. Particularly intriguing are the views on the human resources' requirements through the use of the plural 'employees'. This raises the question of whether 'any establishment' and 'human resources' cover all possible situations. In the present case, the answer for the first term should be affirmative (due to the subsidiary's inclusion as a possible FE) while, for the second, it should be negative (due to the limitation of the human resources' scope).

Case C-547/18 Dong Yang Electronics re-examines the possibility for an FE's constitution via a subsidiary. It is one of the last on this topic and can be defined as debatable.

AG Kokott took into account the FE's legal nature in her opinion. She noted that the criteria laid down 'have no connection with company law' (paragraph 32). Relying on Article 44 VAT Directive, she opined that a subsidiary cannot be an FE (paragraphs 34, 46). Its independent nature was outlined as a proper argument for such a view (paragraph 37, 38). Thus, Kokott focused on the legal nature and not on the economic features that were affected by the DFDS. The AG also drew attention to the control over the percentage of its exercise (paragraph 45).

The AG opinion also examined an exception of when a subsidiary may constitute a FE – abuse of law (paragraphs 47, 48). Kokott used the expressions 'an abusive practice is found' and 'constitute an abusive practice' (para 36, 47). They should be distinguished from the possible risk and from the possible future uncertain consequence. The AG also analysed another exception – the DFDS case for which she followed the view that there is such a possibility but with limited scope. Due to the different factual backgrounds, it was inapplicable in the present case (paragraph 65).

Kokott's opinion is well structured with an in-depth analysis of both an FE's legal nature and its exceptions. She accorded with the view that the legal form is a crucial criterion that is vital

Voltar ao índice

for determining an FE's (non)constitution. However, it seems that this approach is debatable because of the economic risks. It should be clarified that, if the final goal is deliberate tax avoidance, the exception on abuse of law applies. This can sometimes be difficult to prove.

The CJEU's judgement took an expected approach. If Kokott emphasized the legal form, the CJEU drew attention to the 'economic and commercial realities' (paragraph 31). Therefore, it cannot be stated categorically that the subsidiary does not form a FE (paragraph 30). Moreover, the DFDS affirmatively answers this question (paragraph 32).

The CJEU's position crosses the boundaries of the purely legal traits that can sometimes be ineffective and even misleading. However, several things should be noted about this judgement. Less and seemingly not so convincing arguments are presented by the CJEU in comparison with the AG's opinion. There is no thorough analysis about the FE's features and whether there are any exceptions. A possible existence of abuse of law and its applicability in this case has not been considered. Reference to the DFDS is formal without specifying that it is an exception to other facts and circumstances and when there was no FE definition. The CJEU seems to focus on another perception of the FE, seeing no reason that the subsidiary is out of the FE's scope if the economic reality provides substantiation for arguments. Curiously, it referred to the Welmory case for which Kokott is also the AG.

Such views from both from the AG opinion and the CJEU's judgement not only show the challenges in this matter, but can also lead to serious practical difficulties. This author would not state that it is definitely clear when a subsidiary can be an FE but, as seen from the judgement, it is possible in principle.

Following the PE's approach on this issues, the subsidiary's tax treatment from a FE is debatable. However, while there is an explicit provision on this issue in the OECD MC and several paragraphs in the Commentary, there is substantial uncertainty for the FE. Article 11 Regulation 282/2011 does not explicitly address this issue that is entrusted to the CJEU. Unfortunately, it is unconvincing sometimes with differences from the AG's and the CJEU's perspective. Moreover, an FE, as a dynamic concept, is considered as non-statistic practice that can be designed in different directions over the years.

Voltar ao índice

Digital FE: a possible reality in our physical world?

When discussing a digital PE, it is inevitable to analyse the consequences from the VAT perspective through the FE's prism. Currently, it seems futuristic because of the mandatory cumulative requirements – human and technical resources according to Article 11 Regulation 282/2011. The answer is therefore obvious. However, does the CJEU share this view?

A FE in relation with e-commerce is analysed in C-605/12 Welmory. In this case, human and technical resources that are not owned by the company were used. AG Kokott began her arguments with the relevant practice (paragraphs 32-36). She argued that 'it is not necessary for the taxable person to have at his disposal there human resources who are employed by him, or to have technical resources which he owns' (paragraphs 48-50, 56). 'Therefore employment and lease contracts are required in particular in relation to the human and technical resources which put the latter at the taxable person's disposal as if they were his own and which therefore also cannot be terminated at short notice' (paragraphs 51, 65). In this manner, a FE's scope is extended but again with certain limits. The use of other equipment should be 'in a way that is comparable to having its own resources' (para 65). Kokott, however, did not shed some detailed light about the digital specifics of e-commerce. On the contrary, she mentioned several times in her opinion the cumulative preconditions of 'human and technical resources'.

The CJEU also set out these requirements in its judgement (paragraphs 60, 65). It illustrated additional examples in terms of technical aspects – computer equipment, servers, and software. Human intervention is required despite their digital nature. Although new a criterion prevails from the digital economy, the question of what is meant by 'appropriate structure' remains ambiguous.[18]

The case itself raises a number of issues but also brings new guidelines regarding a FE's development. For example, clarity is given on the management of human and technical resources that should not always be a head office's property and does not always lead to a FE's constitution. Control exercised by the taxable person is vital.[19]

18 De la Feria, R., Permanent Establishments in Indirect Taxation, p. 11-12; De la Feria, R. On the…, p. 6

19 Merkx, M., Jovanovic, N., Welmory: a Recipe for VAT Avoidance?, p. 3

Voltar ao índice

What are the possible challenges? First of all, Welmory seems more like a single case than the significant amendment of the FE's perception. The introduction of a new criterion – 'appropriate structure' – raises the question of how much the traditional perceptions are fully clarified and whether further additional criteria can be expected. Moreover, it is not entirely clear what the requirements of the structure in question should be in order to satisfy a FE's constitution. The mentioned non-exhaustive examples – computer equipment and software – are two different manifestations of (in)tangible assets.

The most recent case is C-931/19 Titanium. There is no AG opinion, and the judgement itself is relatively brief. The CJEU did not deviate from the traditional view and considered that the lack of human resources leads to a FE's non-constitution (paragraphs 45, 46). It referred to its practice without any detailed examination. However, there are a number of debatable issues. The arguments shared from the Austrian party for applicable German case law according to which a FE can be constituted without human resources have not been taken into account and more carefully analysed.

In this aspect, German domestic practice on this issue is intriguing and should be observed. A positive approach therewith is that the difference between a FE and a PE is outlined.[20] The German court observed the national doctrine through the prism of both concepts.[21] This can again be defined as a welcoming approach and as a proof that a FE/PE existence does not always lead to their constitution. Following the CJEU's practice, the requirement for the existence of an appropriate degree of human and technical resources structure was introduced.[22] In this regard, it was analysed to what extent the hiring of staff from a third party is an obstacle for a FE's constitution.[23] It was concluded that this is not a deterrent. The Welmory case can be a valid argument where this evaluation is left to the national court.

The permanence of human and technical resources was analysed in another judgement of the German federal court.[24] Reference was again made to Welmory regarding the use of foreign staff.[25] The presence of the necessary prerequisites logically determined the FE's constitution.

It is noteworthy that both judgements accord with the CJEU's practice in domestic law, and the starting point in both cases is the Welmory case. However, why the CJEU does not take them into account in Titanium remains an open question. Indeed, Welmory is a specific case for the CJEU's case law, but it appears to be underestimated.

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20 Schleswig-Holsteinisches Finanzgericht 4. Senat, 17.05.2018, para 26

21 Schleswig-Holsteinisches Finanzgericht 4. Senat, 17.05.2018, para 33

22 Schleswig-Holsteinisches Finanzgericht 4. Senat, 17.05.2018, para 37

23 Schleswig-Holsteinisches Finanzgericht 4. Senat, 17.05.2018, para 54

24 Urteil vom 29. April 2020, XI R 3/18, BFH XI. Senat, para 20, 28

25 Urteil vom 29. April 2020, XI R 3/18, BFH XI. Senat, para 21, 27

Voltar ao índice

What is more intriguing in this case is that this judgement does not sound convincing nor appear as a final solution on this issue. For example, it is likely to be limited to the hypotheses of real estate rental. Paragraph 45 thereof may also raise the possibility of ambiguity. It is questionable whether the result would be similar if the person could act independently without any human resources. Following the CJEU's view, the answer should be affirmative. However, in some cases, the use of the term 'independent' and its limits may play a decisive role.

Despite its controversy, the Titanium case is influenced by Member States domestic perspective. For example, before this judgement, Spanish doctrine considered leased immovable property as a FE.[26] After Titanium, this position changed and 'there is no VAT fixed establishment when the foreign entity does not have any "own" personnel resources in the Spanish VAT territory to perform services relating to the letting'. On the one hand, it is common that CJEU case law influences the domestic perceptions of the Member States. On the other hand, however, are 'the copy/paste arguments' a solid final solution for all similar cases? Perhaps the neutral answer is affirmative taking into account the hierarchy of EU law.

With regard to a digital FE, there is no explicit position that confirms its constitution. This is due to the following reasons. There are no such specific cases that raise this modern and even revolutionary issue with the exception of the Welmory case. The CJEU's practice follows the traditional view without any presentation of additional arguments and without a trial to resolve the issue in an unconventional way.

It should be noted that, even in this hypothesis, there are several issues to be discussed. For example, the use of semi-human/semi-automated resources is challenging. They partially satisfy the requirements outlined in Article 11 Regulation 282/2011. In this regard, it would be interesting to observe how the CJEU will treat cases in which staff is available only for a certain period of time. On the one hand, it is possible to determine that there are no appropriate human resources due to the lack of a sufficient degree of permanence. On the other hand, these activities do not determine the permanent human presence, but its availability is evident. In this respect, the CJEU should more carefully consider the possible unequal treatment regarding normal and semi-automatic activities.

It is no longer so futuristic and it is even recommendable to consider what type of the tax treatment FEs would provide to robots and particularly whether they would have treatment similar to human resources for FE purposes. At this stage, the answer is rather negative, but it is highly possible that it will be the subject of further discussions.

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26 Concept of 'fixed establishment' regarding letting of property: A Spanish perspective, Deloitte, available at: https://www.taxathand.com/article/20334/Spain/2021/Concept-of-fixed-establishment-regarding-letting-of-property-A-Spanish-perspective

Future cases will demonstrate whether there will be a tendency to redesign this approach, however, the current revolutionary views are unlikely to change the perceptions towards FEs. However, this does not provide certainty for the concept, but raises the necessity to rethink it. Although ten years is not a very long period of time, FEs seem rather unstable, archaic, and challenging.

Voltar ao índice

No final conclusions as a conclusion?

Despite their different goals and influence on direct and indirect taxes, FEs and PEs are certainly connected with each other. It is difficult to discuss the identity between them primarily because of their legal nature. Their future trends are even more curious – a more distant or rather closer relationship? A contradictory answer can be given.

With regard to the tax treatment of a subsidiary from a FE and a PE, the answer is contradictory for several reasons. First, in principle, their constitution in these cases cannot be discussed. This is evident both from Article 5, paragraph 7 OECD-MC and Article 11 Regulation 282/2011. However, in fact, it is possible. A valid argument for such a position are the examples illustrated in the Commentary and CJEU's practice in relation to FEs. It seems that the latter rather allows the possibility for the subsidiary to constitute a FE while the OECD does so with explicit clarifications – the paragraphs in question from the Commentary. However, the examples referred thereto are inexhaustible and relatively generally written, taking into account the other paragraphs of Article 5 OECD MC. This is a type of proof for both the critical study of each case and for the practical challenges in this matter.

Regarding a digital PE and FE, a contradictory answer can also be expressed. The OECD's and the EU's intentions for a digital PE are both a serious test and a challenging step. They can be described as revolutionary, i.e. rethinking the traditional postulates of the concept.

The CJEU's practice on digital FEs demonstrates rather traditional and conservative views. Only the Welmory case can be defined as something more atypical.

Therefore, if the Proposal becomes a reality, it can be concluded that two concepts are beginning to increasingly diverge and taking their own paths. This is especially noticeable in the BEPS's context.[27]

27 Merkx, M., Fixed Establishments in European VAT: BEPS's Side Effects?, p. 15

Voltar ao índice

Does this mean that a PE is a clearer concept, or the idea is that the concepts do not differ? Perhaps the answer is somewhere in the middle, leaning towards the first understanding. A PE is much more adaptable to the modern needs concept. It is upgraded by amendments in the definition, the Commentary, and in practice. A FE, on the other hand, does not experience textual conceptual changes but develops via the CJEU's practice which is straightforward and not surprising in most cases.

However, a total separation of the concepts may lead to uncertainty and to comprehensive rethinking of the traditional postulates. FEs and PEs are characterized by relentless dynamics and significant research interest from theoretical and practical perspectives. They do not seem to provide the necessary legal certainty and clarity for their future trends. This is partly logically conditioned due to the dynamic nature of tax law as whole which is further complicated by the ongoing amendments and proposals. The only certain thing in this regard is that PEs and FEs will continue to raise interest, and the subsequent cases will bring 'clarity'.

Voltar ao índice

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